

Swiss Case Law in International Arbitration
3rd revised edition

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Preface

Introduction

Switzerland has an **outstanding reputation** in international commercial arbitration. Numerous parties from all over the world choose Switzerland as the seat of their arbitral tribunal. Accordingly, the Swiss legal provisions on international arbitration are of particular importance for arbitrators and party representatives worldwide.

The Swiss provisions on international arbitration are contained in **Chapter 12 of the Swiss Private International Law Act (PILA)**. As this Chapter has only 19 articles, the Swiss Federal Supreme Court and the cantonal courts have had to clarify countless issues since the entry into force of the PILA on 1 January 1989.

This is why this book presents, in a systematic way, **30 years of unreported and reported Swiss federal and cantonal case law** on Chapter 12 of the PILA. It also presents the Swiss case law with respect to the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 10 June 1958 (NYC) to which Article 194 PILA refers. The “holdings” of each court decision are listed systematically by specific issue under each article of the PILA and the NYC.

Before the entry into force of the PILA on 1 January 1989, international as well as domestic arbitration was governed by the **Concordat** which was concluded by a number of Cantons in 1969 (SR 279). This is why decisions rendered under the former Concordat are also listed, provided the “holdings” are still relevant under the PILA.

On 1 January 2011, the new **Swiss Code on Civil Procedure (CCP)** entered into force. Part 3 of this Code replaced the former Concordat with respect to domestic arbitration.

Chapter 12 of the PILA is currently under **revision**. As the bill has not yet been finalised, we have refrained from printing the current version in our book. One provision of the PILA has changed since the publication of the second edition: the wording of Article 176(2) PILA has been amended to reflect the replacement of the former Concordat by Part 3 of the CCP.

Some Practical Advice for the Readers

Since 1 January 2000, the decisions of the Swiss Federal Supreme Court have been published on its website (www.bger.ch). This is why the reference numbers of the decisions of the Swiss Federal Supreme Court rendered after 1 January 2000 are cited directly in the text of this book. With respect to the decisions rendered by the Swiss Federal Supreme Court prior to 1 January 2000, as well as the cantonal decisions, reference is made to the date of such decisions. The relevant publications and reports concerning these latter decisions can be found in the chronological table of cases (Annexes 1 to 3) at the end of this book. The various Swiss statutes and international treaties to which this book refers can also be found on the internet (www.admin.ch). English

translations of many of the decisions of the Swiss Federal Supreme Court are available on the internet (www.swissarbitrationdecisions.com/) as well.

Technical terms and expressions are marked with the **sign “*”**. They are translated in German, French and Italian in the glossary at the end of this book (p. 845).

Comments or clarifications added by us are stated in square brackets [*example*].

The **sign “*”** before a case means that this case does not directly relate to the PILA but to another statute (e.g. CCP, Concordat) or to a treaty other than the NYC (e.g. bilateral treaties on the recognition and enforcement of arbitral awards) from which conclusions can be drawn for an issue covered by Chapter 12 of the PILA or the NYC.

In order to avoid substituting our interpretation of the law to that of the court, a fairly **literal translation** of the court decisions is presented. This leads, at times, to a somewhat awkward rendition in English, a fact for which we apologize in advance. Contradictions between decisions are left unresolved. Before referring to any “holding” contained in this book, it is advisable to read the original decision. In this regard, we decline any liability for any legal action based solely on the information contained in the present book.

The following **annexes** should facilitate finding “holdings” on specific issues: a chronological list of all cited cases (federal, cantonal and European Court of Human Rights) (p. 789); a glossary in English, German, French and Italian of the principal technical terms (p. 845); and an index of all specific terms used in this book (p. 857).

This third revised edition takes into account federal and cantonal **decisions rendered up to 31 December 2018**. It includes approximately 530 new decisions compared to the second edition.

Neuchâtel, July 2019

Christoph Müller/Sabrina Pearson

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Principal Abbreviations

ASA	Swiss Arbitration Association (= Association Suisse d'Arbitrage)
BJM	Basler Juristische Mitteilungen
CAS	Court of Arbitration for Sport (= Tribunal Arbitral du Sport [TAS])
CC	Swiss Civil Code of 10 December 1907 [RS 210]
CCP	Swiss Code on Civil Procedure (= Zivilprozessordnung [ZPO] = Code de procédure civile [CPC] = Codice di procedura civile [CPC]) [RS 272]
CCrimP	Code on Criminal Procedure (= Strafprozessordnung, [StPO] = Code de procédure pénale [CPP] = Codice di procedura penale [CPP]) [RS 312.0]
CISG	The United Nations Convention of Contracts for the International Sale of Goods of 11 April 1980 [RS 0.221.211.1]
CO	Swiss Code of Obligations of 30 March 1911 [RS 220]
CrimC	Swiss Criminal Code of 21 December 1937 [RS 311.0]
fConcordat	[Former] Intercantonal Concordat on Arbitration of 27 March 1969 [RS 279]
DAB	Dispute Adjudication Board
Digest CAS	Digest of CAS Awards
ECHR	European Convention on Human Rights of 4 November 1950 [RS 0.101]
ECJ	European Court of Justice
FC	Federal Constitution of the Swiss Confederation of 18 April 1999 [RS 101]
f...	former...
FIDIC	Fédération Internationale Des Ingénieurs-Conseils
FIFA	Fédération Internationale de Football Association
FS	Federal Sheet (= feuille fédérale [FF] = Bundesblatt [BB] = foglio federale [FF])
FSCA	Federal Supreme Court Act of 17 June 2005 [RS 173.110]

Principal Abbreviations

FSCD	Federal Supreme Court Decision (= Bundesgerichtsentscheid [BGE] = arrêt du Tribunal fédéral [ATF] = decisione del Tribunale federale [DTF])
ICC	International Chamber of Commerce
ICSID	International Centre for Settlement of Investment Disputes
IOC	International Olympic Committee
JDI	Journal du droit international
JT	Journal des Tribunaux
ICA	International Commercial Arbitration (US)
Int'l Arb Rep	Mealey's International Arbitration Report (US)
LCIA	London Court of International Arbitration
Lugano Convention	Lugano Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters of 16 September 1988 [SR 0.275.11]
NCPC	Nouveau Code de Procédure Civile (F)
NYC	United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 10 June 1958) [SR 0.277.12]
PILA	Swiss Private International Law Statute of 18 December 1987 [RS 291]
Pra	Die Praxis
Rep	Repertorio di Giurisprudenza Patria (TI)
Rome Treaty	Treaty of 25 March 1957 Establishing the European Community
RS	Recueil systématique du droit fédéral (= Systematische Sammlung des Bundesrechts [SR] = Raccolta sistematica del diritto federale [RS])
RSDIE	Revue suisse de droit international et de droit européen (= Schweizerische Zeitschrift für internationale und europäisches Recht [RSDIE])
RSJ	Revue suisse de jurisprudence (= Schweizerische Juristen-Zeitung [SJZ])
RVJ	Revue valaisanne de jurisprudence (= Zeitschrift für Walliser Rechtsprechung [ZWR])

SADOSP	Setting aside of the debtor's opposition to a summons to pay [<i>Art. 81(3) SDCB</i>]
SCAI	Swiss Chambers' Arbitration Institution
SDCB	Federal Statute on Debt Collection and Bankruptcy of 11 April 1889 [SR 281.1]
SGGV	St. Gallische Gerichts- und Verwaltungspraxis
SIA	Société suisse des ingénieurs et des architectes
SJ	Semaine Judiciaire (GE)
SOFJ	Federal Statute on the Organisation of the Federal Judiciary of 16 December 1943 [SR 173.110]
SOG	Solothurnische Gerichtspraxis
UCI	Union cycliste internationale
UEFA	Union of European Football Associations
UNCITRAL	United Nations Commission on International Trade Law
VAT	Value Added Tax
VPB	Verwaltungspraxis der Bundesbehörden (=Jurisprudence des autorités administratives de la Confédération [JAAC])
WIPO	World Intellectual Property Organization
Yearbook	Yearbook Commercial Arbitration (UK)
ZGGVP	Gerichts- und Verwaltungspraxis des Kantons Zug
ZR	Blätter für Zürcherische Rechtsprechung

Chapter 12 of the Swiss Private International Law Act (PILA): International Arbitration

12. Kapitel des Schweizerischen Bundesgesetzes über das internationale Privatrecht (IPRG): Internationale Schiedsgerichtsbarkeit

Chapitre 12 de la loi fédérale suisse sur le droit international privé (LDIP): arbitrage international

Capitolo 12 della legge federale svizzera sul diritto internazionale privato (CPIL): arbitrato internazionale

Article 176

I. Scope of application. Seat of the Arbitration

¹ The provisions of this chapter shall apply to all arbitrations if the seat of the arbitral tribunal is in Switzerland and if, at the time of the conclusion of the arbitration agreement, at least one of the parties had neither its domicile nor its habitual residence in Switzerland.

² The provisions in this chapter shall not apply where the parties have agreed in an explicit declaration in the agreement to arbitrate or in a subsequent agreement that the provisions of this chapter are excluded and that the provisions on arbitration of the CCP should apply exclusively.

³ The seat of the arbitral tribunal shall be determined by the parties, or the arbitral institution designated by them, or, failing both, by the arbitrators.

I. Geltungsbe- reich. Sitz des Schiedsgerichts

¹ Die Bestimmungen dieses Kapitels gelten für Schiedsgerichte mit Sitz in der Schweiz, sofern beim Abschluss der Schiedsvereinbarung wenigstens eine Partei ihren Wohnsitz oder ihren gewöhnlichen Aufenthalt nicht in der Schweiz hatte.

² Die Parteien können die Geltung dieses Kapitels durch eine ausdrückliche Erklärung in der Schiedsvereinbarung oder in einer späteren Übereinkunft ausschliessen und die Anwendung des dritten Teils der ZPO vereinbaren.

³ Der Sitz des Schiedsgerichts wird von den Parteien oder der von ihnen benannten Schiedsgerichtsinstitution, andernfalls von den Schiedsrichtern bezeichnet.

I. Champ d'application; siège du tribunal arbitral

¹ Les dispositions du présent chapitre s'appliquent à tout arbitrage si le siège du tribunal arbitral se trouve en Suisse et si au moins l'une des parties, n'avait, au moment de la conclusion de la convention d'arbitrage, ni son domicile, ni sa résidence habituelle en Suisse.

² Les parties peuvent, par une déclaration expresse dans la convention d'arbitrage ou dans une convention ultérieure, exclure l'application du présent chapitre et

convenir de l'application de la troisième partie du CPC.

³ Les parties en cause ou l'institution d'arbitrage désignée par elles ou, à défaut, les arbitres déterminent le siège du tribunal arbitral.

I. Campo di
applicazione.
Sede del
tribunale
arbitrale

¹ Le disposizioni del presente capitolo si applicano ai tribunali arbitrali con sede in Svizzera sempreché, al momento della stipulazione del patto di arbitrato, almeno una parte non fosse domiciliata né dimorasse abitualmente in Svizzera.

² Le parti possono escludere l'applicabilità del presente capitolo mediante una dichiarazione esplicita nel patto d'arbitrato o in un accordo successivo e convenire di applicare la parte terza del CPC.

³ La sede del tribunale arbitrale è designata dalle parti o dall'istituzione arbitrale da loro indicata, altrimenti dagli arbitri medesimi.

1 Prerequisites for the Application of Chapter 12 PILA

1.1 Field of Application of Chapter 12 PILA

International arbitration is exclusively governed by federal law, i.e. Chapter 12 PILA.

FSCD 117 II 94 [96], TI 24.09.2001 p. 3, GE 07.02.1991 [(2001) ASA p. 276]

Chapter 12 PILA does not give any subsidiary or complementary function to the provisions of the fConcordat. This is how domestic arbitration is distinguished from international arbitration.

FSCD 115 II 288 [290], TI 10.11.2004 c. 4, TI 24.09.2001 p. 3

The new law on international arbitration is primarily designed to replace by a single statute the cantonal provisions which were considered inadequate and the fConcordat. This statute is deemed to fulfil the various requirements of the international #case law and to reinforce the traditionally good reputation of Switzerland as a preferred seat of international #arbitral tribunals. It should also guarantee uniform application of the law and alignment with international developments.

FSCD 115 II 97 [100]

By taking into account the purely formal criterion of whether at least one of the parties was neither domiciled nor resident in Switzerland at the time of the conclusion of the #arbitration agreement, in order to delimitate the international from the domestic arbitration, the legislator wanted to ensure the greatest possible clarity and legal #certainty. The legislator also considered that the provisions on international arbitration should not apply to disputes between Swiss companies concerning contracts of an international character.

FSCD 4P.54/2002 c. 2

It results from the message of the #Federal Council relating to the CCP that the latter only governs domestic arbitration, to the exclusion of international arbitration which is governed by the international private law of 18 December 1987 (PILA).

VD 17.07.2014 c. 4a

1.2 Goals of Arbitration

One of the goals of arbitration is to allow the speedy resolution of disputes. Therefore, the principle of #good faith imposes on the parties a general obligation to abstain from anything which could, without being an absolute necessity, delay the normal course of the #arbitral proceedings.

*FSCD 111 Ia 259 [262], *FSCD 111 Ia 72 [75], *FSCD 109 Ia 81 [83], *FSCD 108 Ia 197 [201], *VD 27.04.2012 c. 3.1, VD 05.01.2011, AG 23.07.1992 [(1995) ASA p. 242]

1.3 Arbitration and the ECHR

The guarantees of Article 30 FC and Article 6(1) ECHR do not only apply to State courts but also to private #arbitral tribunals whose decisions have the same effect with regard to #res judicata and #enforceability as the decisions of State courts and which must therefore guarantee the same #due process rights. This applies in particular to the right to a regularly composed tribunal.

FSCD 119 II 271 [275], FSCD 117 Ia 166 [169-170], FSCD 4P.168/1999 [(2001) ASA p. 785], FSCD 30.06.1994 [(1997) ASA p. 104], *ECHR 11.07.1989 [(1989) VPB p. 529-531]

The guarantee of a #court established by law pursuant to Article 6(1) ECHR does not have a larger scope of application than the guarantee under Article 30 FC.

*FSCD 126 I 235 [236], *FSCD 116 Ia 135 [138], FSCD 09.02.1998 [(1998) ASA p. 646]

If the remaining members of an #arbitral tribunal continue the proceedings after an #arbitrator resigns, without being authorised to do so by the parties, the #right of the parties to be heard by a regularly composed tribunal according to Article 30 FC and Article 6(1) ECHR is violated, even if the #arbitrator resigns without proper grounds.

FSCD 117 Ia 166 [169-170], FSCD 4A_386/2010 c. 4.3.1

If a judge represents, as a lawyer, a (third) party in a parallel case and if this later case constitutes a precedent for the case where it is a judge, the collaboration of this judge in the rendering of the decision constitutes a violation of Article 30 FC and of Article 6(1) ECHR.

FSCD 124 I 121

The guarantees of Article 6(1) ECHR apply only to procedures before #courts established by law. Therefore, they do not apply to an #arbitral tribunal whose members are privately nominated by the parties. However, they apply to procedures for setting aside an #award before State courts.

*FSCD 112 Ia 166 [168], FSCD 4A_612/2009 c. 4.1, FSCD 4P.64/2001 c. 2d/aa, *ECHR 04.03.1987 [(1987) VPB p. 466-467]

The parties to an #arbitration agreement cannot complain of not having benefited from all the guarantees which flow from Article 6 ECHR if they had submitted their dispute to the #jurisdiction of a State court. If the choice of an #arbitral tribunal does not violate the law, the parties alone have to bear the consequences of their choice.

FSCD 09.02.1998 [(1998) ASA p. 645]

- Regarding the compatibility of a cantonal labour #arbitral tribunal with Article 6 ECHR, see Pra 1993 p. 779

1.4 Arbitration and the Lugano Convention

According to Article 1(1), first sentence and Article 1(2)(d) of the Lugano Convention, the Convention applies in civil and commercial matters irrespective of the nature of the #jurisdiction. Arbitration is excluded from its application. Indeed, different international agreements, notably the NYC, already set forth rules which must be respected by State #jurisdictions concerning the #recognition and #enforcement of #arbitral awards.

FSCD 5A_1056/2017 c. 5.1.1

The notion of arbitration is interpreted in an autonomous manner in order to ensure the uniform application of the Lugano Convention.

FSCD 5A_1056/2017 c. 5.1.1

The exclusion concerns arbitration as a whole, including the proceedings introduced before State jurisdictions. Are notably concerned the decision regarding the #validity of the #arbitration agreement, the #setting aside, modification, #recognition and #enforcement of #arbitral awards as well as those regarding the implementation of the #arbitral proceedings.

FSCD 5A_1056/2017 c. 5.1.1

With respect to the State proceedings foreseen, it concerns those which are functionally linked to the #arbitral proceedings. In order to determine them, only the principal object of the proceeding must be taken into account, or the nature of the right which this proceeding ensures the safeguard of, which falls or not within the scope of application of the Lugano Convention. This is linked to arbitration when it aims to protect the right of the parties to submit their dispute to this method of dispute resolution. Therefore, the proceeding which is being carried out in parallel to the #arbitral proceedings and which is intended to support this proceeding is subject to the Lugano Convention (parallel proceeding) whilst the proceeding whose object is to execute the #arbitral proceeding (ancillary proceeding) is excluded from its scope. A State decision which is functionally linked to arbitration will be recognized and enforced according to an international convention or the national rules of the requested State.

FSCD 5A_1056/2017 c. 5.1.1

The #case law regarding the Lugano Convention is of no help in the #interpretation of Chapter 12 PILA, as Article 1(2)(4) Lugano Convention excludes arbitration from its scope of application.

ZH 13.06.2002 p. 4

Court decisions which assist #arbitral proceedings (e.g. those regarding the nomination or the #challenge of arbitrators, the determination of the #seat of the #arbitral tribunal, the extension of the #time limit for the rendering of the #award) or which are connected to it (e.g. those which decide on the #validity of an #arbitration agreement, or those which concern the #setting aside, the modification, the #recognition and #enforcement of an #arbitral award) cannot be subject to exequatur under the Lugano Convention. Decisions which only incorporate an #arbitral award, as is often the case in the United Kingdom, or which only confirm them, are likewise excluded from the scope of application of the Lugano Convention.

*TI 21.07.1997 [(2000) ASA p. 361-362]

1.5 Arbitral Expert Determination

1.5.1 Definition and Applicable Law

According to Article 189(1) CCP, the parties may agree to obtain an arbitral *#expert determination* on disputed *#facts*. According to Article 189(3) CCP, this determination binds the court with regard to the *#facts* established therein, if - in addition to the two other conditions (Art. 189(1)(b) and (c) CCP) - the parties may freely dispose of the legal relationship (Art. 189(1)(a) CCP). In contrast to the arbitral *#award*, which has the effect of a legally binding and enforceable decision (Art. 387 CCP), the arbitral *#expert determination* does not authoritatively decide on *#prayers for relief*, but it does clarify individual questions - which are binding on the court (for the distinction between an arbitral *#award* and an arbitral *#expert determination*, see FSCD 4A_254/2011 c. 4.1, which also leaves open the issue of whether Art. 189(3) CCP ["with regard to the *#facts* established therein"] excludes an arbitral *#expert determination* on certain legal issues - in contrast to the previous *#case law* [FSDC 129 III 535 c. 2 p. 537] - in any case). To this extent, the arbitral *#expert determination* - as the previous instance rightly states - fulfils a partial arbitral task. With the predominant doctrine, the lower instance therefore rightly bases the prerequisite under Article 189(3)(a) CCP on whether the disputed claim is arbitrable under Article 354 CCP. *#Arbitral expert determinability* and *#arbitrability* are congruent in this respect, which is why an arbitral *#expert determination* can always be ordered if an *#arbitral tribunal* could also be appointed to assess the corresponding claim.

FSCD 141 III 201 [205-206]

An *#agreement on an arbitral #expert determination* is an agreement by which a third person is mandated to establish in a binding way certain factual findings or to answer certain legal questions. There is discussion amongst legal scholars on whether the *#expert determination agreement* is a legal construction arising from substantive private law or from procedural law. According to the *#case law* of the Federal Supreme Court, the arbitral *#expert determination agreement* is governed by substantive law.

FSCD 129 III 535 [537-538], FSCD 4A_254/2011 c. 4.1, FSCD 4A_438/2008 c. 3.2.1, GE 15.09.2006 c. 6.2

An arbitration-expertise or arbitral *#expert determination* is an institution by which the parties entrust, by means of a contract (which is governed by substantive law), a third party, who is their agent, to give its opinion on a question of fact or on an element of a legal relationship, to which they declare in advance that they will be bound by.

VD 04.02.2010

The *#expert determination* is an institution governed by federal substantive law. The law of mandate [Art. 394 *et seq.* CO] applies to the relationships between the *#expert* and the *#principals*.

ZH 05.11.1993 [(1995) ZR p. 309]

The arbitral *#expert determination* has to be prepared in proceedings that respect the constitutional requirements of *#due process*. As the arbitral *#expert determination* has far reaching implications on the rights and duties of the

parties, it is important that the principles of neutrality of the #arbitral expert and the #right to be heard are respected. If an #arbitral expert does not act according to these principles, it acts arbitrarily and violates its duties as an agent [Art. 397 *et seq.* CO].

ZH 05.11.1993 [(1995) ZR p. 309]

The task of the #arbitral expert may also be accomplished by a legal entity.

ZH 05.11.1993 [(1995) ZR p. 310]

1.5.2 Distinction between Arbitral Expert Determination and Award

An #arbitral tribunal may be constituted in order to rule on a particular dispute (cf. Art. 357 CCP). An arbitral #award is a binding decision on the disputed claims of the parties, whilst an arbitral #expert determination, in accordance with the clear wording of Article 189(1) CCP, is a determination of “disputed facts”. The systematic positioning of Article 189 CCP in the chapter on evidence also shows that the arbitral #expert determination is foremost a determination of #facts.

FSCD 141 III 274 [279]

In contrast to the arbitral #award, which has the effect of a legally binding and enforceable decision (Art. 387 CCP), the arbitral #expert determination does not authoritatively decide on #prayers for relief, but it does clarify individual questions - which are binding on the court (for the distinction between an #arbitral award and an arbitral #expert determination, see FSCD 4A_254/2011 of 05.07.2011 c. 4.1, which also leaves open the issue of whether Art. 189(3) CCP [“with regard to the #facts established therein”] excludes an arbitral #expert determination on certain legal issues - in contrast to the previous #case law [FSDC 129 III 535 c. 2 p. 537] - in any case).

FSCD 141 III 201 [205]

Arbitration and arbitral #expert determination do not always exclude each other. It is therefore possible to find combinations of the two institutions.

FSCD 4A_254/2011 c. 4.1, FSCD 4A_438/2008 c. 3.2.1

The provisions of the fConcordat apply exclusively to arbitral #awards and not to #expert determinations.

*FSCD 117 Ia 365 [367], *FSCD 107 Ia 318 [323-324], FSCD 30.09.1993 [(1994) ASA p. 46], VS 08.02.1995 [(1996) ASA p. 697-698], TI 26.11.1993 [(1998) ASA p. 149-150]

Whilst the #arbitrator performs a jurisdictional function, the #arbitral expert performs “a task (which) is never, at any level, jurisdictional in nature.”

VD 04.02.2010

The arbitral #expert determination does not have *res judicata* effect and is not enforceable.

VD 04.02.2010

The parties are not absolutely bound by the #arbitral expert's findings, but the judge may review them when it is established that they are manifestly flawed or unfair.

VD 04.02.2010

1.5.2.1 Power to Adjudicate a Dispute or Establish Facts

The distinction between the #award and the arbitral #expert determination lies in the fact that the first has the formal and substantive authority of a court judgment and can be modified if the prerequisites for a #revision are met, whereas the second – even when deciding on factual or legal issues in a binding way for the parties – can only be invalidated by ordinary proceedings in which one has to establish that the findings of the #arbitral expert are manifestly unjust, arbitrary, flawed, clearly violate #equity or are based on erroneous #facts or the conclusion of the contract is flawed by defects with respect to consent.

FSCD 129 III 535 [538], FSCD 4A_254/2011 c. 4.1, FSCD 4A_438/2008 c. 3.2.1, FSCD 30.09.1993 c. 2a [(1994) ASA p. 50], GE 23.02.2007 c. 5.1

The power to adjudicate a dispute, i.e. to render a decision which will have the same force and authority as a court judgment is an essential element of an #arbitration agreement. Agreements providing that a third person is mandated to attempt a conciliation or a mediation between the parties or, in the context of an #expert determination to establish or to evaluate an important fact for the outcome of the dispute, are not #arbitration agreements.

FSCD 4P.299/2006 c. 3

In principle, the #arbitrator's task is to adjudicate a dispute, whereas the #arbitral expert is supposed to establish the legally relevant #facts. It is possible however that the #arbitral expert has to give its opinion on legal issues. The intrinsic character of the decision rendered is decisive because an arbitral #award has the same effect as a judicial #verdict.

*FSCD 117 Ia 365 [367-368], *FSCD 107 Ia 318 [321], FSCD 30.09.1993 [(1994) ASA p. 50], GE 23.02.2007 c. 5.1, TI 26.11.1993 [(1998) ASA p. 150], ZH 05.11.1993 [(1995) ZR p. 309], TI 25.08.1993 p. 5-6

The difference between the concept of arbitral #award and the concept of arbitral #expert determination does not so much lie in the fact that one decides on elements of fact or, as well, on elements of law. It lies in the intrinsic character of a decision which has a mandatory effect, the #award amounting to a judicial #verdict.

GE 23.02.2007 c. 5.1

The fundamental criterion for the distinction between the two institutions is that the #award of the #arbitrator, to the contrary of the one of the #arbitral expert, is an act creating legal obligations.

VS 08.02.1995 [(1996) ASA p. 698]

1.5.2.2 Factors to Consider

Various factors are considered in distinguishing between an arbitral #award and an arbitral #expert determination. These include the terms used in the parties' agreement, the extent of the powers conferred on the third party to be appointed

according to this agreement, as well as the enforceability of the decision taken by the third party. A further factor is the way in which the agent has understood and executed its mission.

FSCD 4A_254/2011 c. 4.1

The wording used by the parties is not decisive. On the contrary, the distinction has to be made by taking into account the content of the contract according to the parties' intent and the way in which the agent has understood and executed its mission.

*FSCD 117 Ia 365 [367-368], *FSCD 107 Ia 318 [321], FSCD 4A_254/2011 c. 4.1, FSCD 4P.299/2006 c. 3, FSCD 30.09.1993 [(1994) ASA p. 50], VS 08.02.1995 [(1996) ASA p. 698], TI 26.11.1993 [(1998) ASA p. 150]

A simple and informal procedure, without an exchange of factual #claims and #prayers for relief, and the fact that the #arbitrator is not mandated to decide on the #costs and the legal #fees point towards an arbitral #expert determination.

*FSCD 117 Ia 365 [368], *FSCD 107 Ia 318 [322], FSCD 4P.299/2006 c. 3, GE 23.02.2007 c. 5.1, TI 26.11.1993 [(1998) ASA p. 150]

There is in principle an arbitral #expert determination if one or more of the following elements are present:

- only factual issues have to be determined;
- partial issues have to be decided upon;
- the parties agree, during proceedings pending before State courts, to request an arbitral #expert determination and consider this determination as binding;
- in a dispute concerning a company, the actual value of the company's assets has to be determined (see, however, *FSCD 107 Ia 246 [247]);
- the sale value of a commercial enterprise has to be determined in a binding way;
- the assets pertaining to an estate have to be determined and their value established;
- the distribution of the #costs of the proceedings has been fixed in advance;
- the #expert has to first submit a draft to the parties and has to finalise the definitive version by taking into account their comments;
- a third person is mandated to complete or modify a contract.

*FSCD 117 Ia 365 [368-369], FSCD 4A_438/2008 c. 3.2.1, FSCD 4P.299/2006 c. 3, TI 26.11.1993 [(1998) ASA p. 150]

There is in principle an *#award* if one or more of the following elements are present:

- the parties declare that a code on civil procedure or the *fConcordat* is applicable;
- the decision includes the identification of the parties, a presentation of the disputed issues as well as an *#operative* part;
- the parties recognise the decision as a *#title* to *#SADOSP*;
- a legal issue concerning the interpretation of an article of a sales contract has to be determined;
- the decision definitively adjudicates the dispute;
- the decision is to have *#res judicata* effect;
- the parties' reciprocal *#prayers for relief* are decided in a definitive way.

*FSCD 117 Ia 365 [369], TI 26.11.1993 [(1998) ASA p. 150]

In a concrete case, it is not the terms used by the parties which allow one to determine whether one is in presence of an arbitral *#award* or an arbitral *#expert* determination, but the content of the contract corresponding to their intent, as well as how the agent (*#arbitrator* or *#arbitral expert*) has understood and executed the task which was assigned to it.

GE 23.02.2007 c. 5.1

1.5.3 Distinction between Arbitral Expert Determination and Expert Opinion

From the point of view of the statute's systematic, the arbitral *#expert* determination pursuant to Article 189 CCP is listed in the chapter on *#evidence* (Art. 168 et seq. CCP). The arbitral *#expert* determination differs from *#expert* opinions (Art. 183-188 CCP) in that the conclusions drawn by the expert on the existence or inexistence of certain *#facts* are binding on the court subject to the conditions set out in Article 189(3) CCP. Whilst the assessment of *#evidence* is generally the responsibility of the court and Article 157 CCP expressly states that the court must form its conviction after freely assessing the *#evidence*, the court is bound by the factual findings made by the *#arbitral expert* in so far as the parties have delegated to an *#arbitral expert* the determination of a particular disputed fact and thus also the assessment of the *#facts* relevant to the determination of that fact (Art. 189(3) CCP). Therefore, obtaining an arbitral *#expert* determination cannot be treated as a *#precautionary taking of evidence* within the meaning of Article 158 CCP. For apart from the fact that the State court - and not a private *#arbitral expert* - takes the evidence requested under Article 158 CCP, the *#precautionary taking of evidence*, unlike the arbitral *#expert* determination, does not include the assessment of the *#evidence*. By contrast, the binding establishment of *#facts* pursuant to Article 189 CCP presupposes the assessment of *#evidence* by the *#arbitral expert* and in this respect eludes the State court.

FSCD 141 III 274 [278]

1.5.4 Distinction between Arbitral Expert Determination and Private Expert Opinion

The common intent, expressed in advance, to submit oneself to the determination of the expert differentiates the #expert determination from the private #expert opinion.

FSCD 4A_254/2011 c. 4.1, FSCD 4A_438/2008 c. 3.2.1

1.5.5 Appointment of the Arbitral Expert

The appointment of #arbitrators, which under Article 356(2) CCP is entrusted to the competent authority designated by cantonal law, cannot in this respect be assimilated to the appointment of an #arbitral expert. The parties may, within the framework of a private and autonomous agreement pursuant to Article 189 CCP, designate a person whom they wish to entrust with the appointment of an #arbitral expert in the event that they are unable to reach agreement. However, if they appoint this person on the basis of their function (e.g. the respective President of the cantonal Supreme Court), they do not appoint the state judicial authority, but a private individual who acts as such - provided that this individual is in a position to do so and agrees to it - in a private contractual relationship. The intervention of the State court pursuant to Article 356 CCP is limited to arbitration and does not include the appointment of experts to establish the #facts, even if the parties have agreed to obtain an arbitral #expert determination.

FSCD 141 III 274 [279]

1.5.6 Challenge of an Arbitral Expert Determination

An arbitral #expert determination can only be challenged with regard to its content if it is clearly unjust, arbitrary, has been negligently elaborated, is flawed by mistakes, contradicts #equity to a high degree or is based on erroneous factual grounds. An arbitral #expert determination may also be set aside if it is based on fraud, error or #duress. Finally, it can be set aside if there is an obvious factual error which every #arbitral expert would have immediately noticed after careful examination. An arbitral #expert determination cannot be set aside if the judge merely has doubts as to the exactitude of its content but is not convinced that an obvious gross error has been made.

FSCD 129 III 535 [538], *FSCD 71 II 194 [295], *FSCD 67 II 146 [148], FSCD 4A_438/2008 c. 3.2.1, GE 23.02.2007 c. 5.3, ZH 05.11.1993 [(1995) ZR p. 309]

If a party considers that the arbitral #expert determination violates #equity, the principle of #good faith requires that the party takes, immediately or within a reasonable time, legal steps in order to complain about the deficiencies of the arbitral #expert determination.

*FSCD 67 II 146 [148-149]

Every factual error is not sufficient to challenge an arbitral #expert determination; the error must be manifest, i.e. that it is blindingly obvious for every competent person through an attentive examination that the #arbitral expert departed from the actual situation. To the contrary, the #motion to set aside the

arbitral [#]expert determination is excluded if one can only assert doubts as to the correctness of the determination and not a conviction that a gross error has manifestly been committed.

GE 23.02.2007 c. 5.3

In order to appreciate the quality of the arbitral [#]expert determination, one has to compare it above all with the [#]facts as they are objectively established instead of with the result of another arbitral [#]expert determination. Differences between arbitral [#]expert determinations may however suggest the existence of gross errors which the State court will compare to the parties' [#]claims and to the [#]facts objectively established through the proceedings.

GE 23.02.2007 c. 5.3

If a legal entity is mandated to elaborate an arbitral [#]expert determination, the lack of [#]independence has to be examined with respect to two issues: On the one hand, with respect to the relationship between the legal entity itself and the parties, and on the other hand, with respect to the [#]physical persons acting on behalf of the legal entity in their relationship with the [#]principal. This renders the elaboration of an independent arbitral [#]expert determination more difficult for a legal entity than for a [#]physical person. The task becomes more difficult for a large legal entity, for which there may be many non-obvious possible [#]conflicts of interest.

ZH 05.11.1993 [(1995) ZR p. 310-311]

1.5.7 Arbitral Expert Determination and State Court Proceedings

The agreement between the parties on an arbitral [#]expert determination does not limit the parties' right to bring their claims before a State court. A party bound by an arbitral [#]expert determination agreement can file a claim with the competent State court, even if the arbitral [#]expert determination is not yet finished. Nor is an arbitral [#]expert determination agreement a sufficient reason for the [#]stay of judicial proceedings.

ZH 21.03.1994 [(1995) ZR p. 208-209]

The agreement on a private arbitral [#]expert determination is exclusive. A State court seized simultaneously or later with the dispute does not have [#]jurisdiction to examine this state of [#]facts. If the party bearing the [#]burden of proof for the [#]facts, the establishment of which it has been agreed to perform an arbitral [#]expert determination, cannot prove these [#]facts by filing the arbitral [#]expert determination, the State court may set a [#]time limit for the filing of the arbitral [#]expert determination. The parties may set aside their contractual claim and the exclusion effect is also eliminated. If the parties do not invoke the arbitral [#]expert determination agreement in the subsequent proceedings, this may be equivalent to a [#]waiver. The effects of the arbitral [#]expert determination are set aside if the parties do not take the necessary steps within the [#]time limit respectively within an objectively reasonable time.

SG 19.06.2000 [(2000) ASA p. 804-805]

1.6 Internationality

If one of the parties has its #seat or its #domicile abroad, the dispute is always of an international nature.

FSCD 131 III 76 [80], FSCD 4A_188/2013 c. 1, VD 19.10./17.11.2005 c. 1a

According to Article 176(1) PILA, which employs a formal criterion for deciding the international character of an arbitration, an arbitration is international if the #seat of the #arbitral tribunal is in Switzerland and if at least one of the parties was neither domiciled nor had its #habitual residence in Switzerland at the time of the conclusion of the #arbitration agreement.

FSCD 4A_600/2016 c. 1.1.1

On the other hand, arbitration is domestic when the #arbitral tribunal has its #seat in Switzerland and Chapter 12 PILA does not apply.

FSCD 4A_600/2016 c. 1.1.1

The prerequisite for the application of Chapter 12 PILA is not that a foreign entity was also a party to the #arbitration agreement, but exclusively that at least one of the parties to the #arbitral proceedings was domiciled or resident abroad at the time of the conclusion of the #arbitration agreement. Only the parties to the proceedings are decisive. Neither the text nor the meaning nor the scope of Article 176(1) PILA implies that the #seat of parties who do not participate in the proceedings should be taken into account. It would be contrary to the goal of clarity and legal #certainty if it were to be examined, in order to determine the #jurisdiction of the State court hearing #appeals, whether other persons than the parties to the proceedings are bound by the #arbitration agreement and where they had their #seat at the time of the conclusion of the #arbitration agreement. The fact that the law applicable to the proceedings can only be determined at the time of the filing of a #request for arbitration against certain persons, if the parties to the proceedings and not the parties to the contract are decisive, does not change this situation.

FSCD 4A_143/2015 c. 1.1, FSCD 4P.54/2002 c. 3

The doctrine has criticised this decision [FSCD 4P.54/2002] as contrary to legal #certainty as it links the domestic or international character of the arbitration to an uncertain future event, namely the circle of participants to the #arbitral proceedings. Moreover, according to the Italian and German versions of Article 176(1) PILA, the “parties” whose #domicile must be taken into account seems to be those parties to the #arbitration agreement rather than those parties to the #arbitral proceedings. In addition, this decision relied on the argument that companies seated in Switzerland could not internationalize the arbitration by deciding to submit to the rules of the PILA whereas this possibility is now offered by Article 353(2) CCP.

FSCD 4A_143/2015 c. 1.1

In order to determine the international character of the arbitration, the PILA does not use a substantive criterion, such as the interests of international commerce (see, in this sense, French law, Art. 1492 NCPC), but a purely formal criterion. Therefore, the international character of the arbitration does not depend on the subject matter of the dispute.

FSCD 4P.115/2003 c. 2.1

The delimitation between domestic and international arbitration is based on purely formal criteria. This aims at achieving the best possible clarity and legal certainty. In fact, the seat of the arbitral tribunal as well as the seat or domicile of the parties to the arbitration agreement may, in general, be easily determined at the moment of the signature of the arbitration agreement.

FSCD 4P.54/2002 c. 2, FSCD 4P.113/2001 c. 3b, FSCD 27.10.1995 [(1996) ASA p. 281]

If a contract between Swiss parties has to be executed abroad, this constitutes a state of facts with an international element within the meaning of Article 1(1) PILA, which is in principle governed by the provisions of the PILA. However, this does not apply to its Chapter 12 PILA because Article 176(1) PILA presupposes that at least one of the parties was neither domiciled nor resident in Switzerland at the time of the conclusion of the arbitration agreement.

*ZH 30.08.1993 [(1993) ASA p. 534]

The respondent's argument that the arbitral proceedings were of an international nature in order to challenge the admissibility of the appeal, when it had not raised an objection when the presiding arbitrator of the panel had indicated to the parties at the outset of the hearing that it considered that it was a domestic arbitration, constitutes contradictory conduct which is incompatible with the rules of good faith and deserves no protection.

FSCD 4A_600/2016 c. 1.1.4

1.7 Place of Business as Domicile or Residence

The question of whether a simple place of business (or a branch) in Switzerland constitutes for the foreign corporate body a Swiss domicile, implying domestic or international arbitration, has been left open. However, a systematic interpretation tends to lead to the conclusion that, in principle, a simple place of business in Switzerland of a foreign company does not amount to a Swiss domicile, as Article 176(1) PILA does not mention the place of business as a criterion for internationality, whereas Article 192(1) PILA expressly states that a Swiss place of business excludes the possibility of a waiver to file an appeal.

FSCD 118 II 508 [509-510], FSCD 04.11.1992 c. 1

1.8 Pertinent Time for the Determination of the Seat

The pertinent time for the determination of the domicile or habitual residence of the parties is at the time of the conclusion of the arbitration agreement.

FSCD 4A_600/2016 c. 1.1.1, FSCD 4A_254/2013 c. 1.2.1

This means that an arbitration can be international even when the case no longer has international elements at the outset of the #arbitral proceedings because one of the parties transferred its #domicile to Switzerland after the conclusion of the #arbitration agreement.

FSCD 4A_600/2016 c. 1.1.1

As Article 176(1) PILA provides that the time of the conclusion of the #arbitration agreement is the pertinent time for the determination of the domicile or the habitual residence of the parties, a subsequent #assignment to a person having its domicile or habitual residence abroad cannot create the international character required by Chapter 12 PILA. By fixing itself the criterion with respect to time, the PILA deprives the parties of the possibility to change the legal bases of the #arbitration agreement and of the #arbitral proceedings by subsequent actions such as a transfer of domicile.

FSCD 4A_143/2015 c. 1.1, FSCD 4P.113/2001 c. 3b, FSCD 27.10.1995 [(1996) ASA p. 281]

If at that time at least one party was domiciled or habitually resident abroad, nothing changes in the applicability of Chapter 12 PILA if that party subsequently transfers its domicile to Switzerland with the consequence that both parties are domiciled in Switzerland at the time the #arbitral proceedings are instituted.

FSCD 4A_254/2013 c. 1.2.1

The pertinent time within the meaning of Article 176(1) PILA is when the new members of a corporate body have accepted the #arbitration agreement contained in the #statutes and not the one when the #statutes have been adopted.

FSCD 4P.113/2001 c. 3a

The pertinent time in the context of a condominium [*Art. 712a et seq. CC*] is the day on which the buyer validly accepted the #arbitration agreement contained in the rules governing the administration and the use of the condominium, i.e. the day on which the sale and purchase agreement is signed.

FSCD 4P.113/2001 c. 3a

The fact that the two parties transferred their residence to Switzerland after the conclusion of the #arbitration agreement, does not change its internationality.

GE 14.09.2007 [C/24853/2006] c. 3

The element of extraterritoriality must exist at the time of the conclusion of the #arbitration agreement and the arbitration keeps its international character even if the foreign party transfers its domicile or seat to Switzerland at the beginning of the proceedings.

GE 12.11.2004 [C/25597/2003] c. 3.1

1.9 Seat of the Arbitral Tribunal in Switzerland

- For the determination of the #seat of the #arbitral tribunal, see Article 176(3) PILA

2 *Opting in Favour of the Application of Part III CCP (2)*

The parties may opt-out, that is, opt for the application of Part III CCP when an arbitration has an international character, excluding Chapter 12 PILA and vice versa.

FSCD 4A_600/2016 c. 1.1.1

The exclusion of Chapter 12 PILA in favour of Part III CCP governing arbitration presupposes an express declaration of the parties in the #arbitration agreement or in a later agreement.

VD 17.07.2014 c. 4a

2.1 *Case Law Regarding the Exclusion Agreement under the Former Version of Article 176(2) PILA*

[Until the entry into force of the CCP on 1 January 2011, Article 176(2) PILA read as follows:

"The provisions in this chapter shall not apply where the parties have agreed in writing that the provisions of this chapter are excluded and that the cantonal provisions on arbitration should apply exclusively."

It is not sufficient that the parties simply choose to apply the *fConcordat*. The common intention of the parties not to apply Chapter 12 PILA must clearly result from the agreement. No particular form is prescribed for this and the common intent can also be determined by #interpretation. However, for the purpose of legal #certainty, the words used by the parties must clearly imply that the federal law [i.e. *Chapter 12 of the PILA*] should not apply.

FSCD 116 II 721 [724], FSCD 4A_254/2013 c. 1.2.3, FSCD 4P.243/2000, p. 4 confirming ZH 22.09.2000 p. 5

A #choice of law in favour of the cantonal provisions [i.e. *the fConcordat*] is only valid if it fulfils all three prerequisites mentioned in Article 176(2) PILA: it must expressly exclude the application of the federal law [i.e. *Chapter 12 of the PILA*], it must determine that the cantonal provisions on arbitration [i.e. *the fConcordat*] shall exclusively apply and it must be in writing.

FSCD 116 II 721 [724], FSCD 115 II 390 [394], FSCD 4P.304/2006 c. 2.2.4, FSCD 4P.140/2000 c. 2a, FSCD 08.09.1999 c. 1a, ZH 26.01.2008 c. 2, TI 10.11.2004 c. 4, TI 24.09.2001 p. 3-4, ZH 22.05.1990 p. 4-5

The exclusion of the federal provisions on international arbitration [i.e. *Chapter 12 of the PILA*] has to result clearly from the written agreement. It is not sufficient that only the application of cantonal law [i.e. *the fConcordat*] has been agreed upon, even if the #taking of evidence would show that this law should replace the federal law in accordance with the intention of the parties. In the interest of limiting the means of #appeal in arbitration, such examination by the taking of #evidence is precisely what should be avoided.

FSCD 116 II 721 [724], FSCD 115 II 390 [394], FSCD 4A_254/2013 c. 1.3.3, FSCD 4P.140/2000 c. 2a, ZH 22.05.1990 p. 4-5

The reference by the parties to the cantonal provisions [i.e. *the fConcordat*] must be exclusive, i.e. relate to the entire proceedings and not only to certain particular issues.

FSCD 116 II 721 [724], FSCD 115 II 390 [394], ZH 22.05.1990 p. 4-5

It is of course not possible to request from the parties that they use a standard formula for an #exclusion agreement. However, even if the common intention of the parties can also be determined by #interpretation, this intention has to be clearly expressed by the terms used by the parties, in order to ensure #legal certainty.

FSCD 115 II 390 [394]

The issue of whether an #exclusion agreement can validly be concluded at any time or only up to the time when one of the parties asks for the #constitution of the #arbitral tribunal has so far been left open.

FSCD 115 II 390 [395]

It is also necessary to distinguish between the arbitration system and the applicable procedural rules. #Arbitration agreements according to which the #arbitral proceedings shall be subject to the fConcordat do not exclude the application of the provisions of Chapter 12 PILA and do not subject the arbitration to the fConcordat as they do not satisfy the strict requirements of Article 176(2) PILA. The parties have great autonomy in fixing the procedure to follow before the #arbitrators and they can refer to the procedural law they wish (including the fConcordat). However, they do not change the nature of the arbitration by their contractual choice of a procedure which remains subject to the PILA and not to the law of the country (or the Canton) whose procedural law they have chosen.

FSCD 4P.140/2000 c. 2b

2.2 Motion to Set Aside Based on a Violation of Article 176(2) PILA

The question of the #validity of the #choice of law pursuant to Article 176(2) PILA can be submitted to the Federal Supreme Court by a [*former*] #motion for constitutional review [Art. 84(1)(d) fSOFJ] against the #appeal decision of the cantonal instance on its #jurisdiction. The Federal Supreme Court examines with unfettered #powers of review whether the federal rules on the organisation of the judiciary have been respected.

FSCD 116 II 721 [723-724], FSCD 4A_600/2016 c. 1.1.2, FSCD 4P.304/2006 c. 2.2.2, FSCD 08.01.2001 [4P.243/2000 p. 3]

The issue of the #validity of a #choice of law within the meaning of Article 176(2) PILA can be put to the Federal Supreme Court not only by a #motion to set aside based on Article 191(1) PILA in connection with Article 190(2)(b) PILA and Article 85(c) fSOFJ, but also by a [*former*] #motion for constitutional review pursuant to Article 84(1)(d) fSOFJ for a violation of the federal law provisions on #jurisdiction *ratione materiae*, following a decision on #appeal by a cantonal court on its #jurisdiction.

FSCD 116 II 721 [723-724], FSCD 4A_600/2016 c. 1.1.2, FSCD 4P.304/2006 c. 2.2.2, FSCD 4P.140/2000 c. 1

The #appellant must base its #motion to set aside on Article 84(1)(d) fSOFJ according to which the [*former*] #motion for constitutional review is available against cantonal decisions on the ground that federal provisions on the delimitation of substantive and territorial #jurisdiction have been violated. By allowing the parties to exclude the application of the federal provisions on proceedings and jurisdiction [*i.e. Chapter 12 PILA*] by a #choice of law, this provision creates a way to decide on jurisdiction which differentiates the federal system on #jurisdiction from the cantonal one within the meaning of Article 84(1)(d) fSOFJ.

FSCD 116 II 721 [723-724]

On a motion based on Article 190(2)(b) PILA, the court can examine whether Chapter 12 PILA is applicable to the #arbitral proceedings. In particular, it can determine whether the parties validly submitted their dispute to cantonal law [*i.e. the fConcordat*] pursuant to Article 176(2) PILA. The interim #decision will be set aside if an #arbitral tribunal has ruled, in violation of Article 176 PILA, that it has #jurisdiction under the PILA.

FSCD 115 II 390 [395]

If an #arbitral tribunal declines in an interim #award to apply cantonal law [*i.e. the fConcordat*] and decides that it has #jurisdiction under the terms of Chapter 12 PILA, the interim #decision is subject to a #motion to set aside pursuant to Article 190(2)(b) PILA for violation of Article 176 PILA.

FSCD 115 II 390 [395], FSCD 4A_600/2016 c. 1.1.2

2.3 Individual Cases under the Former Version of Article 176(2) PILA

The question has been left open whether proceedings based on Article 33 of the “general terms and conditions” of the European Organization for Nuclear Research (CERN) which exclude the application of any national law and, in particular, the Swiss arbitration law, are international #arbitral proceedings within the meaning of Article 176 et seq. PILA.

FSCD 118 Ib 562 [568]

There is no valid exclusion of Chapter 12 PILA if the parties agree during the proceedings on the applicability of the provisions of the fConcordat to possible challenges of #interim awards.

FSCD 116 II 721 [724-725]

There is no valid exclusion of Chapter 12 PILA if the #arbitration agreement has been concluded before the exclusion of these provisions was rendered possible by the PILA and if the #arbitration agreement does not clearly refer to Chapter 12 PILA.

FSCD 115 II 390 [395]

There is no valid exclusion of Chapter 12 PILA, if the #terms of reference signed by the parties state that the #arbitral tribunal shall decide "by taking into account the provisions of the Swiss Concordat on arbitration of 1969" and that "the rules applicable to the proceedings shall be determined in accordance with the provisions of the Concordat".

FSCD 115 II 390 [391, 395]

A choice of the FIFA regulations and the CC as the applicable law does not constitute an explicit #waiver of the applicability of Articles 176 et seq. PILA in favour of Article 353 et seq. CO.

FSCD 4A_568/2015 c. 2.1

There is no valid exclusion of Chapter 12 PILA if an #arbitration agreement which simply provides that the proceedings are governed "*nach dem Schw. Konkordat über Schiedsgerichtsbarkeit*" without mentioning Chapter 12 PILA and without in particular containing an explicit exclusion of the provisions of Chapter 12 PILA. In their further submissions to the #arbitral tribunal, the parties have repeatedly referred to the fConcordat and, in particular, have not objected to the Constitutive Order in which the sole #arbitrator declared the "mandatory provisions of the Concordat" to be applicable. However, the fact that the parties expressly waived the application of the PILA in written form is not asserted by the complainant and is also not apparent. The reference to the fConcordat in the #arbitration agreement is rather to be interpreted as a #choice of law within the meaning of Article 182(1) PILA. According to this provision, the parties may regulate the #arbitral proceedings themselves or by reference to arbitral rules of procedure; they may also subject it to a procedural law of their choice. If the parties declare that the proceedings are governed by the fConcordat without simultaneously excluding the PILA as *lex arbitri*, this can only mean a #choice of law within the meaning of Article 182(1) PILA.

FSCD 4A_254/2013 c. 1.2.4

An agreement which does not mention the PILA and which provides that "all disputes arising in connection with the present Agreement shall b[e] finally and exclusively settled under the rules of arbitration of the Swiss Konkordat über die Schiedsgerichtsbarkeit" does not exclude clearly enough the application of the provisions of the PILA.

FSCD 08.01.2001 [4P.243/2000 p. 4-5] confirming ZH 22.09.2000 p. 5-6

3 *Designation of the Seat of the Arbitration (3)*

3.1 Concept and Significance of the Seat

The designation of a certain #seat of the #arbitral tribunal has the effect that the #award is considered as being rendered at this place. It is not important whether a #hearing has indeed been held in this place or whether the #award has indeed been rendered at this place.

FSCD 24.03.1997 [(1997) ASA p. 330]

The concept of #seat of the #arbitral tribunal is not defined in the PILA. It is the legal relationship by which the parties are linked, on the one hand, to the arbitration and to the #arbitrator, and, on the other hand, to a #forum and an arbitration law. Therefore, it would be more appropriate to speak of the #seat of the arbitration.

GE 07.02.1991 [(2001) ASA p. 273-274]

3.2 Designation of the Seat by the Parties

The enumeration of Article 176(3) PILA is not exhaustive, thus allowing the #seat of the arbitration to be determined otherwise, in accordance with the rules on #interpretation of contracts: elements to be taken into account which have to be found in the #arbitration agreement, can follow from the choice of a certain procedure, of the designation of the authority called to appoint the #arbitrators in the absence of a designation by the parties, etc. These criteria continue to also apply after the entry into force of the PILA, there being no indication that the federal legislator understands Article 176(3) PILA in a narrow sense. Therefore, this applies, in particular, to the designation of the authority called to appoint the #arbitrators.

TI 25.08.1993 [(1994) Rep p. 409-410]

The parties may determine the #seat of the #arbitral tribunal expressly or tacitly. There is a tacit choice of the #seat of the #arbitral tribunal if different hints, e.g. the – even equivocal – indication of a Swiss State court as nomination authority of the #arbitrators, point to a certain country.

GE 07.02.1991 [(2001) ASA p. 274-276]

3.3 No Designation of the Seat

If an #arbitration agreement neither indicates the #seat of the #arbitral tribunal nor an #arbitral institution which could determine the #seat, nor determine how the #arbitrators have to be nominated, the #arbitral proceedings do not fall within the scope of Chapter 12 PILA because of the lack of a #seat in Switzerland. However, if the #respondent has its domicile or headquarters in a Canton bound by the fConcordat, Article 2(2) fConcordat has to be taken into account; according to this provision, the #seat is subsidiarily in the place of the State court which would have #jurisdiction in the absence of an #arbitration agreement. This is also justified by the fact that the PILA recognises the institution of a “*juge d’appui*” in Article 179(2) PILA. The second half-sentence of this provision

provides for the analogous application of cantonal law [*today: the CCP*]. In a Canton which did not enact provisions regulating the #jurisdiction and the proceedings pursuant to Article 179(2) PILA, Article 3(a) and (b) fConcordat and the cantonal rules completing these provisions (in Zurich, Sections 239(2) and 284(3) fCCP/ZH) therefore apply for the time being by analogy. In fact, the cantonal legislator knew of the fConcordat and the cantonal rules completing it when the PILA entered into force and it nevertheless renounced to regulate itself the #jurisdiction and the proceedings, including the #appeals. The term "by analogy" does not have any influence on this conclusion as it solely refers to the specificities of international arbitration which lead for instance to the taking into consideration in particular of the legal environment of the parties.

ZH 08.06.2001 p. 3-5, ZH 30.10.2000 p. 3-4, ZH 25.05.1998 p. 5-6, confirming ZH 02.05.1997 p. 2-3, ZH 28.03.1994 p. 4-6

If a party does not fulfil its duty to cooperate in the determination of the #seat of the #arbitral tribunal, the other party cannot determine the #seat unilaterally. The principle of *favor validitatis* does not alter this solution because the legislator expects a minimum of clarity from the parties when they enter into an #arbitration agreement.

ZH 25.05.1998, confirming ZH 02.05.1997 p. 4

If an #arbitration agreement is invalid because the #seat of the #arbitral tribunal is not determined, the competent State court of the place where the #arbitral tribunal has its #seat, the "*juge d'appui*", cannot be determined either. A determinable #jurisdiction cannot result from the Lugano Convention which allows, contrary to the PILA, a #choice of #jurisdiction to a State court, because it does not apply to arbitration (Art. 1(2)(4) Lugano Convention). This exclusion applies also to the proceedings with regard to the nomination of #arbitrators or the determination of the #seat of the #arbitral tribunal.

ZH 25.05.1998, confirming ZH 02.05.1997 p. 5

If the parties' #arbitration agreement does not determine the #seat of the #arbitral tribunal and the parties are not able, once a dispute has arisen, to agree either on a #seat or on the nomination of the #arbitrators, the #arbitral proceedings do not fall within the scope of Chapter 12 PILA because of the lack of a #seat in Switzerland pursuant to Article 176(3) PILA. In such a case the fConcordat applies. If the #seat has not been determined by the parties, by an institution mandated by them or by the #arbitrators, the #arbitral tribunal has its #seat – according to the fConcordat – at the place of the Swiss State court which would have #jurisdiction in the absence of an #arbitration agreement. This is also the #seat when a State court is requested to appoint an #arbitrator pursuant to Article 3(b) fConcordat, even if no #seat has been determined.

ZH 11.03.1994 p. 2-3

3.4 Discretion to Choose a Seat

If an #arbitration agreement provides that “any dispute or differences arising out of or in connection with this contract shall be settled by a three person arbitration tribunal in accordance with international arbitration rules and practices in either London, Paris or Zurich”, the #claimant can choose the #seat of the #arbitral tribunal because otherwise the agreement does not make sense. As *in casu* an #arbitration agreement clearly existed, this #interpretation is also in accordance with the principle according to which the parties have to be protected in their trust in the #validity of the #arbitration agreement.

ZH 08.05.1998 p. 4-5

Article 176(3) PILA does not forbid the parties from providing that one of the parties should determine the #seat of the #arbitral tribunal. Furthermore, if the parties do not provide that a specific party, but that the #claimant can choose the #seat, there is no inequality of treatment between the parties, as it is unknown at the time of the conclusion of the clause which party to the contract will be the #claimant. Therefore, such an agreement does not privilege one party.

ZH 13.08.1990 p. 3

3.5 Individual Cases

The #seat of the #arbitral tribunal is in Lugano Switzerland when the #arbitration agreement provides that possible disputes with regard to the quality of the products will be resolved in a non-judicial way by arbitration, that the arbitral authority will be appointed by the competent State court of Lugano and that otherwise (*ansonsten*) the #forum will be Lugano/Switzerland (*ist der Gerichtsstand Lugano/Schweiz*). This can only mean that disputes between the parties are decided by the ordinary State court of Lugano (#choice of jurisdiction), whereas certain types of disputes will be submitted to an #arbitral tribunal appointed by the competent judicial authority of Lugano. With such an #arbitration agreement, the #seat of the #arbitral tribunal is in Lugano.

TI 25.08.1993 [(1994) Rep p. 410]

In casu, the clause “*tout litige né de la présente convention soit réglé par arbitrage du Tribunal de Commerce de Genève (Suisse)*” indicates, *inter alia*, that Switzerland shall be the place where the #arbitral tribunal has its #seat.

GE 07.02.1991 [(2001) ASA p. 274-276]

Article 177

- II. Arbitrability** ¹ **Any dispute of financial interest may be the subject of an arbitration.**
² **A State, or an enterprise held by, or an organisation controlled by, a State, which is party to an arbitration agreement, cannot invoke its own law in order to contest its capacity to arbitrate or the arbitrability of a dispute covered by the arbitration agreement.**
- II. Schiedsfähigkeit** ¹ Gegenstand eines Schiedsverfahrens kann jeder vermögensrechtliche Anspruch sein.
² Ist eine Partei ein Staat, ein staatlich beherrschtes Unternehmen oder eine staatlich kontrollierte Organisation, so kann sie nicht unter Berufung auf ihr eigenes Recht ihre Parteifähigkeit im Schiedsverfahren oder die Schiedsfähigkeit einer Streitsache in Frage stellen, die Gegenstand der Schiedsvereinbarung ist.
- II. Arbitrabilité** ¹ Toute cause de nature patrimoniale peut faire l'objet d'un arbitrage.
² Si une partie à la convention d'arbitrage est un Etat, une entreprise dominée ou une organisation contrôlée par lui, cette partie ne peut invoquer son propre droit pour contester l'arbitrabilité d'un litige ou sa capacité d'être partie à un arbitrage.
- II. Compromettibilità** ¹ Può essere oggetto d'arbitrato qualsiasi pretesa patrimoniale.
² Uno Stato, un'impresa dominata da uno Stato o un'organizzazione controllata da uno Stato non può, in quanto parte, invocare il proprio diritto per contestare la compromettibilità della causa oggetto del patto di arbitrato o la propria capacità di essere parte nel procedimento arbitrale.

1 **Subject-Matter of Arbitration (1)**

- For #arbitrability under the NYC, see Article V(2)(a) NYC

1.1 **Legal Nature and Purpose of Article 177 PILA**

#Arbitrability is a prerequisite for the #validity of the #arbitration agreement and hence, for the #jurisdiction of the #arbitral tribunal.

FSCD 133 III 139 [141], FSCD 118 II 353 [355], FSCD 117 II 94 [98], FSCD 4A_515/2012 c. 4.1, FSCD 4A_654/2011 c. 3.2, FSCD 4A_370/2007 c. 5.2.2

Article 177 PILA is a substantive private international law rule. Therefore, #arbitrability is governed by the *lex arbitri*, without any consideration for the possible stricter rules of the law applicable to the #merits or of the national law of the parties. This can have consequences for the #recognition of an #award rendered in Switzerland.

FSCD 118 II 193 [196]

In order to resolve the problem of #arbitrability, the Swiss legislator has, by voluntarily renouncing a #conflict-of-laws rule (law applicable to the #merits, law of the seat of the parties or the *lex fori*), decided to establish a substantive rule of private international law based on the #subject-matter of the dispute by offering the possibility to submit “any dispute of financial interest” to arbitration.

FSCD 118 II 353 [355], FSCD 4A_388/2012 c. 3.2, FSCD 4A_654/2011 c. 3.4, FSCD 1P.113/2000 c. 1b, VD 25.09.2002 p. 9

The Swiss legislator wanted thereby to exclude all difficulties related to a #conflict-of-laws approach, in particular the necessity to determine the law applicable to the issue of the #arbitrability of the dispute.

FSCD 118 II 353 [355], VD 25.09.2002 p. 9

This solution, which does not, contrary to the fConcordat (Art. 5), reserve the exclusive #jurisdiction of the State courts, shows the federal legislator’s intention to ensure wide access to arbitration.

FSCD 118 II 353 [355-356], FSCD 1P.113/2000 c. 1b, VD 25.09.2002 p. 9

1.2 **Notion of Arbitrability**

#Arbitrability means that a matter can be resolved by arbitration with regard to its nature and/or the fact that no mandatory legal provision submits such matter exclusively to a State authority. Therefore, #arbitrability can be defined as a quality of the #subject-matter of the dispute.

FSCD 118 II 193 [195-196], FSCD 5A_22/2013 c. 2.4

In its objective sense, the notion of #arbitrability includes all disputes which can be resolved by #arbitral proceedings (#arbitrability *ratione materiae*, contrary to #arbitrability *ratione personae*, i.e. the #capacity of the parties to enter into an #arbitration agreement).

FSCD 118 II 353 [355], FSCD 5A_22/2013 c. 2.4, FSCD 4A_515/2012 c. 4.1, VD 25.09.1992 p. 9

The #arbitrability of a dispute does not depend on the substantive existence of the disputed #claim. Therefore, #arbitrability cannot be denied for the sole reason that mandatory provisions or a certain substantive #public policy imply the nullity of the claims or make it impossible to claim their enforcement. #Arbitrability can only be denied for claims which are exclusively reserved for the State courts by #public policy provisions which have to be taken into account.

FSCD 118 II 353 [357], FSCD 4A_388/2012 c. 3.3, FSCD 4A_654/2011 c. 3.4

This does not mean that the provisions of a foreign law to which the dispute is connected should necessarily be taken into account when they provide for a stricter concept of #arbitrability.

FSCD 118 II 193 [196], FSCD 4A_388/2012 c. 3

The question has been left open whether, in international arbitration, an #arbitral tribunal having its #seat in Switzerland does not have #jurisdiction to decide a dispute of financial interest if admitting #arbitrability would be incompatible with #public policy.

FSCD 118 II 353 [357]

The difficulty lies in the fact that there is no uniform Swiss definition of objective #arbitrability. Whereas, according to Article 177(1) PILA, any dispute of financial interest may be the #subject-matter of an arbitration, Article 5 fConcordat provides that the arbitration may relate to any claim of which the parties may freely dispose, unless the matter falls within the exclusive #jurisdiction of a State authority by virtue of a mandatory provision of law.

ZG 16.08.2006 c. 2.4.2

1.3 Dispute of Financial Interest

Disputes of financial interest within the meaning of Article 177(1) PILA are all #claims which have a monetary value for the parties, independent of whether they are part of the assets or the liabilities of an estate; in other words, #claims which represent, at least for one of the parties, a direct or indirect interest which is measurable in monetary terms.

FSCD 118 II 353 [356], FSCD 1P.113/2000 c. 1b, VD 25.09.2002 p. 9, VD 11.07.2001 p. 9, VD 19.05.1999 p. 11

Article 177(1) PILA does not subject #arbitrability to the fact that the disputed claim is at the parties' disposal. It is thus wrong to assimilate the character of a dispute of financial interest within the meaning of this provision with the liberty to dispose of Article 5 fConcordat. These are two different criteria. The legislator wanted, on purpose, to exclude the second one which presupposes the choice of a #conflict-of-laws solution as, in international matters, the determination of whether or not the disputed claim is at the parties' disposal requires the examination of the substantive law which governs it.

FSCD 118 II 353 [356], VD 25.09.2002 p. 9

As the legislator has chosen a criterion of #arbitrability which depends on the nature of the dispute and not on the law governing it, restrictions and prohibitions regarding the #arbitrability of the dispute provided in the foreign law do not in principle have to be taken into account.

FSCD 118 II 353 [356]

According to the legal doctrine, the notion of "financial interest" within the meaning of Article 177(1) PILA must be interpreted broadly: by choosing this criterion to define #arbitrability, the legislator had the objective of guaranteeing the widest possible access to international arbitration.

FSCD 5A_22/2013 c. 2.4.1

Over time, #case law and doctrine have recognized, in this particular context, that this definition covers not only #claims that have, in generic terms, an asset or market value, but also #claims which, although do not have their own intrinsic value, appear to be closely related to a financial legal relationship. In borderline cases, what is decisive is to establish whether it is the financial or ideal interest which prevails for the applicant, with the result that even claims of an ideal nature must be considered as #arbitrable, if the judicial protection required has financial consequences and the financial component of the dispute is preponderant.

FSCD 5A_22/2013 c. 2.4.1

The text of Article 177(1) PILA does not make any distinction between whether the #claims are based on private or public law.

FSCD 06.07.1990 c. 4b

Article 177(1) PILA admits the #arbitrability of international civil or commercial disputes, in contract or tort law, subject to national or international public law.

VD 19.05.1999 p. 11

1.4 Review of Arbitrability Issue

Given that an #arbitration agreement cannot be validly concluded unless it concerns an arbitrable dispute, the issue of the #arbitrability of the dispute should be treated first notwithstanding the order of the grounds put forward by the #appellant.

FSCD 4A_515/2012 c. 3

1.5 Non-Arbitrable Preliminary Issues

As a #preliminary issue, the #arbitral tribunal may examine issues which are by themselves not arbitrable, such as the incrimination of a certain behaviour under a specific law.

FSCD 133 III 139 [142], FSCD 4A_482/2010 c. 4.3.1

1.6 Arbitrability and Enforceability of the Award

By adopting a substantive approach to the problem of #arbitrability, the federal legislator has chosen a solution which undoubtedly does not exclude that #awards rendered in Switzerland would not be enforced in certain countries. However, the federal legislator did so whilst being aware of this problem, thus leaving it up to the parties to weigh the risk of the possible lack of #recognition of the #award. Therefore, it is not possible to justify a restrictive approach to #arbitrability by the existence of such a risk.

FSCD 118 II 353 [358], FSCD 4A_388/2012 c. 3.3, FSCD 4A_146/2012 c. 3.3, FSCD 4A_654/2011 c. 3.4

The #arbitral tribunal cannot anticipate with certainty in which State a party may someday seek the #enforcement of the #arbitral award.

FSCD 4A_388/2012 c. 3.3

1.7 *Ex officio* Examination of a Lack of Arbitrability

The doctrine, for its part, is divided on the question of whether the lack of #arbitrability should be raised *ex officio* by the #arbitral tribunal. It is not necessary to settle this controversy definitively here. At most, it can be noted, using common sense, that, if the objective lack of #arbitrability results from a legal restriction to the autonomy of the parties' will, the unreserved entry into the case on the #merits by the #respondent should not prevent the #arbitral tribunal from examining *ex officio* the lack of #arbitrability of the dispute, nor should it prevent that party from bringing an #appeal on that account before the Federal Supreme Court, unless it allows the #arbitral tribunal to assume #jurisdiction, for example, to pronounce a criminal conviction, to take action on an application for divorce, to #SADOSP or to rule on a bankruptcy petition.

FSCD 143 III 578 [586-587]

1.8 Motion to Set Aside for Lack of Arbitrability

- See also Article 190(2)(b) PILA, section 2b.12.5

The #motion to set aside for lack of #jurisdiction relates not only to the issue of #arbitrability (Art. 177 PILA) and of the submission to a tribunal having #jurisdiction (Art. 186(2) PILA) but also to the #validity, content and scope of application of an #arbitration agreement.

FSCD 117 II 94 [98], ZH 22.05.1990 p. 6-8

1.9 Arbitrability and Debt Enforcement and Bankruptcy Law

The #action for validation of an #attachment of assets can be submitted to an #arbitral tribunal. The #case law of the Federal Supreme Court has long recognized this, and the doctrine has followed in its footsteps, with almost unanimity being observed in this respect between specialists in #debt enforcement and bankruptcy law.

FSCD 143 III 578 [582]

Whilst an #arbitral tribunal has #jurisdiction to hear an #action under Article 79 SDCB seeking a declaration that a debt exists, such tribunal does not have #jurisdiction like a State court of law to provisionally or finally decide on a #SADOSP.

FSCD 143 III 578 [583-584], FSCD 136 III 583 [585], FSCD 5A_682/2009 c. 4.2.3.3, FSCD 19.08.2015 [7B.95/2005] c. 4.3, ZH 06.03.2015 c. II.4.1

Moreover, and more generally, a tribunal, whatever it may be, when it is seized of an #action for validation of an #attachment of assets, decides only on the existence of the #claim that is the subject of that action. It does not have #jurisdiction to rule on the #validity or #enforcement of the #attachment of assets, these questions falling within the exclusive #jurisdiction of the law enforcement authorities.

FSCD 143 III 578 [584]

According to the #case law of the Federal Supreme Court, the parties may waive the proceedings for the #SADOSP by means of an #arbitration agreement, but this #waiver must be expressly made. The criteria which the Federal Supreme Court has developed with regard to Article 192 PILA can be applied by analogy to the requirement of the prerequisite of an express #waiver.

FSCD 136 III 583 [586], ZH 06.03.2015 c. II.4.2

The requirement laid down by the Federal Supreme Court for an express #waiver of the #SADOSP in the #arbitration agreement must be upheld. An #arbitration agreement waives proceedings before a State court in favour of an #arbitral tribunal for the purposes of the proceedings for a decision but does not also waive #enforcement proceedings which are not arbitrable. By waiving the #SADOSP, the parties waive a legal institution which is outside the #jurisdiction of the #arbitral tribunal. Parties which waive the #SADOSP thus waive the possibility of a provisional seizure or the inclusion of a list of goods [*Güterverzeichnis, inventaire, inventario*] (cf. Art. 83(1) SDCB). To assume such a far-reaching #waiver without a corresponding express formulation goes too far, in addition for reasons of legal #certainty. There is already some uncertainty in practice with respect to the question of what falls under the term “express declaration” within the meaning of Article 192 PILA. A renunciation of the requirement of explicitness would lead to even greater uncertainty. There is therefore no reason to deviate from the Federal Supreme Court’s #case law.

ZH 06.03.2015 c. II.4.2

Whereas an #arbitral tribunal is allowed to decide on the #recognition of a debt, it cannot decide on a #SADOSP because it lacks coercive powers, the #enforcement of a debt falling within the exclusive #jurisdiction of the State authority.

VD 02.11.2006 c. Ic

#Arbitrability is in any case limited by Swiss #public policy. Swiss #public policy has, in particular, to be taken into account in the field of #debt enforcement and bankruptcy law, in which some proceedings and claims are so closely connected to enforcement that they are reserved to the State courts and are excluded from the adjudication by an #arbitral tribunal. This is the case for the #SADOSP and for the commencement of bankruptcy proceedings, the claim that the assets are in the property of a third person [*Widerspruchsverfahren*, *revendication*, *rivendicazione*; Art. 106 et seq. SDCB] as well as the #attachment of assets.

ZG 16.08.2006 c. 2.4.3

The action for revocation [*Anfechtungsklage*, *révocation*, *revocazione*] according to Articles 285 et seq. SDCB is not arbitrable.

ZG 16.08.2006 c. 2.4.4

Claims based on #debt enforcement, respectively on bankruptcy (proceedings for the #SADOSP, #bankruptcy proceedings) are not arbitrable, contrary to claims of substantive #debt enforcement and bankruptcy law, as such #enforcement measures also concern third parties. It is not possible by an #arbitration agreement to deprive the State courts of their #jurisdiction with respect to proceedings for the #SADOSP.

TG 23.04.2001 [(2003) ASA p. 419], SO 08.01.1996 [(1996) SOG p. 34]

An #action for a declaration that the claim is unfounded within the meaning of Article 83(2) SDCB can be submitted to an #arbitral tribunal, even if its #seat is abroad.

VD 19.05.1999 p. 13

1.10 Arbitrability and Competition Law

- See also Article 190(2)(b) PILA, section 2b.14.2; and Article 190(2)(e) PILA, section 2e.13.25
- For Article 81 Rome Treaty as a #mandatory norm, see Article 187(1) PILA, section 1.5.3

The Swiss judge or #arbitrator who has to decide on the #validity of a contractual agreement concerning markets in the European Union examines this issue in the light of Article 81 Rome Treaty [*Art. 85 fRome Treaty*]. It must do so notwithstanding the fact that the parties agreed on the application of Swiss law to their contract. This examination is in any event mandatory if a party invokes the #invalidity of the contract before the judge or the #arbitrator.

FSCD 132 III 389 [398], FSCD 13.11.1998 [(1999) ASA p. 532]

The #arbitrator who denies its #jurisdiction for this examination violates Article 190(2)(b) PILA.

FSCD 132 III 389 [398]

Neither Article 81 Rome Treaty [*Art. 85 fRome Treaty*] nor its Regulation N 17 of 6 February 1962 forbid a national court, or the #arbitrator, in charge of a dispute relating to the settlement which has to take place between the parties with regard to the performance or the lack of performance of an agreement, to

examine the #validity of this agreement. The risk of contradictory decisions is not decisive in this respect. Neither is the risk that the #enforcement authority does not grant the exequatur. The #arbitrators have to examine the compatibility of the agreements submitted with the regulations of the European Community, if one wants to avoid decisions which would be contrary to them.

FSCD 118 II 193 [198]

Disputes relating to competition law and cartels are arbitrable.

VD 27.09.2011 c. IV b

1.11 Arbitrability and Sports Law

1.11.1 CAS as Arbitral Tribunal

Even if the #CAS is the result of a foundation governed by private law, it has full #jurisdiction to hear, on the basis of legal standards and following an organised procedure, any question of fact and law submitted in the context of the disputes brought before it. Its #awards provide a jurisdictional solution to these disputes and are subject to #appeal to the Federal Supreme Court in the limited circumstances listed in Articles 190 to 192 PILA. [...] The #CAS therefore has the appearance of a "court established by law" within the meaning of Article 6(1) ECHR.

ECHR 02.10.2018 § 149

The #CAS can be considered as a genuine #arbitral tribunal with regard to the proceedings in which the #CAS is entrusted by an international sports #association as an appeals instance with the examination of the #validity of the penalties imposed by its organs.

FSCD 129 III 445 [449], FSCD 119 II 271 [279], FSCD 4P.64/2001 c. 2d/ee, FSCD 5P.427/2000 c. 1c, FSCD 31.03.1999 [(1998-2000) Digest CAS p. 776], FSCD 31.10.1996 [(1986-98) Digest CAS p. 588], BE 19.04.20123 c. III.2.6

The #CAS when functioning as an appeals instance outside of the international #federations cannot be compared to a permanent #arbitral tribunal of an #association mandated to resolve internal disputes in the last resort. Reviewing the #facts and the law with unfettered #powers of review and having full freedom to render a new decision replacing that of the previous instance, it can better be assimilated to a judicial authority independent from the parties. Therefore, the system of the list of #arbitrators does not trigger the same objections as when it is used by #arbitral tribunals created by #associations.

FSCD 129 III 445 [459]

The fact that the #CAS is an institution does not mean that it cannot be considered as a genuine #arbitral tribunal.

FSCD 119 II 271 [280], *FSCD 107 Ia 152 [153-154]

1.11.2 Independence and Impartiality of the CAS

The #CAS is sufficiently independent from the IOC, as well as from all other parties requiring its services, so that the decisions it renders in the matters

concerning it can be considered as genuine arbitral awards, assimilable to judgments of a State court.

FSCD 144 III 120 [124], FSCD 136 III 605 [614], FSCD 129 III 445 [463], FSCD 4A_612/2009 c. 3.1.3, FSCD 4P.149/2003 c. 1.1, VD 30.01.2018 c. III.d, VD 17.07.2014 c. 4c, LU 23.04.2008 c. 4.4.5

From an independence point of view, the Federal Supreme Court has always found the links established by the International Summer Olympic Federations (*in casu*, the FEI (FSCD 129 III 445)) or the International Winter Olympic Federations (*in casu*, the FIS (FSCD 119 II 271)) with the CAS less problematic than those between this arbitral tribunal and the IOC. Therefore, *prima facie*, there is no reason why this should not be the case today.

FSCD 144 III 120 [124]

Since then, this case law has been confirmed on numerous occasions in cases where one or the other of the existing international sports federations appeared as parties [...]. Only compelling reasons could allow the Federal Supreme Court to distinguish FIFA from the other international sports federations with respect to its independence from the CAS [...]. It is therefore reasonable to state, as the respondent does, that the analysis of the relations between the CAS and the IOC, which the Federal Supreme Court carried out in the Lazutina decision [FSCD 129 III 445], applies *a fortiori* to FIFA.

FSCD 144 III 120 [124-127]

The sports arbitration established by the CAS presents certain specificities, such as the closed list of arbitrators, which cannot be ignored even though they do not justify, as such, lower requirements in sports arbitration than in commercial arbitration.

FSCD 136 III 605 [614], FSCD 4A_506/2007 c. 3.1.1

The system of the list of arbitrators as it has been organized since 1994, satisfies the requirements of independence and of impartiality applicable to arbitral tribunals.

FSCD 129 III 445 [457], FSCD 4A_458/2009 c. 3.1, FSCD 4A_506/2007 c. 3.1.1, ECHR 10.02.2018 §157

The CAS has been restructured, taking into account the reservations on its independence expressed in FSCD 119 II 271, so as now to be formally separated from the IOC and placed under the *aegis* of the International Council of Arbitration for Sport (ICAS), a body constituted as an autonomous foundation; it is moreover divided into two divisions and has 150 arbitrators working for it, whilst it previously had only 60.

FSCD 31.10.1996 [(1986-98) Digest CAS p. 592]

In these circumstances, it is in any case beyond question to treat as an unenforceable obligation, within the meaning of Article 27 CC, the adoption by reference of the arbitration agreement contained in the respondent's rules.

FSCD 31.10.1996 [(1986-98) Digest CAS p. 592]

Even though the system of a closed list of arbitrators – provided for by the proceedings before the CAS – satisfies the constitutional requirements of

#independence and #impartiality, it restricts the parties' choice and could violate, depending on the circumstances, the principle of #equality between the parties.

*VD 22.08.2007 c. 3cd

1.11.3 Rules of Law and Rules of the Game

A [former] #motion for constitutional review presupposes that the decision is indeed an international arbitral #award within the meaning of Article 176 et seq. PILA and that it settled legal issues and not only the application of the #rules of the game, which are in principle outside the scope of judicial control.

FSCD 129 III 445 [(2003) ASA p. 605], FSCD 119 II 271 [275, 280], FSCD 118 II 12 [15-17], *FSCD 103 Ia 410, FSCD 4A_206/2017 c. 2.1, FSCD 4P.105/2006 [4P.105/2006] c. 3.3, FSCD 4P.314/2005 c. 2.1, FSCD 4P.149/2003 [4P.149/2003] c. 1.1, FSCD 5P.427/2000 c. 1a, FSCD 31.03.1999 [(1998-2000) Digest CAS p. 776]

The distinction between #rules of law and #rules of the game is of no relevance in case of a violation of #personal rights. The "violation" within the meaning of Articles 28 et seq. CC is constituted by any human behaviour, every act of a third person which affects in any way whatsoever someone else's #personal rights by violating the rights which protect that person; even the application of a #rule of the game can therefore violate #personal rights.

*FSCD 120 II 369 [370-371], VD 18.04.2007 c. Va

The distinction between #rules of the game and rules of law is not a clear-cut one. A sanction imposed by a sports #association has to be subject to judicial control when the #facts which led to the sanction do not arise in sole connection with the game, but deal with the general obligations of the participants or the clubs. Among the rules governing a sport, one has to distinguish between rules which fix the modalities of the competition as such, as e.g. the cubic capacity of a vehicle, the weight or the age of the competitors, and rules whose nature is purely administrative and which fix the admission procedure. Whereas the first are exclusively #rules of the game, the second aim to open the competition in the form and the #time limit fixed by the rules. These are of a judicial nature and can, to this extent, be reviewed by the court. There is no reason to differentiate between amateur and professional exercise of a sport.

FSCD 118 II 12 [15-17], FSCD 31.03.1999 [(1998-2000) Digest CAS p. 775]

1.11.4 Specific Sanctions

Anti-doping rules, whose primary concern is the imposition of penalties, generally lie outside the framework of the ordinary #rules of the game.

FSCD 129 III 445 [(2003) ASA p. 605], FSCD 4P.149/2003 c. 1.1, FSCD 31.03.1999 [(1998-2000) Digest CAS p. 776]

A suspension decision in the field of sports is arbitrable in the sense of Article 177(1) PILA because the claim for its setting aside is a claim of financial interest.

FSCD 129 III 445 [(2003) ASA p. 605], FSCD 119 II 271 [280], FSCD 118 II 353 [356], FSCD 4P.230/2000 c. 1, VD 25.09.2002 [p. 9]

The suspension from international competition goes well beyond mere penalties intended to ensure the correct playing of a game or sport and constitutes nothing less than a statutory penalty which affects the legal interests of the party concerned by it and may, for that reason, be subject to judicial review.

*FSCD 120 II 369 [370-371], FSCD 4P.149/2003 c. 1.1, FSCD 31.03.1999 [(1998-2000) Digest CAS p. 776], VD 18.04.2007 c. Va

The withdrawal by the #CAS in Lausanne of prizes valued at about DM 40'000, combined with a disqualification with retroactive effect for all the competitions in which these prizes had been gained, as well as the suspension from international equestrian competitions – measures which affect without doubt the personal and economic sphere of a professional rider – go beyond simple sanctions aimed at assuring the correct participation in a game and constitute genuine statutory sanctions affecting the legal interests of the aggrieved party; they can therefore be submitted to judicial control.

FSCD 119 II 271 [280-281]

A penalty provided in #statutes is generally considered as a #contractual penalty which is therefore based on the autonomy of the parties and can be subject to arbitration, provided that it is of financial interest within the meaning of Article 177 PILA. A penalty provided in #statutes is something different from the authority to punish which is reserved to the criminal courts. This applies even when the penalty provided in #statutes punishes a behaviour which is also punished by the State.

FSCD 119 II 271 [(1993) ASA p. 407]

If a decision – without imposing a fine or a suspension – disqualifies an athlete and deprives him of the title of FEI World Champion of Endurance Racing 2005, whereby such athlete also loses the prize money, such a decision affects its personal and financial interests and is therefore subject to judicial control.

FSCD 4P.105/2006 c. 3.3

1.12 Arbitrability and Data Protection

The most recent doctrine seems to consider that disputes relating to the violation of personality rights are now likely to be subject to a domestic arbitration. It would therefore be paradoxical if such disputes are excluded from international arbitration, which has always wished to have a wider scope than that of domestic arbitration for the sole reason that it is necessary to make a distinction in the scope of application of the rule in Article 177(1) PILA and that in Article 354 CCP.

FSCD 5A_22/2013 c. 2.4.2

The concept of personal data must be interpreted broadly. Requests for access to data that only seek to protect the personality of the person in the strict sense (e.g. relating to medical data, criminal history, information concerning the private sphere, political or religious convictions) have been added to the requests for the retrieval of financial data which also have a financial purpose. The disputes concerning the right of access to data pursuant to Article 8 of the Data Protection Act may thus present, in addition to an ideal component, a financial component as well which, depending on the circumstances, may prove to be predominant. However, in cases where the financial component is predominant,

there is no reason to contest the international #arbitrability of such disputes. This solution is in line with the concept of “financial interest” of Article 177(1) PILA, which places the decisive emphasis on the predominant interest (ideal or financial) actually sought by the #claimant.

FSCD 5A_22/2013 c. 2.4.2

That disputes based on the Data Protection Act may be considered non-pecuniary in nature with respect to the #admissibility of the #Appeal in Civil Matters does not change this. This #case law only pursues a purely formal objective, which is to ascertain whether the Federal Supreme Court must deal with the #merits of the #appeal and it does not have the consequence that such disputes cannot also have financial aspects and that they are therefore arbitrable within the meaning of Article 177(1) PILA.

FSCD 5A_22/2013 c. 2.4.2

The international #arbitrability of disputes concerning the right of access to data grounded on Article 8 of the Data Protection Act cannot be excluded *a priori* but must depend on the predominant interest (ideal or financial) that the #claimant is concretely pursuing by its claim.

FSCD 5A_22/2013 c. 2.4.2

1.13 Arbitrability and Labour Law

Individual labour disputes can be submitted to international arbitration if at the time the #arbitration agreement was concluded, one of the parties had their domicile or habitual residence abroad.

FSCD 144 III 235 [244-245], FSCD 136 III 467 [471]

The difference between domestic and international arbitration, which in principle allows an arbitral assessment of labour law claims without restrictions (FSCD 136 III 467 c. 4.2), lies in the different description of #arbitrability in Article 177(1) PILA (“Any dispute of financial interest may be the subject of an arbitration.”). Apart from the fact that a different regulation can be justified by the fact that it has little or no connection with Switzerland, the legislator deliberately refrained from standardising when issuing the CCP, even though during the legislative consultation some participants called for harmonisation with Article 177(1) PILA and the expert commission discussed a combined solution for the #arbitrability of claims of financial interest and freely available claims without financial interest. With regard to the protection of the employee in the field of domestic arbitration, it is not permissible to circumvent the limitation of #arbitrability under Article 354 CCP in conjunction with Article 341(1) CO by subjecting a purely Swiss employment relationship to international arbitration by opting out (Art. 353(2) CCP).

FSCD 144 III 235 [244-245]

Article 343 CO does not prohibit subjecting labour disputes to arbitration.

FSCD 119 II 271 [(1993) ASA p. 407], NE 01.02.1993 [(1993) RJN p. 100], GE 23.06.1989

However, an #arbitration agreement in an employment contract is invalid if it purports to cover future disputes in relation to debts which the employee cannot

waive pursuant to Article 341(1) CO, for example, the right to remuneration for overtime work.

FSCD 136 III 467 [473], FSCD 4A_515/2012 c. 4.2

Federal law and Article 5 fConcordat allow the conclusion of #arbitration agreements for collective labour disputes, namely those that arise between employers or organisations of employers, on the one hand, and the organisations of employees, on the other hand.

FSCD 136 III 467 [470]

1.14 Arbitrability in Other Fields

- For administrative actions regarding a co-owned property, see FSCD 142 III 220;
- For the rental and lease of residential premises, see FSCD 141 III 201;
- For the rental of business premises, see FSCD 4A_428/2009;
- For farming leases, see e.g. GE 15.09.1989;
- For #association law, see e.g. ZG 11.09.1998 [(1997-8) GVP p. 139];
- For intellectual property rights according to the fConcordat, see e.g. Decision of the Swiss Federal Office for Intellectual Property (Schweizerisches Patent-, Muster- und Markenblatt 1976 I p. 9 et seq.).

1.15 Timeliness of the Plea of Lack of Arbitrability

- For the timeliness of other pleas of procedural flaws, see Article 180(2) PILA; Article 186(2) PILA, section 2.5; Article 190(2)(a) PILA, section 2a.9; Article 190(2)(b) PILA, section 2b.2; Article 190(2)(c) PILA, section 2c.10; Article 190(2)(d) PILA, section 2d.5; and Article 190(2)(e) PILA, section 2e.14.4

It has long been held that the plea of a lack of #arbitrability of the dispute obeys the same rule as the exception of a lack of #jurisdiction, and therefore, like the latter, must be raised before any defence on the #merits, under penalty of foreclosure.

FSCD 143 III 578 [586], VD 12.04.2012 c. II.d

However, in the judgments published in FSCD 128 III 50, c. 2c/aa, p. 57 and FSCD 143 III 462, c 2.3 p. 465, the applicability of Article 186(2) PILA has been reserved for cases on #arbitrability. In an *obiter dictum* of the judgment 4P.267/1994 of 21 June 1995, it is even mentioned that the #award is absolutely null and void in the event of a lack of #arbitrability of the dispute.

FSCD 143 III 578 [586]

If the lack of #jurisdiction is not raised prior to any pleadings on the #merits, it is not possible any longer to plead a lack of #jurisdiction of the #arbitral tribunal as

a ground for setting aside based on Article 190(2)(b) PILA. The same applies to the plea of lack of #arbitrability.

FSCD 130 III 125 [129], FSCD 120 II 155 [158], FSCD 119 II 271 [(1993) ASA p. 406], FSCD 118 II 353 [355], FSCD 4A_436/2017, FSCD 4A_18/2008 c. 3.2, FSCD 4P.105/2006 c. 6.3, ZH 30.06.2003 p. 6

The exception of lack of #arbitrability follows the same rule as the exception of lack of #jurisdiction. Like the latter (Art. 186(2) PILA), this exception has to be raised prior to any defence on the #merits.

FSCD 4A_654/2011 c. 3.2, FSCD 4A_370/2007 c. 5.2.2, FSCD 15.03.1993 c. 5 (not published in FSCD 119 II 271)

1.16 Award on a Non-Arbitrable Subject-Matter

In an *obiter dictum* of the judgment 4P.267/1994 of 21 June 1995, it is even mentioned that the #award is absolutely null and void in the event of a lack of #arbitrability of the dispute.

FSCD 143 III 578 [586]

Part of the legal doctrine considers that an #arbitral award on a non-arbitrable #subject-matter is null and void because #arbitrability is not at the parties' disposal and because it has to be examined by the #arbitral tribunal *ex officio* at any time.

ZH 30.06.2003 p. 7

1.17 Individual Cases

A dispute is arbitrable even in the presence of the resolutions of the UN Security Council in 1990 and 1991 which forbade all commercial activities with Iraq.

FSCD 118 II 353 [356-358]

There is a dispute of financial interest, if a party claims the payment of a sum of money based on a measure similar to #expropriation.

FSCD 1P.113/2000 c. 1b

2 *State as a Party (2)*

2.1 Principle of Good Faith

This provision follows from the principle of #good faith which applies just as much to a State participating in international economic transactions as it does to private persons. The purpose of this provision is to avoid that the State uses its legislative power to its advantage in its agreements with private persons and thereby frustrates the #arbitral proceedings.

FSCD 13.10.1992 [(1993) ASA p. 74]

The public international law status of a State does not have any influence on its obligations in relation to actions governed by private law.

FSCD 13.10.1992 [(1993) ASA p. 76]

2.2 Representation of a State

The question of the #power of representation of the State has to be decided by the law of that State.

FSCD 13.10.1992 [(1993) ASA p. 75]

2.3 Individual Case

A State which has concluded private or commercial law transactions cannot argue that it has not been recognised as a State in order to claim in the #arbitral proceedings that it has no #capacity to be a party to arbitration. Such behaviour of the State constitutes an #abuse of right, as on the one hand, it entered into an #arbitration agreement, and, on the other hand, it contests its own #capacity to be a party by referring to its status according to public international law.

FSCD 13.10.1992 [(1993) ASA p. 76]

Article 178

III. Arbitration Agreement

¹ The arbitration agreement must be made in writing, by telegram, telex, telecopier or any other means of communication which permits it to be evidenced by a text.

² With respect to substance, the arbitration agreement is valid if it conforms either to the law chosen by the parties, or to the law governing the subject-matter of the dispute, in particular the main contract, or to Swiss law.

³ The arbitration agreement cannot be contested on the grounds that the main contract is not valid or that the arbitration agreement concerns a dispute which has not yet arisen.

III. Schiedsvereinbarung

¹ Die Schiedsvereinbarung hat schriftlich, durch Telegramm, Telex, Telefax oder in einer anderen Form der Übermittlung zu erfolgen, die den Nachweis der Vereinbarung durch Text ermöglicht.

² Die Schiedsvereinbarung ist im übrigen gültig, wenn sie dem von den Parteien gewählten, dem auf die Streitsache, insbesondere dem auf den Hauptvertrag anwendbaren oder dem schweizerischen Recht entspricht.

³ Gegen eine Schiedsvereinbarung kann nicht eingewendet werden, der Hauptvertrag sei ungültig oder die Schiedsvereinbarung beziehe sich auf einen noch nicht entstandenen Streit.

III. Convention d'arbitrage

¹ Quant à la forme, la convention d'arbitrage est valable si elle est passée par écrit, télégramme, télex, télécopieur ou tout autre moyen de communication qui permet d'en établir la preuve par un texte.

² Quant au fond, elle est valable si elle répond aux conditions que pose soit le droit choisi par les parties, soit le droit régissant l'objet du litige et notamment le droit applicable au contrat principal, soit encore le droit suisse.

³ La validité d'une convention d'arbitrage ne peut pas être contestée pour le motif que le contrat principal ne serait pas valable ou que la convention d'arbitrage concernerait un litige non encore né.

III. Patto di arbitrato

¹ Il patto di arbitrato dev'essere per scritto, per telegramma, telex, facsimile o altro mezzo di trasmissione che ne consenta la prova per testo.

² Il patto è materialmente valido se conforme al diritto scelto dalle parti, al diritto applicabile all'oggetto litigioso, segnatamente a quello applicabile al contratto principale, o al diritto svizzero.

³ Contro il patto di arbitrato non può essere eccepita la nullità del contratto principale od il fatto ch'esso si riferisca a una lite non ancora sorta.

1 Form of the Arbitration Agreement (1)

1.1 Scope, Nature and Purpose of Article 178 PILA

The form prescribed by this provision is a condition of #validity of the #arbitration agreement. It seeks to avoid any uncertainty as to the choice of the parties to opt for this type of private dispute resolution and any capriciously given #waiver of the natural #forum and means of recourse existing in State court proceedings.

FSCD 142 III 239 [248], FSCD 4A_473/2016 c. 3.1.1, *GE 23.01.2018 c. 3.4

Article 178(1) PILA establishes a substantive rule of international private law. Thus, when the parties choose Switzerland as the #seat of the arbitration, the formal #validity of the #arbitration agreement is mandatorily governed by this legal provision. Therefore, the parties may not submit it to a law other than Swiss law even if they choose a foreign procedural law to govern the arbitral proceedings. This prohibition of choosing a foreign law exists irrespective of whether the contemplated foreign law may be more or less strict than Article 178(1) PILA.

FSCD 142 III 239 [248]

The issue of the mandatory nature of this provision arises in this context. It would undoubtedly not be conceivable to relax the formal requirements and to satisfy oneself with for example an #arbitration agreement arising from a telephone conversation, even if the parties were to agree to do so, as this would disregard the very text of this legal rule and the protective purpose of the latter. More delicate is the question whether, and subject to what conditions, the parties could agree to apply more stringent requirements with respect to the form of the #arbitration agreement, in particular by conditioning its #validity on the compliance with a handwritten signature which is authorized by Article 16 CO together with Articles 13 and 14 CO for Swiss law contracts which are not subject to a specific form.

FSCD 142 III 239 [249]

Another closely connected issue is as follows: if the main contract provides that it will be concluded only when the parties sign it, does this formal requirement also apply to the #arbitration agreement contained in the contract to be concluded? According to Tschanz, who raises the question, there is no reason *a priori*, in view of the severability of the #arbitration agreement, that the parties would want to remove the power of the #arbitral tribunal to decide on the existence of the main contract or on pre-contractual liability, notably with respect to a matter of agreed upon form. It is therefore a matter of #interpretation of the #arbitration agreement. However, Berger and Kellerhals appear to presume the extension, albeit implicitly, of any special form agreed upon for the main contract to the #arbitration agreement as well. The burden of proving the adoption of a qualified written form for the #arbitration agreement falls upon the #respondent.

FSCD 142 III 239 [249]

The idea that the parties may be authorized to agree to submit their #arbitration agreement to a stricter requirement than Article 178(1) PILA does not appear to be precluded from the outset. After all, the #arbitration agreement is merely a

contract, although one of a unique character, with the result that it is not justified to restrict the freedom of the co-contractors more than necessary. Moreover, it would not be contrary to the spirit of this provision to allow the parties, if they so agree, to make more stringent the formal requirements for which they would agree to submit an eventual dispute which may arise under the contract they intend to conclude to an #arbitral tribunal. To the contrary, the goal of legal #certainty and protection, which is fulfilled by the formal requirement will be more likely attained if there is the least possible uncertainty as to the existence of an agreement of the parties to submit their potential disputes to arbitration. However, this issue does not need to be given a definitive answer in the present case.

FSCD 142 III 239 [250]

An #arbitration agreement is created by concordant mutual expressions of intent between the parties (Art. 1(1) CO).

FSCD 140 III 367 [370], FSCD 4A_562/2013 c. 3.1

Article 178 PILA regulates the formal requirements of the #arbitration agreement and determines the law applicable to its substantive #validity, in particular with regard to its conclusion, its scope of application and its expiry. This provision does not determine the features and the necessary content of an #arbitration agreement.

FSCD 130 III 66 [70], FSCD 4A_404/2010 c. 4.2.2

The issue of whether the #power of attorney of the #representative to conclude the #arbitration agreement must also be in writing can be left open.

FSCD 4A_473/2016 c. 3.1.1

In international disputes with #arbitral tribunals having their #seat in Switzerland, the form of the #arbitration agreement is defined by Article 178 PILA.

FSCD 4P.230/2000 c. 2a, FSCD 31.10.1996 [(1986-98) Digest CAS p. 588]

Article 178(1) PILA is a substantive international private law provision which directly fixes the minimal requirements of form for a valid #arbitration agreement.

SG 16.01.2007 c. 2

The formal requirements of Article 178(1) PILA are based on the ideas of protection and clarity. With regard to clarity on the one hand, it aims at assuring the necessary certainty with respect to the acceptance of the #arbitration agreement. The form requirements should, on the other hand, ensure that parties to an international commercial contract are aware of the fact that they enter into an #arbitration agreement.

SG 16.01.2007 c. 2

1.2 Definition

An #arbitration agreement is an agreement by which two or more determined or determinable parties agree in a binding way to submit one or more existing or determined future disputes to an #arbitral tribunal instead of the State court which would otherwise have #jurisdiction with the mission of issuing a binding

#award as to one or several disputes in existence or arising in the future pursuant to a specific relationship.

FSCD 142 III 239 [247], FSCD 141 III 444 [460], FSCD 4A_394/2017 c. 4.3.3.2, FSCD 4A_473/2016 c. 3.1.1, FSCD 4A_136/2015 c. 2.2.2, FSCD 4A_676/2014 c. 3.2.2, FSCD 4A_90/2014 c. 3.2.2

An #arbitration agreement is an agreement by which two or more determined or determinable parties agree in a binding way to submit one or more existing or determined future disputes to an #arbitral tribunal by excluding the original State #jurisdiction in accordance with a legal order which is determined directly or indirectly.

FSCD 140 III 367 [369], FSCD 140 III 134 [138], FSCD 138 III 29 [35], FSCD 130 III 66 [70], FSCD 5A_907/2017 c. 5.1.2, FSCD 4A_490/2017 c. 3.1.3, FSCD 4A_432/2017 c. 3.2, FSCD 4A_150/2017 c. 3.2, FSCD 4A_492/2016 c. 3.1, FSCD 4A_672/2016 c. 3.1.1, FSCD 4A_618/2015; 4A_634/2015 c. 4.3, FSCD 4A_390/2014 c. 3.3, FSCD 4A_302/2013 c. 4, FSCD 4A_305/2013 c. 3.2.1, FSCD 4A_388/2012 c. 3.4.2, FSCD 4A_244/2012 c. 4.2, FSCD 4A_404/2010 c. 4.2.2, FSCD 4A_279/2010 c. 3, FSCD 4P.299/2006 c. 3, FSCD 4P.253/2003 c. 5.1, NE 28.04.2016 c. 5, GE 18.04.2008 c. 2.1

An #arbitration agreement, foreseen at Article 357 CCP, is an agreement by which two or more determined or determinable parties agree to submit to an #arbitral tribunal or a sole #arbitrator, instead of the State court which would have #jurisdiction, the mission to render a binding #award with respect to an existing dispute or future dispute arising from a specific legal relationship.

GE 23.01.2018 c. 3.4

An #arbitration agreement is an agreement by which the parties accept to submit to an #arbitral tribunal all future disputes which may arise from a specific legal relationship.

VD 27.09.2013 c. 4

1.3 Minimal Content

The intent of the parties to waive the #jurisdiction of the State court normally having #jurisdiction in favour of the private #jurisdiction of an #arbitral tribunal must appear plainly. With respect to the #arbitral tribunal, it must be determined or at least determinable.

FSCD 142 III 239 [247], FSCD 141 III 444 [460-461], FSCD 140 III 134 [138], FSCD 138 III 29 [35], FSCD 138 III 29 [35], FSCD 129 III 675 [679-680], FSCD 4A_150/2017 c. 3.2, FSCD 4A_302/2013 c. 4, GE 23.01.2018 c. 3.4, *VS 08.05.2015 c. 2, GE 18.04.2008 c. 2.1

The essential elements of an #arbitration agreement include the intent of the parties to submit their dispute to an #arbitral tribunal and the determination of the object of the dispute which is to be submitted to arbitration.

FSCD 142 III 239 [248], FSCD 138 III 29 [32], FSCD 4A_473/2016 c. 3.1.1, GE 23.01.2018 c. 3.4

What is decisive is that the #arbitration agreement must express the intent of the parties to have decided in a binding way certain determined disputes by a private #arbitral tribunal, to the exclusion of State jurisdictions. The intent of the parties

to waive the #jurisdiction of the State courts must flow clearly and non-equivocally from the parties' agreement.

FSCD 140 III 367 [369], FSCD 140 III 134 [138], FSCD 138 III 29 [35], FSCD 5A_907/2017 c. 5.1.2, FSCD 4A_490/2017 c. 3.1.3, FSCD 4A_432/2017 c. 3.2, FSCD 4A_492/2016 c. 3.1, FSCD 4A_672/2016 c. 3.1.1

The PILA does not define the minimal content of an #arbitration agreement. It results from the purpose of the #arbitration agreement that the intent of the parties must be expressed to submit certain existing or future disputes to an #arbitral tribunal that is not a State court. Therefore, the #arbitral tribunal must be determinable.

FSCD 140 III 134 [138], FSCD 130 III 66 [70], FSCD 129 III 675 [680], FSCD 4A_136/2015 c. 2.2.2, FSCD 4A_676/2014 c. 3.2.2, 3.2.3.1, FSCD 4A_90/2014 c. 3.2.2, FSCD 4A_388/2012 c. 3.4.2, FSCD 4A_244/2012 c. 4.2, FSCD 4A_456/2009 c. 3.3

Elements such as the #seat of the #arbitral tribunal, the rules concerning the #composition of the #arbitral tribunal, the designation of the #arbitral institution, the choice of the language of the proceedings and the determination of the applicable procedural rules are not essential elements unless a party considered them to be essential and the other party was aware that this was the case.

FSCD 138 III 29 [32]

The failure to use words such as "arbitration", "#arbitral tribunal", "#arbitrator", "#arbitration agreement" or other similar wording is not decisive to determine the objective meaning of the parties' intent.

FSCD 138 III 29 [36], FSCD 4A_676/2014 c. 3.2.3.2

Other general requirements for an #arbitration agreement are its clarity and its certainty with respect to the private #jurisdiction, i.e. the #arbitral tribunal called to render a decision has to be either clearly determined or in any case be determinable.

FSCD 130 III 66 [70], FSCD 4A_676/2014 c. 3.2.2, FSCD 4A_404/2010 c. 4.2.2, FSCD 4A_279/2010 c. 3.1

However, the absence of any reference, albeit indirect, to a dispute to be resolved, a disagreement to be resolved, or a legal dispute to be decided is much more significant as these various terms emphasize the jurisdictional nature of arbitration, the purpose of which is to dispose of a dispute by way of a binding #award. The clause in question only refers to the #interpretation of the agreement and the rules applicable to do so, without the slightest allusion to the settlement of a dispute.

FSCD 4A_676/2014 c. 3.2.3.2

It is not obvious that the mere reference to the "International Chamber of Commerce in Zurich, Switzerland" favours the existence of an #arbitration agreement as it is not established that the parties knew that conducting #arbitral proceedings is among the many services offered by this private institution.

FSCD 4A_676/2014 c. 3.2.3.2

There must be a sufficiently clear intention according to the principle of #trust to remove any disputes arising from the contract from the State courts and to submit them to an #arbitral tribunal.

FSCD 4A_388/2012 c. 3.4.3, FSCD 4A_244/2012 c. 4.4

The power to decide, i.e. to render a decision which will have the same force and authority as a State court judgment, is an essential element of an #arbitration agreement.

FSCD 4P.299/2006 c. 3

Article 178 PILA does not say anything about the characteristics and the minimal content of an #arbitration agreement.

FSCD 4P.253/2003 c. 5.1

The two crucial elements of an #arbitration agreement are, on the one hand, the common intent of the parties to submit their dispute to a binding arbitral decision and, on the other hand, the determination of the dispute.

VD 02.05.2006 p. 6-7, VD 11.07.2001 p. 11, *VS 02.08.2004 c. 3b/aa

Even though their indication may appear desirable, the indication of the #seat of the arbitration and the indication of the #arbitrator(s) are not essential elements of the #arbitration agreement.

VD 02.05.2006 p. 7, VD 11.07.2001 p. 11

The dispute may be defined in general terms, be it by the origin of the dispute or its nature, in particular by giving the #arbitrators the mission to decide on claims arising out of a certain contract or to liquidate a company. It is not necessary that the "*compromis*" [*#arbitration agreement for a dispute which has already arisen or #submission agreement*] defines the concrete issue submitted to the #arbitral tribunal, e.g. by stating the parties' #prayers for relief.

*VS 02.08.2004 c. 3b/bb

The use of the term "arbitration" implies in principle the choice of an arbitral #jurisdiction.

TI 08.02.2002 p.3

The PILA does not require that the #arbitration agreement be made especially evident. It is sufficient to show that the common intention of the parties also encompassed this clause.

FSCD 09.06.1998 [(1998) ASA p. 657]

As to its minimal content, a valid #arbitration agreement only requires that the parties express clearly their intent to submit one or several legal disputes to an #arbitral tribunal.

ZH 17.01.1991 p. 6, ZH 13.08.1990 p. 4-5

1.4 Basic Formal Requirements

For the purposes of Article 178(1) PILA, the simplified written form is sufficient. Contrary to Article 13 CO which imposes a written form for contracts, Article

178(1) PILA does not require the #arbitration agreement to be signed. Therefore an #arbitration agreement entered into by email is formally valid.

FSCD 142 III 239 [248]

The formal requirement is a prerequisite for the validity of the #arbitration agreement.

FSCD 4A_618/2015 c. 4.3, FSCD 4A_634/2015 c. 4.3

The declarations of intent of all parties involved in the conclusion of the #arbitration agreement must comply with the text form. A mere oral or even tacit acceptance of a written arbitration offer therefore does not fulfil the requirement of the text form.

FSCD 4A_618/2015 c. 4.3, FSCD 4A_634/2015 c. 4.3

However, even if this provision merely prescribes a means of communication making it possible to establish proof of the #arbitration agreement by a text, the fact remains that the parties must have expressed in writing their willingness to submit to arbitration and that proof of such an #expression of intent must be provided.

VD 05.03.2015 c. VI.b.bb

Article 358 CCP reproduces the text of Article 178(1) PILA, applicable in international matters. The legislator has opted for a flexible rule of form: there must be an objectively verifiable record of the existence of an #arbitration agreement. A "writing" (text) is therefore required, establishing in a secure manner the joint intent of the parties to submit to arbitration a potential dispute that could divide them. The #arbitration agreement may be validated as soon as a written record of the #arbitration agreement is found. It does not matter whether it is in the classic form of a signed contract, an exchange of letters, faxes, telexes, telegrams or e-mails.

VD 27.09.2013 c. 5

Article 178(1) PILA is a liberal provision which contents itself with an undertaking – even not signed – on a data medium which may be reproduced in the form of a text and which shows the mutual acceptance of the text expressing the parties' agreement.

GE 14.09.2007 [C/24853/2006] c. 4.2

The written form of Article 178 PILA does not require signatures, as Article 13 CO is not applicable.

SG 16.01.2007 c. 2, VD 18.06.2001 p. 6

Both parties have to fulfil the formal requirements for the valid conclusion of the #arbitration agreement, but an exchange of communications is not required. It is sufficient if the entirety of the communications evidenced by text show the assent of all involved persons to the #arbitration agreement.

SG 16.01.2007 c. 2

The written form of Article 178 PILA does not require a written document signed by all parties concerned (Art. 13 CO), but it is satisfied by an undertaking – even not signed – on a data medium which can be evidenced by a text and which

establishes the mutual acceptance by the parties to submit themselves to arbitration.

VD 19.05.1999 p. 10

1.5 Arbitration Agreement as Derogation to Constitutional Guarantees

Swiss constitutional law (Art. 30(1) FC) and the law of international treaties (Art. 6(1) ECHR) guarantee to everyone, #physical person or corporate body, the right that its case be heard by an independent tribunal established by law. The conclusion of an #arbitration agreement should not be too easily admitted, if this issue is disputed, as this implies a derogation to a constitutional guarantee and because #arbitral proceedings are often considerably more costly than ordinary proceedings.

FSCD 140 III 134 [139], FSCD 129 III 675 [680-681], FSCD 128 III 50 [58], *FSCD 116 Ia 56 [58-59], FSCD 4A_388/2012 c. 3.4.2, FSCD 4A_244/2012 c. 4.2, FSCD 4A_146/2012 c. 3.4.1, FSCD 4A_240/2012 c. 4.1, FSCD 4A_103/2011 c. 3.2.1, FSCD 4A_562/2009 c. 3.5.2, FSCD 4C.40/2003 c. 5.3, VD 25.09.2013 p. 6, VD 25.09.2002 p. 10, VD 30.03.1993 [(1995) ASA p. 66], ZH 22.05.1990 p. 15

It must be certain that there is an #arbitration agreement which is binding on the parties to the #arbitral proceedings, since it is only under this condition that one can require them to bear the consequences of their choice (in particular the limitation of the possibilities of #appeal).

FSCD 128 III 50 [58], FSCD 4A_244/2012 c. 4.2

It results from the system of the provisions related to international arbitration (Arts. 174 to 194 PILA) that the federal legislator, by placing first the rules regarding #arbitrability (Art. 177 PILA) and the #arbitration agreement (Art. 178 PILA) and much later the rule regarding the plea of lack of #jurisdiction, has demonstrated that it attached more weight to the fundamental prerequisite of the existence of an #arbitration agreement binding on the parties than to the rule of Article 186(2) PILA, in order to ensure the correct and fair course of the #arbitral proceedings.

FSCD 128 III 50 [58]

Article 6(1) ECHR does not prevent the creation of #arbitral tribunals with a view to adjudicating certain disputes of a financial nature between litigants as long as the waiving of their right to a tribunal in favour of arbitration is free, legal and unequivocal.

FSCD 4A_246/2014 c. 7.2.2, FSCD 4A_238/2011 c. 3.2, ECHR 02.10.2018 §94

There is no violation of #public policy, in particular the right to have a case decided by an independent and impartial tribunal established by law and having #jurisdiction, when parties waive their right to avail themselves of State courts in favour of an #arbitral tribunal by concluding an #arbitration agreement for matters capable of being decided in arbitration.

FSCD 4A_444/2009 c. 4.2.2

As the guarantee of the tribunal established by law stems from the ECHR and from the FC, as #arbitral proceedings regularly cause higher costs and as the

#waiver to seize a State court has the effect of limiting the possibilities of #appeal, it should not be admitted easily that an #arbitration agreement which derogates from these guarantees, has been concluded, if this point is contested.

VD 02.05.2006 p. 7

In this context, the requirement of strict proof is all the more justified as constitutional (for Switzerland, cf. Art. 30(1) FC) and treaty (cf. Art. 6(1) EHRC) law guarantees to every person the right that his case be heard by a tribunal established by law: the derogation to a constitutional guarantee being at stake, one has to refrain from admitting too easily the conclusion of an #arbitration agreement, if this question is disputed (FSCD 130 III 50 c. 2c/aa), which commands a strict application of Article 8 CC.

GE 13.05.2005 c. 2.1

1.6 Relationship with Other Provisions

1.6.1 Article 177 PILA

#Arbitrability is a prerequisite for the #validity of the #arbitration agreement and therefore for the #jurisdiction of the #arbitral tribunal.

FSCD 118 II 353 [355], FSCD 117 II 94 [98], FSCD 4A_654/2011 c. 3.2

1.6.2 Articles II(1) and (2) NYC, 13 CO and 6 fConcordat

Article 178 PILA is clearly based on the text of Article 7(2) *in initio* of the UNCITRAL Model Law [*UNCITRAL Model Law on International Commercial Arbitration (1985)*]. Its wording which has taken into account the development of modern means of communication, must also be considered when interpreting Article II(2) NYC. Therefore, the formal requirements of the international treaty and of Article 178 PILA are in fact the same.

FSCD 121 III 38 [43-44], FSCD 31.10.1996 [(1986-98) Digest CAS p. 588-589], SG 16.01.2007 c. 1, BL 05.07.1994 [(1995) BJM p. 256]

According to the wording of Article II(2) NYC, the requirement of the written form is, on the one hand, lower than that of Article 6 fConcordat which has to be understood through an application by analogy of Article 13 CO; on the other hand, it is stricter than that of Article 178 PILA, provision which only requires a form of communication allowing the agreement to be evidenced by a text.

FSCD 121 III 38 [43], VD 19.05.1999 p. 10

It is true that Article VII(1) NYC reserves, in particular with regard to the form of the #arbitration agreement, the application of a more favourable national law, and that Swiss law has a simplified written form in Article 178(1) PILA.

VD 05.03.2015 c. VI.b.bb

By mentioning telegrams, the authors of the NYC aimed to take into account the means of communication generally used in international trade for the conclusion of contracts. This purpose has to be taken into consideration when interpreting this provision. It is no longer disputed that the exchange of communications through telex is equivalent to the exchange by telegrams. Article 178(1) PILA

confirms this and adds the telefax as well as any other form of communication allowing the agreement to be evidenced by a text. This wording allows an immediate adaptation to the actual state of communication technologies. As this evolution is just a continuation of the technical progress, which was only at its beginning in 1958, Article 178(1) PILA is without any doubt compatible with Article II(2) NYC.

BL 05.07.1994 [(1995) BJM p. 256]

By requesting the written form, Article II NYC wants to exclude a merely oral or tacit #arbitration agreement. In comparison with several foreign legal systems, the rule of the NYC is very strict. Article II NYC provides not only for a maximum but also for a minimum standard. It is clear that a member State cannot provide for more stringent requirements with regard to form. Nor can it limit itself to less strict formal requirements (*FSCD 111 Ib 253 [255]). Article II NYC does not allow admitting the #validity of an #arbitration agreement which does not fulfil the conditions set out. This issue is hardly important as Article 178(1) PILA as well as Article 6 fConcordat do not go further than Article II NYC.

BL 05.07.1994 [(1995) BJM p. 258]

It is questionable whether Article 178 PILA has an independent meaning as the form of an #arbitration agreement is uniformly regulated by Article II(1) & (2) NYC which Switzerland ratified. This provision which prevails over the national laws, is a so-called *#loi uniforme* (*FSCD 110 II 54 [57]) which has to be taken into account in a member State not only in the context of the #recognition and #enforcement of an already rendered #award but also when the #arbitration agreement provides for proceedings which lead to a foreign #award within the meaning of the NYC. In Switzerland, this applies to #arbitral proceedings having their #seat abroad.

ZH 25.08.1992 [(1993) ZR p. 77–78]

1.6.3 Article 7(2) UNCITRAL Model Law

Article 178 PILA is clearly based on the text of Article 7(2) *in initio* of the UNCITRAL Model Law [*UNCITRAL Model Law on International Commercial Arbitration (1985)*]. Its wording which has taken into account the development of modern means of communication, must also be considered when interpreting Article II(2) NYC. Therefore, the formal requirements of the international treaty and of Article 178 PILA are in fact the same.

FSCD 121 III 38 [43–44], FSCD 31.10.1996 [(1986–98) Digest CAS p. 588–589], SG 16.01.2007 c. 1, BL 05.07.1994 [(1995) BJM p. 256]

1.7 No Indication as to the Seat of the Arbitral Tribunal

The designation of the #seat of the #arbitral tribunal and of the #arbitrator(s) is not an essential element of the #arbitration agreement, even if their indication is advisable.

VD 11.07.2001 p. 11

If the #arbitration agreement neither indicates the #seat of the #arbitral tribunal nor an #arbitral institution which could determine the #seat, nor determines how

the #arbitrator has to be appointed, the #arbitration agreement is in principle invalid.

ZH 31.05.2001 [p. 3-4]

An #arbitration agreement which does not expressly fix the #seat of the #arbitral tribunal in the #statutes of an #association, but which provides that the president of the cantonal court at the headquarters of the #association has to appoint an #arbitrator if a party does not do so on its own when invited by the opposing party, and that the same authority has to appoint the presiding #arbitrator of the #arbitral tribunal if the two first #arbitrators cannot agree on the person of the presiding #arbitrator, can be interpreted as fixing the #seat of the #arbitral tribunal at the headquarters of the #association.

ZG 11.09.1998 [(1997-98) GVP p. 139-149]

If a Swiss State court has to decide on the #validity of an #arbitration agreement according to Article 7 PILA and if the #arbitration agreement does not contain any indication as to the #seat of arbitration, the formal #validity of the clause is examined under Article II(2) NYC and not Article 178 PILA.

ZH 25.08.1992 [(1993) ZR p. 77]

1.8 Arbitration Agreement in Statutes of a Corporate Body

- For the #arbitration agreement by #reference, see Article 178(2) PILA, section 2.5

So far, the Federal Supreme Court has only made isolated statements on the validity of #arbitration agreements in #statutes under Chapter 12 PILA. In judgment 4P.113/2001 of 11.09.2001, which - as in the present case - concerned the #validity of an #arbitration agreement in the regulations governing the use and administration of a new co-owner, the Federal Supreme Court stated that an #arbitration agreement in #statutes binds the original co-owners, who adopted and signed the corresponding #statutes. New co-owners, on the other hand, are only bound by the #arbitration agreement if they accept it in text form (judgment 4P.113/2001 of 11.09.2001 c. 3c/cc). Such an acceptance, which is formally valid under Article 178(1) PILA, is present at the latest when the new co-owner invokes the #arbitration agreement in its (written) #request for arbitration (judgment 4P.113/2001 of 11.09.2001 c. 3d/bb).

FSCD 142 III 220 [227]

In today's doctrine on both the PILA and the CCP, the majority argues that #arbitration agreements in #statutes initially bind the founding members who have signed the #statutes, and also new members *eo ipso* when they acquire a pre-existing membership share (e.g. share or capital share), without the need to expressly refer to the #statutes in text form, let alone the #arbitration agreement, in the acquisition act. Only where the membership is not tied to the acquisition of a pre-existing membership share (and to this extent there is no #legal succession), such as in the case of joining an #association or a #cooperative, would the declaration of accession also require a global reference to the #statutes. Individual authors are even more liberal and want to make an act of accession in text form sufficient in the latter case, without the need for a (global) reference to the #statutes.

FSCD 142 III 220 [227-228]

It was also submitted in the older stock corporation law doctrine that a shareholder submits to the #arbitration agreement in the #statutes when acquiring a share. Böckli, however, questions this opinion from the point of view of stock corporation law: He is of the opinion that the #waiver of the State courts and the submission to arbitration is of a binding nature and thus in conflict with the principle of stock corporation law, according to which a shareholder is not obliged to do anything other than pay its shares. According to Böckli, a shareholder must therefore expressly agree to an #arbitration agreement in the #statutes in order for it to become effective against him. Büchler and von der Crone, who also demand express consent to the #arbitration agreement, make the same considerations under stock corporation law. In legislation, however, a contrary development is emerging, which corresponds to the opinion of the civil procedural literature referred to above: According to Article 697I(1) of the Federal Council's preliminary draft of 28.11.2014 on the amendment of the CO (stock corporation act), the #statutes may submit the resolution of disputes under company law to an #arbitral tribunal; such #arbitration agreement contained in the #statutes is "binding on all shareholders, the company and corporate bodies". According to the explanatory report on the preliminary draft, contrary to the reservations expressed in the doctrine on stock corporation law, "a clear legal basis for statutory arbitration agreements" is to be created; "new shareholders" would be "subject to the arbitration agreement *ipso iure* with the acquisition of the position of shareholder"; there is no "additional requirement of consent and form". The #Federal Council's proposal was welcomed by a majority in the consultation (Report on the consultation on the preliminary draft of 28.11.2014 on the amendment of the Code of Obligations [stock corporation act] of 17.09.2015, p. 32).

FSCD 142 III 220 [228-229]

The mere bringing of #arbitral proceedings is not comparable to the declaration of membership to the #statutes of a company and does not therefore lead to the conclusion of a valid #arbitration agreement.

FSCD 137 III 37 [44]

Depending on the type of legal entity, different #interpretation methods may be used for provisions in the #statutes. The #interpretation of the #statutes of large legal entities is more likely to be based on the method of statutory #interpretation. The #interpretation of the #statutes of small legal entities is based more on

the methods of contractual #interpretation, i.e. the principle of #trust. The Federal Supreme Court has also applied this principle in cases in which it had to interpret the #statutes or other important provisions of large sports #associations such as UEFA or FIFA, and in particular - as is the case here - in the case of provisions in the #statutes regarding questions of #jurisdiction.

FSCD 4A_490/2017 c. 3.3.2, FSCD 4A_600/2016 [4A_600/2016] c. 3.3.4.1, FSCD 4A_392/2008 [4A_392/2008] c. 4.2.1

With this outcome, it can remain open whether the #statutes [*of a limited liability company*] can submit contractual disputes between the members of the company to arbitration.

FSCD 4A_344/2017 c. 3.4

A global reference to an #arbitration agreement contained in the #statutes of a sports #federation is valid.

FSCD 4A_640/2010 c. 3.2.2; FSCD 4A_548/2009 c. 4.1, FSCD 4A_460/2008 c. 6.2, FSCD 4P.253/2003 c. 5.4, FSCD 4P.230/2000 c. 2a

A reference to parts of the #statutes of a sports #federation containing an #arbitration agreement for specific disputes is also valid.

FSCD 4A_640/2010 c. 3.3.3

The integration of an #arbitration agreement by reference in the #statutes of a sports #association is close to the conclusion of a preformulated contract and to the integration of #general terms and conditions. Following a general principle, and in the absence of an agreement to the contrary, a reference to external #general terms and conditions relates to the text at the moment when the reference is made, without taking into account later modifications. This is in particular the case for the SIA Norm.

*VD 22.08.2007 c. 3cd

An #arbitration agreement in #statutes validly binds the founding shareholders. As the share is a causal #security paper, i.e. the incorporated rights are determined in particular by the #statutes and possibly by decision of the general assembly, all #ancillary rights and obligations pass by the #assignment of the shares. According to Article 170 CO, in particular #forum selection and #arbitration agreements pass to the assignee, except if they were concluded in light of the person of the assignor or if the #assignment was excluded by the initial parties.

SG 16.01.2007 c. 2

The PILA does not answer the question of whether an #arbitration agreement in the #statutes of a corporate body is valid in international matters. This is however – as in domestic arbitration (Art. 6(2) fConcordat) – without any doubt also the case in international matters.

SG 16.02.2007 c. 2, ZG 11.09.1998 [(1997-98) GVP p. 140]

The question whether an #arbitration agreement – with respect to its form - has been validly concluded according to Article 178(1) PILA, arises only for the conclusion of the #arbitration agreement. Therefore, the question whether it is possible to adhere indirectly to an #arbitration agreement, e.g. by the membership in a corporation with #statutes containing an #arbitration agreement, does

not relate to the form but to the content of the accession to the corporation. Once the #arbitration agreement is validly concluded, it can be transferred to a third person by #legal succession, together with the legal relationship to which the agreement refers, without any need for the assent of this third person and thus without respecting again the form required by Article 178(1) PILA for the conclusion of the #arbitration agreement.

SG 16.01.2007 c. 2a

Therefore, an #arbitration agreement may become binding for the member of accordingly organized #legal person, without the consent of the involved person and without respecting any formal requirements, based on the legal rules governing this #legal person. This applies in particular to a third person who becomes a member of a #legal person by buying a share of the corporation whose #statutes contain an #arbitration agreement. In other words: if ownership rights in a capital company are transferred, the #arbitration agreement contained in the #statutes becomes binding on the buyer, as for the #assignment of claims. Article 178(1) PILA therefore applies accordingly to #arbitration agreements in #statutes of companies. The application of such #arbitration agreements is only excluded if one of the parties is abusively deprived of the access to the ordinary State court.

SG 16.01.2007 c. 2a

From the point of view of the law of #associations [Art. 60 et seq. CC], there is no doubt that the original members of an #association, who are at the same time delegates, can draw up valid #statutes and provide therein for an #arbitration agreement which stipulates that disputes between the members and the #association are submitted to a private #arbitral tribunal, excluding thereby the #jurisdiction of the ordinary State courts.

ZG 11.09.1998 [(1997-98) GVP p. 139]

The #arbitration agreement becomes effective by a reference to the #statutes provided the reference satisfies the same formal requirements as the incorporation of an #arbitration agreement by reference to #general terms and conditions. The purpose of the prerequisite of a written document and the interests to be protected by it have to be taken into account.

ZG 11.09.1998 [(1997-98) GVP p. 140]

If an #arbitration agreement is inserted in the #statutes of an #association, the interest of the corporate body to resolve "internal" disputes by an #arbitral tribunal is opposed to the interest of the member to be protected from a blindfold #waiver of the #jurisdiction of the ordinary State courts. This means that the prerequisite of the written form is without doubt observed when the #statutes are attached to the written declaration of membership or, if this is not the case, if the declaration of membership contains a specific reference to the #arbitration agreement in the #statutes. The #arbitration agreement is also formally valid if it has to be assumed, based on the circumstances, that the #statutes were in fact known by the member at the time of signature of the declaration of membership or if the member should have known about the existence of an #arbitration agreement.

ZG 11.09.1998 [(1997-98) GVP p. 141]

1.9 Arbitration Agreement and Terms of Reference

If the #terms of reference state that #jurisdiction is disputed, it is not possible to impute to them the effect of an #arbitration agreement.

ZH 22.05.1990 p. 5-6

1.10 Unilateral Arbitration Agreement in Wills

A unilateral arbitration provision in a will is invalid not only with respect to statutory #heirs who benefit from the compulsory portion [*Pflichtteil*, *part réservataire*, *porzione legittima*; Art. 608 CC] but also with regard to statutory #heirs not entitled to such a compulsory portion.

*ZH 16.02.1987 [(1990) ZR p. 240]

1.11 Choice between Arbitration and Court Proceedings

The fact that an #arbitration agreement gives one or even both parties the possibility to choose between arbitration and ordinary court proceedings does not prevent the #arbitration agreement from being valid.

TI 08.02.2002 p. 3

2 Law Applicable to the Substantive Validity (2)

2.1 Purpose: *In Favorem Validitatis*

Article 178(2) PILA contains three alternatives *in favorem validitatis*, without any hierarchy between them, i.e. the law chosen by the parties, the law governing the #subject-matter of the dispute (*lex causae*) and Swiss law.

FSCD 142 III 239 [252], FSCD 141 III 495 [502], FSCD 134 III 565 [567], FSCD 4A_34/2016 c. 3.4.2, FSCD 4A_136/2015 c. 2.2.1, FSCD 4A_676/2014 c. 3.2.1, FSCD 4A_90/2014 c. 3.2.1, FSCD 4A_124/2014 c. 3.3, FSCD 4A_450/2013 c. 3.1, FSCD 4A_232/2013 c. 3.2, FSCD 4A_44/2011 c. 2.4.1

Article 178(2) PILA provides for three alternative #connecting factors *in favorem validitatis*, i.e. the law chosen by the parties, the *lex causae* and the law of the #seat of the arbitration.

FSCD 129 III 727 [736], FSCD 4A_631/2011 c. 3.1, GE 12.11.2004 [C/25597/2003] c. 3.2

There exists no hierarchy between these three #connecting factors and it is sufficient that the agreement is valid with respect to the #merits based on one of these three laws.

FSCD 129 III 727 [736], FSCD 4P.124/2001 c. 2c, GE 12.11.2004 [C/25597/2003] c. 3.2

This #conflict-of-laws rule *in favorem validitatis* provides for alternative #connecting factors in order to avoid, as far as possible, disputes with regard to the substantive #validity of the #arbitration agreement.

FSCD 128 III 50 [62], FSCD 119 II 380 [384], FSCD 4P.298/2005 c. 2.2, FSCD 4P.290/2000 c. 3b, FSCD 16.05.1995 [(1996) ASA p. 671-672], FSCD 22.12.1992 [(1996) ASA p. 648]

It makes no difference with regard to Swiss law that the #seat of the arbitration be chosen by the parties themselves, by an #arbitral institution or by the #arbitral tribunal. Neither is it decisive that the case should have a sufficient nexus with Switzerland as to the parties involved or the object of the dispute. This is not the criterion the legislature chose to determine the applicability of the provisions of Chapter 12 PILA. Moreover, in the vast majority of cases, international commercial arbitrations involve parties that are not domiciled in Switzerland and concern contracts with no connection with this country.

FSCD 4A_124/2014 c. 3.3

The Federal Supreme Court has to conduct its review of whether the #arbitral tribunal could assume that the parties have concluded a valid #arbitration agreement based on Article 178(2) PILA. This provision favours the conclusion that a valid #arbitration agreement has been entered into, by establishing alternative grounds.

FSCD 27.01.1999 c. 3

Article 178(2) PILA covers the conclusion of the #arbitration agreement, its performance and its scope of application.

GE 12.11.2004 [C/25597/2003] c. 3.2

The #arbitration agreement is valid, from a substantive point of view, if it fulfils the requirements of one of the three laws mentioned.

VD 19.05.1999 p. 11

2.2 Law Applicable to the Question of Validity

2.2.1 In General

The first of the three alternatives mentioned in this provision is only relevant if the parties have chosen a law applicable to the #arbitration agreement which is different from the one chosen for the main contract.

FSCD 129 III 675 [679], FSCD 117 II 94 [98]

2.2.2 Law Applicable to Pre-Arbitral Mediation

The only open issue is the applicability of Article 178(2) PILA to the alternative dispute resolution mechanisms at hand and in particular to the DAB instituted by FIDIC. Despite the #appellant's objections, the question must be resolved in the affirmative. It would indeed be artificial to distinguish from that point of view the actual #arbitral proceedings on the one hand and the mediation *lato sensu* preceding it on the other hand, in particular when it must be decided whether the latter is a mandatory precondition to the former. Moreover, #case law and doctrine draw no distinction between these two procedures as to the applicability of the provision quoted. The same applies to the FIDIC general conditions included in the two contracts in dispute, which include in the same Clause 20 the DAB procedure (at Sub-Clauses 20.2 to 20.4), the conciliation procedure (at Sub-Clause 20.5) and the arbitration procedure (at Sub-Clause 20.6). Submitting the pre-arbitration phase and the subsequent arbitration to two different laws would doubtlessly be inappropriate and could unnecessarily complicate the resolution of the dispute between the parties insofar as the #arbitral tribunal would lose the benefit of the choice at Article 178(2) PILA if it were forced to take into account the mandatory provisions of the *lex causae* concerning the preliminary mediation phase when deciding on its own #jurisdiction. Doing so would be particularly questionable when, as is the case here, the #arbitral tribunal is forced to apply a provision in the code of civil procedure of the country the law of which governs the subject of the dispute – the country in which, moreover, one of the parties has its headquarters – to decide whether an alternative all-encompassing dispute resolution mechanism established by an international #federation is mandatory or voluntary.

FSCD 4A_124/2014 c. 3.3

2.3 Consent to Arbitrate

When an #arbitration agreement is anchored directly in a multilateral #investment treaty concluded by States for the protection of investments, one provision of which provides for arbitration to settle the disputes concerning the alleged violations of its substantive clauses, arbitration practice assimilates such a provision to an offer of each of the contracting States to resolve disputes that may arise with investors of the other contracting States by arbitration. The

#arbitration agreement is concluded only when the investor accepts the State's offer, which it most often does by conclusive acts when filing the #request for arbitration.

FSCD 141 III 495 [502]

Like any other contract, an #arbitration agreement may be affected by a lack of consent.

FSCD 4A_514/2010 c. 4.2.1

2.4 Specificities in Sports Arbitration

➤ See also Article 192(1) PILA, section 1.11

The liberalism which characterises the #case law with regard to the form of the #arbitration agreement in international arbitration is also reflected in the flexibility the #case law applies to the problem of the #arbitration agreement by reference (FSCD 129 III 727 [735]), including in sports arbitration (FSCD 4P.253/2003 of 25.03.2004 c. 5.4, FSCD 4P.230/2000 of 07.02.2001 c. 2a and FSCD 4C.44/1996 of 25.03.1996 c. 3c). Conversely, the #case law is rigorous with respect to the #waiver to file an #appeal, because it excludes the indirect #waiver and it excludes in principle that a #waiver can be invoked against an athlete.

FSCD 138 III 29 [34], FSCD 133 III 235 [244-245], FSCD 4A_314/2017 c. 2.3.1, FSCD 4A_428/2011 c. 3.2.3, FSCD 4A_640/2010 c. 3.2.2

It is true that there is a contradiction, in theory, in treating differently the #arbitration agreement and the #waiver to file an #appeal, with respect to the form and the mutual consent. However, this differentiated treatment follows a logic which, on the one hand, favours the speedy resolution of disputes, particularly in the field of sports, by specialised #arbitral tribunals presenting sufficient guarantee of #independence and #impartiality, and by assuring, on the other hand, that the parties, and in particular the professional athletes, do not waive without thinking their right to challenge the #awards of the last arbitral instance before the supreme judiciary authority of the State of the #seat of the #arbitral tribunal. In other words: according to this logic, the maintaining of an #appeal constitutes a counterweight to the "benevolence" by which one has to examine the question whether the parties agreed to arbitration in sports matters.

FSCD 138 III 29 [34], FSCD 133 III 235 [245], FSCD 4A_428/2011 c. 3.2.3, FSCD 4A_640/2010 c. 3.2.2, FSCD 4A_548/2009 c. 4.1

Competitive sports are characterised by a highly hierarchical organisation, at the international level as well as at the national level. Such vertically organised relationships between the athletes and the organisations in charge of the different kinds of sports are therefore different from the horizontal relationships between parties to a contract.

FSCD 133 III 235 [243], FSCD 129 III 445 [461]

This structural difference between the two types of relationships is not without influence on the conclusion of the contract. In general, when two parties have contacts on an equal level, every party expresses its will without being subject to the will of the other. This is in general the case in international commercial

relationships. In the field of sports, the situation is completely different. Except for the rather theoretical case of a well-known athlete who based on its reputation could impose conditions on the competent international #federation, experience shows that in most cases, an athlete is not independent enough from the #federation and must automatically comply with its prerequisites. Thus, the athlete who wants to participate in a competition organised under the control of a sports #federation whose rules provide for arbitration, does not have any choice and must accept the #arbitration agreement, particularly by adhering to the #statutes of the sports #federation containing the #arbitration agreement, all the more so when the athlete is a professional. Otherwise, the athlete would be confronted by the following dilemma: agree to the arbitration or practice one's sport as an amateur. Faced with the choice to submit to arbitration or to practice one's sport "in one's garden", by watching the competitions "on TV", the athlete who wants to compete with real competitors or who is forced to do so because this represents its only source of income (monetary and specific prizes, advertising revenue, etc.) will be obliged in fact to opt, whether it likes it or not, for the first branch of the alternative.

FSCD 133 III 235 [243]

The #arbitration agreement must be in the form prescribed by Article 178(1) PILA. Whilst this requirement cannot be completely ignored, the Federal Supreme Court nevertheless examines with "benevolence" the consensual nature of the recourse to arbitration in sports matters, with the aim of promoting the rapid settlement of disputes by specialised courts offering sufficient guarantees of #independence and #impartiality, such as the #CAS.

FSCD 4A_314/2017 c. 2.3.1

In sum, it is generally considered that the #arbitration agreement of the #CAS is typical for sports matters. This means that there is practically no elite sport without consent to sports arbitration.

FSCD 4A_314/2017 c. 2.3.1

It is also reflected in the #case law principle that, depending on the circumstances, a given conduct may, pursuant to the rules of #good faith, supplement the observance of a formal requirement.

FSCD 4A_314/2017 c. 2.3.1

When an athlete submits an application for an authorisation pursuant to the regulations of a #federation, it agrees to the application of these regulations and submits to the dispute settlement procedure contemplated by such regulations in relation to authorisations.

FSCD 4A_548/2009 c. 4.2.2

It is contrary to #good faith for an athlete to submit an application for an authorisation pursuant to the regulations of a #federation, and at the same time to refuse to participate in the dispute settlement procedure contemplated by such regulations with respect to disputes relating to the authorisation.

FSCD 4A_548/2009 c. 4.2.2

2.5 Arbitration Agreement by Reference

2.5.1 Specific and Global Reference

In connection with #general terms and conditions, the text form has to be observed if the #general terms and conditions are linked with the contract signed by both parties and if the parties refer to them. If the #general terms and conditions are not sent together with the contract, the text form is observed if the contract contains a specific reference to the #arbitration agreement in the #general terms and conditions (#incorporation by specific reference). If such a specific reference is missing, a global reference to the #general terms and conditions (#incorporation by global reference) can possibly lead to a valid #arbitration agreement if the opposing party should have known of the existence of an #arbitration agreement in the #general terms and conditions on the basis of #trade usages or other circumstances.

*FSCD 110 II 54 [58-59], ZG 11.09.1998 [(1997-98) GVP p. 140-141]

One must, in particular, examine whether the parties are business people experienced in commercial matters, whether the content of the document incorporated by reference is known to them or whether it should have been known to them, notably because the #arbitration agreement is usual in the commercial field considered.

*FSCD 110 II 54 [58-59], FSCD 4P.230/2000 c. 2a and 2b, BL 05.07.1994 [(1995) BJM p. 257], *ZH 30.08.1993 [(1993) ASA p. 535], ZH 25.08.1992 [(1993) ZR p. 78], ZH 14.12.1989 [(1990) ZR p. 197], *GE 16.12.1988 [(1989) ASA p. 167]

2.5.2 Incorporation by Specific Reference

One must distinguish between #arbitration agreements contained in a document which must in principle be signed, and agreements which result from an exchange of written declarations which do not have to be signed.

FSCD 121 III 38 [45], SG 16.01.2007 c. 2, BL 05.07.1994 [p. 255-256]

One must take into account that with the development of modern means of communication, documents which are not signed have become more and more important and frequent, that the prerequisite of the signature loses importance, in particular in international commerce, and that the difference in the treatment of signed and non-signed documents has to be questioned. Furthermore, in certain situations, a given behaviour may, based on the principle of #good faith, replace the observation of a specific form.

FSCD 121 III 38 [45], FSCD 4P.124/2001 c. 2c, FSCD 31.10.1996 [(1986-98) Digest CAS p. 590], SG 16.01.2007 c. 2, VD 25.09.2002 p. 10

An #arbitration agreement is valid if it is contained in a document other than the contract concluded between the parties and if the contract expressly refers to the #arbitration agreement (#incorporation by specific reference).

*FSCD 110 II 54 [58-59], FSCD 4P.230/2000 c. 2a, BL 05.07.1994 [(1995) BJM p. 257], *ZH 30.08.1993 [(1993) ASA p. 535], ZH 25.08.1992 [(1993) ZR p. 78], ZH 14.12.1989 [(1990) ZR p. 197], *GE 16.12.1988 [(1989) ASA p. 167]

An #arbitration agreement may also be concluded by reference: where a contract refers to a document containing an #arbitration agreement, it establishes the #jurisdiction of the #arbitral tribunal, where the reference is such that the clause is incorporated in the contract.

VD 27.09.2013 c. 5

2.5.3 Incorporation by Global Reference

A global reference to an #arbitration agreement contained in the #statutes of a sports #federation is valid.

FSCD 138 III 29 [34], FSCD 133 III 235 [245], FSCD 129 III 727 [735], FSCD 4A_640/2010 c. 3.2.2, FSCD 4A_548/2009 c. 4.1, FSCD 4A_460/2008 c. 6.2, FSCD 4P.253/2003 c. 5.4, FSCD 4P.230/2000 c. 2a

With regard to the formal requirement (Art. 178(1) PILA), the Federal Supreme Court examines the parties' agreement to have recourse to an #arbitral tribunal in sports matters with a certain "benevolence", with the aim of promoting the speedy resolution of disputes by specialised courts which, like the #CAS, offer sufficient guarantees of #independence and #impartiality. The generosity that characterizes the federal #case law in this area is particularly evident in the assessment of the effectiveness of #arbitration agreements by reference.

FSCD 138 III 29 [34], FSCD 133 III 235 [245], FSCD 4A_490/2017 c. 3.1.2

If the main contract refers without further detail to another document which contains an #arbitration agreement (#incorporation by global reference), the #validity or the #invalidity of the #arbitration agreement depends on the circumstances of the case at hand.

*FSCD 110 II 54 [58-59], FSCD 4P.230/2000 c. 2a, FSCD 31.10.1996 [(1986-98) Digest CAS p. 589], BL 05.07.1994 [(1995) BJM p. 257], *ZH 30.08.1993 [(1993) ASA p. 535], ZH 25.08.1992 [(1993) ZR p. 78], ZH 14.12.1989 [(1990) ZR p. 197], *GE 16.12.1988 [(1989) ASA p. 167]

If an #arbitration agreement is agreed upon by reference to #general terms and conditions or in #standard-form contracts, it does not matter in principle whether the opposing party has read the conditions and therefore knew that the #general terms and conditions contained an #arbitration agreement.

*FSCD 110 II 54 [59], *FSCD 76 I 338 [350], *ZH 30.08.1993 [(1993) ASA p. 536]

A reference to parts of the #statutes of a sports #federation containing an #arbitration agreement for specific disputes is also valid.

FSCD 4A_640/2010 c. 3.3.3

In general, one must assume that a party which accepts without reservation a global reference knows of the #arbitration agreement in the document referred to and agrees to this #arbitration agreement.

FSCD 4A_548/2009 c. 4.1, FSCD 4P.230/2000 c. 2a, FSCD 31.10.1996 [(1986-98) Digest CAS p. 589], ZH 25.08.1992 [(1993) ZR p. 75]

If a warranty refers to the main contract with the exclusive purpose to identify the guaranteed obligations, the parties, by such a reference alone, did not submit themselves to the #arbitration agreement contained in the main contract.

FSCD 4A_128/2008 c. B/b/b

The #arbitration agreement itself does not have to be contained in the contractual documents exchanged between the parties. It is sufficient that these documents contain a global reference to the #arbitration agreement.

FSCD 4P.126/2001 c. 2c, FSCD 4P.113/2001 c. 3b, FSCD 4P.230/2000 c. 2a, VD 25.09.2002 p. 10

A written #appeal without reservation to an arbitral appeals instance according to the internal rules of an #association providing for #arbitral proceedings entails the acceptance of the #arbitration agreement.

FSCD 4P.230/2000 c. 2b

The starting point must be the principle whereby the requirement of a specific form, alongside the probative function assigned to it, essentially seeks to protect the parties and to avoid that they blindly conclude #arbitration agreements.

FSCD 31.10.1996 [(1986-98) Digest CAS p. 589-590]

The rule of the #unusual presupposes that one is dealing with something unexpected, an element which the person to whom the #expression of intent is addressed had not expected.

FSCD 31.10.1996 [(1986-98) Digest CAS p. 591]

Whether an #arbitration agreement in #general terms and conditions, #standard-form contracts, etc. incorporated by reference is binding, does not have to be decided with regard to the form but according to the general principles governing the binding effect of such preformulated parts of contracts.

ZH 30.08.1993 [(1993) ASA p. 535]

However, such a clause remains exceptionally invalid when it is an unusual provision for the contract at hand that the globally acquiescing party did not expect and that it did not have to expect at the time of the conclusion of the contract (the so-called rule of the #unusual).

*ZH 30.08.1993 [(1993) ASA p. 536]

The application of the rule of the #unusual is less justified the less a clause influences the legal position of a party to a contract. It is not evident to what extent the legal position of a #claimant is influenced by the agreement on an #arbitral tribunal instead of the State courts.

*ZH 30.08.1993 [(1993) ASA p. 536]

It follows from the principle of #good faith that a party which agrees globally to #general terms and conditions, is in principle not bound by unusual clauses which it did not have to expect at the time of the conclusion of the contract.

ZH 25.08.1992 [(1993) ZR p. 80]

The global #incorporation of #general terms and conditions providing for a mandatory arbitration is only valid if the designation of the #general terms and

conditions in the main contract is free of any ambiguity or imprecision. The #burden of proof lies on the party alleging the #waiver of the guarantee of the #State court established by law.

GE 16.12.1988 [(1989) ASA p. 168]

2.6 Pathological Clauses

Provisions in #arbitration agreements which are incomplete, unclear or contradictory are considered as #pathological clauses.

FSCD 138 III 29 [35], FSCD 130 III 66 [70-71], FSCD 4A_490/2017 c. 3.1.3, FSCD 4A_407/2017 c. 2.3.2.1, FSCD 4A_136/2015 c. 2.2.2, FSCD 4A_676/2014 c. 3.2.2, FSCD 4A_74/2014 c. 5.2.1 (not published in FSCD 140 III 477), FSCD 4A_90/2014 c. 3.2.2

If the #pathological clauses do not concern mandatory elements of an #arbitration agreement, in particular the binding submission of the dispute to a private #arbitral tribunal, they do not necessarily lead to its #invalidity. On the contrary, one must first search for a solution which respects the fundamental intent of the parties to submit themselves to arbitration by #interpretation and supplementation of the contract by analogy with the general law of contracts.

FSCD 138 III 29 [35, 39], FSCD 130 III 66 [71], FSCD 4A_490/2017 c. 3.1.3, FSCD 4A_407/2017 c. 2.3.2.1, FSCD 4A_136/2015 c. 2.2.2, FSCD 4A_676/2014 c. 3.2.2, FSCD 4A_74/2014 c. 5.2.1 (not published in FSCD 140 III 477), FSCD 4A_90/2014 c. 3.2.2

2.7 Interpretation of the Arbitration Agreement

2.7.1 Applicable Law

Article 178(2) PILA also governs the issue of the law applicable to the #interpretation of the #arbitration agreement.

FSCD 4A_34/2016 c. 3.4.2

2.7.2 Principles Generally Applicable to Interpretation

The #interpretation of an #arbitration agreement follows the principles generally applicable to the #interpretation of private #expressions of intent.

FSCD 142 III 296 [305], FSCD 142 III 239 [253], FSCD 140 III 134 [138], FSCD 130 III 66 [71], FSCD 4A_583/2017 c. 3.3, FSCD 4A_432/2017 c. 3.2, FSCD 4A_407/2017 c. 2.3.2.1, FSCD 4A_150/2017 c. 3.2, FSCD 4A_672/2016 c. 3.1.2, FSCD 4A_310/2016 c. 3.1.2, FSCD 4A_136/2015 c. 2.2.2, FSCD 4A_676/2014 c. 3.2.2, FSCD 4A_390/2014 c. 3.3, FSCD 4A_90/2014 c. 3.2.2, FSCD 4A_124/2014 c. 3.4.1, FSCD 4A_302/2013 c. 4, FSCD 4A_305/2013 c. 3.2.2, FSCD 4A_515/2012 c. 5.3.2.1, FSCD 4A_146/2012 c. 3.4.1, FSCD 4A_119/2012 c. 4.1 (not published in FSCD 138 III 681), FSCD 4A_279/2010 c. 3.1, FSCD 4A_456/2009 c. 3.3, FSCD 4A_562/2009 c. 2.1, FSCD 4A_452/2007 c. 2.3, FSCD 4A_376/2008 c. 7.3.1, FSCD 4A_244/2007 c. 5.4, FSCD 4P.226/2004 c. 4.2, FSCD 4P.253/2003 c. 5.3, FSCD 4P.38/2002 c. 2b, NE 28.04.2016 c. 7, VD 25.09.2013 p. 6, ZH 04.11.2008 c. III.2, VD 07.09.01.2008 c. IIb, *VD 22.08.2007 c. 3ca, *VS 02.08.2004 c. 3b/aa

As the #arbitration agreement depends on the parties' intent, the general rules on the #interpretation of contracts apply. In the first place, it is the actual common intent of the parties which prevails, to the extent that it can be established by #evidence. Furthermore, according to the principle of #good faith which applies also in the field of international arbitration, each party has to admit its expressions in the sense that the other party could and should understand them in #good faith in light of all the circumstances. The wording of the #arbitration agreement has to be understood in the sense a reasonable person in the situation of the addressee would have understood it.

FSCD 142 III 296 [305], FSCD 140 III 367 [370], FSCD 140 III 134 [138-139], FSCD 138 III 29 [35-36], FSCD 130 III 66 [71], FSCD 129 III 675 [680], FSCD 127 III 279 [287], FSCD 126 III 119 [120], FSCD 126 III 375 [379], FSCD 121 III 495 [497], FSCD 5A 907/2017 c. 5.1.2, FSCD 4A 407/2017 c. 2.3.2.1, FSCD 4A_676/2014 c. 3.2.2, FSCD 4A_90/2014 c. 3.2.2, FSCD 4A_562/2013 c. 3.1, FSCD 4A_302/2013 c. 4, FSCD 4A_146/2012 c. 3.4.1, FSCD 4A_240/2012 c. 4.1, FSCD 4A_119/2012 c. 4.1 (not published in FSCD 138 III 681), FSCD 4A_279/2010 c. 3.1, FSCD 4A_456/2009 c. 3.3.1, FSCD 4A_562/2009 c. 2.1, FSCD 4A_376/2008 c. 7.3.1, FSCD 4A_128/2008 c. 5.2, FSCD 4A_452/2007 c. 2.3, FSCD 4A_244/2007 c. 5.4, FSCD 4P.226/2004 c. 4.2, FSCD 4P.253/2003 c. 5.3, FSCD 4C.40/2003 c. 5.1, FSCD 4P.40/2002 c. 2b, FSCD 4P.38/2002 c. 2b, NE 28.04.2016 c. 7, ZH 24.01.2014 c. 4.3, ZH 04.11.2008 c. III.2.1, VD 02.05.2006 p. 7, *VD 22.08.2007 c. 3ca

As the #arbitration agreement is, according to Article 178(2) PILA, valid with respect to substance provided it conforms in particular to Swiss law, reference can be made to the Swiss rules on the #interpretation of the parties' #expressions of intent. Therefore, one has to look for the genuine intent of the parties or, if such an intent is missing, to apply the principle of #good faith which is also applicable to the issues with regard to requested consent for the conclusion of an #arbitration agreement or the #interpretation of such a legal act.

FSCD 4P.40/2002 c. 2b, FSCD 4P.126/2001 c. 2c, FSCD 4P.230/2000 c. 2a

The #arbitration agreement has to be interpreted pursuant to the principle of #good faith and Article 18 CO. Complementary #interpretation rules result from the particular nature of the #arbitration agreement.

*FSCD 116 Ia 56 [58-59], FSCD 17.08.1995 [(1996) ASA p. 677-678], ZH 11.09.2001 [(2002) ASA p. 697], GE 14.09.2007 [C/24853/2006] c. 5.2, GE 12.11.2004 [C/25597/2003] c. 3.2

By #interpretation, the tribunal determines the agreed content of the contract, respectively of the #arbitration agreement, the wording being the primary means of #interpretation. In case of obscurities, additional circumstances such as the place, the time and other circumstances, the behaviour of the parties, as well as the interests of the parties have to be taken into account. However, the wording is authoritative whenever the other circumstances do not allow a contrary conclusion.

ZH 11.09.2001 [(2002) ASA p. 697]

2.7.3 Subjective Interpretation

The judge will first attach importance to the establishment of the actual and common intent of the parties, if need be empirically, on the basis of #evidence,

without stopping at the inexact expressions and names which they may have employed.

FSCD 142 III 296 [305], FSCD 142 III 239 [253], FSCD 140 III 134 [138], FSCD 130 III 66 [71], FSCD 4A_583/2017 c. 3.3, FSCD 4A_672/2016 c. 3.1.2, FSCD 4A_136/2015 c. 2.2, FSCD 4A_124/2014 c. 3.4.1, FSCD 4A_240/2012 c. 4.1

This subjective *#*interpretation relies on the assessment of *#*evidence, which is in principle not subject to review by the Federal Supreme Court.

FSCD 142 III 239 [253], FSCD 4A_432/2017 c. 3.2, FSCD 4A_150/2017 c. 3.2, FSCD 4A_672/2016 c. 3.1.2, FSCD 4A_310/2016 c. 3.1.2, FSCD 4A_390/2014 c. 3.3, FSCD 4A_305/2013 c. 3.2.2, FSCD 4A_146/2012 c. 3.4.1, FSCD 4A_240/2012 c. 4.1

*#*Evidence of the parties' actual and common intent can be found not only in their statements of intent but also from the general context, namely all circumstances that may be useful to determine the intent of the parties including statements made prior to the conclusion of the contract, drafts of the contract, correspondence exchanged as well as the conduct of the parties after the conclusion of the contract.

FSCD 142 III 239 [253]

If the *#*arbitral tribunal decides on an *#*interpretation which is supported by the actual concurrent intent of the parties, then this is a factual finding which is binding on the Federal Supreme Court (Art. 105(1) FSCA).

FSCD 142 III 239 [253], FSCD 4A_432/2017 c. 3.2, FSCD 4A_136/2015 c. 2.2.2, FSCD 4A_390/2014 c. 3.3, FSCD 4A_305/2013 c. 3.2.2

To establish what a contracting party knew or wished at the time of conclusion is a matter of factual findings: the search for the actual intent of the parties is known as subjective *#*interpretation.

FSCD 4A_136/2015 c. 2.2.2

In principle, it is the concurrent factual intent of the parties that is decisive.

FSCD 4A_305/2013 c. 3.2.2, FSCD 4A_146/2012 c. 3.4.1

According to constant *#*case law, the actual intent of the parties is a question of fact which can be established by *#*evidence.

FSCD 4P.253/2003 c. 5.3, FSCD 27.01.1999 c. 4

If the *#*arbitral tribunal establishes the actual common intent of the parties, there is no room – at least under Swiss law – for an *#*interpretation of the contract based on the principle of *#*trust. The parties' actual common intent established by the *#*arbitral tribunal which binds the Federal Supreme Court, prevails over unclear formulations in the text of the contract (Art. 18(1) CO).

FSCD 27.01.1999 c. 4

2.7.4 Objective Interpretation

If it is not possible to determine an actual common intent of the parties, the judge will, by applying the principle of #trust, search for the meaning that the parties could and should have given, according to the rules on #good faith, to their reciprocal #expressions of intent taking into account all circumstances.

FSCD 142 III 296 [305], FSCD 142 III 239 [253], FSCD 140 III 134 [138-139], FSCD 138 III 29 [35-36], FSCD 4A_583/2017 c. 3.3, FSCD 4A_432/2017 c. 3.2, FSCD 4A_150/2017 c. 3.2, FSCD 4A_672/2016 c. 3.1.2, FSCD 4A_310/2016 c. 3.1.2, FSCD 4A_136/2015 c. 2.2.2, FSCD 4A_124/2014 c. 3.4.1, FSCD 4A_240/2012 c. 4.1

This so-called objective #interpretation is a matter of law and it is carried out by reference to the text of and context in which the statements were made as well as in light of the circumstances preceding and accompanying them to the exclusion of subsequent circumstances.

FSCD 142 III 239 [253], FSCD 4A_240/2012 c. 4.1

If it is not possible to determine a real common intent of the parties with respect to the #arbitration agreement, the agreement has to be interpreted according to the principle of #good faith, as the addressee could and had to understand it in #good faith in the given circumstances. As the moment of the conclusion of the contract is decisive, the subsequent behaviour of the parties is not important for an #interpretation according to the principle of #good faith. It can only indicate how the parties have in fact understood their declarations.

FSCD 138 III 29 [35-36], FSCD 129 III 675 [680], *FSCD 116 Ia 56 [58-59], FSCD 4A_136/2015 c. 2.2.2, FSCD 4A_390/2014 c. 3.3, FSCD 4A_74/2014 c. 5.2.1 (not published in FSCD 140 III 477), FSCD 4A_305/2013 c. 3.2.2, FSCD 4A_388/2012 c. 3.4.2, FSCD 4A_244/2012 c. 4.2, FSCD 4A_146/2012 c. 3.4.1, FSCD 4A_119/2012 c. 4.1 (not published in FSCD 138 III 681), FSCD 4A_279/2010 c. 3.1, FSCD 4A_376/2008 c. 7.3.1, GE 18.04.2008 c. 2.1, VD 30.03.1993 [(1995) ASA p. 66]

The Federal Supreme Court examines this objective #interpretation of #expressions of intent as a question of law, whereby it is in principle bound by the findings in the contested decision on the external circumstances as well as the knowledge and intent of the parties involved.

FSCD 142 III 239 [253], FSCD 4A_583/2017 c. 3.4, FSCD 4A_150/2017 c. 3.2, FSCD 4A_672/2016 c. 3.1.2, FSCD 4A_310/2016 c. 3.1.2

The date on which the contract is concluded is decisive for an #interpretation in accordance with the principle of #trust. Subsequent party conduct is of no importance; at most - within the framework of the assessment of #evidence - it can indicate the actual intent of the parties.

FSCD 142 III 239 [253], FSCD 4A_150/2017 c. 3.2

A party may only claim that its contractual partner should have understood an agreement in a certain manner according to the rules of #good faith if it has understood the provision in the same way itself.

FSCD 4A_388/2012 c. 3.4.3

The principle of *#trust* allows to attribute to a party the objective sense of its declaration or its behaviour, even though this meaning does not correspond to the inner will of this party.

FSCD 4A_128/2008 c. 5.1, FSCD 4P.253/2003 c. 5.3

The objective meaning may be reviewed as a question of law and may therefore be examined with unfettered *#powers* of review under the *#ground* for setting aside of Article 190(2)(b) PILA.

FSCD 4P.253/2003 c. 5.3, FSCD 27.01.1999 c. 4

The agreement between the parties, to the extent that it constitutes an agreement on procedural issues, has to be interpreted according to the principles applicable to the *#validity* of contracts. Therefore, one has to examine by simultaneously going back in time what the parties would have stipulated in *#good faith*, had they considered the problem. The *#arbitrator* has to consider the nature and the scope of the contract and to take into account all the circumstances of the case.

FSCD 14.06.1990 [(1994) ASA p. 228]

2.7.5 Literal Meaning

The *#arbitral* tribunal must stick to the expressions that the parties used in order to respect the *#textual* form requirements.

FSCD 140 III 367 [370], FSCD 5A_907/2017 c. 5.1.2, FSCD 4A_562/2013 c. 3.1

Even when the wording appears clear, other contractual provisions may lead to the conclusion that in view of the parties' intent or other circumstances, the wording does not reflect the meaning of the parties' agreement.

FSCD 140 III 134 [139], FSCD 4A_583/2017 c. 3.3, FSCD 4A_124/2014 c. 3.4.1, FSCD 4A_302/2013 c. 4

Even if it is apparently clear, the meaning of a text signed by the parties is not necessarily decisive, as purely literal interpretation is prohibited (Art. 18 CO).

FSCD 4A_124/2014 c. 3.4.1

However, there is no need to depart from the literal meaning of the text adopted by the parties to the contract if there is no serious reason to doubt that it does not correspond to their intent.

FSCD 4A_124/2014 c. 3.4.1

2.7.6 Alternative Rules of Interpretation

Should the application of the principle of *#good faith* fail to lead to a conclusive result, alternative means of *#interpretation* may be resorted to.

FSCD 4A_314/2017 c. 2.3.2.5, FSCD 5A_907/2017 c. 5.1.2, FSCD 4A_407/2017 c. 2.3.2.1, FSCD 4A_136/2015 c. 2.2.2, FSCD 4A_676/2014 c. 3.2.2, FSCD 4A_90/2014 c. 3.2.2, FSCD 4A_240/2012 c. 4.1

2.7.7 No Inappropriate Solution

In doing so, the court must take into account what is appropriate because it can be assumed that the parties did not want an inappropriate solution.

FSCD 140 III 134 [139], FSCD 4A_583/2017 c. 3.3

2.7.8 Rule of Ambiguous Clauses

These include the so-called rule of ambiguous clauses pursuant to which in case of doubt, the contract must be interpreted against the drafter.

FSCD 4A_314/2017 c. 2.3.2.5, FSCD 5A_907/2017 c. 5.1.2, FSCD 4A_407/2017 c. 2.3.2.1, FSCD 4A_136/2015 c. 2.2.2, FSCD 4A_676/2014 c. 3.2.2, FSCD 4A_90/2014 c. 3.2.2

2.7.9 Reconciliation of Contradictory Clauses

When faced with contradictory clauses, one should choose to the extent possible an #interpretation making it possible to harmonize such clauses.

FSCD 4A_240/2012 c. 4.1

2.7.10 Principle of Utility

If the #interpretation leads to the conclusion that the parties wanted to exclude the dispute from State #jurisdiction and to submit it to an #arbitral tribunal, but differences exist as to the modalities of the #arbitral proceedings, an understanding of the contract has to be found which maintains the #validity of the #arbitration agreement.

FSCD 138 III 29 [36], FSCD 130 III 66 [71-72], FSCD 4A_490/2017 c. 3.1.3, FSCD 4A_432/2017 c. 3.2, FSCD 4A_407/2017 c. 2.3.2.1, FSCD 4A_150/2017 c. 3.2 & 3.5.5, FSCD 4A_672/2016 c. 3.1.2, FSCD 4A_136/2015 c. 2.2.2, FSCD 4A_676/2014 c. 3.2.2, FSCD 4A_74/2014 c. 5.2.1 (not published in FSCD 140 III 477), FSCD 4A_90/2014 c. 3.2.2, FSCD 4A_388/2012 c. 3.4.2, 3.4.3, FSCD 4A_244/2012 c. 4.2 & 4.4, FSCD 4A_103/2011 c. 3.2.1, FSCD 4A_279/2010 c. 3.1, FSCD 4A_562/2009 c. 2.1, FSCD 4P.226/2004 c. 4.2

It is only if the #interpretation leads to the conclusion that the parties wanted to remove the dispute from the State judiciary and to submit it to the decision of an #arbitral tribunal, but if there subsist controversies with respect to the course of the #arbitral proceedings that one will endeavour, according to the principle of #utility, to understand the contract in a sense which safeguards the #validity of the #arbitration agreement.

VD 02.05.2006 p. 7

It is according to this principle of #utility of the #arbitration agreement that one will presume in case of doubt that the parties wanted to submit to arbitration not only their disputes concerning the performance of their contractual obligations but also a potential dispute about the #validity of the main contract.

VD 02.05 2006 p. 7-8

2.7.11 Partially Impossible Arbitration Agreement

The partially impossible content of the #arbitration agreement is to be remedied to the extent possible by supplementing the contract on the basis of the hypothetical intent of the parties. One must enquire as to what the parties would have agreed if they had known about the partially impossible content at the time of the conclusion of the contract.

FSCD 138 III 29 [39]

If an #arbitration agreement has a partially impossible content and if it is clear that the parties wanted to submit their dispute to private arbitration, the partial impossibility does not lead to complete #invalidity (Art. 20(2) CO by analogy). The impossible part has to be interpreted with regard to its scope, has to be deleted without substitution or has to be substituted by subsidiary State law.

FSCD 130 III 66 [74]

2.7.12 Restrictive Interpretation regarding the Existence of an Arbitration Agreement

When interpreting an #arbitration agreement, its legal nature has to be taken into account; in particular, it has to be taken into account that with the #waiver of a State court, the legal remedies are severely restricted. Such an intent to waive cannot easily be assumed according to the Federal Supreme Court's #case law. Therefore, in case of doubt, a restrictive #interpretation should apply.

FSCD 140 III 134 [139], FSCD 4A_150/2017 c. 3.2, FSCD 4A_310/2016 c. 3.1.2

The legal nature of the #arbitration agreement has to be taken into account for its #interpretation. One must consider that the choice of an #arbitral tribunal is an important choice since #arbitral proceedings lead regularly to higher costs than proceedings before State courts and since the means of #appeal are limited by the #waiver of a State court.

FSCD 129 III 675 [680], FSCD 4A_244/2012 c. 4.2, FSCD 4A_386/2010 c. 5.3.4, FSCD 4A_279/2010 c. 3.1, FSCD 4A_562/2009 c. 2.1

As Article 178(2) PILA only regulates the law applicable to the #arbitration agreement, it is not possible to derive an #interpretation rule from this provision which pleads against the restrictive #interpretation of the existence of an #arbitration agreement.

FSCD 129 III 675 [681]

In interpreting the #arbitration agreement, the Court must take into account its legal nature; in particular, it should be noted that a #waiver of the #jurisdiction of a State court would severely restrict the legal remedies of the parties. Such a #waiver cannot be accepted lightly, according to the #case law of the Federal Supreme Court, which is why, in case of doubt, the Court must favour a restrictive #interpretation.

FSCD 4A_432/2017 c. 3.2

By an #arbitration agreement, the parties waive their right to an adjudication of possible disputes by ordinary State courts, a #waiver which is important because of the limitation of #appeals and the considerably higher #costs of arbitration.

Therefore, it should not be easily assumed, in case of dispute, that the parties entered into an #arbitration agreement.

FSCD 4A_103/2011 c. 3.2.1, FSCD 4C.40/2003 c. 5.3, *FSCD 116 Ia 56 [58], *NE 23.02.1999 [(2000) ASA p. 341]

2.7.13 Broad Interpretation regarding the Scope of Application

➤ See also Article 178(2) PILA, section 2.10

Once it is established that an #arbitration agreement has been concluded, it must not be interpreted in a restrictive way. The judge has to assume that, by entering into an #arbitration agreement, the parties wanted to give wide #jurisdiction to the #arbitral tribunal.

FSCD 140 III 134 [139-140], FSCD 138 III 681 [687], *FSCD 116 Ia 56 [58-59], FSCD 4A_583/2017 c. 3.3 & 3.4, FSCD 4A_310/2016 c. 3.1.2, FSCD 4A_103/2011 c. 3.2.1, FSCD 4A_386/2010 c. 5.3.4, FSCD 4A_562/2009 c. 2.1, FSCD 4C.40/2003 c. 5.3, *NE 23.02.1999 [(2000) ASA p. 341]

Federal Supreme Court practice in this context is based on the assumption that, in the absence of special circumstances, the parties submit their dispute as a whole to the #arbitral tribunal and do not wish to split it up in such a way that individual questions would have to be submitted to other State courts for decision. In particular, it has been decided that #arbitration agreements for disputes arising out of a particular contract also relate to disputes concerning the conclusion and termination of the contract.

FSCD 140 III 134 [140], *FSCD 116 Ia 56 [58-59], FSCD 4A_583/2017 c. 3.4

There is no basis for a particularly restrictive interpretation if it is undisputed that there is an #arbitration agreement. The wish of the parties must be heeded, and the dispute should be submitted to an #arbitral tribunal.

FSCD 138 III 681 [687]

Such a broad interpretation of the #arbitration agreement, consistent with procedural efficiency and #procedural economy, does not however imply a presumption in favour of arbitral #jurisdiction.

FSCD 4A_103/2011 c. 3.2.1, FSCD 4A_562/2009 c. 2.1

Once the existence of an #arbitration agreement is established, its content and scope of application must not be subject to a particularly restrictive interpretation.

*VS 02.08.2004 c. 3b/aa

2.8 Inexact Designation of the Arbitral Tribunal

An imprecise or defective designation of the #arbitral tribunal does not lead to the #invalidity of the #arbitration agreement, if it can be established by #interpretation which #arbitral tribunal the parties meant.

FSCD 138 III 29 [36], FSCD 130 III 66 [72], FSCD 129 III 675 [681], FSCD 4A_407/2017 c. 2.3.2.1, FSCD 4A_672/2016 c. 3.1.2, FSCD 4A_136/2015 c. 2.2.2, FSCD 4A_676/2014 c. 3.2.2, FSCD 4A_74/2014 c. 5.2.1 (not published in FSCD 140 III 477), FSCD 4A_90/2014 c. 3.2.2, FSCD 4A_279/2010 c. 3.1, FSCD 4A_376/2008 c. 7.1, GE 18.04.2008 c. 2.1, FSCD 4P.226/2004 c. 4.2

A clause which contains an imprecise, incomplete, contradictory or erroneous designation of the #arbitral tribunal – i.e. a so-called #pathological clause – does therefore not lead to the #invalidity of the #arbitration agreement, if it is possible to establish by way of #interpretation which #arbitral tribunal the parties envisaged.

FSCD 138 III 29 [35], FSCD 130 II 66 [71-72], FSCD 129 III 675 [681], FSCD 4A_376/2008 c. 7.1

A clause providing for the submission of disputes to the FIFA or UEFA Commission, showed the intent of the parties to exclude State courts and to submit their disputes to arbitration. The parties had clearly agreed on an institution which was not a State court, which was not based in the State of one party and which would be familiar with the object of the dispute. An #interpretation of this clause in accordance with the principle of #trust shows that the parties wanted to submit the dispute to an #arbitral tribunal.

FSCD 138 III 29 [32]

The impossibility of constituting the #arbitral tribunal according to the rules agreed upon by the parties does not necessarily mean that the #arbitration agreement is void, provided that this clause clearly shows the intent of the parties to have their disputes decided by a private #arbitral tribunal. If such is the case, the principle of #utility imposes in fact to interpret the clause in a way which ensures its #validity.

FSCD 130 III 66 [71], FSCD 4A_376/2008 c. 7.1

Clauses which mention as #arbitral tribunal the ICC in connection with a city in Switzerland, even though the ICC has its seat in Paris, are often interpreted in the sense that the parties wanted the application of the ICC Arbitration Rules with respect to an #arbitral tribunal having its #seat at the place they mentioned.

FSCD 129 III 675 [681], FSCD 4A_376/2008 c. 7.3.3 & 7.3.4

One must assume that the parties have meant an #arbitral tribunal of the Zurich Chamber of Commerce by the clauses "Swiss Arbitration Court, Zurich", "International Trade Organization in Zurich" or "International Trade arbitration in Zurich".

FSCD 129 III 675 [681], FSCD 4A_74/2014 c. 5.2.2 (not published in FSCD 140 III 477), FSCD 4A_376/2008 c. 7.3.3

If the parties mention a “Commercial Court respectively an Economic Court with seat in Zurich” (“*Handelsgericht bzw. Wirtschaftsgericht mit Sitz in Zürich*”), they must have wanted an #arbitral tribunal of the Zurich Chamber of Commerce.

FSCD 129 III 675 [682], FSCD 4A_74/2014 c. 5.2.2 (not published in FSCD 140 III 477), FSCD 4A_376/2008 c. 7.3.3

The #arbitral tribunal has interpreted the #arbitration agreement (“All disputes arising out or in connection with this Agreement shall be finally settled in English language by the International Chamber of Commerce of Geneva, under the Rules of Conciliation and Arbitration of the International Chamber of Commerce, by three arbitrators appointed in accordance with said Rules”) in #good faith to the effect that the parties wished to have any disputes settled by an #arbitral tribunal seated in Geneva in proceedings administered by the ICC.

FSCD 4A_672/2016 c. 3.3

A clause providing that “the parties agree in advance to have the dispute submitted to binding arbitration through The American Arbitration Association or to any other US court” does not express the parties’ clear and unambiguous intention to submit all disputes arising out of their contract to arbitration and to exclude the #jurisdiction of State courts of law.

FSCD 4A_279/2010 c. 3.2

Interpreted according to the principle of #trust, the disputed clause by which the parties have agreed to submit potential disputes to the “Arbitration Court of the International Chamber of Commerce of Zurich, in Lugano” must be understood in the sense that the institution called to administer the arbitration to be held in Lugano is the #ICC International Court of Arbitration in Paris.

FSCD 4A_376/2008 c. 7.3.3

2.9 Inexact Designation of the Appointing Authority

Except in extraordinary cases, the designation of an #arbitral institution or body should not be considered as subjectively essential to the parties.

FSCD 138 III 29 [32]

An #arbitration agreement is not invalid merely because of an inexact designation of the #appointing authority [in casu the “*Tribunal de Commerce de Genève (Suisse)*”].

GE 07.02.1991 [(2001) ASA p. 275]

2.10 Material Scope of Application

- See also Article 178(2) PILA, section 2.7.13; Article 186(1) PILA, section 1.3.4; and Article 190(2)(b) PILA, section 2b.12.8

2.10.1 In General

The material scope of an #arbitration agreement is determined according to Article 178(2) PILA based on the law chosen by the parties, the law applicable to

the dispute, in particular the law applicable to the main contract or according to Swiss law.

FSCD 140 III 134 [138]

When an #arbitration agreement encompasses the disputes “in connection with” the contract, it must be understood as meaning that the parties did not wish to submit the claims resulting from their contractual relationship in various legal respects to an #arbitral tribunal and otherwise to the State courts. In accordance with the presumed intent of the parties, it must be assumed that they wanted to refer all claims arising from the #facts contained in the contract or concerning them directly to the exclusive #jurisdiction of the #arbitral tribunal.

FSCD 140 III 134 [140], FSCD 138 III 681 [687], FSCD 5A_907/2017 c. 5.1.3

Federal Supreme Court practice in this context is based on the assumption that, in the absence of special circumstances, the parties submit their dispute as a whole to the #arbitral tribunal and do not wish to split it up in such a way that individual questions would have to be submitted to other courts for decision. In particular, it has been decided that #arbitration agreements for disputes arising out of a particular contract also relate to disputes concerning the conclusion and termination of the contract.

FSCD 140 III 134 [140], *FSCD 116 Ia 56 [58-59], FSCD 4A_583/2017 c. 3.4

In case of doubt, clauses on #jurisdiction, whether #arbitration agreements or #agreements on jurisdiction, have to be considered as autonomous agreements, in the sense that they also embrace disputes concerning the #validity of the main contract or the disputes arising in connection with its termination and its liquidation. However, freedom of contract allows the parties to provide for the contrary (see Art. 8(4) fICC Arbitration Rules).

FSCD 121 III 495 [497, 500], *FSCD 116 Ia 56 [58-59]

An #arbitral tribunal only has #jurisdiction if, among other conditions, the dispute is covered by the #arbitration agreement and if the #arbitral tribunal does not exceed the limits fixed by the #request for arbitration and possibly by the #terms of reference.

FSCD 06.09.1996 [(1997) ASA p. 299], FSCD 19.04.1994 c. 3c (not published in FSCD 120 II 172)

Even if the #arbitration agreement is formally linked to the substantive main contract in the same document, it is, as a procedural agreement, independent to the extent that in case of doubt it has to be assumed that the parties did not only want to submit to arbitration disputes on the performance of their mutual obligations under the contract but also disputes on the issue of whether a contract has been validly concluded. Therefore, the #arbitration agreement does not necessarily share the fate of the main contract.

*FSCD 116 Ia 56 [59]

This also applies to a #termination agreement regarding the main contract, as it has to be assumed in general, except if the parties provide expressly for the contrary in their #termination agreement, that they want to apply the #arbitration agreement also to disputes in connection with the performance or the termination of the contract.

*FSCD 116 Ia 56 [59]

The wording “any dispute relating to the agreement” includes disputes relating to the existence, #validity and the termination of the contractual relationship resulting from the agreement in which this #arbitration agreement is included and issues connected indirectly to the dispute submitted to arbitration. It could also extend to additional or accessory contracts unless they contain different #arbitration agreements.

FSCD 4A_103/2011 c. 3.2.2

The question of the material scope of application of the #arbitral tribunal’s #jurisdiction according to the #arbitration agreement has to be examined on the basis of the #facts alleged by #claimant.

ZH 22.05.1990 p. 12

2.10.2 Security

If an #arbitration agreement provides that all disputes arising in connection with a contract shall be settled by arbitration, all disputes concerning the performance of the contract fall within its scope. Therefore, if one of the parties has made out a #bill of exchange when concluding or performing the contract in question, disputes in connection with this #security fall within the #jurisdiction of the #arbitral tribunal.

FSCD 13.10.1992 [(1993) ASA p. 78]

2.10.3 Several Claims and Execution of Several Obligations

If the #obligee alleges that it has performed a disputed obligation, in particular that it has paid a debt, the tribunal has to examine *ex officio* whether an alleged and proven performance of the obligation has the effect of extinguishing the obligation claimed in the proceedings. If several claims face several performances of obligations, the tribunal has to examine *ex officio*, from a legal point of view, whether the obligation claimed still exists, even though it does not also have #jurisdiction to decide in a binding manner on the extinction of the other obligations.

FSCD 06.05.1996 c. 2b

2.10.4 Torts

It is admitted on an international level that even if arbitration in general relates to disputes of a contractual nature, the #arbitrator has also the power to decide disputes with regard to torts. However, the #arbitration agreement has to be formulated in a sufficiently broad manner. Legal scholars acknowledge that a formulation such as “all disputes arising out of or in connection with the contract”

is in principle sufficiently broad to include arbitrations with respect to torts, without it being necessary that these torts consist in the violation of the contract.

VD 07./09.01.2008 c. IIb

2.10.5 Set-off

The question whether an #arbitral tribunal has #jurisdiction to decide on a #set-off claim if the compensating claim is not covered by the #arbitration agreement, is subject to controversy.

FSCD 4A_96/2009 & 4A_94/2009 c. 4

2.10.6 Group of Contracts

When several contracts are materially connected but only one of them contains an #arbitration agreement, unless there is a specific rule to the contrary it must be presumed that the parties intended to submit the other contracts of the same group to that #arbitration agreement as well.

FSCD 142 III 239 [255]

2.10.7 Individual Cases

The wording “any dispute or disagreement between them relating to or arising out of any provision of this agreement” extends to any claims based on the termination of the contract in addition to disputes as to its conclusion or #validity.

FSCD 140 III 134 [140]

The wording “all disputes arising from or in connection with the agreement” leads to the conclusion that the parties presumably intended to submit all related claims to the exclusive #jurisdiction of the #arbitral tribunal, even the claims the #respondent could raise on another contractual or ex-contractual basis.

FSCD 138 III 681 [687]

The wording “disagreement over the interpretation of any terms of this Agreement” extends to disputes between the parties as to the performance of sales agreements that they would enter into eventually, the object of which was referred to in the agreement.

FSCD 4A_103/2011 c. 3.2.2

The wording “any dispute arising under, or in connection with this agreement” does not imply any limitation and includes, in particular, the disputes with regard to the existence, the #validity and the termination of the contractual relationship following from the agreement in which this #arbitration agreement is included.

FSCD 4A_210/2008 c. 3.2

The wording “in connection with this contract” [*“im Zusammenhang mit diesem Vertrag”*] must not be understood as covering also other contracts with different #arbitration agreements. On the contrary, #arbitration agreements drafted in this way also cover disputes about the conclusion and the #validity of the contract as

well as about the claims resulting from the termination of the contract or claims based on torts.

FSCD 20.02.2008 c. 2.5.1

The wording of the specific #arbitration agreement is - compared to other possible formulations - rather narrow (it refers only to legal disputes "concerning the interpretation or application of this contract", not of disputes "arising out of or in connection with the contract"). There is no evidence that the parties intended to include a claim for damages resulting from the #attachment of assets failing to comply with legal requirements (not in the examination of the asserted claim). When the contract was concluded, the parties could not foresee where and according to which legal rules assets could be attached and what formal prerequisites the #attachment of assets would have to meet.

BS 29.09.2011 c. 3.2.3

2.11 Personal Scope of Application

- See also Article 186(1) PILA, section 1.3.5; and Article 190(2)(b) PILA, section 2b.12.7

2.11.1 In General

When the #arbitrators examine whether they have #jurisdiction to decide the dispute submitted to them, they have to resolve, among other issues, the question of the personal scope of application of the #arbitration agreement. They have in particular to determine which parties are bound by the #arbitration agreement, and, as the case may be, whether one or several third parties who are not mentioned enter nevertheless into the scope of application. This question of #jurisdiction *ratione personae* which pertains to the #merits has to be answered in light of Article 178(2) PILA.

FSCD 134 III 565 [567], FSCD 129 III 727 [733, 736], FSCD 128 III 50 [54], FSCD 117 II 94 [98], FSCD 4A_314/2017 c. 2.3.1, FSCD 4A_473/2016 c. 4.1, FSCD 4A_450/2013 c. 3.2, FSCD 4A_232/2013 c. 3.2, FSCD 4A_627/2011 c. 3.2, FSCD 4A_428/2011 c. 4.1.1, FSCD 4A_44/2011 c. 2.4.1, FSCD 4A_128/2008 c. 4.1.1, FSCD 22.02.2008 [4A_244/2007] c. 5.1, FSCD 4P.126/2001 c. 2a, FSCD 4P.290/2000 c. 3b, FSCD 22.12.1992 [(1996) ASA p. 648]

Being part of the examination of #jurisdiction, the question whether the parties are bound by the #arbitration agreement has to be examined with unfettered #powers of review, even if this question depends on #facts which are also relevant for the examination of the #merits.

FSCD 128 III 50 [56-57], FSCD 121 III 495 [503], FSCD 4P.226/2004 c. 4.3.3

The #arbitral tribunal, when deciding whether the dispute submitted is in its own #jurisdiction or in the one of the ordinary State courts, has to decide whether a certain person summoned before it is bound or not by the #arbitration agreement.

FSCD 128 III 50 [54]

When examining the #validity of the #arbitration agreement, the #arbitral tribunal may also have to determine its scope of application, in particular the parties bound by its provisions and the #validity of its #assignment.

FSCD 120 II 155 [163-164], FSCD 117 II 94 [98], FSCD 13.10.1992 [(1993) ASA p. 70]

The question of #validity of the #arbitration agreement encompasses also the issue of the parties bound by it.

FSCD 117 II 94 [98]

However, these are typical or normal arbitrations, characterized by the existence of an #arbitration agreement where it must be determined if it binds other persons than the contractual parties, particularly in case of inheritance, merger, #assignment or #assumption of a claim.

FSCD 4A_428/2011 c. 4.1.1

It is doubtful that it would also apply to atypical arbitrations such as sports arbitrations where the #jurisdiction of the #arbitral tribunal is found in the #statutes of the sport #federation providing for arbitration to settle disciplinary disputes.

FSCD 4A_488/2011 c. 4.3.1, FSCD 4A_428/2011 c. 4.1.1

The question of the #arbitral tribunal's #jurisdiction also includes the issue of the personal scope of the #arbitration agreement. Whether all parties are bound by it is a question of their #capacity to be a party to the #arbitral proceedings and thus a condition to hear the case [*Sachurteilsvoraussetzung, Eintretensvoraussetzung*] (FSCD 128 III 50 [54]).

FSCD 22.02.2008 [4A_244/2007] c. 5.1, FSCD 4P.137/2002 c. 3.1

2.11.2 Non-Signatories

According to the principle of the #privity of contractual obligations, the #arbitration agreement contained in a contract only binds the contracting parties. However, in a certain number of cases, such as the #assignment of claim, the (simple or cumulative) #assumption of an obligation or the #assignment of a contractual relationship, the Federal Supreme Court has recognized for a long time that an #arbitration agreement may bind even persons who did not sign it and who are not mentioned in it.

FSCD 134 III 565 [567-568], FSCD 129 III 727 [735], FSCD 128 III 50 [54], FSCD 120 II 155 [163], FSCD 4A_473/2016 c. 4.1, FSCD 4A_459/2016 c. 2.1, FSCD 4A_310/2016 c. 3.1.1, FSCD 07.04.2014 [4A_450/2013] c. 3.2, FSCD 4A_627/2011 c. 3.2, FSCD 4A_44/2011 c. 2.4.1, FSCD 4A_376/2008 c. 8.4, FSCD 4P.226/2004 c. 4.3.1, VD 25.09.2013 p. 7

Furthermore, the third person who involves itself in the performance of the contract containing an #arbitration agreement is deemed to have adhered to it, by #implied actions, if one can deduce from this involvement its will to be party to the #arbitration agreement.

FSCD 134 III 565 [568], FSCD 129 III 727 [737], FSCD 4A_473/2016 c. 4.1, FSCD 4A_459/2016 c. 2.1, FSCD 4A_310/2016 c. 3.1.1, FSCD 4A_450/2013 c. 3.2, FSCD 4A_627/2011 c. 3.2, FSCD 4A_44/2011 c. 2.4.1, FSCD 4A_376/2008 c. 8.4, FSCD 4P.48/2005 c. 3.4.1, VD 25.09.2013 p. 7

The liberalism which characterizes the federal #case law with respect to the form of the #arbitration agreement in international arbitration manifests itself also in the flexibility with which this #case law treats the #arbitration agreement by reference.

FSCD 129 III 727 [735], FSCD 4P.126/2001 c. 2e/bb

This appears even more clearly in two recent decisions where it has been stated that by a simple procedural action, a party adhered to an #arbitration agreement (FSCD 4C.40/2003 of 19.05.2003 c. 4, FSCD 4P.230/2000 of 07.02.2001 c. 2).

FSCD 129 III 727 [735]

Furthermore, it has been decided, still in the same sense and in general, that depending on the circumstances, a certain behaviour can replace, based on #good faith considerations, the observation of form requirements.

FSCD 129 III 727 [735], FSCD 121 III 38 [45], FSCD 5A_441/2015 c. 4.2, FSCD 4A_428/2011 c. 3.2.3, FSCD 4A_548/2009 c. 4.1, FSCD 4P.124/2001 c. 2c

Therefore, and in the direct prolongation of this liberal #case law, there should not be too strict requirements concerning the formal #validity of the extension of an #arbitral agreement to a third party. It is without doubt not possible to ignore the formal requirements of Article 178(1) PILA. Thus, if one of the parties to an oral #arbitration agreement directs its claims against the opposing party and a third party before an #arbitral tribunal having its #seat in Switzerland and if this tribunal dismisses the objection of #lack of jurisdiction raised only by the third party, this third party could successfully plead (an #abuse of right being reserved) in a #motion to set aside based on Article 190(2)(b) PILA that it could not be validly integrated in the #arbitral proceedings because the #arbitration agreement did not respect the form required by Article 178(1) PILA. However, this form requirement only applies to the #arbitration agreement itself, i.e. the agreement by which the initial parties expressed their common intent to arbitrate. As to the issue of the subjective scope of application of an #arbitration agreement which is formally valid pursuant to Article 178(1) PILA – one has to determine which are the parties bound by the agreement and to examine, as the case may be, whether one or several third parties which are not mentioned in the agreement nevertheless enter into its scope of application *ratione personae* – this question being part of the #merits and must therefore be resolved in the light of Article 178(2) PILA.

FSCD 129 III 727 [736]

A third party which did not sign the #arbitration agreement, such as #heirs, assignees, #partners, etc., can be bound by it.

FSCD 128 III 50 [54], FSCD 120 II 155 [163], FSCD 4C.40/2003 c. 4.1, FSCD 4P.126/2001 c. 2c

The question of the extension of an #arbitration agreement to parties who did not sign it, can also arise in connection with groups of companies or companies controlled by the State.

FSCD 120 II 155 [163]

With respect to #legal persons, and depending on the circumstances, some contractual obligations may also be due by the #mother company when the scope of activities of the mother and daughter activity overlap. Various legal concepts

have justified the refusal to take into account the formal independence of the mother and daughter company towards third parties. Apart from #piercing the corporate veil and taking into account a #power of attorney, liability based on appearance seeks to protect the contractual counterparty – pursuant to the principle of #trust – when it erroneously believes that it concluded the contract with the mother and not the daughter company or even with both.

FSCD 4A_450/2013 c. 3.2

In principle an #arbitration agreement is binding only on the parties which have agreed by contract to submit their disputes to #arbitral proceedings, be it directly or by their #agents. Cases of #legal succession, of subsequent approval of the #arbitration agreement or of #piercing of the corporate veil in case of an abusive challenge of the clause are reserved.

FSCD 4A_128/2008 c. 4.1.1, FSCD 4C.40/2003 c. 4.1

According to the principle of #privity of contractual obligations and the independence of #legal persons, Swiss law provides for strict requirements for the extension of an #arbitration agreement to a third person who is not mentioned in it.

FSCD 4A_128/2008 c. 4.1.2

Based on the constant #case law of the Federal Supreme Court, the extension of the #arbitration agreement to a third party should not be submitted to too strict requirements. This is in accordance with the #case law of the Federal Supreme Court which is coined by the philosophy of #utility, i.e. which searches for an understanding of the contract preserving the #arbitration agreement (FSCD 130 III 71 c. 3.2, FSCD 129 III 681 c. 2.3).

SG 16.01.2007 c. 2b

2.11.3 Power of Representation

The question of whether a person is an organ of a foreign company and whether this person has the power to bind the company by the signature of an #arbitration agreement, depends on the law applicable to the company.

*FSCD 101 II 168 [170]

The law, according to which the #capacity to act and the #power of representation of a person signing an #arbitration agreement are examined, is not determined pursuant to the special #conflict-of-laws rule of Article 178(2) PILA which provides for alternative #connecting factors in order to avoid invalid #arbitration agreements. The applicable law is determined by the general #conflict-of-laws rules on the #capacity to act of #physical persons and corporate bodies (Article 35 et seq. and Article 154 et seq. PILA) as well as their representation (Articles 126, 155 and 158 PILA).

*FSCD 96 I 334 [340], FSCD 01.09.1993 [(1996) ASA p. 626], FSCD 22.12.1992 [(1996) ASA p. 648]

The #standing of a party to the arbitration and the #power of the person acting on its behalf in the arbitration is also determined by the rules applicable to the person or to the company or the power to represent.

FSCD 4A_446/2014 c. 3.3.2, FSCD 4A_118/2014 c. 3.1

A person who signs the #arbitration agreement on behalf of a third party is not bound by it.

FSCD 4C.40/2003 c. 4.1

The international #arbitrator having its seat in Switzerland is only subject to Chapter 12 PILA; the #conflict-of-laws rules which the Swiss State court has to apply in contracts, such as Article 126 PILA, are not mandatory for the #arbitrator.

FSCD 08.12.1999 [(2000) ASA p. 554]

In general, the law applicable to the #power of representation applies to all questions of #representation.

FSCD 01.09.1993 [(1996) ASA p. 626]

The #principal without #power of representation can also become contractually bound by subsequent ratification of the actions. Such ratification appears less as a subsequent #power of attorney than as a healing of the legal transaction and is also governed by the law applicable to the main contract in relation with third parties.

FSCD 01.09.1993 [(1996) ASA p. 627]

With respect to the #capacity to enter into an #arbitration agreement as well as the #powers of the signatories, the #arbitral tribunal has to determine the law which governs these issues by application of Article 187(1) PILA, i.e. or the law applicable to the #merits, which will be the one chosen by the parties, or – in the absence of such a choice – the law with which the dispute presents the closest connection.

GE 12.11.2004 [C/25597/2003] c. 3.2

The examination of the #powers of the signatory includes the examination of whether it has apparent #powers which could be sufficient and whether the circumstances of the case at hand lead to the dismissal of the claim based on the absence of #powers of the signatory if it violates the requirements of #good faith.

GE 12.11.2004 [C/25597/2003] c. 3.2

2.11.4 Principle of Good Faith

When a contractual party and the group to which it belongs acted in such a manner that the other contracting party believed in #good faith in the existence of a legal relationship with the group, the extension of the original legal relationship to this subcontractor pursuant to the principle of #trust is justified.

FSCD 4A_450/2013 c. 3.5.5.1.1

In general, the law applicable to the #power of representation applies to all questions of #representation.

FSCD 01.09.1993 [(1996) ASA p. 626]

This does not apply where problems of consent in the context of the #representation create normative contractual relationships because the #principal is liable towards the third party on the basis of the #apparent legal relationship it created and therefore of the positive protection of #good faith. Therefore, contractual

relationships or relationships similar to contracts created on the basis of #good faith are governed by the law applicable to the legal transaction founded normatively or on the basis of the #apparent legal relationship.

FSCD 01.09.1993 [(1996) ASA p. 626-627]

Therefore, one has to examine according to the law applicable to the main contract whether the defence based on lack of #power of representation could be excluded by the principle of #good faith.

FSCD 01.09.1993 [(1996) ASA p. 627]

The principle of #good faith and the special protection of the third party which is in #good faith is especially important in relations with State-held enterprises and holdings.

FSCD 01.09.1993 [(1996) ASA p. 628]

The question has been left open whether the principle of #good faith in the sense of the prohibition of contradictory conduct (*estoppel*, *venire contra factum proprium*) has universal #validity in international trade.

FSCD 01.09.1993 [(1996) ASA p. 627]

The examination of the #powers of the signatory includes the examination of whether it has apparent #powers which could be sufficient and whether the circumstances of the case at hand lead to the dismissal of the claim based on the absence of #powers of the signatory if it violates the requirements of #good faith.

GE 12.11.2004 [C/25597/2003] c. 3.2

2.11.5 Assignment of the Arbitration Agreement

The question of whether an #arbitration agreement has been validly assigned has to be examined according to the law defined in Article 178(2) PILA, in particular according to the law most favourable to its #validity.

FSCD 128 III 50 [62], FSCD 117 II 94 [98], FSCD 4P.290/2000 c. 3b, BS 24.04.2014 c. 2.6, SG 16.01.2007 c. 2

The #assignment of a claim (or of a contractual relationship) including an #arbitration agreement has a double nature: it entails not only the substantive transfer of the right assigned, issue which is a substantive matter, but also the transfer of the #arbitration agreement, issue which is a procedural matter. In other words, the same circumstance – i.e. the valid #assignment of the disputed claim – has two distinct effects, as it determines at the same time the #capacity to sue or to be sued of the #assignee as well as the #capacity to be a party in #arbitral proceedings launched by the performance of the #arbitration agreement. This is why the notions of #capacity to sue and to be sued and of #capacity to be a party overlap in a certain sense in the case of an #assignment of a claim, and this renders its delimitation difficult.

FSCD 128 III 50 [56]

A contractual clause of non-assignability also encompasses an #arbitration agreement in the contract. Therefore, an #arbitral tribunal seized on the ground of an assigned #arbitration agreement of this kind has to deny its #jurisdiction.

FSCD 128 III 50 [63], FSCD 117 II 94 [100], FSCD 09.07.1996 [4P.289/1995] c. 2b

A contractual clause of non-assignability applies, as the #arbitration agreement itself, also to claims based on the termination of the contract.

FSCD 128 III 50 [63], FSCD 117 II 94 [99], *FSCD 116 Ia 56 [59]

When examining the #validity of the #arbitration agreement, the #arbitral tribunal may also have to determine its scope of application, in particular the parties bound by its provisions and the #validity of its #assignment.

FSCD 117 II 94 [98], FSCD 13.10.1992 [(1993) ASA p. 70]

A contractual clause of non-assignability does not only refer to claims related to the performance of the contract but includes also the non-assignability of claims of damages based on the contract.

FSCD 117 II 94 [99-100]

If the parties have agreed that an #assignment is only possible subject to prior written permission, if, in other words, the original parties to the contract did not wish to be confronted with another party without their consent, they also did not want this in #arbitral proceedings.

FSCD 117 II 94 [100]

When a claim is assigned, privileged and #ancillary rights, in particular an #arbitration agreement, are also assigned.

*FSCD 103 II 75 [77-79], FSCD 4P.124/2001 c. 2c, FSCD 09.07.1996 [4P.289/1995] c. 2a, FSCD 13.10.1992 [(1993) ASA p. 71]

The question of the #assignment of the #arbitration agreement to an individual or universal successor of the initial party has also to be examined under the most favourable law. It is recognized under Swiss law, considering that this is an #ancillary right with respect to the main contract.

GE 12.11.2004 [C/25597/2003] c. 3.2

2.11.6 Contract in Favour of a Third Party

Article 26(4) of the Energy Charter Treaty requires that the investor give its consent in writing. However, the #appellant does not argue that the #respondent would not have done so, neither does it invoke an error as to form which could invalidate the acceptance of the offer. Therefore, the existence of an #arbitration agreement must be admitted under the non-standard arrangement, which #case law has considered like a #contract in favour of a third person within the meaning of Article 112 CO.

FSCD 141 III 495 [503]

The personal scope of an #arbitration agreement is extended to the beneficiary in the case of a genuine #contract in favour of a third party [*echter Vertrag zu Gunsten eines Dritten, stipulation pour autrui parfait, contratto a favore di terzi*] (Art. 112(2) CO): if such a contract contains an #arbitration agreement, the third party may rely on it when enforcing its claim against the promisor, unless the #arbitration agreement specifically excludes it.

FSCD 4A_310/2016 c. 3.1.1

The beneficiary of a #contract in favour of a third party within the meaning of Article 112(2) CO acquires a claim against the debtor or promisor together with all privileged rights and #ancillary rights including the #arbitration agreement. The beneficiary may invoke such rights in #arbitral proceedings.

FSCD 4A_627/2011 c. 3.2, FSCD 4A_44/2011 c. 2.4.1

2.11.7 Assumption of an Obligation

The external #assumption of an obligation entails the transfer of the #ancillary rights, within the meaning of Article 178(1) CO, from the #obligor to the new #obligor. The #arbitration agreement is such an #ancillary right. Therefore, it binds the new #obligor, save exceptions. This is obvious for an exclusive #assumption of an obligation, because this implies a replacement of the passive element of the obligation, a new #obligor taking the place of the former one.

FSCD 134 III 565 [568]

#Case law has recognized a similar effect to the cumulative #assumption of an obligation (FSCD 4P.126/2001 of 18.12.2001 c. 2e/bb), even though, in this case, there is no change of #obligor, but the intervention of a second #obligor who becomes jointly and severally liable on the side of the original #obligor. As for the exclusive #assumption of an obligation, this solution is justified because the #arbitration agreement, as an accessory of the assumed obligation, is, as such, inseparable of the obligation and passes, in the absence of a rule to the contrary, to the new #obligor, when it becomes jointly and severally liable for the obligation, notwithstanding the fact that the original #obligor is still bound. It would be hardly efficient, from the viewpoint of #procedural economy, to force the #obligee to assert simultaneously the same claim before an #arbitral tribunal against the original #obligor and before a State court against the new #obligor, without mentioning the risk of contradictory decisions which proceedings before two different tribunals would entail. Furthermore, this solution does not aggravate the situation of the new co-#obligor as it knows, when assuming the obligation cumulatively, that the #obligee may sue it before an #arbitral tribunal. Therefore, it can refuse the #assumption of an obligation or agree with the #obligee not to apply the #arbitration agreement to possible disputes between them.

FSCD 134 III 565 [568]

From a functional point of view, the cumulative #assumption of an obligation is a means of #guarantee which serves to secure a claim. This does not mean that the other forms of #guarantees (guarantee, #guarantee of performance by a third person, bank guarantee, etc.) have to be treated the same way with regard to the #arbitration agreement. The situation of the other guarantors is fundamentally different from the one of the person who assumes an obligation: the former do not become the passive element of the guaranteed debt but conclude another obligation, be it a new one (#guarantee of performance by a third person) or an ancillary one (guarantee), in order to guarantee the payment of this debt. This is why the #arbitration agreement of the main contract may not be considered as an accessory of the debt stemming from the #guarantee contract *lato sensu*. Therefore, an #arbitral tribunal may not grant its #jurisdiction to decide on the rights of the #obligee against the guarantor only because the contract between the #obligee and the #obligor contains an #arbitration agreement.

FSCD 134 III 565 [569], FSCD 4P.126/2001 c. 2e/bb & 4e

2.11.8 Piercing of the Corporate Veil

It has also been admitted that when the conditions of the principle of #piercing the corporate veil are fulfilled, the #arbitration agreement binds not only the person that formally concluded the contract but also the third party which together with it forms an economic unit.

FSCD 4A_473/2016 c. 4.1, FSCD 4A_160/2009 c. 4.3, FSCD 4C.40/2003 c. 4.1

If two companies (or a #physical person and a company) have the same economic identity, it is admissible to disregard the legal independence and to pierce the corporate veil between the two companies, if the claim of the independence of one or the other legal entity appears to be abusive.

FSCD 4A_160/2009 c. 4.3.1

If, based on the #piercing of the corporate veil, the independence of the #subsidiary company as a #legal person is negated, it is generally justified to extend the #arbitration agreement without further ado to the #mother company, because the contractual effects are also transferred. The same reasoning applies when behind the so called "corporate veil" there is a shareholder.

FSCD 4A_160/2009 c. 4.3.1, FSCD 29.01.1996 [(1996) ASA p. 506]

In principle an #arbitration agreement is binding only on the parties which have agreed by contract to submit their disputes to #arbitral proceedings, be it directly or by their #agents. Cases of #legal succession, of subsequent approval of the #arbitration agreement or of #piercing of the corporate veil in case of an abusive challenge of the clause are reserved.

FSCD 4A_128/2008 c. 4.1.1, FSCD 4C.40/2003 c. 4.1

According to the principle of #privity of contractual obligations and the independence of #legal persons, Swiss law provides for strict requirements for the extension of an #arbitration agreement to a third person who is not mentioned in it.

FSCD 4A_128/2008 c. 4.1.2

In the absence of exceptional circumstances, the control of a #legal person by another does not constitute a sufficient element to reverse the presumption that only the person who signed the #arbitration agreement is bound by it.

FSCD 4A_128/2008 c. 4.1.2

Not every substantive #piercing of the corporate veil implies a binding effect on the #mother company through an #arbitration agreement signed by the #subsidiary company. Such a #piercing of the corporate veil has to be admitted if it results from the contract containing the #arbitration agreement that the #partners or the #mother company is normatively bound, in particular by the #apparent legal relationship.

FSCD 29.01.1996 [(1996) ASA p. 505]

If the obligation of the #mother company is based on legal grounds which are independent of the contract, e.g. on the protection of #good faith, on torts or on the violation of corporate or holding obligations, the application of the #arbitration agreement to the #mother company always requires an independent and, if necessary, formally valid #expression of intent.

FSCD 29.01.1996 [(1996) ASA p. 505]

Only where the #subsidiary company's #independence as a corporate body is, in application of the #piercing of the corporate veil doctrine, answered in the negative, it is generally justified to extend the binding effect of the #arbitration agreement to the #mother company without further ado, as the contractual effects are shifted.

FSCD 29.01.1996 [(1996) ASA p. 506]

The case is however different if control according to the law on persons should be reflected in an additional liability, in particular by a direct liability of the #mother company as a compensation of loss in the internal relationship. In such a case it is decisive that there is a duty of two #legal persons based on different legal grounds. This excludes the binding effect of the #arbitration agreement entered into by one person on the other person. Therefore, in the event of #piercing of the corporate veil due to an undercapitalisation in a holding, an #arbitration agreement signed by the #subsidiary company is only binding on the #mother company if it subjected itself to the clause by a corresponding #expression of intent.

FSCD 29.01.1996 [(1996) ASA p. 506]

2.11.9 Group of Companies Doctrine

The question of the extension of an #arbitration agreement to parties, who did not sign it, can also arise in connection with groups of companies or companies controlled by the State.

FSCD 120 II 155 [163]

Besides the fact that a binding effect based on the “*groupe de sociétés*” doctrine has to be admitted with restraint, in particular with respect to the #respondent in #arbitral proceedings, such an effect presupposes special circumstances which justify the protection of #good faith of a third party based on the #apparent legal relationship.

FSCD 29.01.1996 [(1996) ASA p. 506]

2.11.10 Guarantees

From a functional point of view, the cumulative #assumption of an obligation is a means of #guarantee which serves to secure a claim. This does not mean that the other forms of #guarantees (#guarantee, #guarantee of performance by a third person, bank guarantee, etc.) have to be treated the same way with regard to the #arbitration agreement. The situation of the other guarantors is fundamentally different from the one of the person who assumes an obligation: the former do not become the passive element of the guaranteed debt but conclude another obligation, be it a new one (#guarantee of performance by a third person) or an ancillary one (#guarantee), in order to guarantee the payment of this debt. This is why the #arbitration agreement of the main contract cannot be considered as an accessory of the debt stemming from the #guarantee contract *lato sensu*. Therefore, an #arbitral tribunal may not grant its #jurisdiction to decide on the rights of the #obligee against the guarantor only because the contract between the #obligee and the #obligor contains an #arbitration agreement.

FSCD 134 III 565 [569], FSCD 4A_44/2011 c. 2.4.1, FSCD 4P.126/2001 c. 2e/bb & 4e

In order to recognize the #arbitral tribunal’s #jurisdiction, the #guarantee contract must contain an #arbitration agreement providing specifically for the #jurisdiction, respectively a sufficient reference to the #arbitration agreement of the main contract (#arbitration agreement by reference), or, in the absence of such a reference, the guarantor must show, explicitly or by #implied actions, its intent to be bound by the #arbitration agreement of the principal contract, a will which the #obligee could in #good faith (according to the principle of #trust) interpret as the expression of such an intent.

FSCD 134 III 565 [569]

2.11.11 Adhesion by Implied Actions

It has been decided, still in the same sense and in general, that depending on the circumstances, a certain behaviour can replace, based on #good faith considerations, the observation of form requirements.

FSCD 129 III 727 [735], FSCD 121 III 38 [45], FSCD 5A_441/2015 c. 4.2, FSCD 4P.124/2001 c. 2c, SG 16.01.2007 c. 2c

The extension of the #arbitration agreement by #implied actions to a third party requires that this party intervened in a constant and repeated manner in the execution of the contract.

FSCD 129 III 727 [735], FSCD 4P.48/2005 c. 3.4.1

2.11.12 Adhesion through Membership in a Corporate Body

- For the #arbitration agreement contained in #statutes of a corporate body, see Article 178(1) PILA, section 1.8

The mere bringing of #arbitral proceedings is not comparable to the declaration of membership to the #statutes of a company and does not therefore lead to the conclusion of a valid #arbitration agreement.

FSCD 137 III 37 [44]

The provisions of the Listing Rules of the SIX Swiss Exchange which provide for the #jurisdiction of an #arbitral tribunal does not constitute an offer to submit the existing dispute to arbitration.

FSCD 137 III 37 [44-45]

The question whether an #arbitration agreement – with respect to its form - has been validly concluded according to Article 178(1) PILA, arises only for the conclusion of the #arbitration agreement. Therefore, the question whether it is possible to adhere indirectly to an #arbitration agreement, e.g. by the membership in a corporation with #statutes containing an #arbitration agreement, does not relate to the form but to the content of the accession to the corporation. Once the #arbitration agreement is validly concluded, it can be transferred to a third person by #legal succession, together with the legal relationship to which the agreement refers, without any need for the assent of this third person and thus without respecting again the form required by Article 178(1) PILA for the conclusion of the #arbitration agreement.

SG 16.01.2007 c. 2a

2.11.13 Standing to Sue and Capacity to Be a Party

- See also Article 190(2)(b) PILA, section 2b.12.11

With respect to the #capacity to be a party, the PILA contains an express provision only for entities controlled or organized by a State (Art. 177(2) PILA). The PILA does not contain any provision on the subjective #capacity of non-State parties to be a party. Therefore, the general procedural principle applies according to which the #capacity to be a party depends on the preliminary substantive law issue of the #legal capacity. This #capacity is determined by the law applicable to the personal status pursuant to Articles 33 et seq. PILA (for #physical persons) respectively Articles 154 and 155(c) PILA (for #legal persons). The special #conflict of laws rule of Article 178(2) PILA does not come into play in this context.

FSCD 138 III 714 [720-721], FSCD 4A_118/2014 c. 3.1, FSCD 4A_428/2008 c. 3.2

When a foreign entity is a #legal person according to the law at the place of incorporation, it is also capable of being a party to an international arbitration seated in Switzerland. Any limitations of the legal status of the person or legal entity that are specific to #arbitral proceedings, but which do not affect the legal personality of the foreign entity are irrelevant with respect to the #capacity of that person or legal entity to be a party to an arbitration seated in Switzerland.

FSCD 138 III 714 [722]

In principle it is necessary to make a clear distinction between the notion of #standing to sue or to be sued, on the one hand, and the notion of #capacity to be a party, on the other hand. The #capacity to sue or to be sued in civil proceedings pertains to the substantive grounds of the claim; it pertains to the (active or passive) entitlement over the right claimed and its absence entails not the #inadmissibility of the claim but its dismissal (FSCD 108 II 216 c. 1). On the contrary, the #capacity to be a party, understood in its widest sense, consists in the faculty to participate in proceedings as a party; it represents a condition of #admissibility of the claim and if not fulfilled will lead to a #bar to consider the case. Therefore, the question whether #claimant or #respondent is a party to the #arbitration agreement, in other words, whether it has the #capacity to be a party, is an issue of #admissibility which determines the #jurisdiction of the #arbitral tribunal and which should not, theoretically, be confused with the substantive #prayer for relief derived from the lack of #capacity to sue or to be sued.

FSCD 128 III 50 [55], FSCD 4A_428/2011 c. 4.1.1, FSCD 06.09.1996 [(1997) ASA p. 302-303], FSCD 31.01.1992 c. 1a

The #assignment of a claim (or of a contractual relationship), including an #arbitration agreement has a double nature: it entails not only the substantive transfer of the right assigned, issue which is a substantive matter, but also the transfer of the #arbitration agreement, issue which is a procedural matter. In other words, the same circumstance – i.e. the valid #assignment of the disputed claim – has two distinct effects, since it determines at the same time the #capacity to sue or to be sued of the #assignee as well as the #capacity to be a party in #arbitral proceedings launched by the performance of the #arbitration agreement. This is why the notions of #capacity to sue and to be sued and of #capacity to be a party overlap in a certain sense in the case of an #assignment of claim which makes its delimitation difficult.

FSCD 128 III 50 [56]

The question of the #standing to sue – or the entitlement over the claim resulting from the main contract – is a substantive issue. The #arbitral tribunal must have asserted its #jurisdiction, which can alone be the subject of a #motion to set aside in order to examine this issue.

FSCD 117 II 94 [98], *FSCD 102 Ia 574 [577-578], FSCD 4P.290/2000 c. 3b, FSCD 16.05.1995 [(1996) ASA p. 670]

Deciding whether or not a party has #standing to appeal the decision taken by a sport #federation is not an issue of the #jurisdiction of the #arbitral tribunal but an issue of the #standing to act.

FSCD 4A_540/2013 c. 3.1, FSCD 4A_488/2011 c. 4.3.1, FSCD 4A_428/2011 c. 4.1.1, FSCD 4A_424/2008 c. 3.3

The question of the #arbitral tribunal's #jurisdiction also includes the issue of the personal scope of the #arbitration agreement. Whether all parties are bound by it is a question of their #capacity to be a party to the #arbitral proceedings and thus a condition to hear the case [*Sachurteilsvoraussetzung, Eintretensvoraussetzung*] (FSCD 128 III 50 [54]).

FSCD 22.02.2008 [4A_244/2007] c. 5.1, FSCD 4P.137/2002 c. 3.1

The #standing to sue, i.e. the right of the #claimant as the substantive #holder of the claim to file the claim against the #respondent, is a notion of substantive law. The #standing to sue and #to be sued are not prerequisites in the sense of procedural conditions on which the #admissibility of a claim would depend. If the #standing to sue is missing, the claim has to be dismissed by a #decision on the #merits. On the contrary, the #capacity to be a party is a notion of procedural law and represents the procedural right to appear as a party in the proceedings.

FSCD 13.10.1992 [(1993) ASA p. 70-71]

If a party contests the #capacity to be a party of the opposing party, it recognises, in principle, the #jurisdiction of the #arbitral tribunal.

FSCD 31.01.1992 c. 1a

2.11.14 Individual Cases

Under Swiss law, bankruptcy does not affect the #validity of the #arbitration agreement.

FSCD 138 III 714 [726]

If a guarantor states in a #guarantee “as if the Guarantor was the original obligor”, this does not yet mean that the guarantor accepts to be sued by the #obligee before the same tribunal to which the #obligor voluntarily submitted its disputes.

FSCD 4A_128/2008 c. 5.2

Regarding, in particular, the lack of a specific #power of attorney (“*mandato expreso*”) according to Article 1713 of the Spanish Civil Code and the subsequent approval by conduct (#good faith expectation) as well as, subsidiarily, by a #power of representation by #estoppel within the meaning of Article 281 of the Spanish Commercial Code, see

FSCD 22.12.1992 [(1996) ASA p. 649]

If [a co-owner of a condominium [Art. 712a et seq. CO] sells its part to a third party, the acquirer will not be bound by the #arbitration agreement [in the administration and use regulations] by virtue of Article 649a CC. It follows that the #arbitration agreement must have been accepted in writing, pursuant to Article 6 fConcordat and pursuant to the conditions provided for in Articles 357 et seq. CCP under the aegis of CCP, by the owner (of floors) concerned, failing which it is not binding on it.

VD 27.09.2013 c. 4

There is no #abuse of right in holding that a non-signatory company of an #arbitration agreement contained in a contract for the sale of its shares is not bound by the #arbitration agreement and it does not matter that the buyers were both organs and shareholders of this company as there was no #evidence that the company buyers were acting on behalf of the company and there was no #evidence of the company’s intent to waive the #jurisdiction of the State courts.

VD 25.09.2013 p. 8

2.12 Scope of Application with Respect to Time

When an #arbitration agreement has been entered into, it can be terminated at any time, in particular during the #arbitral proceedings, by an agreement of the parties. In such a case, the #jurisdiction of the #arbitral tribunal lapses.

FSCD 4A_305/2013 c. 3.2.1

If the #jurisdiction of an #arbitral tribunal is grounded on an #arbitration agreement contained in an #investment treaty, this #jurisdiction covers – with regard to time – only violations of the treaty which took place after the #claimant investor made its investment and thus triggered the application of the treaty between the parties (cf. Art. 28 Vienna Convention on the Law of Treaties).

FSCD 4P.114/2006 c. 6.4

If the parties agreed that a #request for arbitration has to be submitted to the #arbitral tribunal within a #time limit of 30 days after it was agreed that the difference or dispute could not be resolved by negotiation, this means that they wanted to exclude the #arbitrators' #jurisdiction after the expiry of this #time limit.

FSCD 17.08.1995 [(1996) ASA p. 678-679]

The #arbitration agreement according to which “the said difference or dispute shall be so referred by either party within the thirty days after it was agreed that the difference or dispute cannot be resolved by negotiation”, does, notwithstanding the term “it was agreed”, not require an express agreement between the parties on the failure of their negotiations.

FSCD 17.08.1995 [(1996) ASA p. 678]

2.13 Arbitration Agreement and Agreement on Jurisdiction

The question whether an #agreement on #jurisdiction in a #settlement agreement, which repeals a main contract, does discharge the #arbitration agreement thereof, has to be determined by #interpretation.

FSCD 121 III 495 [496-497], *FSCD 116 Ia 56 [58-59], FSCD 4A_244/2012 c. 4.5, FSCD 4C.163/2001 c. 3b

The principle of freedom of contract allows parties to agree that the recourse to arbitration is optional in the sense that the two parties or one of them can choose between arbitration and the ordinary #jurisdiction of the State courts.

FSCD 4A_515/2012 c. 5.2

If an #arbitration agreement provides that possible disputes with regard to the quality of the products will be resolved in a non-judicial way by arbitration and that otherwise (*ansonsten*) the #forum will be Lugano/Switzerland (*ist der Gerichtsstand Lugano/Schweiz*), this can only mean that disputes between the parties are decided by the ordinary State court of Lugano (#choice of jurisdiction), whereas certain types of disputes will be submitted to an #arbitral tribunal.

TI 25.08.1993 [(1994) Rep p. 410]

2.14 Validity and Mandatory Provisions of a Third State

The Federal Supreme Court has not yet determined if and to what extent an #arbitral tribunal must take into account the #mandatory norms of another State when assessing the #validity of an #arbitration agreement.

FSCD 138 III 714 [726-727]

3 *Autonomy of the Arbitration Agreement (3)*

3.1 Principle

Swiss law recognizes the principle of #autonomy of the #arbitration agreement, a principle which has been recognized by the Swiss #case law decades ago and which is universally recognized in Western Europe and in the United States under the denomination "severability" or "separability".

FSCD 142 III 239 [244], FSCD 119 II 380 [384], *FSCD 116 Ia 56 [59], *FSCD 88 I 100 [105], *FSCD 65 I 19 [21-22], *FSCD 59 I 177 [179-180]

Article 178(3) PILA is not sufficiently precise. On the one hand, the text is too restrictive as it only addresses the #validity of the main contract, even though the issue of #autonomy of the #arbitration agreement may arise even if the main contract does not exist. On the other hand, the text is too broad as it wrongly suggests that the #invalidity of the main contract may never have an impact on the #validity of the #arbitration agreement.

FSCD 142 III 239 [245]

The principle of the #autonomy of the #arbitration agreement means that the #arbitration agreement does not necessarily share the fate of the main contract with respect to its entry into force, #validity and termination.

FSCD 140 III 134 [140]

An #arbitration agreement is, like an #agreement on jurisdiction (*FSCD 93 I 323), a procedural contract which is autonomous and independent from the main contract in which it is contained. The #arbitration agreement applies even if one of the parties is not bound by the main contract, since such an agreement is normally also made to resolve disputes concerning the #validity of the main contract.

FSCD 121 III 495 [499], FSCD 119 II 380 [384], *FSCD 59 I 177 [179-180], FSCD 4P.290/2000 c. 3b, FSCD 16.05.1995 [(1996) ASA p. 670]

The #arbitration agreement has an independent or autonomous character.

FSCD 119 II 380 [384], FSCD 06.09.1996 [(1997) ASA p. 300], VD 30.03.1993 [(1995) ASA p. 65]

Even if the #arbitration agreement is formally linked to the substantive main contract in the same document, it is, as a procedural agreement, independent to the extent that in case of doubt it has to be assumed that the parties did not want to submit to arbitration only disputes concerning the performance of their mutual obligations under the contract, but also disputes on whether a contract has been validly concluded. Therefore, the #arbitration agreement does not necessarily share the fate of the main contract.

*FSCD 116 Ia 56 [59], FSCD 06.09.1996 [(1997) ASA p. 300], VD 30.03.1993 [(1995) ASA p. 65]

It follows from the #autonomy of the #arbitration agreement that in international matters the #arbitration agreement and the main contract can be subject to different laws.

FSCD 21.03.1995 [(1996) ASA p. 258]

An #arbitration agreement is independent from the main contract, even though it is normally contained in it.

FSCD 06.07.1990 c. 2a/bb

3.2 Conclusion of the Arbitration Agreement before the Conclusion of the Main Contract

In exceptional circumstances, an #arbitration agreement may be created before the main contract, of which it should form part, is concluded, even if the contract does not come into existence at all. Admittedly, the mere exchange of drafts in the framework of negotiations between potential co-contractors is not normally sufficient to conclude, on the basis of the principle of #trust, that the parties intended to bind themselves to an individual clause of the contract even before the latter was concluded. Neither is it usual in business relationships to enter into an #arbitration agreement by way of an exchange of draft contracts which are not binding from a substantive point of view. However, the existence in a given situation of certain qualified additional circumstances may sometimes lead to the opposite conclusion as an exception and may endow the #arbitral tribunal with #jurisdiction to address a claim based on *culpa in contrahendo* on the basis of an exchange of drafts of a contract.

FSCD 142 III 239 [246]

This could happen, for instance, when in the past, the parties had entered into several contracts, each time containing the same #arbitration agreement, when they have a recognizable and objectively understandable interest to submit to the #jurisdiction of an #arbitral tribunal, irrespective of whether or not the main contract was concluded (neutrality of the #forum, choice of an international language, #confidentiality, etc.) or if the drafts they exchanged reveal their common intent to conclude an #arbitration agreement, irrespective of the outcome of the negotiations concerning the main contract; the latter hypothesis may be the case when in the framework of successive exchanges of several amended drafts of the main contract, the parties make various changes to the #arbitration agreement and the final modified version then remains unchanged throughout one or several subsequent exchanges of drafts of the main contract.

FSCD 142 III 239 [246]

3.3 Assignment of the Main Contract

The fact that the #arbitration agreement is, based on its function, severable from the main contract (FSCD 119 II 380 [384], *FSCD 116 Ia 56 [59]) does not entail that it is necessarily independent therefrom.

FSCD 128 III 50 [55]

Swiss law, as German and French law, admits that the #arbitration agreement, as an ancillary clause of procedural nature, is transferred to the assignee in case of the #assignment of claim (*FSCD 103 II 75, FSCD 13.10.1992 [(1993) ASA p. 68]) or in case of the #assumption of a contractual relationship (FSCD 4P.124/2001 c. 2c]) provided that there is no agreement to the contrary.

FSCD 128 III 50 [55-56], FSCD 4P.126/2001 c. 2e/bb

As far as the #assignment of claim is concerned, such an effect is derived from Article 170 CO, whether the #arbitration agreement is considered as a preferential right or as an #ancillary right.

FSCD 128 III 50 [56]

3.4 Invalidity of the Main Contract

There are a number of situations in which the #arbitration agreement shares the fate of the main contract. Situations of this kind, which the doctrine in German refers to as *Fehleridentität* or identity of defect are met in particular when a party does not have the #capacity to contract, or does not have the authority to represent the party wishing to contract or where the main contract was concluded under #duress.

FSCD 142 III 239 [245]

The principle of #autonomy of the #arbitration agreement means that the mere claim of the non-existence of the main contract is not sufficient to put an end to the #arbitrator's #jurisdiction. However, if the #arbitrator finds that the main contract does not exist and that the cause of such non-existence also impacts the #arbitration agreement, it must deny #jurisdiction. According to a French commentator, the absence of consent of one of the parties is the least implausible hypothesis of non-severability. According to the latter, if the conduct of the addressee of an offer does not amount to acceptance, the main contract is not concluded, and the #arbitration agreement does not become more effective than the other clauses for lack of a specific exchange of consent in respect thereof.

FSCD 142 III 239 [245-246]

The principle of the #autonomy of the agreement does not apply if the cause of the #invalidity of the main contract also affects the #arbitration agreement contained in it. This is for instance the case if one of the parties' intent to enter into an agreement was flawed, because one of the parties lacked #capacity, because there is a simulated agreement, or because of a #defect with respect to consent due to for example #duress.

FSCD 121 III 495 [500], FSCD 119 II 380 [384], *FSCD 88 I 100 [105], FSCD 17.02.1999 [(2000) ASA p. 317], FSCD 09.06.1998 [(1998) ASA p. 657], VD 30.03.1993 [(1995) ASA p. 65]

If the #validity of the main contract to which the #arbitration agreement refers is disputed, the #validity of the #arbitration agreement is not necessarily concerned, as the #arbitration agreement constitutes an independent agreement even if it is contained in the main contract.

*FSCD 88 I 100 [104-105], FSCD 06.09.1996 [(1997) ASA p. 300]

In case of doubt one must assume that the parties to the contract also wanted to submit the question of #validity of the main contract containing the #arbitration agreement to the #arbitrators. This presumption applies especially when one of the parties wants to challenge the main contract for a #defect with respect to consent.

*FSCD 88 I 100 [105], *FSCD 59 I 177 [179-180], *BS 02.01.1984 [(1985) ASA p. 21-22]

The principle of the #autonomy of the #arbitration agreement – found in the CCP at Article 357, signifies that the #validity of the #arbitration agreement cannot be disputed on the sole ground of the #invalidity of the main contract – is not applicable when the cause of the #invalidity of the main contract also affects the #arbitration agreement which is contained therein; this is notably the case where the intent of one of the parties to contract suffers from a #defect with respect to consent, such as #duress. This problematic does not however affect the #jurisdiction to decide on the #validity of the procedural agreement.

*NE 28.04.2016 c. 5

3.5 Termination of the Main Contract

According to the principle of #autonomy of the #arbitration agreement, it must be basically assumed that the #arbitration agreement contained in a contract is not affected by the expiry of the contractual time or its termination. An agreement to the contrary cannot be accepted lightly.

FSCD 140 III 134 [141]

In general, the acceptance of the expiration of the #arbitration agreement as a consequence of the termination of the contract would carry some significant uncertainties, particularly because the very #validity of the termination, its time and consequences are indeed often in dispute between the parties.

FSCD 140 III 134 [142-143]

Adopting rules as to #jurisdiction that would be dependent upon the time and the #validity of the termination of the main contract appears therefore tedious and problematic as a finding of the contractually instituted #arbitral tribunal that the termination is valid would result in its lack of #jurisdiction and render an arbitral #award impossible as to the termination or its consequences. This would then cause the parties to seize a State court to determine whether the contract still remains in force or not and – should this be the case – to invoke the #arbitration agreement again. Such a result would contradict the intention of the parties expressed in the #arbitration agreement to submit any possible disputes to a specific dispute resolution mechanism.

FSCD 140 III 134 [142-143]

In case of doubt, clauses on #jurisdiction, whether #arbitration agreements or #agreements on jurisdiction, have to be considered as autonomous agreements, in the sense that they also embrace disputes concerning the #validity of the main contract or the disputes arising in connection with its termination and its liquidation. However, freedom of contract allows the parties to provide for the contrary (see Art. 8(4) fICC Arbitration Rules).

FSCD 121 III 495 [497, 500], *FSCD 116 Ia 56 [58-59]

Another solution only applies if the parties, by the termination of the main contract, have also expressly or tacitly revoked the #arbitration agreement contained therein.

FSCD 121 III 495 [498], FSCD 06.09.1996 [(1997) ASA p. 300]

This also applies to the case of a #termination agreement regarding the main contract, as it has to be assumed in general, except if the parties provide expressly for the contrary in their #termination agreement, that they also want to apply the #arbitration agreement to disputes in connection with the termination of the contract.

*FSCD 116 Ia 56 [59]

In the absence of a party agreement to the contrary, it also follows from the principle of #autonomy (or independence) of the #arbitration agreement that the #arbitral tribunal has #jurisdiction to decide on the #validity or the termination of the main contract. This also applies when the parties have terminated the main contract by a later #settlement agreement without an #arbitration agreement.

*FSCD 88 I 100 [105], FSCD 06.09.1996 [(1997) ASA p. 300]

3.6 Settlement Agreement

The conclusion of a #settlement agreement regarding contractual claims normally does not have any effect on the #validity of the #arbitration agreement in the main contract, except if the parties have agreed explicitly or tacitly on its #invalidity.

FSCD 121 III 495 [497], FSCD 06.09.1996 [(1997) ASA p. 300], FSCD 15.11.1989 c. 4b/bb (not published in FSCD 115 II 390), *FSCD 29.11.1985 c. 2

Such an intent of the parties can in principle be presumed when a contract with an #arbitration agreement or a #agreement on jurisdiction is replaced by another contract which contains a similar clause with regard to #jurisdiction. In such a case, it has to be presumed that the repeal of the first contract also includes the procedural provisions and their replacement by the clauses of the same nature contained in the subsequent contract. This is not a #legal presumption [*cf. Art. 116(1) CO*], but follows from the principle of #good faith, according to which, in the absence of a common party intent to the contrary, a later contractual clause replaces the former, according to the presumed intention of the parties, if the simultaneous application of both clauses is excluded (*ius posterior derogat priori*).

FSCD 121 III 495 [497-498], FSCD 4C.163/2001 c. 3b, FSCD 08.12.1999 [(2000) ASA p. 555]

In the absence of #evidence to the contrary, it can be assumed that the parties to the #arbitration agreement also wanted to submit the question of whether a #settlement agreement terminated the contract as a whole to arbitration.

FSCD 06.09.1996 [(1997) ASA p. 300], FSCD 15.11.1989 c. 4b/bb (not published in FSCD 115 II 390), *FSCD 29.11.1985 c. 2

In the absence of a party agreement to the contrary, it also follows from the principle of #autonomy (or independence) of the #arbitration agreement that the #arbitral tribunal has #jurisdiction to decide on the #validity or the termination of

the main contract. This also applies when the parties have terminated the main contract by a later #settlement agreement without an #arbitration agreement.

*FSCD 88 I 100 [105], FSCD 06.09.1996 [(1997) ASA p. 300]

This is also the case when a claim falling within the scope of an #arbitration agreement is terminated by #novation [Art. 116 CO] or a #settlement agreement.

FSCD 06.09.1996 [(1997) ASA p. 300]

3.7 Main Contract Flawed by Corruption

According to Swiss law, promises to pay #bribes are illegal and therefore null and void according to Articles 19 et seq. CO. They are also contrary to international #public policy. However, an #arbitration agreement concluded along with the main contract based on such #bribes is not necessarily null and void as well. In fact, there could be a controversy concerning the question of whether the payments are legal payments or illegal #bribes. Only #evidentiary proceedings – which can of course be within the #jurisdiction of an #arbitral tribunal – can answer this question. Therefore, the principle of #autonomy of the #arbitration agreement is completely justified in this context. The former opinion according to which contracts flawed by #bribery cannot be examined by any authority, even arbitral, is outdated.

FSCD 119 II 380 [384-385]

3.8 Arbitration Defence of Article 7 PILA

- See also Article II(3) NYC, section 3.1
- Due to the entry into force on 1 January 2007 of Article 186(1bis) PILA, the former #case law should be consulted with caution

3.8.1 Principle

According to Article 61 CCP, the State court shall decline #jurisdiction only if the parties have concluded an #arbitration agreement which relates to an arbitrable dispute. These elements mentioned in Article 61 CCP are to be examined in a first step with full #powers of review.

FSCD 140 III 367 [370], FSCD 138 III 681 [685], FSCD 4A_562/2013 c. 2.2.3, *NE 28.04.2016 c. 5, *VS 08.05.2015 c. 2

If there is a valid #arbitration agreement, the State court must, as a matter of principle, refer the #claimant to arbitration – unless the #respondent consents – and does so irrespective of whether or not the arbitration has already been initiated.

FSCD 138 III 681 [684], FSCD 124 III 83 [87], FSCD 4A_279/2010 c. 2

Article 7 PILA provides the following: "If the parties have concluded an arbitration agreement concerning an arbitrable dispute, the Swiss court invoked shall decline jurisdiction unless: (a) the defendant has made an appearance in the proceedings without reservation; (b) the court determines that the arbitration agreement is void, without effect, or cannot be performed, or (c) the arbitral

tribunal cannot be constituted due to reasons for which the defendant in the arbitration proceedings is obviously responsible”.

FSCD 138 III 681 [683-684], FSCD 122 III 139 [142], FSCD 4A_160/2009 c. 5.2.1, VD 05.12.2017 c. 3.2.1, GE 14.09.2007 [C/24853/2006] c. 4.1, GE 17.02.2006 [C/10108/2004] c. c. 2.3, GE 12.11.2004 [C/25597/2003] c. 3.1

The State court seized by a claim on the #merits – the case of an action claiming declaratory relief concerning the #jurisdiction of the #arbitrators being left aside (FSCD 26.01.1987, SJ 1987 p. 230 c. 2a) – must decide on its own #jurisdiction, even though this forces it to decide on the #validity of the #arbitration agreement (FSCD 16.07.1997 [4C.206/1996, c. 7b/bb]). The State court may examine, according to Article II(3) NYC or Article 7(b) PILA whether the clause is void, without effect, or cannot be performed. This could be the case if the parties have waived the #arbitration agreement.

FSCD 127 III 279 [286]

If the State court is seized by an #arbitration defence and the #arbitral tribunal has its #seat in Switzerland, the State court must decline #jurisdiction if a #summary examination of the #arbitration agreement does not lead this court to the conclusion that the #arbitration agreement is void, without effect, or cannot be performed.

FSCD 122 III 139 [142], GE 14.09.2007 [C/24853/2006] c. 4.1

Article 7 PILA entitles the State court to examine, as a #preliminary issue, the validity of the #arbitration agreement in order to decide on its own #jurisdiction.

FSCD 122 III 139 [142], GE 13.05.2005 c. 2.1

Article 7(c) PILA shall avoid that a party to the proceedings may doubly hinder the #claimant to have recourse to the State court, by blocking the #constitution of the #arbitral tribunal on the one hand, and by raising, in case of a claim before a State court, the #arbitration defence (which has been torpedoed by #respondent itself).

FSCD 4A_160/2009 c. 5.2.1

The question whether the complete failure of the #constitution of the #arbitral tribunal due to the fault of one party can already be covered by Article 7(b) PILA is not decisive, given the same legal consequences provided for in Article 7(b) and (c) PILA.

FSCD 4A_160/2009 c. 5.2.1

The reservation provided for in Articles II(3) NYC and 7(b) PILA applies to cases where the #arbitration agreement is “void, without effect or cannot be performed”. These provisions consider three situations which are not always easy to distinguish. Independently of the category in which it is placed, the situation where the nullity of the #arbitration agreement is due to the passing of the time for which it has been provided, is considered as an application of the reservation of Article II(3) NYC or Article 7(b) PILA.

FSCD 16.07.1997 c. 7b/dd

If there is no clear and unambiguous #expression of intent of the parties to mandatorily submit their disputes to an #arbitral tribunal, to the exclusion of the State courts, there is no #arbitration agreement within the meaning of Article 61

CCP, with the result that a #summary examination of the agreement pursuant to Article 61(b) CCP is not necessary.

* VS 08.05.2015 c. 2

In order for Article 7(b) PILA to be applicable, the parties must have entered into a valid #arbitration agreement according to the prerequisites of Article 178 PILA.

GE 18.04.2008 c. 2.1

A valid #arbitration agreement grounds the #jurisdiction of the #arbitral tribunal and leads in principle to the lack of #jurisdiction of State courts. In proceedings filed before the State courts in violation of the agreement, the #arbitration agreement hinders the proceedings.

ZH 25.08.1992 [(1993) ZR p. 73]

3.8.2 Applicability of the PILA or the NYC

If the #arbitration agreement provides that the #seat of the #arbitral proceedings is in Switzerland, the seized Swiss State court has to decide on the basis of the PILA whether the #arbitration defence is founded.

FSCD 122 III 139 [141-142], FSCD 4A_160/2009 c. 4.1

If the #arbitral tribunal has its seat abroad, the Swiss State court, before which an #arbitration defence is raised, has to examine the #validity of the #arbitration agreement based on Article II(2) NYC.

FSCD 121 III 38 [42]

In case of an international arbitration and to the extent that it is not argued that the seat of the #arbitral tribunal to be constituted would be in Switzerland, it is in principle the NYC which applies. It is without importance that the State in which the arbitration has to take place is not a member State of the NYC.

FSCD 4A_279/2010 c. 2, FSCD 16.07.1997 c. 7b/aa

If it is not clear whether the #arbitral tribunal which possibly has #jurisdiction has its #seat in Switzerland, the #validity of the #arbitration agreement is not examined pursuant to Article 178 PILA but pursuant to Article II(3) NYC.

ZH 25.08.1992 [(1993) ZR p. 77]

3.8.3 Timeliness of the Arbitration Defence

The issue as to whether the #arbitration defence has been raised in time is neither governed by the NYC nor by the PILA, but by the *lex fori*.

FSCD 127 III 279 [287], FSCD 111 II 62 [66]

The #arbitration defence has to be raised prior to the pleadings on the #merits and the parties have to be referred, as the case may be, quickly to the #arbitral tribunal. An #arbitration defence which is raised too late cannot be used as a means to delay the proceedings. Such an #interpretation is compatible with Article VI(1) of the European Convention on International Commercial Arbitration of 21 April 1961, as well as the internal law of the majority of the member States of the NYC.

FSCD 111 II 62 [65-66]

It is possible to waive an #arbitration agreement tacitly. This happens in particular when a party acts in front of the State courts notwithstanding the existence of an #arbitration agreement and the #respondent proceeds on the #merits without invoking the #arbitration agreement. However, a #waiver cannot be deduced from a mere letter of notice, albeit accompanied by a threat to sue in the State courts, which remained without effect because the #legal person on behalf of which the letter was sent acted in front of the #arbitral tribunal mentioned in the #arbitration agreement between the parties.

FSCD 4A_136/2015 c. 2.2.3.4, FSCD 4A_579/2010 c. 2.2.2

Even if the filing of the request for conciliation could be deemed to be a #waiver of arbitration, the fact that the #appellant did not proceed on the #merits before the Geneva courts but immediately and of its own accord, raised the #arbitration defence did not allow one to consider the behaviour of the #appellant as a tacit waiver of the #arbitration agreement.

FSCD 4A_136/2015 c. 2.2.3.4

3.8.4 Default of the Respondent

If the #respondent does not participate at all in the proceedings, but if it results from the file that the parties are bound by an #arbitration agreement, the Swiss court which is seized despite this #arbitration agreement has to deny its #jurisdiction *ex officio*, provided none of the conditions mentioned in Article 7(a) to (c) PILA is fulfilled.

NE 01.02.1993 [(1993) RJN p. 101-102]

3.8.5 Jurisdiction of Swiss Court to Order Provisional Measures (Art. 10 PILA)

It is acknowledged under Swiss law and on an international level that an #arbitration agreement does not prevent the parties from addressing the State courts to obtain #provisional measures. This possibility remains even after the #constitution of the #arbitral tribunal.

VD 07./09.01.2008 c. IIIg

A Swiss State court has #jurisdiction even if the #seat of the arbitration is abroad, if the measure has to be executed in Switzerland.

VD 07./09.01.2008 c. IIIg

The #jurisdiction of the Swiss State courts to order #provisional measures pursuant to Article 10 PILA is not excluded by a valid #arbitration agreement.

ZG 20.10.1989 [(1989-90) GVP p. 107]

3.8.6 Setting Aside the Debtor's Opposition

Article 7 PILA applies only to genuine proceedings leading to the establishment of a right and not to #debt enforcement proceedings. Hence, the proceedings for the #SADOSP cannot be withheld from the State court by an #arbitration agreement.

SO 08.01.1996 [(1996) SOG p. 34]

3.8.7 Relationship with Article II(3) NYC

The procedural form in which the #arbitration defence has to be raised is not contained in the NYC but in the national law of the State whose courts have been seized (*lex fori*).

FSCD 111 II 62 [65-66]

Article 7 PILA has adopted the system of Article II(3) NYC and commented on it slightly.

FSCD 16.07.1997 c. 7b/aa, ZH 25.08.1992 [(1993) ZR p. 73-74]

Article II(3) NYC does not exclude the possibility for a party to assert the absence or the #invalidity of an #arbitration agreement before the State courts by a declaratory #action but neither does it proscribe this way. Therefore, it leaves it up to the State courts to decide whether they prefer letting the #arbitrators decide on their own #jurisdiction or not.

*FSCD 26.01.1987 [(1987) SJ p. 230]

3.8.8 *Prima Facie* Review by the State Court (Seat of the Arbitral Tribunal in Switzerland)

Only when an #arbitration agreement on an arbitrable #subject matter within the meaning of Article 61 CCP has been concluded, does the second step according to Article 61(b) CCP require an examination as to whether the #arbitration agreement is manifestly invalid or unenforceable. This wording is similar to that of Article 7(b) PILA, although this provision, unlike Article 61(b) CCP, does not contain the word “manifestly”. With the criterion of obviousness in Article 61(b) CCP, the legislature sought to codify the #case law of the Federal Supreme Court on Article 7(b) PILA, according to which the State court is to review the #arbitration agreement with a mere #summary examination as to whether it is invalid, ineffective or unenforceable. The #summary examination under Article 61(b) CCP refers in particular to the scope of the #arbitration agreement and to pathological #arbitration agreements, i.e. agreements which, although making a dispute subject to a binding decision by a private #arbitral tribunal, contain provisions which are incomplete, unclear or contradictory.

FSCD 140 III 367 [370], FSCD 138 III 681 [685], FSCD 4A_562/2013 c. 2.2.3, *NE 28.04.2016 c. 5, *VS 08.05.2015 c. 2

Limited review by the State court is justified because in the framework of an #appeal against the #arbitral award, the State court may subsequently review freely whether or not the #arbitral tribunal rightly assumed or denied #jurisdiction.

FSCD 138 III 681 [685]

Accordingly, it is appropriate that when assessing a jurisdictional objection in favour of arbitration on the basis of a #summary examination of the #validity of the #arbitration agreement and its capability of being performed, the State court should decide in favour of arbitration if in doubt.

FSCD 138 III 681 [685]

A State court may only accept #jurisdiction when it is obvious that there is no valid #arbitration agreement between the parties. It is enough if the #jurisdiction of the State court appears to be superseded *prima facie* by the #arbitration agreement.

FSCD 138 III 681 [686]

The limited review by the State court also concerns the case in which there is a disagreement as to whether or not the #arbitration agreement extends to the claims submitted to the State court.

FSCD 138 III 681 [686], NE 28.04.2016 c. 5

Indeed, the issue of the objective scope of the #arbitration agreement may also be reviewed later in the framework of an #appeal against the #award pursuant to Article 190(2)(b) PILA.

FSCD 138 III 681 [686]

If the #arbitration agreement provides for a #seat of the #arbitral tribunal in Switzerland, the Swiss State court seized by an #arbitration defence limits itself to a #summary examination of the *prima facie* existence of an #arbitration agreement, in order not to prejudge the decision of the #arbitral tribunal on its own #jurisdiction.

FSCD 138 III 681 [684], FSCD 122 III 139 [141-142], FSCD 121 III 38 [41], *VS 08.05.2015 c. 2, LU 23.04.2008 c. 4.4.4, GE 18.04.2008 c. 2.1

If an #arbitration defence is raised before a State court and the #arbitral tribunal has its #seat in Switzerland, it must decline to exercise #jurisdiction if a #summary examination of the #arbitration agreement does not permit it to find that such agreement is void, without effect, or cannot be performed.

FSCD 138 III 681 [684], FSCD 122 III 139 [141-142], FSCD 4P.114/2004 c. 7.1, FSCD 4C.40/2003 c. 3, FSCD 31.10.1996 [(1986-98) Digest CAS p. 586], *VS 08.05.2015 c. 2

This applies if it is the substantive #validity of the #arbitration agreement which is at issue, given that the #jurisdiction to rule on this point lies primarily, or even exclusively, with the #arbitral tribunal (Art. 186(1) PILA).

FSCD 31.10.1996 [(1986-98) Digest CAS p. 586-587]

The same cannot be said, however, when the point at issue is the formal #validity of an #arbitration agreement, that is to say establishing essentially whether the #jurisdiction of the ordinary State court has been replaced by that of an #arbitral tribunal by an extension agreement which respects the legal requirements in terms of form. The effects of the #arbitration agreement, in the same way as those of the #forum selection clause, are generally characterized by the exclusion of a given decision-making #jurisdiction and the extension to another decision-making power. The #validity of the exclusion presupposes that the competent State court pursuant to the substantive law has been validly excluded. Now, even in cases which lend themselves to this, such exclusion may, among other reasons, face obstacles drawn from the formal provisions of procedural law.

FSCD 31.10.1996 [(1986-98) Digest CAS p. 587]

Consequently, the State court which is confronted with a motion raised in this connection, shall rule on the problem of form on the basis of its own #jurisdiction, which the #respondent intends to exclude, and not in terms of the extended #jurisdiction of another #court or tribunal. It should do this with unfettered #powers of review, whether the extension agreement at issue seeks to establish the #jurisdiction of another State court or that of an #arbitral tribunal. Indeed, it alone has the power to render a binding decision on the subject of exclusion of its own #jurisdiction, provided that a decision rendered elsewhere which has the substantive force of #*res judicata* has not already excluded such #jurisdiction.

FSCD 31.10.1996 [(1986-98) Digest CAS p. 587]

The consequence of this is, *inter alia*, that a decision whereby a court (ordinary or arbitration) with extended #jurisdiction declines #jurisdiction is not alone sufficient to establish the #jurisdiction of the court whose #jurisdiction is supposed to have been excluded. Thus, once the State court, before which the case has been brought, is called upon to rule exclusively on the exclusion of its own #jurisdiction and hence to render a binding decision on this point, it must rule on the issue with unfettered powers of examination, irrespective of whether it is the first or second court before which the objection of lack of #jurisdiction has been raised.

FSCD 31.10.1996 [(1986-98) Digest CAS p. 587]

Nor should one lose sight of the fact that formal provisions, where these perform a protective function, must ensure that waiving the legal protection provided by the State is not done lightly, but is the result of a well-established desire to do so. Consequently, the State court must make sure that only a validly agreed exemption excludes its own #jurisdiction.

FSCD 31.10.1996 [(1986-98) Digest CAS p. 588]

Where the #seat of the arbitration is in Switzerland, the Swiss judge must, according to the #case law, confine itself to a #summary examination of the *prima facie* existence of the #arbitration agreement. If, at the end of this examination, it comes to the conclusion that such an agreement exists, it must decline #jurisdiction, unless it finds that the agreement is null and void, inoperative or unenforceable or that it is established that the #respondent is preventing the #constitution of the #arbitral tribunal by tactics that the latter does not have the powers to thwart.

VD 05.12.2017 c. 3.2.1

According to Hurni, the issue of whether the #arbitration agreement is affected by a #defect in consent also takes place in this framework and without a detailed study.

*NE 28.04.2016 c. 5

If the State judge must confine itself to a #summary examination of whether *prima facie* there exists an #arbitration agreement, this is because it must not prejudge the #arbitral tribunal's decision on #jurisdiction. Its attention will be focused on the immediately available documents. This would seem to exclude the #hearing of the parties or #witnesses.

*NE 28.04.2016 c. 5

If the #arbitration agreement refers to an #arbitral tribunal having its #seat in Switzerland, the State court sitting in Switzerland and faced with an #arbitration defence examines only *prima facie* whether the #arbitration agreement on the basis of the #arbitration defence has become void, without effect, or cannot be performed within the meaning of Article 7(b) PILA. With respect to the decision on #jurisdiction, it has to give priority to the #arbitral tribunal, whose #award will be examined, upon a #motion for setting aside (Art. 190(2)(b) PILA), with unfettered #powers of review by the State instance of review.

LU 23.04.2008 c. 4.4.4

3.8.9 Unfettered Powers of Review of the State Court (Seat of the Arbitral Tribunal outside of Switzerland)

If the #arbitral tribunal has its seat abroad, the Swiss State court before which an #arbitration defence is raised has to decide on this defence with unfettered #powers of review with regard to the filed #grievances and in particular the one derived from Article II(3) NYC, without being allowed to limit itself to a *prima facie* examination.

FSCD 122 III 139 [142], FSCD 121 III 38 [42], FSCD 4A_279/2010 c. 2, LU 23.04.2008 c. 4.4.4, GE 13.05.2005 c. 2.1

There must be strict proof of the existence and of the #validity of the #arbitration agreement because, contrary to French law for instance, the proof of the mere appearance of such an agreement is not sufficient (cf. Art. 1458(2) French Code on Civil Procedure).

GE 13.05.2005 c. 2.1

The party which raises the #arbitration defence has to prove the #facts which it asserts in order to derive its rights therefrom (Art. 8 CC). Therefore, this party must assert – and prove in case of dispute – the #facts underlying the existence of an #arbitration agreement. The failure of this proof – which [*is*] governed by the unfettered assessment of the #evidence by the State court (Art. 196 FCCP/GE) - entails the absence of #jurisdiction of the #arbitral tribunal and leads to the dismissal of the #arbitration defence in favour of the ordinary #jurisdiction.

GE 13.05.2005 c. 2.1

In this context, the requirement of strict proof is all the more justified as constitutional (for Switzerland, cf. Art. 30(1) FC) and treaty (cf. Art. 6(1) EHRC) law guarantees to every person the right that one's case be heard by a #court established by law: the derogation to a guarantee of the constitutional level being at stake, one has to refrain from admitting too easily the conclusion of an #arbitration agreement, if this question is disputed (FSCD 130 III 50 c. 2c/aa), which commands a strict application of Article 8 CC.

GE 13.05.2005 c. 2.1

If the #respondent raises the #arbitration defence before the State court, the State court must decide on the #validity of the #arbitration agreement and on the question whether the dispute lies within the scope of application of the #arbitration agreement.

ZH 25.08.1992 [(1993) ZR p. 73]

3.8.10 Effect of the State Court's Decision on the Arbitral Tribunal

The preliminary #decision by which the State court grants its #jurisdiction binds the Swiss #arbitrator called subsequently to decide upon the same issue.

FSCD 120 II 155 [164], FSCD 4P.114/2004 c. 7.1

If the State court declines its #jurisdiction, its decision does not bind the #arbitral tribunal seized afterwards.

FSCD 120 II 155 [164], *NE 28.04.2016 c. 10

The #arbitral tribunal which is, by hypothesis, seized afterwards examines freely if it has #jurisdiction.

*NE 28.04.2016 c. 10

In the event that the #arbitral tribunal also declares itself not to have #jurisdiction a second time, the State judge is bound by this decision and cannot afterwards deny its #jurisdiction.

*NE 28.04.2016 c. 10

If, on the other hand the State court seized first directly declares itself to have #jurisdiction, it must take note of this in an independent decision within the meaning of Article 237(1) CCP, which may be the object of an #appeal before the State courts.

*NE 28.04.2016 c. 10

If the State court grants the #arbitration defence, it decides exclusively – also when it decides with unfettered #powers of review – that the #arbitration agreement raised before it excludes its own #jurisdiction. It does not decide on the #jurisdiction of the #arbitral tribunal. The validity of the #arbitration agreement which is recognized by the State court is only the ground for its own decision of lack of #jurisdiction and is as such not part of its legal effect. Therefore, a negative decision on #jurisdiction by the State court does not bind an #arbitral tribunal which is later confronted with this issue and this #arbitral tribunal can examine its #jurisdiction with unfettered #powers of review.

LU 23.04.2008 c. 4.4.4

In case of a negative decision on #jurisdiction by the (PILA) #arbitral tribunal, the #claimant can again file its claim before a State court. Based on the final arbitral lack of #jurisdiction decision, this State court must consider the #arbitration agreement as ineffective within the meaning of Article II(3) NYC and – if the other conditions for its #jurisdiction are met – grant its #jurisdiction. In this perspective, the first decision by the first cantonal instance has only a limited precedential effect.

LU 23.04.2008 c. 4.4.4

3.8.11 Individual Cases

The Swiss court seized by a Liechtenstein #foundation can assume *prima facie* the existence of a valid #arbitration agreement if the #physical persons concerned have given a #power of attorney to an attorney-at-law in Geneva to incorporate the #foundation, if the mandate is clearly governed by Swiss law and

the provisions of the Geneva bar rules (which expressly give to the agent the right to enter into an #arbitration agreement), if the contract containing the #arbitration agreement has been signed by this attorney and if the #arbitration agreement is clearly formulated and printed in capital letters. Under such circumstances, the court does not have to examine whether the law of Liechtenstein, on which the #claimant relies, effectively limits the #power of attorney, which is subject to Swiss law, as Article 7 PILA would only be used to delay the #arbitral proceedings.

FSCD 122 III 139 [143-144]

If a party raises the #arbitration defence and if the opposing party claims that the #arbitration agreement has been terminated by a subsequent #termination agreement, the Swiss court deciding on the #arbitration defence has to examine whether the #arbitration agreement has been rendered invalid by the subsequent clause.

FSCD 121 II 495 [502]

The reference to "*la jurisdiction (sic) suisse et l'arbitrage du Tribunal de Commerce suisse, sis à Genève*" is not clear and can be interpreted, *prima facie*, as an #arbitration agreement or as a reference to the ordinary Geneva courts. In fact, the use of the expression "*l'arbitrage du Tribunal de commerce suisse, sis à Genève*" could mean that the parties had an #arbitration agreement in mind. However, the disputed provision could also be interpreted, due to the common meaning of the word "*arbitrage*", i.e. the resolution of a dispute, and the reference to the "*Tribunal de commerce suisse, sis à Genève*" as the expression of the parties' intent to submit their disputes to a specialised State #jurisdiction.

GE 18.04.2008 c. 2.3

Article 179

IV. Arbitral Tribunal 1. Constitution

¹ The arbitrators shall be appointed, removed or replaced in accordance with the agreement of the parties.

² In the absence of such agreement, the judge where the tribunal has its seat may be seized with the question; the judge applies, by analogy, the provisions of the CCP on appointment, removal or replacement of arbitrators.

³ If a judge has been designated as the authority for appointing an arbitrator, such judge shall make the appointment unless a summary examination shows that no arbitration agreement exists between the parties.

IV. Schieds- gericht 1. Bestellung

¹ Die Schiedsrichter werden gemäss der Vereinbarung der Parteien ernannt, abberufen oder ersetzt.

² Fehlt eine solche Vereinbarung, so kann der Richter am Sitz des Schiedsgerichts angerufen werden; er wendet sinngemäss die Bestimmungen der ZPO über die Ernennung, Abberufung oder Ersetzung von Schiedsrichtern an.

³ Ist ein staatlicher Richter mit der Ernennung eines Schiedsrichters betraut, so muss er diesem Begehren stattgeben, es sei denn, eine summarische Prüfung ergebe, dass zwischen den Parteien keine Schiedsvereinbarung besteht.

IV. Tribunal arbitral 1. Constitution

¹ Les arbitres sont nommés, révoqués ou remplacés conformément à la convention des parties.

² A défaut d'une telle convention, le juge du siège du tribunal arbitral peut être saisi; il applique par analogie les dispositions du CPC sur la nomination, la révocation ou le remplacement des arbitres.

³ Lorsqu'un juge est appelé à nommer un arbitre, il donne suite à la demande de nomination qui lui est adressée, à moins qu'un examen sommaire ne démontre qu'il n'existe entre les parties aucune convention d'arbitrage.

IV. Arbitri
1. Costituzione
del tribunale
arbitrale

¹ Gli arbitri sono nominati, revocati e sostituiti giusta quanto pattuito fra le parti.

² Se tale pattuizione manca, può essere adito il giudice del luogo di sede del tribunale arbitrale; questi applica per analogia le disposizioni del CPC concernenti la nomina, la revoca e la sostituzione degli arbitri.

³ Il giudice cui è stata affidata la nomina di un arbitro soddisfa tale richiesta eccetto che, da un esame sommario, risulti che le parti non sono legate da un patto d'arbitrato.

1 *Parties' Agreement (1)*

1.1 Notion of Arbitral Tribunal

An #arbitral tribunal whose #jurisdiction is derived directly from a legal norm is not a real #arbitral tribunal, based on a private agreement, but a tribunal established by law.

FSCD 137 III 37 [41]

The #arbitral tribunal is an authority composed of private persons directly or indirectly mandated by the parties in a contract to decide a dispute instead of the normally competent judiciary.

*FSCD 125 I 389 [390]

1.2 Principle

The parties can in a private and autonomous way decide how the #arbitrators have to be appointed.

FSCD 4P.129/2002 c. 3.3

The appointment of the #arbitral tribunal depends primarily on the intent of the parties and only subsidiarily - in the absence of a party agreement - on the intervention of a State judge.

ZH 20.11.2014 c. 1

The appointment of the #arbitral tribunal is in principle a matter for the parties, which are granted extensive freedom.

SZ 23.08.2010 c. 3b

1.3 Constitution of the Arbitral Tribunal and Jurisdiction

An #arbitral tribunal may not hear a dispute against a party which did not participate or, at least has not been invited to participate in its #constitution pursuant to Article 179 PILA. Before ruling on its #jurisdiction to decide on #prayers for relief and to adjudicate a dispute, a tribunal must be constituted. It is only once it is constituted, with the participation of the third party, that it can decide whether it has #jurisdiction to integrate the third party into the proceedings. An #arbitral tribunal is deemed to be constituted when it has accepted its mission with respect to all parties and for the dispute for which it is seized, i.e. for a specific and existing case. Without being constituted with respect to a party, the #arbitral tribunal has no adjudicative powers over this party. Therefore, every judgment or every decision it renders with respect to this party must be considered as inexistent and does not have to be taken into consideration.

FSCD 11.11.1994 c. 3

1.4 Arbitral Contract

The #arbitral contract embodies the contractual relationship between the #arbitrator and the parties. It is part of the mixed nature of arbitration, which is contractual in its source and jurisdictional in its object. The #arbitrator is vested with the power to decide the dispute in an #award equivalent to a judgment, but it derives this power from the intent of the parties. The #arbitral contract is often qualified as a *sui generis* mandate but the rules of mandate (Arts. 394 et seq. CO) are mainly excluded by the status of the #arbitrator, in particular with respect to the conditions under which the contract terminates.

FSCD 140 III 75 [77], FSCD 4A_76/2018 c. 4.2

The #arbitral contract usually terminates when the proceedings end, i.e. in the vast majority of cases, when the final #award is issued, or more rarely, because the proceedings are terminated as a consequence of a withdrawal or a settlement. It may however terminate beforehand, *pendente lite*, if the #arbitrator dies, if the #arbitrator is challenged, removed by the parties or by a State court or if the #arbitrator resigns.

FSCD 140 III 75 [77]

When an #arbitrator accepts to function as such, the #arbitrator is bound to the parties by a contractual relationship (#arbitral contract) governed by procedural law, whilst private law may apply by analogy.

*FSCD 111 Ia 72 [76]

The majority of the doctrine, which draws consequences from a contract which is located at the interface of the jurisdictional and the contractual, admits the principle of the #arbitrator's contractual liability, whilst considering that this should be adjusted in order to take into account the #arbitrator's jurisdictional function; it is often question in this regard of a certain immunity of the #arbitrator.

FSCD 4A_76/2018 c. 4.2

1.5 Number of Arbitrators

According to Article 179 PILA, as well as to the fConcordat (Arts. 10, 11(4) & 12), the parties are free to determine the number of #arbitrators. It is also possible to agree on an even number of #arbitrators.

FSCD 121 I 81 [85], FSCD 4A_602/2010 c. 3.1

In the PILA, there is no subsidiary provision such as Article 11(3) fConcordat, according to which in case of the lack of an agreement or an express regulation on the appointment by the parties, each party appoints the same number of #arbitrators and that these then appoint a presiding #arbitrator. However, based on the fact that the three-members tribunal with the appointment of one #arbitrator by each party and the choice of the presiding #arbitrator by these two #arbitrators is the rule in an international setting, an #arbitration agreement which is silent on the appointment has to be understood in the sense that the parties wanted to appoint – tacitly – such an #arbitral tribunal.

ZH 26.01.2008 c. 3, ZH 26.03.2004, TI 25.07.2003

As the nomination of a three-member #arbitral tribunal with the nomination of one #arbitrator by each party and the designation of the presiding #arbitrator by these two #arbitrators is the rule in international arbitration, an #arbitration agreement which does not provide anything in this respect has to be interpreted in the sense that the parties have tacitly agreed on such an #arbitral tribunal.

ZH 28.03.1994 confirming ZH 08.04.1993 p. 6

1.6 Nomination of the Arbitrators in the Arbitration Agreement

It is not prohibited to nominate the #arbitrator or the #arbitrators in the #arbitration agreement. However, this way of proceeding bears certain risks. Nobody knows how the relationship of the #arbitrator with the parties will evolve between the conclusion of the #arbitration agreement and the beginning of a possible dispute which entails #arbitral proceedings. If the #arbitrator designated in advance becomes incapable of exercising its function or becomes subject to a #challenge, the parties will have no #arbitrator and no proceedings for the #arbitrator's appointment, and the question arises whether the application of the subsidiary provision of the State procedural laws are not precluded in such a case. This is why the #arbitrator is only rarely designated by the parties in the #arbitration agreement.

ZH 26.05.1994 [(1997) ASA p. 271]

1.7 The Arbitrators' Duty to Disclose

As before the conclusion of every contract, the future parties have a duty to inform each other about the circumstances susceptible to substantially influence the other party's decision to conclude the contract, if there are grounds to believe that the other party is unaware of these circumstances. This also applies to the #arbitrator. If an #arbitrator conceals #facts on which a challenge could be based, it hinders the orderly conduct of the proceedings in a way contrary to the principle of #good faith, because its silence prevents the aggrieved party from exercising one of its legitimate procedural rights. Hence, the #arbitrator has the pre-contractual, and then contractual, duty to inform the parties of the #facts on which a #challenge could be based. This applies at least when the #arbitrator has good reasons to think that these #facts are not known by the parties or by the party which could invoke them.

*FSCD 111 Ia 72 [76], FSCD 4A_162/2010 c. 2.2

1.8 Equal Treatment of the Parties in the Appointment of Arbitrators

No party shall have a preponderant influence in the appointment of the #arbitral tribunal.

*FSCD 107 Ia 155 [158]

The principle of #equal treatment is a matter of #public policy. Therefore, the parties cannot waive it.

*FSCD 107 Ia 155 [161-162]

The principle of #equal treatment of the parties is one of the fundamental principles of arbitration law. It therefore constitutes #mandatory law which the parties cannot agree to waive. If the #arbitration agreement violates the principle of #equal treatment of the parties, it is invalid. If an #arbitration agreement provides that one of the parties can appoint more #arbitrators than the other party, such an agreement concerning the appointment of the #arbitrators violates the principle of #equal treatment, because in such a case one of the parties could not only appoint more #arbitrators than the other party, but would also have a preponderant influence with respect to the appointment of the presiding #arbitrator, as the latter would be designated by a majority decision.

ZH 11.09.2001 [(2002) ASA p. 698]

In the presence of a compulsory #joinder of the parties on the basis of substantive law, the parties must also act jointly in procedural matters. Consequently, the joining parties must also designate a common #arbitrator. Only this solution takes into account the principle of the guarantee of an independent #arbitral tribunal.

ZH 11.09.2001 [(2002) ASA p. 699]

To exercise a preponderant influence means that the #claimant had, according to the #arbitration agreement, a preponderant position and used it, or that it used a mechanism which procured it this position, without the opposing party having a possibility to benefit from an appropriate treatment.

*GE 26.11.1982 [(1984) SJ p. 318]

1.9 Nationality of the Arbitrators

The mere fact that all #arbitrators have the same nationality as one of the parties does not constitute a violation of #public policy.

*FSCD 84 I 39 [51], *GE 26.11.1982 [(1984) SJ p. 317]

It would go too far to admit, for the resolution of commercial disputes, only #arbitral tribunals which are equally composed of nationals of the State of origin of the two parties and of nationals of other States.

*FSCD 84 I 39 [51], *GE 26.11.1982 [(1984) SJ p. 317-318]

1.10 List of Arbitrators

The system whereby the parties can only choose the #arbitrators figuring on a list is in particular applied in corporate institutions where it is justified by the manifestly technical aspects of most of the disputes, but it limits the choice of the parties and can, depending on the circumstances, infringe the principle of #equal treatment of the parties. However, it cannot be condemned as such, but the possible influence of a party on the composition of the list of #arbitrators has to be avoided (see also *FSCD 107 Ia 155 [161], *FSCD 93 I 265 [273-274], *FSCD 84 I 39 [50], which makes, however, a difference between #arbitral tribunals of the #chambers of commerce and #arbitral tribunals created by #associations).

FSCD 129 III 445 [456-457]

It is not certain that the so-called system of the open list – which offers to the parties (or to one of them) the possibility to choose an #arbitrator outside of the list – constitutes the cure-all. On the contrary, from the viewpoint of the efficiency of the #arbital tribunal, this system entails the risk that there are one or several non-specialised #arbitrators in the #arbital tribunal who are inclined to act as if they were the attorneys of the parties who nominated them.

FSCD 129 III 445 [459]

1.11 Refusal of a Party to Nominate an Arbitrator

There is no violation of #public policy if one of the #arbitrators is appointed by the permanent #arbital tribunal of a #chamber of commerce when the party which should have appointed this #arbitrator did not do so.

*FSCD 84 I 39 [49], *GE 26.11.1982 [(1984) SJ p. 317]

The fact that a party does not nominate an #arbitrator despite the existence of an #arbitration agreement may amount to a violation of the principle of #good faith and therefore may constitute an action contrary to law.

ZH 08.04.1993 [p. 7], confirmed by ZH 28.03.1994

1.12 Reference to the ICC Arbitration Rules

A reference to the ICC Arbitration Rules constitutes a valid agreement between the parties with regard to the rules on nomination contained therein. There is no need for an explicit reference to the rules on the appointment of the #arbitrator.

*FSCD 110 Ia 59 [63-64]

The clause by which the parties referred to the ICC Arbitration Rules has to be interpreted in accordance with the principle of #good faith. Therefore, such a reference implies the application of the ICC Arbitration Rules according to the meaning which is given to them within this organisation by the competent organs, provided that they do not act arbitrarily by attributing to their rules a meaning which the parties could not reasonably have given to them.

*FSCD 110 Ia 59 [65]

The practice of the #ICC International Court of Arbitration consisting in nominating an #arbitrator if the institution provided for by the parties is not in a position or is not willing to do so, is neither untenable nor unforeseeable. Therefore, the nomination of the presiding #arbitrator of an #arbital tribunal is covered by the agreement between the parties who referred to the former ICC Arbitration Rules in their #arbitration agreement.

*FSCD 110 Ia 59 [65-66]

This is in particular true regarding the former Article 13 of the ICC Arbitration Rules, according to which *“lorsque les parties conviennent d’avoir recours à l’arbitrage par les soins de la Chambre du Commerce Internationale, elles se soumettent par là même au présent Règlement”*.

*FSCD 102 Ia 493 [498-500]

The provisions of the ICC Arbitration Rules concerning the nomination of the #arbitrators prevail over the corresponding provisions of the fConcordat, which therefore do not apply.

*FSCD 102 Ia 493 [501-502]

A declaration by the parties without reservation, according to which they want to submit the #arbitral proceedings to the ICC, encompasses also an approval of the rules issued by the ICC, in particular Article 7(2)(3) of the former ICC Arbitration Rules. This provision gives the #ICC International Court of Arbitration the possibility to attribute the proceedings in certain circumstances to a sole #arbitrator, provided that the parties did not agree on the number of #arbitrators. A clause according to which "[a]ny controversy or claim, arising out of and relating to this agreement or breach thereof shall be settled by arbitration by the International Chamber of Commerce in Geneva, Switzerland", contains a tacit reference to the ICC Arbitration Rules.

*FSCD 102 Ia 493 [498-500]

When interpreting the criterion of the importance of the dispute mentioned in Article 7(2) of the former ICC Arbitration Rules, one should, according to the wording of this provision, take into account not only the #amount in dispute.

*FSCD 102 Ia 493 [502-503]

By declaring the ICC Arbitration Rules applicable, the parties have referred to institutional arbitration rules. As a result, the authority to appoint, dismiss, replace or challenge an #arbitrator has (also) been transferred to the designated #arbitral institution. In accordance with the ICC Arbitration Rules, the #arbitral tribunal is therefore to be appointed by the body designated therein, which is why the Administrative Commission of the Supreme Court of the Canton of Zurich has no #jurisdiction to appoint an #arbitral tribunal.

ZH 20.11.2014 c. 2.3

1.13 Interpretation of the Parties' Agreement

1.13.1 Principle

The #interpretation of the content of this #arbitration agreement must be based on the generally accepted principles of #interpretation of private #expressions of intent (FSCD 130 III 66 c. 3.2 with further references). The decisive factor is first and foremost the agreement of the parties on the actual understanding of the expressions exchanged (Art. 18 CO). If the actual intent of the parties cannot be established, the #arbitration agreement must be interpreted objectively according to the principle of #trust, i.e. the presumed party's intent must be determined as it may and must be understood in #good faith by the respective recipient of the expression.

ZH 24.01.2014 c. 4.3

As the nomination of a three-member #arbitral tribunal with the nomination of one #arbitrator by each party and the designation of the presiding #arbitrator by these two #arbitrators is the rule in international arbitration, an #arbitration

agreement which does not provide anything in this respect has to be interpreted in the sense that the parties have tacitly agreed on such an #arbitral tribunal.

ZH 28.03.1994 confirming ZH 08.04.1993 p. 6

In a context where the conclusion of an agreement should not be admitted too easily, one cannot be satisfied with an unclear clause as this is #evidence of an agreement with an uncertain object.

VD 30.03.1993 [(1995) ASA p. 67]

1.13.2 Individual Cases

In the present case, the parties have agreed that the President of "the Court of Appeal in Zurich" shall be responsible for the appointment if the two #arbitrators appointed by the parties are unable to agree on a presiding #arbitrator within the #time limit. Both parties agree that "President of the Court of Appeal of Zurich" means the President of the Supreme Court of the Canton of Zurich. This means that the #jurisdiction of the President of the Supreme Court of the Canton of Zurich is affirmed.

ZH 24.01.2014 c. 5.2

The clause "*3. Die Schiedsrichter müssen die Befähigung zum Richteramt haben, der Obmann muss Anwalt oder Richter sein. Der Obmann soll über besondere Erfahrungen im Handels- und Wirtschaftsrecht verfügen*" means that the presiding #arbitrator to be appointed must be a lawyer or judge and be experienced in commercial and business law. It is not necessary, however, that the presiding #arbitrator is "qualified to hold the office of judge" within the meaning of German law.

ZH 24.01.2014 c. 4.7

1.14 Arbitrator as a Physical Person

Only #physical persons can be #arbitrators and not corporate bodies or communities. In particular a #chamber of commerce cannot be designated as #arbitrator.

VD 30.03.1993 [(1995) ASA p. 66]

1.15 End of the Arbitral Tribunal's Mission

If it is true that the tasks of an #arbitrator usually end with the issuance of the first #award, the #appellant seems to forget that this principle is not absolute and is subject to numerous exceptions: think, for example, of what happens when this court [*the Federal Supreme Court*] accepts a request for direct review against an arbitral decision (Art. 399 CCP).

FSCD 4A_253/2014 c. 3.3

1.16 Time Limit of the Mission of the Arbitral Tribunal

The parties have the right to limit in the #arbitration agreement or in a subsequent agreement the duration of the mission of the #arbitral tribunal. This

possibility is found in Article 366(1) CCP for domestic arbitration and it must be recognized in international arbitration as well.

FSCD 140 III 75 [79-80]

In both situations, it is anticipated – specifically by Article 366(2) CCP or indirectly by resorting to Articles 179(1) and 185 PILA – that the #time limit can be extended by agreement between the parties or pursuant to a request by one of them. However, if such an extension is not applied for or not granted, the final #award may be issued after the deadline given to the #arbitrator to carry out its mission.

FSCD 140 III 75 [80]

The PILA does not provide for #time limits of the mission of an #arbitral tribunal. Nevertheless, the parties have the possibility to limit with regard to time the office of the #arbitral tribunal. This can be determined in the #arbitration agreement or afterwards expressly or by reference to a statute or to arbitration rules containing such a limitation.

ZH 02.06.1992 p. 3-4

The fact that a party might have to enforce an #award abroad and that the court of #enforcement might declare the #award null and void by a strict application of national procedural rules providing for a #time limit of the office of an #arbitral tribunal, does not entail that a Swiss court, without any legal basis grants an extension of the office of an #arbitral tribunal based on this non-applicable foreign law [in casu *Turkish law*].

ZH 02.06.1992 p. 4

1.17 Resignation and Replacement of the Arbitrator

1.17.1 Removal of the Arbitrator by a State Court or Arbitral Institution

The concept of revocation referred to in Article 179(1) PILA also includes that of #removal. #Removal means the end of an #arbitrator's mission pronounced by a State court or an #arbitral institution upon request from one party for just cause relating to the #arbitrator but which does not constitute a ground for #challenge. As provided by Article 370(2) CCP in domestic arbitration, it is justified in particular when an #arbitrator is not in a position to perform its duty timely or does not do so with the requested diligence. Failing an agreement between the parties establishing, directly or indirectly by reference to arbitration rules, some rules in this respect, it is the State court at the #seat of the #arbitral tribunal which shall be seized of the *ad hoc* request and it will apply by analogy the aforesaid provision in conformity with Article 179(2) PILA.

FSCD 140 III 75 [78]

1.17.2 Termination of the Arbitral Contract by the Parties

According to Article 179(1) PILA, #arbitrators are removed in accordance with the agreement of the parties. The #removal emanates from them. Not subject in principle to any particular formal requirement, it may take place at any time and without reasons, but it must come from all parties to the arbitration.

FSCD 140 III 75 [77]

The #removal is possible even with respect to an #arbitrator appointed by a third party or by a State court. The #arbitrator cannot oppose it.

FSCD 140 III 75 [78]

1.17.3 Termination of the Arbitral Contract by the Arbitrator

An #arbitrator's #resignation during the proceedings is not the object of any specific provision of Swiss domestic or international arbitration law. As the #arbitral contract is not a simple mandate, the rule of Article 404(1) CO does not apply according to which the mandate can be terminated at any time. It is therefore generally admitted that the #arbitrator is entitled to resign for just cause only.

FSCD 140 III 75 [78-79]

If all parties to the proceeding accept the #resignation of an #arbitrator, this is tantamount to a #removal. Conversely, failing any relevant rules contained in the agreement of the parties or the arbitration rules, the court at the #seat of the arbitration shall decide on the #validity of the #resignation.

FSCD 140 III 75 [79]

The legal nature of the termination is similar to the termination of a mandate, as the latter is the exercise of a right of unilateral termination extinguishing the legal relationship entered into by the parties with the #arbitrator pursuant to the #arbitral contract. Like the termination of a mandate, a #resignation takes effect *ex nunc* either immediately or when the #time limit expires if it is given for a determined term.

FSCD 140 III 75 [79]

Subjecting the termination of a mandate or the #resignation to a condition is generally incompatible with the principle of #legal certainty. However, a conditional #removal or #resignation is not ruled out to the extent that it does not create an uncertain situation for the addressee of the #expression of intent. It is thus considered that the revocation or termination of a mandate subject to a potestative condition is admissible when its realisation depends only on the will of the #principal or the agent, such as a revocation already notified to the agent should the agent fail to perform its contractual obligations within a certain #time limit.

FSCD 140 III 75 [79]

There is no valid #resignation when the #arbitrator offers to resign but such offer was refused, and it did not oppose that refusal.

FSCD 4A_386/2010 c. 4.3.2

The issue of whether the right of termination applicable in the law of mandate applies also to the #arbitral contract and whether the #arbitrator can therefore resign at any time – subject to the payment of damages in case of termination at an improper time (Art. 404(2) CO) – may remain open. However, such a #resignation from office can only take place in case of serious grounds.

FSCD 117 Ia 166 [169], *GE 10.02.1984 [(1984) SJ p. 392]

If an #arbitrator dies, is removed, disqualified or resigns, its replacement takes place according to the method adopted for its appointment or nomination (Article 23(1) fConcordat). If this replacement cannot take place, the new #arbitrator is nominated by the judicial authority foreseen in Article 3 fConcordat (Article 23(2) fConcordat). This last provision applies when the appointed #arbitrator refuses to accept its mandate or refuses to cooperate in the arbitration in such a way that this refusal can be interpreted as a #resignation.

* VD 29.02.2016 c. III. A

1.17.4 Resignation for Good Reason

If there are good reasons for the #resignation of the #arbitrator, the court can declare the termination of the #arbitration agreement.

FSCD 117 Ia 166 [169]

1.17.5 Resignation for No Good Reason

- For the refusal of an #arbitrator to collaborate, see Article 189(2) PILA, section 2.1.5

If the #arbitrator resigned for no good reason, the judge has to order that the resigning #arbitrator continue its #mandate.

FSCD 117 Ia 166 [169]

If an #arbitrator resigned for no good reason, the remaining #arbitrators cannot simply continue the proceedings in its absence and without a new #arbitrator, unless the #arbitration agreement explicitly empowers them to do so. To proceed otherwise would constitute a violation of the parties' right to a properly constituted #arbitral tribunal according to Article 30 fFC and Article 6 ECHR.

FSCD 117 Ia 166 [169-170], FSCD 4A_386/2010 c. 4.3.1

The #arbitral tribunal is not correctly constituted after a #resignation until the resigned #arbitrator has either reconsidered its decision, be it at the behest of a State court or of an #arbitral institution whose rules are applicable, or has been replaced despite the absence of proper grounds for #resignation because it cannot be forced to remain in office against its will.

FSCD 117 Ia 166 [170]

Therefore, the #resignation of an #arbitrator without good reason does not entail other consequences than the parties' possibility to claim damages and possible disciplinary action.

FSCD 117 Ia 166 [170], FSCD 4A_76/2018 c. 4.2

1.17.6 Jurisdiction to Decide on the Validity of the Reasons for Resignation

It is the State courts who have #jurisdiction and not the remaining #arbitrators who have #jurisdiction to decide whether an #arbitrator has resigned for good reason.

FSCD 117 Ia 166 [169]

1.17.7 Acceptance by the ICC

It is not decisive whether the #ICC International Court of Arbitration accepts the #resignation of an #arbitrator or not.

FSCD 128 III 234 [239-240]

1.17.8 No Stay of the Proceedings

The filing of a request for #resignation does not *ipso facto* lead to the #stay of the proceedings.

FSCD 128 III 234 [240]

1.17.9 Repetition of Previous Procedural Steps

The Federal Supreme Court left open the question whether it is the newly constituted #arbitral tribunal which must decide, in the absence of a party agreement or a provision in the applicable rules, to what extent it shall repeat the proceedings.

FSCD 14.06.1990 [(1994) ASA p. 227]

1.17.10 Article 2(12) of the 1988 ICC Arbitration Rules

If the parties have agreed on the application of the ICC Arbitration Rules, but they disagree on whether the 1975 or the 1988 version is applicable, the application of the 1988 ICC Arbitration Rules and in particular of its Article 2(12) corresponds to the hypothetical intent of the parties, even if they have chosen the fCCP/BE as a complementary set of rules. The regulation contained in Article 2(12) of the 1988 ICC Arbitration Rules is not at all surprising. It has to be presumed that reasonable parties would not have excluded upfront such a provision.

FSCD 14.06.1990 [(1994) ASA p. 228-229]

2 *Application to the Court (2)*

2.1 Principle

The appointment of an #arbitrator pursuant to Article 179 PILA or Article 12 fConcordat takes place in non-adversarial #proceedings.

*FSCD 108 Ia 308 [310-311], FSCD 17.07.1998 [4P.108/1998] c. 1c

If the appointment procedure expressly or impliedly chosen by the parties in the #arbitration agreement is not followed by one party and the #arbitral tribunal cannot therefore be fully constituted, the other party may request the competent State court to appoint it. Specifically, a State appointment of an #arbitral tribunal member presupposes that one party does not appoint the members to be designated by it within a reasonable period of time and that the #arbitration agreement does not provide for another body for the appointment, respectively that this body does not appoint the members within a reasonable period of time. Unless otherwise agreed by the parties, the appointment must be made within 30 days of the request (cf. Art. 179(2) PILA in conjunction with Art. 362(1)(b) CCP).

ZH 02.02.2017 c. 3, ZH 06.01.2017 c. 3

In the absence of an agreement between the parties on the appointment of #arbitrators in an #arbitration agreement, Article 179(2 & 3) PILA provides that the national judge at the #seat of the #arbitral tribunal may be called upon to make the appointment.

BS 24.04.2014 c. 1.2

According to Article 12 fConcordat, the judicial authority makes the appointment at the request of a party if the parties cannot agree on the appointment of the sole #arbitrator or if a party does not appoint the #arbitrator or #arbitrators to be designated by it or if the #arbitrators do not agree on the appointment of the presiding #arbitrator, unless the #arbitration agreement provides for another body. Article 362(1) CCP incorporates Article 12 fConcordat.

SZ 23.08.2010 c. 3b, * VD 29.02.2016 c. III.a

The failure to proceed to designate an #arbitrator is a wide concept which includes the refusal to designate an #arbitrator; Article 12 fConcordat also applies in the case where the defaulting party is not in a position to take advantage of the possibility which is objectively open to it to designate one or more #arbitrators within the meaning of Article 11(3) fConcordat; the defaulting party must have been objectively put in a position to designate within the agreed #time limit for that purpose or within a reasonable #time limit.

* VD 29.02.2016 c. III.a

If the conditions for the application of Article 12 fConcordat are fulfilled, the judicial authority is obliged to proceed to nominate one or all #arbitrators and the presiding #arbitrator; it cannot evade for any reason whatsoever, notably for example because an additional #time limit was not previously granted to the applicant to appoint an #arbitrator.

* VD 29.02.2016 c. III. a

In the case of Article 12 fConcordat, the judicial authority does not act at its discretion, but is rather obliged to take action, which already results from the intention pursued with its intervention to enable and secure the execution of the #arbitral proceedings.

SZ 23.08.2010 c. 4b

The State court's #jurisdiction to appoint an #arbitrator is subject to the substantive law prerequisite that an agreement between the parties on the nomination, #challenge and replacement of the #arbitrators is missing.

ZH 25.08.2004 c. 3

2.2 Agreement on the Appointing Authority

Parties who conduct an arbitration in accordance with Chapter 12 PILA and who have recourse to the assistance of an #arbitral institution, such as the one of the ICC, submit themselves also *ipso facto* to this institution's rules with regard to the appointment and the replacement of the #arbitrators.

ZH 19.11.2004 c. 4

If the parties agreed on the application of institutional rules and one of the parties refuses to nominate its #arbitrator, this does not entitle the opposing party to have recourse to a State court on the basis of Article 179 PILA.

ZH 19.11.2004 c. 4

By going beyond its narrow wording, this provision has to be interpreted in the sense that the competent cantonal court may and shall intervene every time the intent of the parties to submit their dispute to an #arbitral tribunal results clearly from the #arbitration agreement, but the appointment of one or several #arbitrators is not possible for some reason.

ZH 03.06.1991 p. 6-7

These proceedings have to be considered as a kind of #enforcement of the #arbitration agreement proceedings which are very similar to #summary proceedings.

ZH 03.06.1991 p. 12

An #arbitration agreement is not invalid merely because of the inaccurate designation of the #appointing authority [*in casu* the "*Tribunal de Commerce de Genève (Suisse)*"]. It would constitute an #excessive formalism to decide otherwise. The principle of efficiency in favour of an existing authority has to be taken into account.

GE 07.02.1991 [(2001) ASA p. 277]

If an #arbitration agreement provides that a dispute shall be resolved "in accordance with the Commercial Arbitration Board of Switzerland", there is no valid agreement between the parties as to the appointment of the #arbitrators. According to the wording of the #arbitration agreement, the #arbitral tribunal of a #chamber of commerce would be the #appointing authority. The Swiss Arbitration Association does not have anything in common with such an institution. It is correct that the president of this #association can, according to the #statutes, appoint #arbitrators. However, the #association does not have a proper #arbitral

tribunal for commercial matters and considers itself more as a scientific institution. However, these circumstances do not entail the #invalidity of the #arbitration agreement (see also ZH 20.11.1981 [(1982) ZR 1982/81 N 95], but the application of Article 179(2) PILA.

ZH 11.07.1991 p. 2-3

If an #arbitration agreement provides that the dispute shall be resolved by “an #arbitrator appointed by the Board of Arbitrators in Zurich”, the parties’ agreement has, on this point, an impossible content, as there is no such appointing institution. This renders the agreement partially null and void in the sense that only the flawed part has to be ignored, provided that the parties would have also concluded the whole contract without the impossible part (Art. 20(1) & (2) CO).

*ZH 20.11.1981 [(1982) ZR p. 227]

The judicial proceedings for the appointment of #arbitrators aim at securing the efficient #constitution of #arbitral tribunals even in cases where a party tries to hinder this. Therefore, the goal of the judicial appointment proceedings is to ensure the #constitution of the #arbitral tribunal. The rights of refusal of a party are not concerned by the judicial appointment. The judicial appointment does not aim at appointing an #arbitrator who is independent and who has specific knowledge. It occurs only subsidiarily in place of the defaulting party. A proposal by an initially defaulting party with respect to a certain #arbitrator has to be taken into account. Such a proposal has to be considered by the State court within the limits of its discretionary powers. As it is characteristic of an #arbitral tribunal that both parties collaborate in principle in the same way in its #constitution and that the judicial authority must only collaborate in order to ensure that the #arbitral tribunal is constituted, the proposal of the defaulting party has priority over other possible #arbitrators, provided that there are no specific grounds against the person proposed by the defaulting party.

*AG 04.05.1998 [(2000) ASA p. 780-781]

2.3 Refusal by the Appointing Authority

The competent State court can in particular also be seized when the #appointing authority agreed upon between the parties refuses to take a decision.

*FSCD 110 Ia 59 [62], ZH 04.11.2008 c. III.1

2.4 Request of a Party

Before a party can submit a request for appointment to the court, it must have already designated the #arbitrator to be appointed by it and unsuccessfully requested the other party to appoint its own party #arbitrator. Although this request is not bound by any form, the #burden of proof lies with the party invoking it.

ZH 02.02.2017 c. 3, ZH 06.01.2017 c. 3

Before a party can make a request to the State judge to appoint an #arbitrator, it must formally appoint and announce the #arbitrator to be appointed by it and also invite the other party to appoint an #arbitrator. The appointment of an

#arbitrator shall only be incumbent upon the State court on the basis of proof of an invitation to appoint an #arbitrator.

BS 24.04.2014 c. 2.2

According to Article 362 CCP, the State court which has #jurisdiction pursuant to Article 356(2) CCP shall appoint an #arbitrator at the request of a party if the #arbitration agreement does not provide for the appointment authority or if such authority does not appoint the members within a reasonable period of time and the parties do not agree on the appointment of the sole #arbitrator or the presiding #arbitrator (Article 362(1)(a) CCP). The appointment of an #arbitrator by the State court at the request of a party therefore presupposes that the parties have not been able to agree on a person. It is only on the provision of this proof that the appointment of the #arbitrator is incumbent on the State court.

ZH 25.07.2013 c. II/2

Pursuant to Article 12 fConcordat, an application by one party - and not by an (already appointed) #arbitrator - is required, whereby both parties are entitled to designate the presiding #arbitrator. An application is also necessary pursuant to Article 179(2) PILA. Before the presiding #arbitrator is appointed, both parties must be granted the #right to be heard.

SZ 23.08.2010 c. 3c/aa

The fact that the appointment in the cases listed in Article 12 fConcordat is made at the request of one of the parties does not mean that the judge, who already has proceedings pending for the appointment of #arbitrators, has to make a new request, or that such a request must exist, in order to be able to appoint a presiding #arbitrator in the event of disagreement between the #arbitrators. Article 12 fConcordat does not provide for the appointment of the #arbitrators and the presiding #arbitrator to be subject to different applications by the parties. Rather, Article 12 fConcordat is to be understood as meaning that the State court will only act upon the request of the parties.

SZ 23.08.2010 c. 3c/aa

2.5 Application by Analogy of the CCP

Article 461B(2) fCCP/GE refers to the cantonal provision in arbitrations based on the fConcordat. The fConcordat provides for – but does not impose – the #jurisdiction of the superior tribunal of the ordinary civil jurisdiction of the Canton for the appointment of the #arbitrators, by reserving however Article 45(2) fConcordat which allows the Cantons to attribute these powers to another judicial authority.

FSCD 141 III 444 [447], FSCD 4A_215/2008 c. 3.2.3.2

According to Article 361(2) CCP, in the absence of an agreement, each party shall appoint the same number of members who shall unanimously designate the presiding #arbitrator. Article 361(2) CCP implicitly assumes a two-party arbitration procedure. However, the case in which several parties are involved in the dispute on the #claimant's and/or #respondent's side (multi-party relationships) is not regulated. It is therefore also open whether, in such a case, each party to the proceedings or each individual party to the contract must appoint an

#arbitrator. In this respect, there is a gap in the law which must be filled in such a way that it is compatible with the principle of #equal treatment of the parties.

ZH 07.03.2018 c. III/6.1

The principle of #equal treatment means that no party may have a predominant influence on the appointment of the #arbitral tribunal. The right to #equal treatment with respect to the #composition of the #arbitral tribunal already existed under the fConcordat (Art. 19(1) fConcordat) and also applies within the scope of application of the CCP. It is intended to guarantee an impartial and independent #jurisdiction. According to the doctrine, agreements which grant one party a predominant influence on the appointment of the members of the #arbitral tribunal or which grant one party the right to appoint more #arbitrators than the others violate the principle of #equal treatment. In multi-party arbitration proceedings, the principle of #equal treatment means that the individual party must be able to participate in the appointment of the #arbitral tribunal.

ZH 07.03.2018 c. III/6.1

In the so-called Westland decision of 1983, the Federal Supreme Court had the opportunity to deal with the question of the violation of the principle of #equal treatment. However, unlike the present dispute, the decision concerned international arbitration. In it, the Federal Supreme Court implicitly approved the view of the lower court, which obliged several #respondents to jointly appoint an #arbitrator (unpublished decision of the Federal Supreme Court of 16 May 1983, summarised in (1984) ASA Bulletin p. 203 et seq.; Judgment of the lower instance: Judgment of the *Cour de Justice de Genève* of 26 November 1982, reproduced in SJ 1984 p. 309 et seq.). It considered it irrelevant whether the interests of the several #respondents coincided or diverged.

ZH 07.03.2018 c. III/6.2

The majority of scholars hold the view that the gap in Article 361(2) CCP must be filled to the effect that several #claimants or several #respondents must each jointly appoint an #arbitrator. The doctrine generally does not distinguish between whether the interests of the several #claimants or #respondents are convergent or divergent. The obligation to appoint a joint #arbitrator by several #claimants or #respondents is justified by the violation of the principle of #equal treatment of the parties, that would follow if for example one #claimant were to sue two #respondents and the latter would each be entitled to appoint as many #arbitrators as the #claimant.

ZH 07.03.2018 c. III/6.3

This applies in particular in cases in which several #respondents have the same interests. In such cases, the principle of #equal treatment of the #respondents is not violated by the obligation to jointly appoint a member of the #arbitral tribunal. The party-appointed #arbitrators are not regarded as representatives of the parties (judgment of the *Cour de Justice de Genève* of 26 November 1982, reproduced in SJ 1984 p. 310 & 318), but must fulfil all the requirements of judicial #independence and #impartiality in accordance with Article 367 CCP. The #respondents therefore have no reason to fear any disadvantages from the fact that the #claimant may appoint its own #arbitrator while they have to appoint a joint #arbitrator.

ZH 07.03.2018 c. III/6.4

With regard to conflicting interests, the Federal Supreme Court implicitly confirmed the #admissibility of the obligation of several #respondents to appoint a joint #arbitrator in the aforementioned decision of 16 May 1983. It thus approved the #case law of the lower court, which obliged several #respondents, irrespective of their interests, to jointly appoint an #arbitrator, provided that there was sufficient security concerning the #independence and #impartiality of the #arbitrators (unpublished decision of the Federal Supreme Court of 16 May 1983 in (1984) ASA Bulletin p. 203 et seq.; see also the judgment of the lower instance: Judgment of the *Cour de Justice de Genève* of 26 November 1982, reproduced in SJ 1984 p. 309 et seq., p. 317 et seq.). According to the #case law of the Federal Supreme Court, the duty to jointly appoint a candidate is thus permissible or does not violate the principle of #equal treatment, at least in international cases, even in the case of diverging interests.

ZH 07.03.2018 c. III/6.5

The obligation to jointly appoint a member of the #arbitral tribunal, even in the case of diverging interests, can also be justified by the fact that this does not constitute a #waiver of the right of #equal treatment in proceedings within the meaning of Article 373(4) CCP, but only leads to the parties giving up their right to appoint an #arbitrator of their choice alone, who has their preferred professional and personal qualities. However, the right of #equal treatment in proceedings continues to exist, as does the duty of the members of the #arbitral tribunal to decide independently and impartially (Art. 368 CCP).

ZH 07.03.2018 c. III/6.5

The obligation to jointly appoint an #arbitrator also corresponds to the increasing international practice (cf. Art. 8(4) Swiss Rules; Art. 12(6) ICC Rules).

ZH 07.03.2018 c. III/6.9

Finally, in connection with the appointment of #arbitrators, the question arises whether the State court should appoint only the #arbitrator whom the #respondent should have appointed, or all #arbitrators together. Article 362(2) CCP provides that, in the case of #multi-party arbitration, the court may appoint all members. It is thus left to the court to find a case-specific solution. Article 362(2) CCP corresponds in this respect to Article 8(5) Swiss Rules, which also leaves the Court free to appoint all members of the #arbitral tribunal. Article 12(8) ICC Rules provides the same.

ZH 07.03.2018 c. III/8.2

In the Westland decision, the violation of the principle of #equal treatment in the event that the appointing authority only appointed the #arbitrator for the #respondent, which consisted of several persons, and did not (newly) appoint all the members of the #arbitral tribunal, was denied (judgment of the *Cour de Justice de Genève* of 26 November 1982, reproduced in (1984) SJ p. 309 et seq., p. 319). The Federal Supreme Court did not correct this view (decision of the Federal Supreme Court of 16 May 1983, (1984) ASA Bulletin p. 203 et seq.). According to the #case law of the Federal Supreme Court, it is therefore permissible to have one party #arbitrator appointed by one party and the other by way of substitution (*contra*, French Cour de Cassation on 7 January 1992, in: *Revue de l'arbitrage* 1992, p. 470 et seq.).

ZH 07.03.2018 c. III/8.3

According to Article 360(1) CCP, the parties are free to determine the number of members of the #arbitral tribunal. In the absence of an agreement, the law provides for a three-member #arbitral tribunal. The State court appoints for each party an #arbitrator, who unanimously elect a presiding #arbitrator (Article 362(2) CCP).

ZH 02.02.2017 c. 3, ZH 06.01.2017 c. 3, ZH 11.09.2013 c. II/6.1

The State court applies *mutatis mutandis* the provisions of the CCP (SR 272) on the appointment of members of the #arbitral tribunal (in particular Art. 362 CCP). The State court which has #jurisdiction pursuant to Article 356(2)(a) CCP shall make the appointment at the request of either party.

BS 24.04.2014 c. 1.2

If the State court is responsible for appointing an #arbitral tribunal, it shall, in accordance with Article 179(2) PILA, apply by analogy the provisions of the CCP, unless the parties have agreed otherwise (Art. 179(1) PILA).

ZH 11.09.2013 c. II/4.2

Article 179(2) PILA, in conjunction with Article 362 CCP, regulates the appointment of #arbitrators by the State court.

ZH 11.09.2013 c. II/4.2, ZH 25.07.2013 c. II/2

According to Article 179(2) PILA in connection with Article 362 CCP, the State court which has #jurisdiction pursuant to Article 356(2) CCP shall appoint an #arbitrator only if the parties have been unable to agree on the appointment of the sole #arbitrator or the presiding #arbitrator (Article 362(1)(a) CCP). The requesting party must at least have sought agreement with the opposing party, the latter not agreeing within a reasonable time. It is only on the basis of proof of an unsuccessful attempt to reach an agreement that the appointment of the #arbitrator is incumbent on the State court (cf. analogously Article 362(1)(a) CCP).

ZH 11.09.2013 c. II/5.1

2.6 Powers of Examination of the Court

In case of a subsidiary assistance in the appointment of an #arbitrator by the State court at the seat of the #arbitral tribunal, the appointment must be subject to the *prima facie* proof of the existence of an #arbitration agreement.

ZH 04.11.2008 c. III/1

The State court in charge of the appointment of an #arbitrator only has to decide on the existence, but not on the #validity or the scope of application of the #arbitration agreement or on the fulfilment of the procedural prerequisites.

ZH 26.01.2008 c. 5

The examination of whether the agreement between the parties exists, is not subject to the limited #powers of review of the judge within the meaning of Article 179(3) PILA. It is true that the #summary examination includes for both cases of judicial appointment (Art. 179(2) & (3) PILA) the proof of the existence of an #arbitration agreement, even though this is not expressly stated in Article 179(2) PILA. The reason for this is that in case of a merely subsidiary intervention of the State court in the appointment of #arbitrators, such an intervention must be subject to the *prima facie* proof of the existence of an #arbitration agreement. The goal of these limited powers of examination is only to ensure that in case of doubt concerning the existence of an #arbitration agreement, an #arbitral tribunal is constituted, which then only examines with unfettered #powers of review the #validity of the #arbitration agreement for the disputed claims and thus decides on its own #jurisdiction *ratione materiae* in the sense of Article 186 PILA. This aims at preventing that a party can avoid afterwards by filibuster its contractual duty to resolve disputes by arbitration. To the contrary, the unfettered #powers of review concerning the existence of a valid #arbitration agreement with regard to the appointment of the #arbitrators is justified because of the principle of #party autonomy, which constitutes one of the main pillars of the new PILA. The State judge shall not easily intervene in the appointment proceedings chosen by the parties.

ZH 19.11.2004 c. 5

The #appointing authority is not empowered to give instructions to the #arbitrators as to how they should nominate the presiding #arbitrator.

ZH 08.06.2001 p. 5-6

2.7 Arbitration Agreement without Indication of the Seat

Based on Article 179(2) PILA, it has in general to be considered that the State court at the #seat of arbitration has #jurisdiction to appoint the #arbitral tribunal if the appointment cannot be realised by the rules established autonomously by the parties. This judicial #constitution of the #arbitral tribunal presupposes however that the parties have fixed the #arbitral tribunal's #seat.

FSCD 138 III 29 [35], FSCD 130 III 66 [72], FSCD 129 III 675 [680], ZH 04.11.2008 c. III/2

If an #arbitration agreement has a partially impossible content and if it is clear that the parties wanted to submit their dispute to arbitration, this partial

impossibility does not lead to complete #invalidity (Art. 20(2) CO by analogy). The impossible part has to be interpreted with regard to its scope, has to be deleted without substitution or has to be substituted by subsidiary State law.

FSCD 130 III 66 [74]

If an #arbitration agreement neither indicates the #seat of the #arbitral tribunal nor an #arbitral institution which could determine the #seat, nor determines how the #arbitrators have to be appointed, the #arbitral proceedings do not fall within the scope of Chapter 12 PILA because of the lack of a #seat in Switzerland. However, if the #respondent has its domicile or seat in a Canton bound by the fConcordat, Article 2(2) fConcordat has to be taken into account; this provision provides that the #seat is subsidiarily at the place of the court which would have #jurisdiction in the absence of an #arbitration agreement. This is also justified by the fact that the PILA recognises the institution of a "*juge d'appui*" in Article 179(2) PILA. The [former version of the] second half-sentence of this provision provides for the analogous application of cantonal law. In a Canton which did not enact provisions regulating the #jurisdiction and the proceedings pursuant to Article 179(2) PILA, Article 3(a) & (b) fConcordat and the cantonal rules completing these provisions (in Zurich, Sections 239(2) & § 284(3) fCCP/ZH) apply for the time being by analogy. In fact, the cantonal legislator knew of the fConcordat and the cantonal rules completing it when the PILA entered into force and it nevertheless renounced from regulating the #jurisdiction and the proceedings, including the #appeals. The term "by analogy" does not have any influence on this conclusion as it solely refers to the specificities of international arbitration which lead for instance to the taking into consideration in particular of the legal environment of the parties.

ZH 08.06.2001 p. 3-5, ZH 30.10.2000 p. 3-4, ZH 25.05.1998 p. 5-6, confirming ZH 02.05.1997 p. 2-3, ZH 28.03.1994 p. 4-6

If an #arbitration agreement is invalid because it lacks a determination of the #seat of the #arbitral tribunal, the competent court of the place where the #arbitral tribunal has its seat, the "*juge d'appui*" cannot be determined either. A determinable #jurisdiction cannot result from the Lugano Convention which allows, contrary to the PILA, a #choice of #jurisdiction to a State court, because it does not apply to arbitration (Art. 1(2)(4) Lugano Convention). This exclusion also applies to the proceedings with regard to the nomination of #arbitrators or to the determination of the #seat of the #arbitral tribunal.

ZH 25.05.1998, confirming ZH 02.05.1997 p. 5

2.8 Joinder of a New Party

The problem of the entry or the invitation of a third party into #arbitral proceedings is difficult to resolve because of the necessity of allowing every party to appoint its #arbitrator or, at least, to participate in the proceedings for the appointment of the #arbitrators.

FSCD 11.11.1994 c. 4

Contrary to the fConcordat, the PILA does not directly address the participation of third parties in the arbitration, but one has to admit that the provisions applicable to arbitrations under the PILA cannot be different than those of Article 28 fConcordat.

FSCD 11.11.1994 c. 4

Therefore, it is only possible to bring a third party into an arbitration if there is an #arbitration agreement between the third party and the parties to the dispute and provided that the #arbitral tribunal agrees to this.

FSCD 11.11.1994 c. 4

The appointment proceedings of an #arbitrator are part of the non-contentious #jurisdiction of the #appointing authority which cannot decide on the #merits. However, in case of a #multi-party arbitration, the State court has to determine at the moment of the #constitution of the #arbitral tribunal, which are the parties to the sought-for #arbitral proceedings and to form groups of those which have a similar position by taking into account that each group thereby formed constitutes a party which has to designate an #arbitrator.

*NE 17.06.1994 [(1995) ASA p. 54]

2.9 Competent Cantonal Courts

In the Canton of Geneva, the *Tribunal de première instance* is the competent authority for the appointment of #arbitrators in the absence of an agreement between the parties (Arts. 458(1), 461B(1)(a) & (2) fCCP/GE).

FSCD 121 I 81 [83], FSCD 4A_215/2008 c. 3.2.2, GE 03.03.1994 [(1994) SJ p. 447]

According to Article 380(3) fCCP/BE, the President of the tribunal at the #seat of the arbitration has #jurisdiction for the decisions and the tasks of Articles 179, 180, 183 to 185 and 193 PILA. The provision on #summary proceedings (Art. 305 et seq. fCCP/BE) should be applied by analogy.

FSCD 119 Ia 421 [422]

According to Section 46 GOG [*Gerichtsorganisationsgesetz*] in conjunction with Section 18(1) of the Ordinance on the Organisation of the Supreme Court of 3 November 2010 (LS 212.51), the Administrative Commission of the Supreme Court of the Canton of Zurich has jurisdiction *ratione materiae*.

ZH 27.03.2018 c. III/2, ZH 07.03.2018 c. III/1, ZH 02.02.2017 c. 2, ZH 06.01.2017 c. 2, ZH 11.09.2013 c. II/1, ZH 25.07.2013 c. II/1

The State court, which according to Article 179(2) PILA in conjunction with Article 356(2) CCP, has #jurisdiction over the appointment is the only cantonal court within the meaning of Article 75(2)(a) FSCA.

ZH 11.09.2013 c. III/2, ZH 25.07.2013 c. III/2

If the CCP prescribes a single cantonal authority, the special division of the Court of Appeal [BS] has #jurisdiction (Section 11(1) BS Introductory Statute CCP in conjunction with Section 63(3bis) GOG [*Gerichtsorganisationsgesetz*] [SG

154.100])). Decisions according to Article 356(2) CCP are made by a single judge (Section 11(3) BS Introductory Statute CCP).

BS 24.04.2014 c. 1.2

Article 5 of the *fDecreto legislativo concernente l'adesione del Cantone Ticino al CIA e l'attuazione della LDIP in materia di arbitrato internazionale* provides that the *Camera civile d'appello* has #jurisdiction in the cases mentioned in Articles 179(2) and 180(3) PILA.

TI 25.08.1993 p. 2-3

In the Canton Vaud, the President of the Civil Court of the Cantonal Tribunal is the competent authority (Art. 427(a) fCCP/VD).

FSCD 17.07.1998 [4P.108/1998] c. 1c, *VD 29.02.2016 c. IIb, VD 22.12.2010, VD 18.06.2001 p. 7

If the #arbitration agreement provides that the "President of the Swiss Court" shall appoint the #arbitrators and determines Zurich as the #seat of the #arbitral tribunal, the appointment has to be made in the form of a presidential decree [*Präsidentialverfügung*] of the President of the Cantonal Court.

ZH 17.01.1991 p. 7

3 Summary Examination of the Existence of an Arbitration Agreement (3)

3.1 Purpose and Scope of Application of Article 179(3) PILA

The #arbitral tribunal's #jurisdiction to decide the issue of the existence and #validity of an #arbitration agreement is not exclusive. Depending on the circumstances, another authority could have #jurisdiction to decide this question: this could be, for instance, the Swiss court confronted with an #arbitration defence (Art. 7 PILA) or – with limited #powers of review – the court requested to appoint an #arbitrator (Art. 179(3) PILA), or even another #arbitral tribunal, in the case of several #arbitration agreements. The conflicts which may possibly result from this multitude of #jurisdictions have to be resolved by the rules governing the *#lis pendens* (Art. 9 PILA), the *#res judicata* or the #recognition and #enforcement of foreign #awards (Art. 25 et seq. PILA).

FSCD 127 III 279 [284], FSCD 121 III 495 [502]

This provision obliges in principle the State court to grant a request for appointment.

FSCD 118 Ia 20 [24], BS 24.04.2014 c. 1.3, ZH 24.01.2014 c. 1

By this provision, the legislator wanted to counter the practice – also followed by the Presidents of the Federal Supreme Court – to refuse the appointment of an #arbitrator if one party contests the #validity of the #arbitration agreement and if the disputed matter does not have other links to Switzerland than the #seat of the #arbitral tribunal.

FSCD 118 Ia 20 [24], BS 24.04.2014 c. 1.3, ZH 03.06.1991 p. 9-10

Based on its wording and on its independent position within the provision, Article 179(3) PILA clearly obliges not only the competent State court designated by the parties but also the one specified by the cantonal law to act as #appointing authority.

FSCD 118 Ia 20 [24]

However, the provision applies only to State courts and not to other #appointing authorities designated by the parties. The State court is obliged to act, independently of the rules of cantonal law. In this respect, Article 179(3) PILA represents a federal procedural rule and its violation can be invoked by an #appeal to the Federal Supreme Court, if no other procedural obstacles exist.

FSCD 118 Ia 20 [24]

This provision creates a duty for the judge to accept the (private) mandate of the parties and to act accordingly. In these circumstances, it would be unusual not to consider a duty of a State judge, expressly provided for by a statutory provision to appoint an #arbitrator as being based on a judicial #jurisdiction.

FSCD 118 Ia 20 [24], ZH 22.03.1995 [(1995) RSJ p. 277], ZH 03.06.1991 p. 7-11

Article 179(3) PILA may be regarded as a *lex specialis* to Article 179(2) PILA. With respect to its wording and scope, this provision has, as an equivalent of the obligation, also established an actual #jurisdiction of the judge designated by the parties' agreement. Therefore, the appointment or the refusal to appoint

constitutes a judicial act which can in principle be challenged before an appeals instance.

FSCD 118 Ia 20 [24], ZH 22.03.1995 [(1995) RSJ p. 277], ZH 03.06.1991 p. 11

The State court requested to appoint an #arbitrator has the obligation to do so. The State court designated by the parties may not impose additional conditions concerning the #respondent's attitude or the links of the dispute to Switzerland (except the conditions of application pursuant to Article 176 PILA) on the nomination of the #arbitrators.

GE 07.02.1991 [(2001) ASA p. 277-278]

3.2 Summary Examination

The #summary examination, within the meaning of Article 179(3) PILA is a procedural rule prescribed by a federal statute.

FSCD 141 III 444 [458]

The State court called to appoint an #arbitrator has to examine on the basis of a #summary or *prima facie* examination only the existence, but not the #validity or the exact scope of application, of the #arbitration agreement.

FSCD 141 III 444 [459], FSCD 118 Ia 20 [27], *FSCD 108 Ia 308, *FSCD 78 I 352 [363], ZH 04.11.2008 c. III.1, ZH 13.09.1999 p. 3, *ZH 20.11.1981 [(1982) ZR p. 227]

The State court called to appoint an #arbitrator should in all cases grant a request to appoint an #arbitrator even if there is a problem of #interpretation of the #arbitration agreement, whether it be its personal, substantive or temporal scope of application and even if the result of its #summary examination does not allow it to exclude immediately the issue of whether there exists an #arbitration agreement applicable to the dispute between the parties. The State court must always be guided by the principle of *in dubio pro arbitro*.

FSCD 141 III 444 [460]

On the other hand, Article 179(3) PILA aims at protecting a party from the obligation to plead in #arbitral proceedings when there is not even the appearance of an #arbitration agreement. This is why this provision can, without #arbitrariness, be interpreted in the sense that the appointment of an #arbitrator may be refused when there is an #arbitration agreement between the parties but when there is no doubt that it covers only legal relationships which obviously do not have any connection with the claims asserted *in casu*. In particular in international relationships, a party has an interest, which should be protected, not to be involved in #arbitral proceedings when the disputed claims clearly do not fall within the scope of the #arbitration agreement. Such an #interpretation is at least not untenable.

FSCD 141 III 444 [459], FSCD 118 Ia 20 [27], BS 24.04.2014 c. 1.3, ZH 26.01.2008 c. 5

The examination by the State court concerning the existence of a valid #arbitration agreement is done *prima facie*, which means based on a judgment of the sole appearance and following an examination which is necessarily summary.

*FSCD 108 Ia 308 [310-311], TI 08.02.2002 p. 2-3, VD 18.06.2001 p. 7

An #arbitral tribunal does not unduly interfere with the #jurisdiction of State courts when deciding that it has #jurisdiction to rule on the violation of the #arbitration agreement and that the bringing of State proceedings amounts to a violation of the #arbitration agreement.

FSCD 4A_444/2009 c. 4.1.2

In order to allow the State court to accomplish its task under Chapter 12 PILA (and by analogy Article 3 fConcordat), there has to be at least the appearance of the existence of a valid #arbitration agreement between the parties.

*FSCD 14.11.1979 [SJ p. 445], TI 08.02.2002 [p. 2]

The appointing judge is denied the right to carry out a preliminary examination of the #subject matter of the arbitration and to decide on the #validity and the exact scope of the #arbitration agreement. On the other hand, with reference to the #case law of the Federal Supreme Court and the previous cantonal #case law, the judge is permitted to refuse the appointment if the asserted claims are clearly not covered by the #arbitration agreement. The judge is thus entitled to conduct a *prima facie* review of the existence of the #arbitration agreement. In case of doubt, the judge must decide in favour of an appointment.

ZH 27.03.2018 c. III/3.3, ZH 20.10.2009 (PG090001), c. 2

The #summary examination of the State judge is limited to the existence of the #arbitration agreement, but not to its #validity or its exact scope. The question of the conduct of a previous conciliation procedure or of an attempt to reach an amicable agreement in advance is therefore not to be examined in the present case.

ZH 07.03.2018 c. III/4.2, ZH 11.09.2001 c. 3

If the appointment is entrusted to a State court, it must be made in accordance with Article 362(3) CCP, unless a #summary examination shows that there is no #arbitration agreement between the parties. According to the prevailing doctrine, this #summary examination is limited to the existence of an #arbitration agreement and, in particular, its scope does not need to be examined. The Cantonal Court of Graubünden concurred with this view and stated that all objections relating to the #subject-matter of the dispute itself must be disregarded in the appointment procedure, such as the objection that the dispute is not covered by the #arbitration agreement (cf. decision of the Cantonal District of Graubünden ERZ 11 19 of 5 April 2011, c. 3a). In a decision on Article 179(3) PILA, which corresponds to Article 362(3) CCP, the Federal Supreme Court first considered that the State judge involved in the appointment of an #arbitrator had to decide by a #summary examination only on the #validity and not on the exact scope of the #arbitration agreement. It also recognised, however, that the provision could be interpreted without arbitrariness in such a way that the appointment of the #arbitrator may be rejected if there is an #arbitration agreement between the parties but there can be no doubt that it relates solely to legal relationships which are obviously unrelated to the claims actually asserted (FSCD 118 Ia 20 c. 5b p. 27). In a more recent decision concerning Article 362(3) CCP, the Federal Supreme Court referred to the aforementioned decision and the criticism levelled against it by the doctrine and expressly refused to establish final principles on the scope of the #summary examination. As a general principle, however, it has been stated that the judge has to comply with a request for the appointment of an #arbitrator in any case if there is an #interpre-

tation problem with regard to the personal, factual or temporal scope of application of the #arbitration agreement or if the result of the #summary examination does not allow it to exclude from the outset and with certainty the existence of an #arbitration agreement applicable to the legal dispute between the parties (FSCD 141 III 144 c. 3 p. 458 et seq.).

BS 18.09.2017 c. 2.2

The judicial authority can only examine *prima facie* if there exists at least the appearance of a valid and applicable #arbitration agreement. It is therefore only if it is obvious that there is no #arbitration agreement that it must refuse to follow up on the request for the appointment of an #arbitrator. In the framework of the appointment proceedings of Article 12 fConcordat, it is excluded to examine the exceptions or objections which must be examined by the #arbitral tribunal. In particular, it is for the #arbitral tribunal to examine its #jurisdiction, or if the dispute has already been ruled on or if the dispute enters into the scope of the #arbitration agreement.

* VD 29.02.2016 c. III.d

Through its activity, the judge called upon prevents a party from subsequently evading arbitral dispute resolution by failing to comply with its contractually assumed obligation; in this respect, the legislator wanted to reinforce the principle of *#pacta sunt servanda*. The judge called upon on the basis of the #arbitration agreement is therefore in principle obliged to make the appointment, unless a *prima facie* review would show that there is obviously no #arbitration agreement between the parties. The interested party has a legal claim to judicial assistance unless a first glance reveals to the judge that there is obviously no #arbitration agreement between the parties. If there is not even the appearance of an #arbitration agreement, a party shall be prevented from having to enter into #arbitral proceedings.

BS 24.04.2014 c. 1.3

According to the #case law of the Federal Supreme Court, the appointment of an #arbitrator may only be challenged if an #arbitration agreement exists between the parties but there can be no doubt that it relates solely to legal relationships which are obviously unrelated to the claims actually asserted. In particular, in international circumstances, a party has an interest worthy of protection in not being involved in #arbitral proceedings from the outset if the disputed claims are clearly not covered by the #arbitration agreement (FSCD 118 Ia 20 c. 5b).

ZH 24.01.2014 c. 1.1

With this #case law, the Federal Supreme Court supported the view that a purely formal review of the existence of an #arbitration agreement between the parties was not sufficient, but that the existence of a relationship between the #arbitration agreement and the claims asserted should also be examined. The doctrine criticises this #case law, which is now more than 20 years old, with arguments that are well worth examining. It is argued, for example, that such extensive control is particularly problematic where claims arising from group liability, #piercing of the corporate veil or #legal succession are asserted. In addition, such an #interpretation is dangerous, since the appointing judge may be inclined or forced to examine a dispute more than just *prima facie*, because especially in cases of international commercial law there are usually extremely complex economic and legal circumstances which cannot normally be resolved by a

#summary examination. Thus, contrary to the legislator's intention, the appointing judge would decide on an issue reserved to the #arbitral tribunal under Article 186(1) PILA, i.e. the #arbitral tribunal's own #jurisdiction. The doctrine therefore takes the view that the appointing judge must carry out only a #summary examination of the existence of the #arbitration agreement between the parties and not of its scope.

ZH 24.01.2014 c. 1.1

The #summary examination under Article 179(3) PILA generally covers - as is undisputed in the doctrine - only the existence, but not the #validity or scope, of the #arbitration agreement. The appointing judge should not interfere in the dispute to be examined by the #arbitral tribunal. The #arbitral tribunal itself shall decide on this on the basis of the so-called #competence-competence granted to it under Article 186(1) PILA. The subsidiarity principle, which runs through the entire Chapter 12 PILA with regard to the intervention of State judges, corresponds to the fact that in case of doubt the judge must decide in favour of an appointment, otherwise it intervenes in the #jurisdiction of the #arbitral tribunal. In case of doubt, the appointing judge must therefore designate "because a superfluous appointment causes at least less injustice than no appointment". Finally, Article 179(3) PILA assumes the existence of a valid #arbitration agreement, which means that the #respondent must provide the summary counterevidence that no #arbitration agreement exists in order to successfully defend against the #constitution of the #arbitral tribunal.

BS 24.04.2014 c. 1.3

It is the #arbitral tribunal itself which will decide, based on the #competence-competence of Article 186(1) PILA, on the #validity and the exact scope of application of the #arbitration agreement.

ZH 04.11.2008 c. III/2

The examination by the appointing State court is limited to protecting a party from having to participate in #arbitral proceedings, when there is not even the appearance of an #arbitration agreement.

ZH 04.11.2008 c. III/2, ZH 26.01.2008 c. 5

In case of doubt, the seized #appointing authority shall decide in favour of the appointment of the #arbitrators.

ZH 04.11.2008 c. III/2

The so-called #competence-competence of the #arbitral tribunal has to be distinguished from the #summary examination of the appointing State court on whether an #arbitration agreement has been submitted and whether it has #jurisdiction *ratione loci* to appoint the #arbitrators (Art. 179(2) PILA).

ZH 04.11.2008 c. III/2.2

The examination of whether the agreement between the parties exists, is not subject to the limited #powers of review of the judge within the meaning of Article 179(3) PILA. It is true that the #summary examination includes for both cases of judicial appointment (Art. 179(2) & (3) PILA) the proof of the existence of an #arbitration agreement, even though this is not expressly stated in Article 179(2) PILA. The reason for this is that in case of a merely subsidiary intervention by the State court in the appointment of #arbitrators, such an intervention

must be subject to the *prima facie* proof of the existence of an #arbitration agreement. The goal of these limited #powers of review is only to ensure that in case of doubt concerning the existence of an #arbitration agreement, an #arbitral tribunal is constituted, which then examines with unfettered #powers of review the #validity of the #arbitration agreement for the disputed claims and thus decides on its own #jurisdiction *ratione materiae* within the meaning of Article 186 PILA. This aims at preventing that a party can avoid afterwards by filibuster its contractual duty to resolve disputes by arbitration. To the contrary, the unfettered #powers of review concerning the existence of a valid #arbitration agreement with regard to the appointment of the #arbitrators is justified because of the principle of #party autonomy, which constitutes one of the main pillars of the new PILA. The State judge shall not easily intervene in the appointment proceedings chosen by the parties.

ZH 19.11.2004 c. 5, ZH 25.08.2004 c. 5

This *prima facie* examination in the field of international arbitration is analogous to the one conducted by the court when applying [Article 3 of] the fConcordat.

TI 08.02.2002 p. 2

The cantonal court may only refuse to appoint an #arbitrator if it is immediately clear from the documents on the file that there is no #arbitration agreement between the parties.

VD 18.06.2001 p. 7, ZH 03.04.1990 [(1992) ASA p. 353]

Whether an #arbitration agreement exists between the parties, is not examined in an absolute and abstract way, but concretely with respect to the claims asserted by the #claimant. It cannot be the meaning of the new provision of the PILA that the court has to appoint an #arbitrator any time that there is an #arbitration agreement in any contract between the parties, even though the asserted claims cannot *prima facie* be derived from this contract. On the contrary, the existence of an #arbitration agreement has to be examined concretely with regard to the asserted claims.

ZH 03.06.1991 p. 14-15

The court has a real duty to appoint when, by a #summary examination, it reaches the conclusion that the asserted claims could possibly be based on the submitted contract containing the #arbitration agreement. This does not mean that the court is also obliged to appoint the #arbitrator when, according to its conviction, the claims asserted in the case at hand clearly do not fall within the scope of the submitted agreement containing the #arbitration agreement.

ZH 03.06.1991 p. 15

In appointment proceedings, the Zurich Supreme Court [*Obergericht*] has always examined only as a #preliminary question, and without any binding effect on the final decision on #jurisdiction of the #arbitral tribunal, whether there is a valid #arbitration agreement. In general, it has refused the appointment only when the #invalidity of the #arbitration agreement was evident. This situation did not change with the entry into force of the PILA. This statute also provides in Article 179(3) PILA for a #summary examination only.

ZH 17.01.1991 p. 6, ZH 13.08.1990 p. 4

3.3 Cantonal Remedies

The PILA does not preclude the cantonal legislator from providing remedies against the decision of a State court on the appointment of an #arbitrator pursuant to Article 179(2) & (3) PILA.

FSCD 119 Ia 421, FSCD 4A_215/2008 c. 4.1 et seq., FSCD 17.07.1998 [4P.108/1998] c. 1b, FSCD 10.01.1995 [(1995) ASA p. 229], ZH 09.01.1995 [(1996) ZR p. 240], ZH 03.06.1991 p. 11

Bernese cantonal law provides for a #motion to set aside (“*Nichtigkeitsklage*”) against decisions of cantonal courts refusing to appoint an #arbitrator (Art. 380(3) in connection with Art. 360 fCCP/BE). Such a #motion to set aside permits a party, in particular, to complain about a manifest violation of the law and an obviously erroneous assessment of the #evidence or the file (Art. 360(2) fCCP/BE). A limited legal examination of the #merits is thereby possible.

FSCD 119 Ia 421 [422-423]

Such a regulation which provides for an ordinary or extraordinary cantonal remedy against a refusal to appoint an #arbitrator pursuant to Article 179(3) PILA is not in contradiction with the provisions of the fConcordat to which [*the former version of*] Article 179(2) PILA implicitly refers.

FSCD 119 Ia 421 [423], FSCD 4A_215/2008 c. 4.1, FSCD 17.07.1998 [4P.108/1998] c. 1b

It is up to the Cantons (Art. 179(2) PILA) to provide for possible remedies according to the cantonal (procedural) law against refusals to appoint an #arbitrator. Therefore, it depends exclusively on the cantonal law whether in international arbitration there is a cantonal remedy against appointment decisions. The Federal Supreme Court examines the #interpretation and application of cantonal law on a [*former*] #motion for constitutional review only with respect to #arbitrariness.

FSCD 119 Ia 421 [423], FSCD 17.07.1998 [4P.108/1998] c. 1b, FSCD 20.06.1995 [(1996) ZR p. 241], FSCD 10.01.1995 [(1995) ASA p. 229], ZH 09.01.1995 [(1996) ZR p. 240]

The decision of the *Tribunal de première instance* of Geneva is rendered by the last cantonal authority as the cantonal legislator has excluded the #motion to set aside against the [positive and negative] decisions of a State court on the appointment of an #arbitrator.

FSCD 121 I 81 [83], FSCD 4A_215/2008 c. 3.2.2 & 3.2.3.1 et seq., FSCD 10.01.1995 [(1995) ASA p. 231-232], confirming GE 03.03.1994 [(1994) SJ p. 448], which overruled GE 07.02.1991

In the Canton of Vaud, there is an #appeal against the decision of a State court refusing the appointment of an #arbitrator.

FSCD 17.07.1998 [4P.108/1998] c. 1c

The #appellant whose right to file an #appeal before a cantonal court against the appointment decision has been denied has, without doubt, a legally protected interest to invoke a procedural #denial of justice constituting a violation of Article 8 fFC.

FSCD 10.01.1995 [(1995) ASA p. 229]

Section 69a [of the former] *Gerichtsverfassungsgesetz*/ZH excludes a nullity appeal [*Nichtigkeitsbeschwerde*] against a positive or negative appointment decision of the President of the commercial court.

FSCD 20.06.1995 [(1996) ZR p. 242], ZH 09.01.1995 [(1996) ZR p. 240], overruling ZH 03.06.1991 p. 11-14

The decisions taken pursuant to Article 356(2) CCP by the court designated by cantonal law to nominate, challenge, remove or replace #arbitrators (a.) by a "single court" are not subject to an #appeal before a cantonal court.

* VD 29.02.2016 c. V.

3.4 Federal Remedies

3.4.1 No Remedy against the Positive Appointment Decision

There are no remedies before the Federal Supreme Court against a decision by which an authority appoints an #arbitrator pursuant to Article 179 PILA.

FSCD 142 III 230 [232], FSCD 141 III 444 [449], FSCD 121 I 81 [83], FSCD 115 II 294 [295], FSCD 10.01.1995 [(1995) ASA p. 228], FSCD 04.01.1995 [(1995) ASA p. 211], BS 24.04.2014 c. 3, ZH 04.11.2008 c. IV.4, ZH 09.01.1995 [(1996) ZR p. 241]

There is no right of #appeal to the Federal Supreme Court against the positive appointment decision of the State court, which means that the existence of a #ground for #challenge against the appointed #arbitrator or the absence of a valid #arbitration agreement and thus the lack of #jurisdiction of the #arbitral tribunal can only be raised in the context of #motion to set aside the arbitral #award.

FSCD 142 III 230 [232], FSCD 115 II 294 [295]

The fact that the positive appointment decision cannot be challenged follows, on the one hand, from the fact that in the field of arbitration the possibilities of #appeal have been limited according to the clear will of the legislator in order to preserve the autonomy and expeditious nature of arbitration. On the other hand, Article 180(3) PILA excludes an #appeal to the Federal Supreme Court against judicial decisions on #challenges of #arbitrators. The only objection to the positive appointment decision of the State court could therefore be that the existence of an #arbitration agreement between the parties had been wrongly affirmed (Art. 179(3) PILA). However, this concerns the issue of #jurisdiction, on which, according to Swiss opinion, the #arbitral tribunal - which is not bound by the appointment decision with regard to the question of #jurisdiction - has to decide first and foremost and only secondarily the State judge.

FSCD 142 III 230 [232]

The civil #appeal [Art. 43 et seq. fSOFJ] against a positive appointment decision is not available. As such a decision is an interim #decision, this remedy is only possible against a decision of the last cantonal instance or of a unique cantonal instance (Art. 48(1) & (2) [of the former] SOFJ). Since such a decision is rendered in non-adversarial #proceedings, it is not vested with the authority of #res judicata as the #arbitrators will still have the possibility to examine in an independent way the #jurisdiction and the regularity of the #arbitral tribunal's #constitution.

FSCD 115 II 294 [295], *FSCD 110 Ia 59 [61], *FSCD 108 Ia 308 [310-311], FSCD 4A_407/2017 c. 2.3.1.1, FSCD 4A_146/2012 c. 3.3.2

In international arbitration, this consequence is in perfect harmony with the intent of the legislator and the scope of the PILA to limit the remedies available to the parties. This limitation does not infringe their rights as the remedies of Article 190(2)(a), (b) & (3) PILA are still available.

FSCD 115 II 294 [296]

The nullity #appeal within the meaning of Article 68 et seq. fSOFJ is also excluded, as Article 179(3) PILA does not regulate the #jurisdiction of the authorities with regard to the #matter in dispute or the place within the meaning of Article 68(1)(b) fSOFJ.

FSCD 115 II 294 [295]

As Article 179(3) PILA is not a federal provision delimiting the #jurisdiction of the authorities with regard to the #matter in dispute or the place, at least not within the meaning set out by #case law (FSCD 97 I 56), the [former] #motion for constitutional review pursuant to Article 84(1)(d) fSOFJ is also excluded.

FSCD 115 II 294 [295]

A [former] #motion for constitutional review for #arbitrariness in the application of the law cannot be envisaged either. Such a motion can only be filed against decisions taken in the last instance (Art. 87 fSOFJ). As the challenged decision is an interim #decision, such a motion would anyway not be possible as there is no irreparable detriment according to #case law (FSCD 108 Ia 203 [204], FSCD 106 Ia 229 [234]).

FSCD 115 II 294 [295]

The decision by which an appointing judge appoints an #arbitrator is not subject to recourse, whether directly or indirectly, namely in conjunction with an #Appeal in Civil Matters against an #award issued subsequently, partial or final, by which the sole #arbitrator appointed (or the constituted #arbitral tribunal) with the help of the appointing judge accepts its #jurisdiction without being bound by the reasons in this regard in the State appointment decision.

FSCD 4A_407/2017 c. 2.2.1

If a State court confirms the appointment of the #arbitrators by the parties in a #multi-party arbitration, but changes the position of #claimant and #respondent with respect to certain parties, this amounts to a positive appointment decision.

FSCD 04.01.1995 [(1995) ASA p. 213]

Obviously, there is not the same need of protection when the appointing judge granted the request to appoint an #arbitrator. Such a decision, being taken by a "sole court" within the meaning of Article 356(2) CCP, is not subject to any direct #appeal, whether that be cantonal or federal. It can only be challenged at the same time as the arbitral #award or the interim #decision of the #arbitral tribunal on its #jurisdiction.

*VD 29.02.2016 c. V.

There is no federal remedy available against the positive appointment decision of the State judge; the #appeal to the Federal Supreme Court is only open against the preliminary arbitral #award on #jurisdiction (cf. Art. 190(2)(b) PILA), where the Federal Supreme Court examines the #jurisdiction of the appointed #arbitral tribunal (FSCD 129 III 727 ff. c. 5.1.2 p. 731).

BS 24.04.2014 c. 3

A positive appointment decision by a State court does not constitute a final #decision within the meaning of Article 90 FSCA or a preliminary or interim #decision within the meaning of Article 92 et seq. FSCA, since it cannot bring about any irreparable disadvantage within the meaning of Article 93(1)(a) FSCA. Accordingly, a positive appointment decision cannot be challenged, or can only be challenged together with the later arbitral #award.

ZH 11.09.2013 c. III/2, ZH 25.07.2013 c. III/2

In the case of the appointment of an #arbitrator by the judge, there is no immediate #appeal, the appointment only being allowed to be challenged with the first #award rendered by the #arbitrator explicitly or implicitly affirming the regularity of the #composition or the #jurisdiction of the #arbitral tribunal.

VD 22.10.2012

3.4.2 Remedies against the Negative Appointment Decision

The decision by which the #appointing judge refuses to appoint an #arbitrator or declares inadmissible the *ad hoc* request is a decision which can be appealed directly to the Federal Supreme Court by way of an #Appeal in Civil Matters.

FSCD 142 III 230 [231], FSCD 141 III 444 [458], FSCD 121 I 81 [83], FSCD 118 Ia 20 [23], FSCD 4A_407/2017 c. 2.2.1, *VD 29.02.2016 c. V.

The decision by which the appointing judge refuses to appoint an #arbitrator or declares the *ad hoc* request inadmissible, in the context of domestic arbitration, may be submitted directly to the Federal Supreme Court by way of an #Appeal in Civil Matters, even if it does not come from a court ruling on an #appeal. This is the case even where, as in the present case, the #appointing judge who renders this decision is not the superior court within the meaning of Article 75(2) FSCA.

FSCD 141 III 444 [458], *VD 29.02.2016 c. V.

According to Article 72 FSCA, the Federal Supreme Court has #jurisdiction over #appeals against decisions in civil matters. The petition for the appointment of an #arbitrator and for the #constitution of an #arbitral tribunal called to decide a dispute in international arbitration pursuant to Articles 176 et seq. PILA falls without doubt within the field of civil matters. The corresponding provision in the FSCA, i.e. Article 77 FSCA, is among the provisions concerning the #Appeal in

Civil Matters (Arts. 72-77 FSCA). This is why the decision of a cantonal supreme court to not hear a negative appointment decision of a cantonal court of first instance has to be challenged by an #Appeal in Civil Matters before the Federal Supreme Court.

FSCD 4A_215/2008 c. 1.1

The federal legislator has deliberately renounced keeping the distinction between "civil disputes" ["*contestations civiles*"] and "civil matters" ["*affaires civiles*"] in Articles 72-77 FSCA. Therefore, it is without importance, in the new system, whether the case in which an #Appeal in Civil Matters is filed is contentious or non-contentious. The decision by which the "*juge d'appui*" refuses to appoint an #arbitrator may be submitted to the Federal Supreme Court by an #Appeal in Civil Matters, even though the decision is a non-contentious matter.

FSCD 4A_215/2008 c. 1.1

The same applies to a decision to not hear a cantonal #appeal against such a negative appointment decision.

FSCD 4A_215/2008 c. 1.1

If a cantonal court of first instance [in casu, *Tribunal de première instance de Genève*] refuses to appoint an #arbitrator based on Article 179(3) PILA and the cantonal supreme court [in casu, *Cour de Justice du canton de Genève*] does not hear an #appeal against this decision because there is no cantonal appeal (see FSCD 10.01.1995 c. 1), there exists a federal #appeal against such decision, independently of the question of whether the substantive issue, such as the appointment of an #arbitrator, can be submitted or not to the Federal Supreme Court.

FSCD 4A_215/2008 c. 1.1, FSCD 20.06.1995 c. 2

The Federal Supreme Court has left open the question whether the non-contentious nature of such proceedings has the effect that the prerequisite of a minimal #amount in dispute (Art. 74(1)(b) FSCA) does not apply to the #Appeal in Civil Matters and whether, in general, this requirement also applies in international arbitration.

FSCD 4A_215/2008 c. 1.1

The #Subsidiary Constitutional Appeal can thus not be heard (Art. 113 FSCA).

FSCD 4A_215/2008 c. 1.1

The #Appeal in Civil Matters may be filed for a violation of federal law (Art. 95(a) FSCA), including constitutional rights (FSCD 133 III 446 [447, 462]). On the contrary, it cannot be filed based on a violation of cantonal law as such. However, one may claim that the erroneous application of cantonal law amounts to a violation of federal law, in particular that the application is arbitrary or violates other constitutional rights (FSCD 134 III 379 [383], FSCD 133 III 462 c. 2.3). The violation of fundamental rights is only examined if the #appellant has asserted and motivated this #grievance (Art. 106(2) FSCA).

FSCD 4A_215/2008 c. 1.3

An immediate #appeal against the decision of a "different tribunal" is only possible in the case of a refusal to appoint an #arbitrator.

VD 22.10.2012

3.5 No Direct Remedy against the Appointment Decisions of Private Bodies

There is no direct remedy against a negative appointment decision of a private #appointing authority like the #ICC International Court of Arbitration. However, such a decision can be re-examined indirectly by a #motion to set aside the first [challengeable] #award.

FSCD 138 III 270 [271], FSCD 118 II 359 [361], FSCD 120 II 155 [(1994) ASA p. 415], FSCD 4A_546/2016 c. 1.2.3, FSCD 4A_54/2012 c. 2.1, FSCD 4A_256/2009 c. 3.1.2, FSCD 4A_458/2009 c. 3.3.2, FSCD 4A_644/2009 c. 1, FSCD 4A_258/2009 c. 3.1.2, FSCD 4P.168/1999 [(2001) ASA p. 783], FSCD 30.06.1994 [(1997) ASA p. 102]

The decisions of the #ICC International Court of Arbitration with respect to the appointment, confirmation or #challenge of an #arbitrator are not subject to a direct #appeal.

FSCD 138 III 270 [271], FSCD 120 II 155 [(1994) ASA p. 415], FSCD 118 II 359 [361], FSCD 4A_546/2016 c. 1.2.3, FSCD 4A_54/2012 c. 2.1, FSCD 4A_644/2009 c. 1, FSCD 4A_256/2009 c. 3.1.2, FSCD 4A_348/2009 c. 3.1,

The decisions of the ICAS [International Council of Arbitration for Sport] with respect to the #challenge of an #arbitrator are not subject to a direct #appeal. Such decisions can only be re-examined in the context of a #motion to set aside the #award on the ground of the irregular #constitution of the #arbitral tribunal.

FSCD 138 III 270 [271], FSCD 4A_282/2013 c. 5.3.2 (not published in FSCD 139 III 511), FSCD 4A_458/2009 c. 3.3.2, FSCD 4A_644/2009 c. 1

Decisions by which private bodies appoint an #arbitrator on behalf of the parties - e.g. in accordance with agreed rules of an #arbitral institution such as the ICC or the SCAI - are not subject to #appeal. Such bodies act in a private capacity and not as #arbitrators, let alone as judges. Their appointment decision does not qualify as an arbitral #award and can therefore not be appealed to the Federal Supreme Court.

FSCD 4A_546/2016 c. 1.2.3

Similar to the #ICC International Court of Arbitration, the Arbitration Court of the SCAI is not itself an #arbitral tribunal within the meaning of Part 3 CCP or Chapter 12 PILA, but an #association that offers the service of administering #arbitral proceedings. Its decisions concerning the #constitution of an #arbitral tribunal are not arbitral #awards and as such cannot be appealed against before the Federal Supreme Court.

FSCD 4A_546/2016 c. 1.3

It is left open whether one should revisit the above #case law, on the ground of procedural efficiency and in order to preserve the logic of the legislative system, given that a decision taken by the President of the Ordinary Arbitration Division [of the #CAS] deciding on the #composition of the #arbitral tribunal is subject to a direct #appeal.

FSCD 4A_282/2013 c. 5.3.2 (not published in FSCD 139 III 511)

The indirect examination of the negative nomination decision of a private body is possible in the proceedings for setting aside of the #arbitral award, provided that

this appears to be necessary in order to respect the constitutional requirements of the #arbital proceedings, i.e. the #arbitrators' #independence.

FSCD 128 III 330 [332], FSCD 118 II 359 [361], FSCD 4A_458/2009 c. 3.3.2, FSCD 4P.235/2001 c. 2b, FSCD 4P.168/1999 [(2001) ASA p. 784], FSCD 30.06.1994 [(1997) ASA p. 103-104], FSCD 18.05.1993 c. 3

The #appellant may not only assert #grounds for #challenge which it became aware of once the #award was rendered, but also those which it was already aware of before, but which had not been accepted as such by the body deciding on the #challenge. A legal system must reserve the possibility to examine the #award and the #arbital proceedings with respect to the constitutional requirements, of which the #impartiality of the #arbitrator forms part. Only Article 190(2)(a) PILA (incorrect #constitution of the #arbital tribunal) and not Article 190(2)(b) PILA (erroneous interim #decision) can serve as basis for the #motion to set aside.

FSCD 118 II 359 [361], FSCD 18.05.1993 c. 3, FSCD 11.05.1992 [(1992) ASA p. 389]

As, according to Article 190 PILA, only decisions and certain preliminary #decisions of an #arbital tribunal can be challenged before the State court, there is no #appeal, if the body deciding on the challenge – like the #ICC International Court of Arbitration – is not an #arbital tribunal.

FSCD 118 II 359 [361], FSCD 4P.168/1999 [(2001) ASA p. 783], FSCD 30.06.1994 [(1997) ASA p. 102], FSCD 18.05.1993 c. 3

The provision applies exclusively to State courts and not to other #appointing authorities designated by the parties. The State court is obliged to act, independently of the rules of cantonal law. In this respect, Article 179(3) PILA represents a federal procedural rule and its violation can be invoked by an #appeal to the Federal Supreme Court, if no other procedural obstacles exist.

FSCD 118 Ia 20 [24]

Even if the #ICC International Court of Arbitration is a judiciary organ, its decision, rendered in non-adversarial #proceedings, does not have any #res *judicata* effect. Therefore, this decision leaves to the #arbitrators and subsequently to the appeals instances the possibility to examine in an independent way the #jurisdiction and the regularity of the #arbital tribunal's #constitution.

*FSCD 110 Ia 59 [61]

The #grievance stating that the decision of the private body has been rendered in violation of the procedural rules and that the decision has not been correctly communicated, respectively founded, cannot be heard, as this #grievance does not concern the correct #composition of the #arbital tribunal and does not concern the #arbital proceedings as such.

FSCD 4P.235/2001 c. 2b

The fact that it is possible that a considerable part of the #arbitral proceedings has to be repeated if the plea of lack of #independence or #impartiality is granted, is a consequence which has to be accepted. It does, in any case, not justify admitting the [former] #motion for constitutional review against a negative appointment decision of a private body such as the #ICC International Court of Arbitration contrary to the provisions of the PILA.

FSCD 18.05.1993 c. 3

The appeals instances may examine in an independent way the #jurisdiction and the regularity of the #composition of the #arbitral tribunal without taking into account a decision of the #ICC International Court of Arbitration, as this judicial organ renders its decisions in non-adversarial #proceedings.

FSCD 11.05.1992 [(1992) ASA p. 390]

3.6 Relationship with Article 186 PILA

However, the #arbitral tribunal's #jurisdiction to decide the issue of the existence and #validity of an #arbitration agreement is not exclusive. Depending on the circumstances, another authority could have #jurisdiction to decide this question: this could be, for instance, the Swiss court confronted with an #arbitration defence (Art. 7 PILA) or – with limited #powers of review – the court requested to appoint an #arbitrator (Art. 179(3) PILA), or even another #arbitral tribunal, in the case of several #arbitration agreements. The conflicts which may result from this multitude of #jurisdictions have to be resolved by the rules governing the #*lis pendens* (Art. 9 PILA), the #*res judicata* or the #recognition and #enforcement of foreign #awards (Arts. 25 et seq. PILA).

FSCD 127 III 279 [284], FSCD 121 III 495 [502]

Article 180

IV. Arbitral Tribunal 2. Challenge of Arbitrators

- ¹ An arbitrator may be challenged:**
 - a. if it does not meet the qualifications agreed upon by the parties;**
 - b. if a ground for challenge exists under the rules of arbitration agreed upon by the parties; or**
 - c. if circumstances exist that give rise to justifiable doubts as to its independence.**
- ² No party may challenge an arbitrator nominated by it, or whom it was instrumental in appointing, except on a ground which came to the party's attention after such appointment. The ground for challenge must be notified to the arbitral tribunal and to the other party without delay.**
- ³ To the extent that the parties have not made provisions for this challenge procedure, the court at the seat of the arbitral tribunal shall make the final decision.**

IV. Schiedsgericht 2. Ablehnung eines Schiedsrichters

- ¹ Ein Schiedsrichter kann abgelehnt werden:**
 - a. wenn er nicht den von den Parteien vereinbarten Anforderungen entspricht;**
 - b. wenn ein in der von den Parteien vereinbarten Verfahrensordnung enthaltener Ablehnungsgrund vorliegt, oder**
 - c. wenn Umstände vorliegen, die Anlass zu berechtigten Zweifeln an seiner Unabhängigkeit geben.**
- ² Eine Partei kann einen Schiedsrichter, den sie ernannt hat oder an dessen Ernennung sie mitgewirkt hat, nur aus Gründen ablehnen, von denen sie erst nach dessen Ernennung Kenntnis erhalten hat. Vom Ablehnungsgrund ist dem Schiedsgericht sowie der anderen Partei unverzüglich Mitteilung zu machen.**
- ³ Soweit die Parteien das Ablehnungsverfahren nicht geregelt haben, entscheidet im Bestreitungsfall der Richter am Sitz des Schiedsgerichts endgültig.**

IV. Tribunal
arbitral
2. Récusation
des arbitres

¹ Un arbitre peut être récusé:

- a. Lorsqu'il ne répond pas aux qualifications convenues par les parties;
- b. Lorsqu'existe une cause de récusation prévue par le règlement d'arbitrage adopté par les parties, ou
- c. Lorsque les circonstances permettent de douter légitimement de son indépendance.

² Une partie ne peut récuser un arbitre qu'elle a nommé ou qu'elle a contribué à nommer que pour une cause dont elle a eu connaissance après cette nomination. Le tribunal arbitral et l'autre partie doivent être informés sans délai de la cause de récusation.

³ En cas de litige et si les parties n'ont pas réglé la procédure de récusation, le juge compétent du siège du tribunal arbitral statue définitivement.

IV. Arbitri
2. Ricusa

¹ Un arbitro può essere ricusato se:

- a. non soddisfa ai requisiti convenuti dalle parti;
- b. vi è una causa di ricusa contemplata dall'ordinamento procedurale convenuto dalle parti o
- c. vi sono circostanze tali da far dubitare legittimamente della sua indipendenza.

² Una parte può ricusare un arbitro da lei nominato, o alla cui nomina ha partecipato, soltanto per cause di cui è venuta a conoscenza dopo la nomina. La causa di ricusa dev'essere comunicata senza indugio al tribunale arbitrale e all'altra parte.

³ Ove le parti abbiano disciplinato la procedura di ricusa, i casi controversi sono decisi definitivamente dal giudice del luogo di sede del tribunale arbitrale.

1 *Grounds for Challenge (1)*

1.1 *Failure to Meet the Requirements Agreed upon by the Parties (1a)*

1.1.1 Principle

If the parties' stated #grounds for #challenge go beyond the constitutional requirements, it is doubtful whether this can found the #ground for setting aside under Article 190(2)(a) PILA.

FSCD 4P.188/2001 c. 2e

The violation of qualifications agreed upon only by the parties (Article 180(1)(a) PILA), and which go beyond the constitutional guarantees, does not entail the setting aside of the #award. On the contrary, the #motion for setting aside is available to claim a lack of #independence according to Article 180(1)(c) PILA.

FSCD 30.06.1994 [(1997) ASA p. 104]

This provision applies in particular to the nationality of the #arbitrators.

GE 1993 [(1993) ASA p. 81]

If the #arbitration agreement provides that the nationality of the third #arbitrator must be different from those of the #arbitrators appointed by the parties, and if three different nationalities are represented in the #arbitral tribunal, the presiding #arbitrator cannot be challenged on the grounds that it is of the same nationality as a party-appointed #arbitrator who replaced another party-appointed #arbitrator.

GE 1993 [(1993) ASA p. 79]

1.1.2 Individual Cases

If the contracts provide that "[u]nless the parties otherwise agree, the arbitration tribunal shall consist of persons employed or engaged in or retired from senior positions in insurance or reinsurance with not less than ten years' experience of insurance or reinsurance", the parties consider eligible as #arbitrators persons who are, or have been, active in (re)insurance and have professional experience of more than ten years.

ZH 11.01.2012 c. 3.2 & 3.3

1.2 Grounds for Challenge in the Procedural Rules (1b)

1.3 Justifiable Doubts as to the Arbitrator's Independence (1c)

1.3.1 Principle

Following the example of State courts, an #arbitral tribunal has to present sufficient guarantees of #independence and #impartiality. The violation of this principle, which applies to the party-appointed #arbitrators as well as the presiding #arbitrator of the #arbitral tribunal, leads to an incorrect #constitution within the meaning of Article 190(2)(a) PILA.

FSCD 142 III 521 [536], FSCD 136 III 605 [608], FSCD 129 III 445 [449], *FSCD 125 I 389 [390], FSCD 119 II 271 [275], FSCD 118 II 359 [361], FSCD 4A_505/2017 c. 4.2.1, FSCD 4A_704/2015 c. 3.1, FSCD 4A_598/2014 c. 2.2.1, FSCD 4A_606/2013 c. 5.1, FSCD 4A_54/2012 c. 2.2.1, FSCD 4A_530/2011 c. 3.2, FSCD 4A_233/2010 c. 3.2.2, FSCD 4A_458/2009 c. 3.1, FSCD 4A_612/2009 c. 3.1.2, FSCD 4A_348/2009 c. 3.2, *FSCD 4A_586/2008 c. 3.1.1, FSCD 4A_539/2008 c. 3.2, FSCD 4A_210/2008 c. 4.2, FSCD 4A_506/2007 c. 3.1.1, FSCD 4P.4/2007 c. 3.1, FSCD 4P.263/2002 c. 5.1, FSCD 4P.188/2001 c. 2b, *GE 16.10.2015 c. 3.1.3, ZH 17.01.2014 II.2

The parties to #arbitral proceedings are entitled to a decision from the #arbitral tribunal by an independent and impartial #arbitrator without the interference of any reason outside of the case, in the same way as in the case of a decision by a State court.

FSCD 4A_424/2011 c. 3.1.1, ZH 12.08.2016 c. 36.1

1.3.2 Constitutional Requirements with Regard to Independence and Impartiality

In order to know whether an #arbitral tribunal presents sufficient guarantees of #independence and #impartiality, one has to refer to the constitutional principles developed with regard to State courts.

FSCD 142 III 521 [536], FSCD 136 III 605 [608, 612], *FSCD 135 I 14 [15], FSCD 129 III 445 [466], *FSCD 125 I 389 [390], *FSCD 124 I 121 [123], FSCD 120 II 155 [166], FSCD 119 II 271 [275], FSCD 118 II 359 [361], FSCD 117 Ia 166 [168], *FSCD 113 Ia 407 [408-409], FSCD 4A_284/2018 c. 6.1.2, FSCD 4A_505/2017 c. 4.2.1, FSCD 4A_236/2017 c. 3.1.1, FSCD 4A_704/2015 c. 3.1, FSCD 4A_598/2014 c. 2.2.1, FSCD 4A_606/2013 c. 5.1, FSCD 4A_54/2012 c. 2.2.1, FSCD 4A_233/2010 c. 3.2.2, FSCD 4A_458/2009 c. 3.1, FSCD 4A_348/2009 c. 3.2, *FSCD 4A_586/2008 c. 3.1.1, FSCD 4A_539/2008 c. 3.2, FSCD 4A_210/2008 c. 4.2, FSCD 4A_506/2007 c. 3.1.1, FSCD 4P.4/2007 c. 3.1, FSCD 4P.263/2002 c. 5.1, FSCD 4P.129/2002 c. 5.2, FSCD 4P.168/1999 [(2001) ASA p. 785], FSCD 09.02.1998 [(1998) ASA p. 645-646], *GE 16.10.2015 c. 3.1.3, GR 30.01.1996 [(1996) ASA p. 265]

According to Article 30(1) FC and Article 6(1) ECHR, every person whose matter has to be decided in judicial proceedings has the right that its matter be submitted to a #court established by law, which has #jurisdiction and is

independent and impartial. This guarantee permits challenging a judge whose situation or behaviour is such as to give rise to doubts as to its #impartiality.

FSCD 142 III 521 [536], FSCD 136 III 605 [608], *FSCD 135 I 14 [15], FSCD 129 III 445 [454], FSCD 120 II 155 [166], FSCD 118 II 359 [361], FSCD 4A_505/2017 c. 4.2.1, FSCD 4A_236/2017 c. 3.1.2, FSCD 4A_704/2015 c. 3.1, FSCD 4A_598/2014 c. 2.2.1, FSCD 4A_606/2013 c. 5.1, FSCD 4A_54/2012 c. 2.2.1, FSCD 4A_233/2010 c. 3.2.2, FSCD 4A_162/2010 c. 2.2, FSCD 4A_458/2009 c. 3.1, *FSCD 4A_586/2008 c. 3.1.1, FSCD 4A_539/2008 c. 3.2, FSCD 4A_210/2008 c. 4.2, FSCD 4A_506/2007 c. 3.1.1, FSCD 4P.4/2007 c. 3.1, *FSCD 4P.247/2006 c. 3.2, FSCD 08.09.1999 c. 2a, FSCD 01.09.1999 c. 1a, FSCD 30.06.1994 [(1997) ASA p. 105]

In order to know whether an #arbitral tribunal offers sufficient guarantees of #independence and #impartiality, one has to refer to the constitutional principles developed with regard to Article 30 FC and Article 19 fConcordat.

FSCD 136 III 605 [612], FSCD 129 III 445 [454], *FSCD 125 I 389 [390], *FSCD 124 I 121 [123], FSCD 119 II 271 [275], FSCD 118 II 359 [361], FSCD 4A_233/2010 c. 3.2.2, FSCD 4A_348/2009 c. 3.2, FSCD 4P.168/1999 [(2001) ASA p. 785], FSCD 09.02.1998 [(1998) ASA p. 645-646]

The guarantees of Article 30 FC and Article 6(1) ECHR do not only apply to State courts but also to private #arbitral tribunals whose decisions have the same effects with regard to #res judicata and enforceability as the decisions of State courts and which must therefore guarantee the same judicial #independence. This applies in particular to the right to a regularly composed tribunal.

*FSCD 135 I 14 [15], FSCD 119 II 271 [275], FSCD 117 Ia 166 [169-179], FSCD 4P.208/2004 c. 4.1, FSCD 4P.196/2003 c. 3.1, FSCD 4P.188/2001 c. 2b, FSCD 4P.168/1999 [(2001) ASA p. 785], FSCD 08.09.1999 c. 2a, FSCD 01.09.1999 c. 1a, FSCD 30.06.1994 [(1997) ASA p. 104], *ECHR 11.07.1989 [(1989) VPB p. 529-531]

Article 34 FSCA contains a concretisation of Article 30(1) FC.

FSCD 4A_162/2010 c. 2.2

The constitutional guarantee of a #court established by law pursuant to Article 30(1) FC also applies to arbitration, which is why private #arbitral tribunals must in principle offer the same guarantee of independent justice as State courts.

ZH 12.08.2016 c. 36.1

1.3.3 Independence of the Arbitrator

The #independence of the #arbitrator means that the #arbitrator should not be linked to the party which appointed him in any way which reduces him to a mere representative of this party.

FSCD 129 III 445 [466], FSCD 09.02.1998 [(1998) ASA p. 644]

#Independence of an #arbitrator means that the #arbitrator has no personal, economic or financial relations or ties with any party, and that the #arbitrator has no interest in the outcome of the proceedings. #Independence is therefore aimed at objective links between the #arbitrator and a party.

ZH 12.08.2016 c. 36.4

1.3.4 Appearance of Lack of Independence Based on Objectively Established Circumstances

This guarantee aims in particular at avoiding that circumstances external to the matter might influence the decision in favour or to the detriment of a party. It does not only impose the replacement of a judge when an effective partiality is established, because an inner state of mind cannot be proven; it is sufficient that the circumstances give the impression of partiality and lead to fear of partiality by the judge.

FSCD 142 III 521 [536], FSCD 136 III 605 [609], FSCD 129 III 445 [454], FSCD 4A_505/2017 c. 4.2.1, FSCD 4A_236/2017 c. 3.1.2, FSCD 4A_704/2015 c. 3.1, FSCD 4A_598/2014 c. 2.2.1, FSCD 4A_606/2013 c. 5.1, FSCD 4A_54/2012 c. 2.2.1, FSCD 4A_233/2010 c. 3.2.2, FSCD 4A_458/2009 c. 3.1, *FSCD 4A_586/2008 c. 3.1.1, FSCD 4A_539/2008 c. 3.2, FSCD 4A_210/2008 c. 4.2, FSCD 4A_506/2007 c. 3.1.1, FSCD 4P.4/2007 c. 3.1, FSCD 4P.208/2004 c. 4.1, *GE 16.10.2015 c. 3.1.3

Only objectively established circumstances may be taken into account. The purely individual impressions by one of the parties to the proceedings are not decisive.

FSCD 142 III 521 [536], FSCD 136 III 605 [609], *FSCD 128 V 82 [84], FSCD 4A_505/2017 c. 4.2.1, FSCD 4A_704/2015 c. 3.1, FSCD 4A_598/2014 c. 2.2.1, FSCD 4A_606/2013 c. 5.1, FSCD 4A_233/2010 c. 3.2.2, FSCD 4A_458/2009 c. 3.1, *FSCD 4A_586/2008 c. 3.1.1, FSCD 4A_539/2008 c. 3.2, FSCD 4A_506/2007 c. 3.1.1, FSCD 4A_210/2008 c. 4.2, FSCD 4P.4/2007 c. 3.1, FSCD 4P.208/2004 c. 4.1, *GE 16.10.2015 c. 3.1.3, VD 05.01.2011

It is sufficient if there are circumstances which, objectively, give the impression of dependence and partiality. For the #challenge it is not required that the judge is actually biased.

FSCD 142 III 521 [536], FSCD 4A_236/2017 c. 3.1.2

The guarantee of an independent judge is violated when an objective examination reveals circumstances which are a basis for the appearance of a lack of #independence and the danger of partiality.

FSCD 142 III 521 [536], *FSCD 135 I 14 [15], *FSCD 131 I 113 [116], *FSCD 124 I 121 [123], FSCD 4A_236/2017 c. 3.1.2, FSCD 4P.208/2004 c. 4.1, FSCD 4P.196/2003 c. 3.1, FSCD 4P.263/2002 c. 5.2, FSCD 4P.168/1999 [(2001) ASA p. 785], FSCD 01.09.1999 c. 1a & 2a, FSCD 30.06.1994 [(1997) ASA p. 105], ZH 12.08.2016 c. 36.3, NE 16.05.1997 [(1997) RSDIE p. 633]

The purely subjective impression of a party cannot be taken into account. On the contrary, the mistrust with regard to partiality has to appear as objectively founded. Therefore, such a subjective impression can only be taken into account if it is based on concrete #facts and if these #facts are by themselves susceptible to justify objectively and reasonably such an impression by a person acting normally.

FSCD 129 III 445 [454, 466], FSCD 118 II 359 [362], FSCD 4A_54/2012 c. 2.2.1, FSCD 4P.146/2005 c. 4.3, FSCD 4P.168/1999 [(2001) ASA p. 785], FSCD 09.02.1998 [(1998) ASA, p. 644], FSCD 30.06.1994 [(1997) ASA p. 105], FSCD 11.05.1992 [(1992) ASA p. 392], *FSCD 115 Ia 400 [405], VD 05.01.2011, ZH 17.01.2014 c. II.2, NE 26.05.1997 [(1997) RSDIE p. 633], GR 30.01.1996 [(1996) ASA p. 265]

Dependence and partiality in this sense are assumed according to the [#]case law, if in the individual case, based on all actual and procedural circumstances, there are circumstances which give rise to mistrust with respect to the [#]impartiality of the judge. Such circumstances may in particular be based on a certain conduct of the judge. However, the mere subjective feeling of a party cannot be taken as a basis for this conclusion.

FSCD 142 III 521 [536], FSCD 4A_236/2017 c. 3.1.2, ZH 12.08.2016 c. 36.3

The subjective [#]impartiality - which is presumed until proof of the contrary - guarantees to everyone that its matter be decided without regard to its person. The simple [#]claim of partiality is not sufficient, but the partiality has to be based on objective [#]facts. On the contrary, it is not necessary that the judge is indeed partial. The suspicion is legitimate even though it is based only on appearance, provided that the appearance results from objectively examined circumstances.

FSCD 136 III 605 [609], FSCD 129 III 445 [454], FSCD 118 II 359 [362], *FSCD 4A_586/2008 c. 3.1.1, FSCD 4A_506/2007 c. 3.1.1, FSCD 4P.4/2007 c. 3.1, FSCD 08.09.1999 c. 2a

There is a lack of [#]independence when there are circumstances which are proper to inspire mistrust with respect to the [#]impartiality of the judge. However, lack of [#]independence is an inner state of mind, which can hardly be evidenced. It is therefore not necessary to establish for the [#]challenge of a judge that this judge indeed lacked [#]independence. It is sufficient that there are circumstances which may give the impression of lack of [#]independence and create a risk of partiality.

*FSCD 133 I 89 [91-92], BS 28.12.2005 c. 2.1

Apart from functional or organizational circumstances, a certain personal behaviour of a member of the tribunal can in particular give cause for doubts with respect to its [#]independence. However, the subjective impression of a party is not a sufficient ground.

FSCD 08.09.1999 c. 2a, FSCD 01.09.1999 c. 1a

In each case, a concrete assessment shall be made as to whether circumstances exist which give rise to justified doubts as to the [#]independence of an [#]arbitrator. In order for an [#]arbitrator to be challenged, according to the [#]case law of the Federal Supreme Court, there must be [#]facts which objectively prove mistrust. Such a mistrust must not be based on a subjective feeling of one of the parties, but rather on concrete circumstances which, in turn, are capable of objectively and reasonably provoking mistrust of the [#]arbitrator's [#]independence in a normal person. The subjective [#]independence of an [#]arbitrator is presumed until proven otherwise. Mere procedural errors or a wrong decision on the [#]merits of the case alone cannot justify the appearance of bias, unless there are particularly blatant and repeated errors.

ZH 17.01.2014 c. II.2

1.3.5 Impartiality of the Arbitrator

The PILA has renounced the supplementary prerequisite of [#]impartiality of the party-appointed [#]arbitrators. The practical importance of this renunciation is very limited because of the prerequisite of [#]independence. The renunciation shows at least that, according to the legislator's will, the integrity of the party-appointed

#arbitrators must be evaluated as strictly as that of the presiding #arbitrator of the #arbitral tribunal.

FSCD 08.09.1999 c. 2a, FSCD 30.06.1994 [(1997) ASA p. 104]

This renunciation is of hardly any practical importance, as the duty of the #arbitrator pursuant to Article 180(1)(c) PILA to decide in full #independence also implies a minimum #impartiality.

FSCD 08.09.1999 c. 2a

By omitting the mention of the notion of #impartiality in Article 180(1)(c) PILA, the legislator did not want to submit all members of the #arbitral tribunal to the same requirements as the magistrates of the judicial order. The abandonment of the criterion of #impartiality weakens the assimilation made by #case law between the situation of a party-appointed #arbitrator and the one of the presiding or the sole #arbitrator.

FSCD 09.02.1998 [(1998) ASA p. 644-645]

A presiding #arbitrator is nevertheless supposed to have an independent and impartial attitude as the decision must be made by the presiding #arbitrator in case no majority is reached during the #deliberations (Art. 189(2) PILA).

FSCD 09.02.1998 [(1998) ASA p. 645]

The #impartiality of an #arbitrator, on the other hand, means that the arbitrator has no preconceived opinion of the parties or the #subject-matter of the dispute. It thus refers to the subjective attitude of an #arbitrator. Ultimately, the concrete circumstances of the individual case are always decisive for the assessment of the #conflict of interest.

ZH 12.08.2016 c. 36.4

1.3.6 Subjective and Objective Impartiality

The subjective #impartiality - which is presumed until proof of the contrary - guarantees to everyone that its matter be decided without regard to its person. The objective #impartiality aims in particular at avoiding that the same judge participates in the same case in different capacities and at guaranteeing the #independence of the judge with regard to every party.

FSCD 142 III 521 [536], FSCD 136 III 605 [609], FSCD 4A_505/2017 c. 4.2.1, FSCD 4A_704/2015 c. 3.1, FSCD 4A_606/2013 c. 5.1, FSCD 4A_54/2012 c. 2.2.1, FSCD 4A_539/2008 c. 3.2, FSCD 4A_210/2008 c. 4.2, FSCD 4P.4/2007 c. 3.1

Objective #impartiality is intended, in particular, to prevent the same judge from being involved more than once in different functions in the same case and to guarantee the judge's #independence vis-à-vis both parties to the proceedings.

FSCD 142 III 521 [536], FSCD 136 III 605 [609], FSCD 4A_236/2017 c. 3.1.2

1.3.7 Specificities of International Arbitration in General

When examining whether an #arbital tribunal offers sufficient guarantees of #independence and #impartiality, the specificities of arbitration, in particular international arbitration, have to be taken into account.

FSCD 142 III 521 [536], FSCD 136 III 605 [609], FSCD 129 III 445 [454], FSCD 4A_284/2018 c. 6.1.2, FSCD 4A_505/2017 c. 4.2.1, FSCD 4A_236/2017 c. 3.1.1, FSCD 4A_704/2015 c. 3.1, FSCD 4A_598/2014 c. 2.2.1, FSCD 4A_606/2013 c. 5.1, FSCD 4A_54/2012 c. 2.2.1, FSCD 4P.105/2006 c. 4, FSCD 09.02.1998 [(1998) ASA p. 645], *GE 16.10.2015 c. 3.1.3, VD 05.01.2011,

In general, a judge cannot be challenged for the only reason that it was, in previous proceedings, in charge of a case involving a party now before it, even though the judge had dismissed that party's claims. The same must apply in the field of arbitration and, in particular, in the field of international arbitration. Encounters are frequent in the restricted circle of international arbitration; it is not rare that the same person may be on one occasion #arbitrator in a certain matter, and on another occasion, #representative of one of the parties in another matter, pleading before its co-#arbitrator in the previous matter. These contacts are, by nature, even more regular if the #arbitrators, obliged to figure on a closed list, must have a certain legal education and must have recognized knowledge in a certain field.

FSCD 136 III 605 [622-623], FSCD 129 III 445 [466-467], *FSCD 4A_586/2008 c. 3.1.2, FSCD 4P.105/2006 c. 4

The different context of the relationship between a judge of a State court or an #arbitrator, on the one hand, and the parties, respectively their representatives, on the other hand, has to be taken into account. These relationships are more frequent and narrower due to the economic and professional necessities with regard to the persons active in the field of private arbitration, so that they cannot, without further examination, be considered as a #ground for #challenge.

FSCD 129 III 445 [454], *FSCD 125 I 389 [390], *FSCD 124 I 121 [123], FSCD 118 II 359 [361], FSCD 4A_233/2010 c. 3.2.2, FSCD 4A_458/2009 c. 3.1, *FSCD 4A_586/2008 c. 3.1.1, FSCD 4A_539/2008 c. 3.2, FSCD 4A_210/2008 c. 4.2, FSCD 4A_506/2007 c. 3.1.1, FSCD 4P.4/2007 c. 3.1, FSCD 4P.168/1999 [(2001) ASA p. 785], FSCD 09.02.1998 [(1998) ASA p. 645], FSCD 30.06.1994 [(1997) ASA p. 104-105], ZH 17.01.2014 c. II.2, GR 30.01.1996 [(1996) ASA p. 265]

The circle of international arbitration is limited and it is inevitable that after a few years of arbitral practice, the #arbitrators, being often attorneys-at-law themselves, have the occasion to collaborate in other #arbitral proceedings with one of their colleagues or with a representative. This does not lead to an automatic loss of #independence.

FSCD 4P.105/2006 c. 4, FSCD 09.02.1998 [(1998) ASA p. 645]

When applying Article 30 FC and Article 6(1) ECHR in private international arbitration, the Federal Supreme Court has to take into account the economic and professional relationships between a party and its attorney-at-law, on the one hand, and an #arbitrator, on the other hand, in order to admit a #ground for #challenge only very restrictively. This is all the more so because it can be expected from an attorney-at-law functioning as #arbitrator that it knows how to

establish the necessary distance between the relationships among colleagues and the neutrality which is requested in arbitration.

FSCD 09.02.1998 [(1998) ASA p. 648]

1.3.8 Specificities of Sports Arbitration

- For general specificities of Sports Arbitration, see Article 177(1) PILA, section 1.11

In matters of commercial arbitration and sports arbitration freely, lawfully and unequivocally consented to, the concepts of #independence and #impartiality can be interpreted flexibly, insofar as the very essence of the arbitration system is based on the appointment of decision-making bodies, or at least a part of them, by the parties to the dispute.

ECHR 02.10.2018 § 146

As regards the financing of the #CAS by sports bodies, such as the Government, it is noted that State courts are always financed from the State budget and this circumstance does not imply a lack of #independence and #impartiality of these State courts in disputes between litigants and the State. By analogy, one cannot deduce a lack of #independence and #impartiality of the #CAS solely because of its funding method.

ECHR 02.10.2018 § 151

The respect for the guarantees of #independence and #impartiality demanded from each #arbitrator must be reviewed the same in the fields of sports and commercial arbitration.

FSCD 136 III 605 [614], VD 05.01.2011

The specificities of sports arbitration may not be disregarded when the regularity of the #composition of a #CAS panel is under review. Accordingly, one must take into account the fact that the choice of #arbitrators is limited but that they must have legal training and they have to be acknowledged as competent in the field of sport.

FSCD 136 III 605 [614], FSCD 129 III 445 [467]

These peculiarities may lead #CAS #arbitrators to meet sports organisations, specialized lawyers and other experts in sports law without these contacts necessarily compromising their #independence.

FSCD 136 III 605 [614], FSCD 133 III 235 [245]

Deciding whether a #CAS panel presented the guarantees of #independence and #impartiality or not will depend on an analysis of the circumstances of the case at hand.

FSCD 136 III 605 [614]

An #arbitral tribunal which is an organ of an #association taking part in a dispute as a party does not fulfil the requirements of judicial #independence guaranteed by Article 30 FC. In fact, to render an #award in one's own matter is simply not compatible with the guarantee of #independence. Therefore, it does not matter, in this respect, whether the personal #independence of the members of the

#arbitral tribunal called to decide the dispute could be guaranteed through the rules on #challenge.

*FSCD 125 I 389 [390-391], FSCD 119 II 271 [275-276], *FSCD 97 I 488 [489-490]

These principles also apply if the party aggrieved by the decision of the organ of an #association is only indirectly a member of the #association, in other words, if only the #associations or other corporate bodies can become members, as sections, of the #federation.

FSCD 119 II 271 [276], NE 23.02.1999 [(2000) ASA p. 342-343, 345]

In case of statutory sanctions, this legal protection has to be guaranteed even to a person who is not a member of the #association, if this person is subject to the rules established by the #association, e.g. if such a step is a prerequisite for the participation in an event organised by the #association. The attacked decision must be subject to unfettered and independent judicial control. An #arbitral tribunal can be vested with such a control if this tribunal constitutes a real judicial authority and not a simple organ of the #association interested in the outcome of the dispute.

FSCD 119 II 271 [276-277]

1.3.9 Party-Appointed and Presiding Arbitrator

The #independence and #impartiality demanded from the members of an #arbitral tribunal extends to the party-appointed #arbitrators as well as to the presiding #arbitrator.

FSCD 136 III 605 [612], ZH 17.01.2014 c. II.2

However, an #arbitrator appointed by a party may in no case become the lawyer of "its" party in the #arbitral proceedings.

ZH 17.01.2014 c. II.2

1.3.10 Circumstances Giving Rise to Justifiable Doubts

1.3.10.1 *In General*

When deciding this issue, the circumstances of each case have to be taken into account; there are no absolute #grounds for challenge.

FSCD 129 III 445 [466], FSCD 20.06.2010 c. 3.3.3.2, FSCD 09.02.1998 [(1998) ASA p. 644]

Such #grounds may consist either in a specific behaviour of the #arbitrator or in functional or organisational circumstances.

*FSCD 124 I 121 [123]

The circumstances giving rise to justifiable doubts may be based on the personal behaviour of the judge or on functional and organisational circumstances. However, in both cases the judge must indeed be partial because of these circumstances. It is sufficient that there are circumstances which can create the appearance of partiality.

FSCD 4P.208/2004 c. 4.1, FSCD 4P.168/1999 [(2001) ASA p. 785], FSCD 30.06.1994 [(1997) ASA p. 105]

Whether there is a #ground for #challenge is, to a large extent, a discretionary decision.

FSCD 4P.156/2000 [(2001) ASA p. 804], *FSCD 111 Ia 259 [263]

It can be expected from a State judge whose decision has been set aside for procedural or substantive reasons, that the judge continues to handle the dispute in an independent and impartial way. This rule also applies to #arbitral tribunals.

*FSCD 113 Ia 407 [410], FSCD 4P.263/2002 c. 5.5

1.3.10.2 Procedural Errors or Erroneous Decision on the Merits

Procedural measures, right or wrong, are not, as such, of a nature to give rise to an objective suspicion of partiality with respect to the #arbitrator that took them. The same applies to the #arbitrator who took an active role in a partial #award, albeit wrong.

FSCD 4A_505/2017 c. 4.2.2, FSCD 4A_704/2015 c. 3.1, FSCD 4A_606/2013 c. 5.1, *VD 27.04.2012 c. 4.2

Procedural errors or an erroneous decision on the #merits are not sufficient to create the appearance of partiality of an #arbitrator, except for particularly serious or repeated errors which would amount to a manifest violation of its duties.

FSCD 144 III 120 [128], *FSCD 115 Ia 400 [404], FSCD 4A_505/2017 c. 4.2.2, FSCD 4A_704/2015 c. 3.1, FSCD 4A_606/2013 c. 5.3, FSCD 4A_54/2012 c. 2.2.3, FSCD 4A_458/2009 c. 3.3.3.2, FSCD 4A_348/2009 c. 3.3.3, FSCD 4P.196/2003 c. 3.1, FSCD 4A_539/2008 c. 3.3.2, FSCD 4P.129/2002 c. 5.2, FSCD 4P.235/2001 c. 2d, FSCD 11.05.1992 [(1992) ASA p. 392], NE 26.05.1997 [(1997) RSDIE p. 633]

This latter exception must not be generalized, otherwise it would turn on its head the economy of the system of legal means allowing one to attack an #award rendered in international arbitration. It should not serve as a basis for criticizing the factual findings and legal conclusions on which the final #award is based, nor allow one party which has invoked without success one of the #grounds foreseen at letters b to e of Article 190(2) PILA to obtain the #setting aside of the said #award by means of an #appeal grounded on Article 190(2)(a) PILA. This would lead to indirectly making the Federal Supreme Court a simple court of #appeal.

FSCD 4A_505/2017 c. 4.2.2, FSCD 4A_704/2015 c. 3.1, FSCD 4A_606/2013 c. 5.1

The activity of the judge implies necessarily that it has to decide on questions which are contentious, and which are to a large extent in its discretion. Even if the decisions taken in the normal course of its activity appear to be erroneous, this circumstance as such cannot be interpreted as partiality. Furthermore, the #challenge proceedings can in general not be used to examine alleged procedural

or other errors of the judge. Such claims have to be filed in the applicable setting aside proceedings.

FSCD 4P.129/2002 c. 5.2

1.3.10.3 Relationship between an Arbitrator and a Party or its Representative

A friendly relationship (being on familiar terms with each other and mutual recommendations) between an #arbitrator and the attorney-at-law of one of the parties is in principle not sufficient to found #grounds for #challenge.

FSCD 129 III 445 [466], *FSCD 4A_586/2008 c. 3.1.2, FSCD 4P.105/2006 c. 4, FSCD 30.06.1994 [(1997) ASA p. 107]

Only additional circumstances could justify the #challenge of such #arbitrators. The fact that the #arbitrators had their meals together, probably slept in the same hotel and travelled together, are in any case not of this nature.

FSCD 129 III 445 [467]

It must be assumed that the members of an #arbital tribunal are capable of leaving the circumstances of their appointment behind them when they are called upon to render concrete decisions during the exercise of their function.

FSCD 129 III 445 [467], FSCD 4A_506/2007 c. 3.3.2.2

The appearance of partiality can result from the fact that a judge finds itself in a relationship, notably of a professional nature, with a party to the proceedings. In its #case law relating to #arbitrators who carry out their principal professional activity as an attorney-at-law, the Federal Supreme Court has held that there is an appearance of partiality, irrespective of the other circumstances of the case, if there still exists a mandate relationship between the #arbitrator and the party or if the former has been the representative of the party on several occasions or a short time ago, irrespective of the question of whether or not the mandate had a link to the dispute in question.

FSCD 4A_598/2014 c. 2.2.1

This #case law has been extended in the sense that the attorney who carries out the functions of an #arbitrator appears to be objectively partial not only when, in the framework of another proceeding, it represents or recently represented one of the parties to the proceedings in which it is sitting, but also when it represents or has recently represented the opposing party. Experience shows that a party to proceedings often carries over its negative feelings with respect to the opposing party to its lawyer. It is therefore understandable that a party does not expect an #arbitrator to act suddenly with #impartiality towards it when it is fighting or fought against it recently as a representative of the opposing party.

FSCD 4A_598/2014 c. 2.2.1

According to Article 34(1)(a) FSCA, a judge is to stand down if, among other things, the judge has a personal interest in the matter. This includes not only interests which directly affect the judge, but also those which indirectly affect the judge. It is necessary that the judge has a noticeable personal relationship with the #subject-matter of the dispute. The interest may be material or non-material and may influence the legal or factual situation. However, in order to call into question its judicial #independence, it must not only affect the judge concerned

in general but must also affect the personal sphere of interest perceptibly and more than that of other judges. A personal interest in the matter can be assumed if someone is an organ of a party, intervener, co-entitled or co-obligated person, guarantor of a party or owner of the matter, who is responsible for the liability of the party.

FSCD 4A_162/2010 c. 2.2

There can also be an interest due to a relationship with a third party, be this a #physical person or #legal person, who can provide the judge with an advantage or disadvantage in connection with the outcome of the dispute. If, for example, the judge had to indirectly bear the financial consequences of a litigation loss due to a significant shareholding in a company conducting the proceedings, this would give rise to justified doubts as to the judge's #impartiality.

FSCD 4A_162/2010 c. 2.2

An indirect interest may also be presumed to exist in the case of a lawyer who, as a part-time judge, is involved in a case which may have considerable prejudicial importance in similar proceedings in which it represents a party.

FSCD 4A_162/2010 c. 2.2

The #arbitrator's #independence and #impartiality are compromised by the existence of close relations between the latter and one of the parties to the proceedings. They may also be compromised in case of close relations between an #arbitrator and a party's counsel. However, in such a case, the relation is indirect. Therefore, one may less easily admit a risk of partiality. The Federal Supreme Court's #case law shows restraint when it examines the #ground for #challenge based on the dependence between an #arbitrator and a party's counsel. This #case law relates primarily to international arbitration.

*FSCD 4A_586/2008 c. 3.1.2

This also applies in particular when the two constellations – #arbitrator/counsel and #arbitrator/party-appointed #arbitrator – occur at the same time in two ongoing matters. Even in such a situation, it must be assumed that a judge knows how to remain internally and externally independent and how to favour #independence over a friendly relationship.

FSCD 4P.105/2006 c. 4

Article 30(1) FC and Article 6(1) ECHR apply in principle only to relations between a party and a judge. However, a profound hostility between a counsel and a judge may constitute a #ground for #challenge. A friendship between a judge and a counsel, on the other hand, is not a valid #ground for a #challenge in the absence of other serious elements.

*FSCD 1P.99/2000

A dependent condition, i.e. a special relation between the judge and one of the parties or its attorney-at-law may, depending on their nature and their intensity, give rise to justifiable doubts as to the #independence of the #arbitrator without it being necessary to prove that the judge is effectively biased.

FSCD 09.02.1998 [(1998) ASA p. 646]

In order to be able to examine a matter neutrally, a judge must not be in the parties' sphere of influence.

FSCD 30.06.1994 [(1997) ASA p. 105]

Under certain circumstances, it may be sufficient that the judge has a special relationship not to one of the parties, but to one of their attorneys-at-law, which relationship makes it appear as objectively lacking #independence.

FSCD 30.06.1994 [(1997) ASA p. 105]

If a judge is primarily employed as an attorney-at-law, this combination can raise problems as to its #independence. The judge's #independence should however not be easily denied as it can be assumed that a judge is able to make the distinction between attorney-at-law and party as well as between its role as a judge and its professional activity.

FSCD 30.06.1994 [(1997) ASA p. 105-106]

One must assume that an attorney-at-law is able to make the distinction between collegiality amongst colleagues and neutrality as an #arbitrator.

FSCD 30.06.1994 [(1997) ASA p. 107]

1.3.10.4 *No Justifiable Doubts due to Prior Participation of Arbitral Tribunal in Interim or Partial Awards*

Save in exceptional circumstances, it is not admissible to challenge *posteriori* the regularity of the #composition of the #arbitral tribunal which issues the final #award simply because its members already decided the matter by participating in interim or partial #awards.

FSCD 4A_458/2009 c. 3.3.3.2

1.3.11 Arbitrator's Duty to Disclose

When an #arbitrator accepts to function as such, it is bound to the parties by a contractual relationship (#arbitral contract) governed by procedural law, while private law can apply by analogy. As before the conclusion of every contract, the future parties have a duty to inform each other about the circumstances susceptible to substantially influence the other party's decision to conclude the contract, if there are grounds to think that the other party is unaware of these circumstances. This also applies to the #arbitrator. If an #arbitrator conceals #facts on which a #challenge could be based, it contributes to hinder the orderly conduct of the proceedings in a way contrary to the principle of #good faith, because its silence prevents the aggrieved party from exercising one of its legitimate procedural rights. Hence, the #arbitrator has the pre-contractual, and then contractual, duty to inform the parties about the #facts on which a #challenge could be based. This applies at least when the #arbitrator has good reasons to think that these #facts are not known by the parties or by the party which could invoke them.

*FSCD 111 Ia 72 [76]

According to Article 363 CCP, a person to whom a mandate to act as #arbitrator is proposed must immediately disclose the existence of circumstances which may give rise to legitimate doubts as to its #independence or #impartiality.

ZH 12.08.2016 c. 36.3

In assessing whether the #arbitrator must disclose certain circumstances; it is not decisive whether it considers itself to be independent or impartial. Nor is it relevant whether dependence or partiality actually exists.

ZH 12.08.2016 c. 36.3

If circumstances exist which, in the opinion of the #arbitrator, do not affect its #independence and #impartiality but which may give rise to legitimate doubts in the eyes of the parties, the #arbitrator is obliged to disclose such circumstances without delay in accordance with Article 363 CCP. This duty shall remain in force throughout the proceedings (Art. 363(2) CCP).

ZH 12.08.2016 c. 36.8

1.3.12 Party's Duty to Investigate

The party which wants to #challenge an #arbitrator must communicate the #ground for #challenge as soon as it knows it. This #case law rule applies not only to the #grounds for #challenge which the interested party effectively knew but also to those which the party could have known if it had paid the necessary attention. Depending on the circumstances, choosing to remain ignorant may amount to an abusive behaviour comparable to delaying the communication of a #challenge. This rule is an application, in the field of #arbitral proceedings, of the principle of #good faith.

FSCD 136 III 605 [609], FSCD 130 III 66 [75], FSCD 129 III 445 [465], FSCD 4A_260/2017 c. 4.1, FSCD 4A_606/2013 c. 6.2.1, FSCD 4A_6/2014 c. 5.2.2 [4A_74/2014] (not published in FSCD 140 III 477), FSCD 4A_620/2012 c. 3.2, FSCD 4A_476/2012 c. 3.2, FSCD 4A_43/2010 c. 4.3, FSCD 4A_233/2010 c. 3.2.2, FSCD 4A_176/2008 c. 3.3, FSCD 4A_234/2008 c. 2.2.1, FSCD 4A_506/2007 c. 3.2.1, *FSCD 5P.362/2005 c. 2, FSCD 4P.188/2001 c. 2c, FSCD 15.03.1993 c. 6 (not published in FSCD 119 II 271)

Depending on the circumstances (#amount in dispute, number of #arbitrators, etc.), a party may have a duty to investigate in order to make sure that the #arbitrator(s) offer(s) sufficient guarantees of #independence and #impartiality. In such a case, the party cannot rely on the general declaration of #independence that every #arbitrator makes on the *ad hoc* standard form [*in casu* of the #CAS].

FSCD 136 III 605 [618], FSCD 4A_234/2008 c. 2.2.2, FSCD 4A_528/2007 c. 2.5.3, FSCD 4A_506/2007 c. 3.2

It is at the time when a party nominates its #arbitrator that it has to make the necessary verifications with regard to the circumstances, in order to invoke a #ground for challenge without delay and not to disturb the #arbitral proceedings. To choose to remain ignorant may, depending on the circumstances, constitute behaviour contrary to the principle of #good faith and be considered comparable to delaying the #challenge of an #arbitrator.

FSCD 4P.188/2001 c. 2c

1.3.13 Settlement Negotiations

The judge must act as a “true umpire” [“*echter Mittler*”] and therefore rise above the parties’ dispute and guarantee an independent, impartial and unbiased resolution of the dispute (FSCD 124 I 121 c. 3a). The heavily formalised proceedings contribute to the realisation of this goal, the parties being heard to the same extent and in a foreseeable way, evidence being taken with the parties’ collaboration and procedural measures being recorded on the file. This also aims at avoiding the unilateral influence on the judge by one party. The phase of settlement negotiations before the judge has to be distinguished therefrom. This phase of the proceedings is not governed by strict procedural rules: The judge is responsive to wishes and views of the parties and searches for amicable solutions in the interest of the parties, sometimes even before the taking of #evidence. One may not impose too strict requirements on the mediation actions. In this phase, the judge has more the role of a mediator than the one of a judge. The mediation attempt as such cannot call into question the #impartiality respectively #independence of a judge. The guarantees of Article 30(1) FC [Art. 58(1) *fFC*] and Article 6(1) ECHR nevertheless apply when the mediating judge afterwards acts as judge. Therefore, the judge may be challenged if the previous mediation activity or a settlement proposal creates the objectively founded appearance of partiality or if the judge takes a fact which has to be established through the proceedings as proven and thus binds itself unnecessarily, so that doubts arise on whether it can still decide impartially.

FSCD 08.09.1999 c. 2b

1.3.14 IBA Guidelines on Conflicts of Interest

To verify the #independence of their #arbitrators, the parties might also refer to the IBA Guidelines on Conflicts of Interest in International Arbitration, approved on 22 May 2004 (http://www.ibanet.org/publications/Publications_home.cfm). These Guidelines do not have the value of a law. They nevertheless represent a precious working tool, which will presumably contribute to the harmonisation and unification of the standards applied in international arbitration for the resolution of #conflicts of interest. This tool is likely to influence the practice of #arbitral institutions and tribunals. These Guidelines set out general principles. They also contain a non-exhaustive enumeration of specific situations: a red list, divided in two parts (situations which give rise to justifiable doubts as to the #impartiality and #independence, where the parties cannot waive the most serious ones among them); an orange list (intermediary situations which have to be disclosed, but do not necessarily lead to a #challenge); a green list (specific situations where objectively no #conflict of interest exists and which the #arbitrators do not have to disclose). It goes without saying that despite the existence of such lists, the circumstances of the case at hand will always remain decisive for the resolution of the #conflict of interest.

FSCD 142 III 521 [536-537], FSCD 4A_506/2007 c. 3.3.2.2, ZH 05.11.2018 c. 5.1.4

The circumstance in which an #arbitrator has a relationship with another #arbitrator or with the counsel for one of the parties through the membership in the same professional #association or social organization is a situation which has been inserted in the green list of the Guidelines (section 4.4.1 of the green list).

On this issue, the Guidelines merely express, in other terms, the principles established by the #case law of the Federal Supreme Court by taking into account the specificities of international arbitration in sports (FSCD 129 III 445 c. 3.3.3 and 4.2.2.2 p. 467, confirmed by FSCD 4P.105/2006 of 4P.105/2006 c. 4).

FSCD 4A_458/2009 c. 3.3.1, FSCD 4A_506/2007 c. 3.3.2.2

In FSCD 142 III 521, the Federal Supreme Court based its decision among other things on these lists as so-called "soft law".

ZH 05.11.2018 c. 5.1.4

1.3.15 Decisive Time for the Examination of the Independence

It is at the time when a party nominates its #arbitrator that it has to make the necessary verifications with regard to the circumstances, in order to invoke a #ground for challenge without delay and not to disturb the #arbitral proceedings. To choose to remain ignorant may, depending on the circumstances, constitute behaviour contrary to the principle of #good faith and be considered comparable to delaying the #challenge of an #arbitrator.

FSCD 4P.188/2001 c. 2c

The #independence of the #arbitrator must be guaranteed not only at the time of its appointment, but also during the entire proceedings, i.e. until the notification of the #final award.

FSCD 11.05.1992 [(1992) ASA p. 390]

1.3.16 Independence and Impartiality of Experts

The procedural guarantees of Article 30(1) FC and Article 6(1) ECHR apply by analogy to the #independence and #impartiality of #experts.

FSCD 126 III 249 [253]

As long as an #expert does not have a direct personal interest in the outcome of the proceedings, which would change the #ground for #challenge into a ground for #exclusion, there is no violation of procedural #public policy if #grounds for challenge are not taken into account *ex officio*. This would change the #ground for challenge into a ground for #exclusion, and the sanction of #waiver of a challenge because of acts against #good faith would become irrelevant, because every forfeited #ground for #challenge would become a ground for #exclusion to be taken into account *ex officio*. The distinction between #grounds for #challenge and for #exclusion would thus become meaningless.

FSCD 126 III 249 [255-256]

The #expert called in by a State court shall be deemed to be an auxiliary person of the judge. According to the #case law of the Federal Supreme Court, the corresponding guarantee must therefore also be applied *mutatis mutandis* to the #independence and #impartiality of #experts in #arbitral proceedings.

FSCD 4A_424/2011 c. 3.1.1

Accordingly, State court experts may be challenged by a party if circumstances exist which, from an objective point of view, are likely to give rise to the appearance of partiality.

FSCD 4A_424/2011 c. 3.1.1

1.3.17 Individual Cases

There are **no circumstances** giving rise to justifiable doubts as to the #arbitrator's #independence:

- when an #arbitrator hears two #CAS #appeals concerning the same party when the legal issues to be decided upon in the two #appeals were different.
ECHR 02.10.2018 §§ 161-165
- when the #CAS Secretary General scrutinizes the draft #award pursuant to Article R59 of the #CAS Code.
FSCD 144 III 120 [128], FSCD 4A_612/2009 c. 3.3
- when a law firm belonging to the same network as the sole #arbitrator's law firm had advised an affiliate of the #claimant, when such law firms were legally independent and there was no fee sharing system between them.
FSCD 142 III 521 [541-543]
- when an #arbitrator, who is a university professor, carried out some limited assignments dating back several years for the World Sport Organisation which was a party to the #arbitral proceedings.
FSCD 136 III 605 [622-623]
- when an #arbitrator orders procedural measures, whether right or wrong.
FSCD 4A_236/2017 c. 3.3
- when the #arbitrator who rendered the #award, represented, some twelve years before the introduction of the #request for arbitration, the opposing party to a company whose company administrator appeared before it twelve years later as a party.
FSCD 4A_598/2014 c. 2.2.2
- when the presiding #arbitrator of the #arbitral tribunal stated in another context that it takes a "hard line" on doping issues. This statement is too vague and general to give rise to reasonable doubt with respect to the #independence of the #arbitrator concerned especially since there is no direct relationship to these proceedings.
FSCD 4A_612/2009 c. 3.2
- when the #ICC International Court of Arbitration refused to confirm the #arbitrator in a previous arbitration in which the #arbitrator was nominated by the same party.
FSCD 4A_258/2009 c. 3.1.2
- when, during pending #arbitral proceedings, one of the three #arbitrators had represented, together with counsel to one of the parties, the civil inter-

ests in criminal proceedings pending in Geneva and without any relation to the #arbitral proceedings.

*FSCD 4A_586/2008 c. 3.2

- when an #arbitrator and a party's counsel in #arbitral proceedings function both of them as #arbitrators in other pending #arbitral proceedings. There must have been particular circumstances so that this set of #facts creates doubts with respect to the #arbitrator's #independence. It was thus not sufficient to assert that in the normal course of action; one should expect that the two protagonists discuss the first arbitration when meeting for the second arbitration.

*FSCD 4A_586/2008 c. 3.1.2, FSCD 4P.105/2006 c. 4

- when, provided there are no additional circumstances justifying another assessment of the situation, two of the three #arbitrators and the counsel of one of the parties are members of the same #association.

*FSCD 4A_586/2008, c. 3.1.2, FSCD 4A_506/2007 c. 3.3.2

- when an #arbitrator working as attorney-at-law shares its law firm with a colleague who sues, before a State court, a corporation which belongs to the same holding as the corporation which nominated the party-appointed #arbitrator.

*FSCD 4A_586/2008 c. 3.1.2, FSCD 09.02.1998 [(1998) ASA p. 648-649]

- when an #arbitral tribunal decides that the parties have to pay their #advance on costs in the clients' bank account in the name of the presiding #arbitrator. It cannot be concluded that the presiding #arbitrator lacks #independence, because such a bank account takes the function of an escrow deposit and because this decision was rendered by the entire #arbitral tribunal.

FSCD 4P.235/2001 c. 2e

- when an #arbitrator appointed by a party, an attorney-at-law admitted to the *Oberlandesgericht* Düsseldorf, has professional relations with the representative of this party which is also admitted as an attorney-at-law in Düsseldorf, but exclusively to the *Landesgericht*. Even if this #arbitrator could have taken a substantial economic profit through the recommendations of the party representative and through the supply of clients based thereon, this does not yet constitute an economic dependency which could question his integrity. This is even the case when one takes into account that the two attorneys-at-law work in the same field of specialisation and that the attorneys-at-law specialised in this field are rare. Even a friendship resulting therefrom does not in general constitute grounds for the assumption of a lack of #impartiality.

FSCD 30.06.1994 [(1997) ASA p. 107]

- when a partial #award is rendered and signed only by two #arbitrators (the presiding #arbitrator and the #arbitrator appointed by #respondent) after the #arbitrator appointed by #claimant has resigned due to disagreement and left the meeting of the #arbitral tribunal.

*FSCD 115 Ia 400 [404-405]

- when a partial [#]award on [#]jurisdiction rendered by the [#]arbitral tribunal has been declared null and void by the competent State court because the [#]award neither contained a decision on the [#]merits of the claim raised nor terminated the [#]arbitral proceedings. The fact that the [#]arbitrators have taken part in the former proceedings does not constitute as such a [#]ground for [#]challenge.
*FSCD 112 Ia 344 [347]
- when an [#]arbitrator has previously expressed an opinion, notably in another dispute, concerning legal issues which also arise in the [#]matter in dispute.
VD 05.01.2011
- when the attorney-at-law appointed by one of the parties as an [#]arbitrator is a member of the same club as the appointing party, *in casu* a Rotary club with about 60 members. The case would only be different if the common activities of the two persons in the club led to a friendship. There are also no doubts with respect to [#]independence when a [#]party-appointed arbitrator is a member of the board of directors in a corporation whose president appointed him, provided it is not a stock-owner in this company and the dispute to be decided by the [#]arbitral tribunal does not concern the corporation.
GR 30.01.1996 [(1996) ASA p. 266-267]

There are **circumstances** giving rise to justifiable doubts as to the [#]arbitrator's [#]independence:

- when a part-time judge working as an attorney-at-law takes part, as a judge, in proceedings which concern a rarely occurring legal question, and when the judge furthermore represents a party as attorney-at-law in proceedings pending in the same Canton which could probably profit from the decision on such a legal issue because both cases basically concern the same legal problem.
*FSCD 124 I 121 [125-126]
- when the [#]arbitrator is the sole member of the board of directors and an important shareholder of a company which has the contractual duty to take over the obligation to pay determined by the [#]award.
*FSCD 111 Ia 72 [74]
- when the spouse of the [#]arbitrator works as an attorney-at-law in the law firm of the representative of the party which appointed it.
*FSCD 92 I 271 [276-277]
- when a part-time judge is the agent of one of the parties and has been several times the attorney-at-law of this party (*FSCD 116 Ia 485 [488-490]). However, this solution only applies to the situation where it can be concluded that a kind of long-term relationship has been created between them linked to the expectations of regular mandates.
FSCD 4P.188/2001 c. 2d

- when an #arbitrator carried out notarial mandates for the representative of the #respondent party in parallel with the #arbitral proceedings.
ZH 12.08.2016 c. 36.11
- when an attorney-at-law is appointed by a party as #arbitrator in a case where a colleague of the same law firm represents or has represented the interests of the same party.
VS 20.01.1986 [(1986) RVJ p. 256-259]

2 Timeliness of the Challenge (2)

- For the timeliness of other pleas of procedural flaws, see Article 177(1) PILA, section 1.15; Article 186(2) PILA, section 2.5; Article 190(2)(a) PILA, section 2a.9; Article 190(2)(b) PILA, section 2b.2; Article 190(2)(c) PILA, section 2c.10; Article 190(2)(d) PILA, section 2d.5; and Article 190(2)(e) PILA, section 2e.14.4

2.1 Immediate Communication

The party which wants to challenge an #arbitrator must communicate the #ground for challenge as soon as it knows of it. This #case law rule applies not only to the #grounds for #challenge which the interested party effectively knew but also to those which the party could have known if it had paid the necessary attention. Depending on the circumstances, choosing to remain ignorant may amount to abusive behaviour comparable to delaying the communication of a challenge. This rule is an application, in the field of #arbitral proceedings, of the principle of #good faith.

FSCD 136 III 605 [609], FSCD 130 III 66 [75], FSCD 129 III 445 [465], FSCD 126 III 249 [253-254], FSCD 4A_260/2017 c. 4.1, FSCD 4A_236/2017 c. 3.3, FSCD 4A_606/2013 c. 6.2.1, FSCD 4A_74/2014 c. 5.2.2 (not published in FSCD 140 III 477), FSCD 4A_620/2012 c. 3.2, FSCD 4A_476/2012 c. 3.2, FSCD 4A_43/2010 c. 4.3, FSCD 4A_424/2011 [4A_424/2011] c. 3.1.1, FSCD 4A_233/2010 c. 3.2.2, FSCD 4A_176/2008 c. 3.3, FSCD 4A_234/2008 c. 2.2.1, FSCD 4A_506/2007 c. 3.2.1, *FSCD 5P.362/2005 c. 2, FSCD 4P.188/2001 c. 2c, FSCD 15.03.1996 c. 6 (not published in FSCD 119 II 271)

According to the principle of #good faith, the right to invoke the #ground for setting aside based on the incorrect #constitution of the #arbitral tribunal is forfeited if the party does not invoke it immediately, because this party is not entitled to hold back this #ground for setting aside in order to raise it in case of a negative outcome of the #arbitral proceedings.

FSCD 136 III 605 [609], FSCD 129 III 445 [449], FSCD 4A_505/2017 c. 4.3, FSCD 4A_173/2016 c. 2.1, FSCD 4A_606/2013 c. 6.2.1, FSCD 4A_597/2013 c. 2.1, FSCD 4A_620/2012 c. 3.2, FSCD 4A_476/2012 c. 3.1, FSCD 4A_233/2010 c. 3.2.2, FSCD 4A_258/2009 c. 3.1.2, FSCD 4A_176/2008 c. 3.3, FSCD 4A_234/2008 c. 2.2.1, FSCD 4A_506/2007 c. 3.1.2

The grounds for #challenge that a party becomes aware of must be raised immediately not only against fully appointed #arbitrators but also against potential #arbitrators proposed by the parties or by an #appointing authority. When the parties are asked specifically and within a #time limit to express their views on the proposed #composition of the #arbitral tribunal and, if necessary, to oppose it, the corresponding objections must be raised in a timely manner according to the general principle of #good faith, pursuant to the #case law of the Federal Supreme Court. Otherwise, the silence of the parties can be interpreted as an agreement or the corresponding exceptions may be rejected as constituting contradictory conduct.

FSCD 130 III 66 [74-75], FSCD 4A_428/2015 c. 3.1, FSCD 4A_620/2012 c. 3.6

In order to respect the principle of #good faith which is also recognised in the field of international arbitration and which is expressed with regard to #challeng-

es in Article 180(2) PILA *in fine*, the #grounds for #challenge have to be communicated to the #arbitral tribunal and to the other party immediately after their discovery.

FSCD 129 III 445 [465], FSCD 126 III 249 [253-254], *FSCD 124 I 121 [123], FSCD 4A_428/2015 c. 3.1, FSCD 4A_256/2009 c. 3.1.2, FSCD 4A_258/2009 c. 3.1.2, FSCD 4P.263/2002 c. 6.1, FSCD 4P.129/2002 c. 5.2, FSCD 4P.235/2001 c. 2e, FSCD 09.02.1998 [(1998) ASA p. 646], NE 26.05.1997 [(1997) RSDIE p. 633]

Even though Article 180(2) PILA does not provide for any #time limit, the party which does not react immediately forfeits its right to subsequently invoke the #grounds for #challenge in point.

FSCD 126 III 249 [253], FSCD 124 I 121 [122-123], FSCD 4A_256/2009 c. 3.1.2, FSCD 4A_258/2009 c. 3.1.2, FSCD 4P.263/2002 c. 6.1, FSCD 09.02.1998 [(1998) ASA p. 646]

A party acts contrary to #good faith and #abuses its rights if it “reserves” #grounds for #challenge in order to file them later during the course of the proceedings if the development of the case is to its detriment and if the claim will probably fail, as well as when an #expert opinion is rendered to its disadvantage.

FSCD 126 III 249 [254], *FSCD 124 I 121 [122-123], *FSCD 111 Ia 72 [75], FSCD 4A_682/2012 c. 3.1, FSCD 08.09.1999 c. 1b

Whereas, at the beginning of the proceedings, the parties should not use every possible indication to file an unsubstantiated #challenge, they have, as the case proceeds and at the time at which the final #award will be rendered approaches, a duty to invoke a real or supposed flaw.

FSCD 126 III 249 [254], *FSCD 111 Ia 72 [74-75], FSCD 4P.263/2002 c. 6.1, FSCD 08.09.1999 c. 1b

The decisions of the #ICC International Court of Arbitration with regard to the appointment, confirmation or #challenge of the #arbitrators are not subject to an immediate #appeal (FSCD 118 II 359 [361]). This does not change anything with regard to the necessity to claim as soon as possible the incorrect #constitution of the #arbitral tribunal, be it by a #motion to set aside a preliminary #award, otherwise there is a risk of #waiver, provided there is no irreparable flaw, in particular the violation of mandatory provisions like Article 22 fSOFJ with regard to the mandatory #disqualification referred to in Article 18 fConcordat.

FSCD 120 II 155 [(1994) ASA p. 415], *FSCD 111 Ia 72 [75], NE 26.05.1997 [(1997) RSDIE p. 633]

A delayed reaction can only be excused if the person claiming the reparable flaw was not aware of it straightaway.

FSCD 120 II 155 [(1994) ASA p. 415]

A person who enters into proceedings on the #merits without making a reservation in #arbitral proceedings recognizes, by this conclusive act, the #jurisdiction of the #arbitral tribunal and therefore definitively loses the right to invoke the lack of #jurisdiction of the said #tribunal. Conversely, the person who fails to participate does not lose this right, as a general rule, because its failure to do so cannot be considered as a tacit recognition of the #arbitral tribunal's #jurisdiction.

FSCD 120 II 155 [164-165]

At the beginning of the proceedings, the parties must be given sufficient time to invoke their #grounds for #challenge. The case is different during the proceedings, especially when the proceedings are close to the final decision. The party which intends to invoke #grounds for #challenge has to observe a special duty of care. In fact, the conclusion of the #arbitral contract obliges the parties to collaborate in #good faith in the proceedings, thus making it possible for the #award to be rendered in a reasonable time. Therefore, they have to challenge an #arbitrator without delay. If they do not proceed this way, they forfeit the possibility to invoke the #ground for #challenge subsequently, except if the flaw cannot be cured.

*FSCD 111 Ia 259 [262], *FSCD 111 Ia 72 [75], FSCD 4P.263/2002 c. 6.1

The rules of #good faith prevent a party which has only partial knowledge of a #ground for #challenge from awaiting the rendering of the #award and from reserving the #challenge in order to blame the #arbitrator for not having informed the parties of the #facts which could justify a #challenge. However, an exception must be made for the case where the flaw cannot be cured.

*FSCD 111 Ia 72 [75]

In principle, a #challenge cannot be filed after the rendering of the #award. However, if a party only became aware of a #ground for #challenge after the rendering of the #award, i.e. during the #time limit to file a #motion to set aside, because of the silence of the #arbitrator, then the #challenge is still admissible.

*FSCD 111 Ia 72 [76-77]

Article R34 of the Procedural Rules of the #CAS has explicitly adopted this #case law rule.

FSCD 4A_260/2017 c. 4.1110, FSCD 4A_620/2012 c. 3.2, FSCD 4A_176/2008 c. 3.3, FSCD 4A_506/2007 c. 3.2.1

This rule derived from #case law must also apply to the challenge of an #expert.

FSCD 4A_606/2013 c. 6.2.1

The party which does not immediately challenge the judge or the officer when it knows the ground for #challenge, but tacitly enters into the #merits or continues the proceedings, forfeits its right to later raise the #challenge.

FSCD 08.09.1999 c. 1b

No non-waivable constitutional rights forbid such #waiver.

FSCD 30.06.1994 [(1997) ASA p. 101]

2.2 Continuation of the Arbitral Proceedings

In the absence of provisions to the contrary in the arbitration rules, proceedings concerning the #challenge of an #arbitrator before the State court do not have #suspensive effect and do not hinder the course of the #arbitral proceedings. Therefore, the #arbitral tribunal has #jurisdiction to render an #award, with the risk however that the #award may be set aside if the #grounds for #challenge are accepted.

FSCD 4P.263/2002 c. 4.3

3 *Determination of Challenge Procedure by the Parties and Final Decision of the Court at the Seat of the Arbitral Tribunal (3)*

3.1 Determination of Challenge Procedure by the Parties

The parties may determine the #challenge procedure themselves.

FSCD 128 III 330 [332], FSCD 4A_620/2012 c. 3.3

3.2 Competent Cantonal Courts

According to Article 380(3) fCCP/BE, the president of the tribunal at the #seat of the arbitration has #jurisdiction over the decisions and the tasks of Articles 179, 180, 183 to 185 and 193 PILA. The provisions concerning #summary proceedings (Art. 305 et seq. fCCP/BE) are to be applied by analogy.

FSCD 119 Ia 421 [422]

Consequently, applying Article 180(3) PILA, the judge at the #seat of the #arbitral tribunal in Zurich has #jurisdiction to hear the #challenge in the absence of a corresponding regulation by the parties. The substantive #jurisdiction then results from Article 356(2)(a) fCCP/ZH analogously in connection with Section 46 GOG [*Gerichtsorganisationsgesetz*] and lies with the Supreme Court of the Canton of Zurich.

ZH 17.01.2014 Prozessuales c. 2, ZH 11.01.2012 c. 1.2

The court at the #seat of the #arbitral tribunal has #jurisdiction to appoint #arbitrators within the meaning of Article 356(2)(a) CCP, which in the present case therefore is the court in the Canton of Zurich. *Ratione materiae*, the Administrative Commission of the Supreme Court of the Canton of Zurich [*Verwaltungskommission des Obergerichts des Kantons Zürich*] has #jurisdiction according to Section 46 GOG [*Gerichtsorganisationsgesetz*] in conjunction with Section 18(1) of the Ordinance on the Organisation of the Supreme Court of 3 November 2010 (LS 212.51).

ZH 07.02.2012 c. 3

Under the new law [CCP], the single judge of the respective district court at the #seat of the #arbitral tribunal has #jurisdiction over the appointment, #challenge, dismissal and replacement of the #arbitrators as well as, in the event of disagreement, the appointment of the presiding #arbitrator (cf. Section 101(2) JV) in conjunction with Art. 356(2) CCP [*in conjunction with Art. 362(1) CCP*]]. This supporting activity is a so-called auxiliary State procedure [*staatliches Hilfsverfahren*].

SZ 16.01.2012 c. 2b

The president of the civil court of the Canton of Basel-Stadt has #jurisdiction over the #challenge of an #arbitrator. The question of whether, from a substantive point of view, a three-member court or even a chamber court [*Dreier- oder gar Kammergericht*] would have had #jurisdiction, has been left open.

BS 24.08.2001 p. 3

In Geneva, the *Tribunal de première instance* has #jurisdiction to decide on the #challenges of #arbitrators if the parties did not stipulate other proceedings (Art. 461 B(1)(b) fCCP/GE). #Summary proceedings "*en Chambre de Conseil*" (Art. 459(1)(c) and 461 B(2) fCCC/GE) are applicable.

GE 1993 [(1993) ASA p. 81]

According to Article 141(2) fCCP/GR, the "*Kassationsgerichts ausschuss*" is the competent cantonal court in the Canton of Grisons.

GR 30.01.1996 [(1996) ASA p. 264]

Article 5 of the [former] *Decreto legislativo concernente l'adesione del Cantone Ticino al CIA e l'attuazione della LDIP in materia di arbitrato internazionale* provides that the *Camera civile d'appello* has #jurisdiction in the cases mentioned in Articles 179(2) and 180(3) PILA.

TI 25.08.1993 p. 2-3

3.3 Jurisdiction of Federal Supreme Court to Hear Challenge

The question of whether the Federal Supreme Court may itself, upon request of the #appellant, accept a #challenge of the #arbitrators has not yet been resolved.

FSCD 4A_210/2008 c. 2.2, FSCD 4P.196/2003 c. 2.2, FSCD 25.05.1992 c. 2d/cc

3.4 No Federal Motion to Set Aside

When a judge has ruled on a #challenge pursuant to Article 180(3) PILA, its decision cannot be attacked indirectly in setting aside proceedings against the subsequent #award on the ground of Article 190(2)(a) PILA.

FSCD 141 III 444 [456], FSCD 138 III 270 [271], FSCD 4A_709/2014 c. 3.2.1

The issue of whether the decision on a #challenge issued by a State court may be reviewed indirectly in the framework of setting aside proceedings against the #award is left open.

FSCD 138 III 270 [275]

The decision of the competent court at the #seat of the #arbitral tribunal on the #challenge of an #arbitrator pursuant to Article 180(3) PILA is not subject to a #motion for setting aside.

FSCD 138 III 270 [271], FSCD 128 III 330 [332], FSCD 122 I 370 [372-373], FSCD 118 Ia 20 [23], FSCD 08.09.1999 c. 1b, FSCD 09.02.1998 [(1998) ASA p. 640]

As the #arbitrator's #impartiality has, in the context of a decision on a #challenge pursuant to Article 180(3) PILA, already been examined by a State court, there is to this extent no need for a further control by the State courts. In accordance

with the goal of the statutory rules on international arbitration to limit the possibilities of setting aside as much as possible, the finality of the decision according to Article 180(3) PILA has to be understood in the sense that it also excludes, in the context of setting aside proceedings against the #award, the subsequent examination of the negative appointment decision of the cantonal court.

FSCD 138 III 270 [271], FSCD 128 III 330 [332-333], FSCD 122 I 370 [372]

The decision of the State judge regarding the challenge of an #arbitrator based on Article 180 PILA is final (Art. 180(3) PILA). Due to the legislator's intention to limit the possibilities of #challenge in #arbitral proceedings, the Federal Supreme Court does not recognise a federal remedy (FSCD 122 I 370 p. 372). According to the Federal Supreme Court's rulings, the finality should also refer to the cantonal remedies (FSCD of 09.02.1998, (1998) ASA Bulletin, p. 634; FSCD 128 III 330 c. 2). This also applies in the case of a withdrawal.

ZH 22.02.2012 c. 5

However, the final character of the cantonal court decisions in these matters is not derived only from the legal nature of the decision on a #challenge, because interim #decisions in procedural matters can directly be attacked by a [former] #motion for constitutional review based on a violation of Article 8 FC [Art. 4 fFC]. The clear will of the legislator and the general purpose of the legal rules on international arbitration to limit the possibilities to set aside an #award in these proceedings are decisive. The final #jurisdiction of the cantonal court expressly mentioned in the statute would not make any sense if its decision could be subject to a [former] #motion for constitutional review, as the other federal remedies are excluded because there is no decision susceptible of #appeal.

FSCD 122 I 370 [372-373], FSCD 118 Ia 20 [23], FSCD 09.02.1998 [(1998) ASA p. 640]

3.5 No Cantonal Motion to Set Aside

The decision of the State judge regarding the challenge of an #arbitrator based on Article 180 PILA is final (Art. 180(3) PILA). Due to the legislator's intention to limit the possibilities of #challenge in #arbitral proceedings, the Federal Supreme Court does not recognise a federal remedy (FSCD 122 I 370 p. 372). According to the Federal Supreme Court's rulings, the finality should also refer to the cantonal remedies (FSCD of 09.02.1998, (1998) ASA Bulletin, p. 634; FSCD 128 III 330 c. 2). This also applies in the case of a withdrawal.

ZH 22.02.2012 c. 5

The Federal Supreme Court's considerations with regard to the final character of the court's decision do not apply only to federal but also to cantonal #motions to set aside. Therefore, there is neither an ordinary nor an extraordinary cantonal #motion to set aside against a positive or negative decision of the State court concerning the #challenge of an #arbitrator.

BS 24.08.2001 [p. 4]

3.6 Setting Aside of the Final Award

Any grounds for #challenge which arise after the decision of the State court can be raised in the framework of setting aside proceedings against the #award pursuant to the ground of Article 190(2)(a) PILA.

FSCD 138 III 270 [274]

It can be left open whether, in case of a negative final decision of the State court, the subsequent #award can be challenged based on Article 190(2)(b) PILA on the grounds of the participation of a challengeable #arbitrator or whether this possibility of setting aside is limited to cases in which an authority designated by the parties has decided on the #challenge.

FSCD 128 III 330 [332], FSCD 122 I 370 [373]

3.7 Appointment Decisions of Private Bodies

- See also Article 190(2)(a) PILA, section 2a.10

There is no direct remedy against a negative appointment decision of a private appointing body like the #ICC International Court of Arbitration. However, such a decision can be re-examined indirectly by a #motion to set aside the #award.

FSCD 138 III 270 [271], FSCD 118 II 359 [361], FSCD 4A_236/2017 c. 3.1.1, FSCD 4A_704/2015 c. 3.2, FSCD 4A_586/2014, FSCD 4A_620/2012 c. 3.3, FSCD 4A_256/2009 c. 3.1.2, FSCD 4A_348/2009 c. 3.1, FSCD 4P.226/2004 c. 3.1, FSCD 4P.172/1999 [(2001) ASA p. 790], FSCD 18.05.1993 c. 3

In the context of setting aside proceedings of an #award, the #appellant can invoke not only #grounds for #challenge which it learned after the rendering of the #award, but also #grounds which it knew and invoked before the rendering of the #award but which were not accepted by the [private] authority deciding on the #challenge.

FSCD 126 III 249 [253], FSCD 118 II 359 [361], FSCD 08.09.1999 c. 1b

A legal system must reserve the possibility to examine the #award and the #arbitral proceedings with regard to the constitutional requirements, of which the #impartiality of the #arbitrator is part. Only Article 190(2)(a) PILA (incorrect #constitution of the #arbitral tribunal) and not Article 190(2)(b) PILA (erroneous interim #decision) can serve as basis for the #motion to set aside.

FSCD 118 II 359 [361], FSCD 18.05.1993 c. 3, FSCD 11.05.1992 [(1992) ASA p. 389]

A negative appointment decision rendered by a private body like a #chamber of commerce cannot be challenged by a direct #motion to set aside, because according to Article 190 PILA, only #awards and certain partial #awards of an #arbitral tribunal can be challenged before a State court.

FSCD 118 II 359 [361], FSCD 4P.226/2004 c. 3.1, FSCD 4P.208/2004 c. 3.2, FSCD 4P.168/1999 c. 1c, FSCD 18.05.1993 c. 3

The appointment decision of a private authority mandated by the parties, *in casu* the #ICC International Court of Arbitration, does not bind the State courts. Even if this organ were a judicial instance, its decision, rendered in #non-adversarial

proceedings, is not vested with *res judicata*. Therefore, this leaves to the arbitrators, and, upon a motion to set aside, to the appeals instance, the possibility to examine in an independent way the jurisdiction and the regularity of the constitution of the tribunal.

*FSCD 110 Ia 59 [61], *FSCD 102 Ia 493 [502], FSCD 11.05.1992 [(1992) ASA p. 390]

Considering that the CAS is also a private body that decides on challenges (cf. S6(4) and R34 CAS Code), its decisions cannot be directly challenged before the Federal Supreme Court according to the Federal Supreme Court's case law.

FSCD 4A_586/2014, FSCD 4A_282/2013 c. 5.3.2 (not published in FSCD 139 III 511), FSCD 4A_644/2009 c. 1

3.8 Position of the Arbitrator in the Challenge Proceedings

The challenged arbitrator is not a party in the proceedings on the challenge before the State court. The proceedings concern exclusively the parties to the arbitral proceedings. It is true that the State court will regularly request the challenged arbitrator to file its comments. However, the arbitrator does not have the right to be heard and does not have any other rights that a party has.

BS 24.08.2001 p. 7

If the arbitrator is not a party to the proceedings on its challenge before a State court, the decision on costs cannot decide on the arbitrator's prayer for reimbursement of costs.

BS 24.08.2001 p. 7

3.9 Jurisdiction before the Determination of the Arbitral Tribunal's Seat

When the seat of the arbitral tribunal, and hence the local jurisdiction for the decision on the challenge, is not yet determined (*in casu* because the arbitrators have to determine the seat but they were not yet in a position to do so), the court cannot hear the challenge of an arbitrator. Until the jurisdiction is determined, it is also not possible to refer the matter to a subsequently competent court.

ZH 28.03.1994, confirming ZH 08.04.1993 p. 7-8

If the seat of the arbitral tribunal is not yet determined and a party-appointed arbitrator has been challenged, this challenge does not prevent the appointed arbitrators from nominating their presiding arbitrator and to determine the seat of the arbitral tribunal once the presiding arbitrator is nominated. In fact, a challenge has no influence on the freedom of the arbitral tribunal to act. In particular, it does not oblige the challenged arbitrator to abstain from exercising its office. On the contrary, the arbitral tribunal can start, respectively continue, the proceedings irrespectively of the challenge.

ZH 28.03.1994, confirming ZH 08.04.1993 p. 8

3.10 Challenge of the Entire Arbitral Tribunal

The tribunal which is challenged as a whole can decide not to hear the #challenge if it is abusive or manifestly unfounded, even though this decision should have been taken, according to the applicable procedural rules, by another authority.

FSCD 129 III 445 [464]

3.11 Individual Cases

- For disciplinary proceedings against an attorney-at-law acting as an #arbitrator, see
ZH 02.02.2000 [(2001) ASA p. 314]
- For a request of a lawyer acting as an #arbitrator to be released from secrecy obligations, see
ZH 07.09.2000 [(2001) ASA p. 322]

Article 181

V. *Lis Pendens* **The arbitral proceedings shall be pending from the time when one of the parties seizes either the arbitrator or arbitrators designated in the arbitration agreement with a claim or, in the absence of such designation in the arbitration agreement, from the time when one of the parties initiates the procedure for the appointment of the arbitral tribunal.**

V. Rechtshängigkeit Das Schiedsverfahren ist hängig, sobald eine Partei mit einem Rechtsbegehren den oder die in der Schiedsvereinbarung bezeichneten Schiedsrichter anruft oder, wenn die Vereinbarung keinen Schiedsrichter bezeichnet, sobald eine Partei das Verfahren zur Bildung des Schiedsgerichts einleitet.

V. Litispendance L'instance arbitrale est pendante dès le moment où l'une des parties saisit le ou les arbitres désignés dans la convention d'arbitrage ou, à défaut d'une telle désignation, dès que l'une des parties engage la procédure de constitution du tribunal arbitral.

V. Litispendenza Il procedimento arbitrale è pendente appena una parte adisca l'arbitro o gli arbitri designati nel patto di arbitrato o, in mancanza di tale designazione, appena una parte avvii la procedura di costituzione del tribunale arbitrale.

1 *Ad Hoc* Arbitral Tribunal with a Sole Arbitrator

Proceedings for the #constitution of an *ad hoc* #arbitral tribunal with a sole #arbitrator are instituted when the #claimant sends its statement of claim with a proposition for the appointment of the sole #arbitrator to the #respondent.

FSCD 4P.129/2002 c. 3.3

2 Claims Related to Debt Enforcement Proceedings

If the court seized by an #action for recognition of a debt aiming at the validation of an #attachment of assets, is an #arbitral tribunal whose members are not designated in the #arbitration agreement, so that it cannot be seized immediately but has to be appointed first, the creditor must take the necessary steps for the appointment of the #arbitrators within 10 days (Art. 278(2) & (4) SDCB). As soon as the #arbitral tribunal is constituted, the creditor has to file its statement of claim within a further 10 days, in order to ensure, with regard to the time, the link between the #debt enforcement proceedings after an #attachment of assets order and the proceedings aiming at the validation of this order. The completion in time of only one of these elements is not sufficient.

FSCD 143 III 578 [583], *FSCD 112 III 120 [123-124], *FSCD 101 III 58 [63], FSCD 7B.55/2006 c. 3.2

This rule also applies to the #action for a declaration that the claim is unfounded pursuant to Article 83(2) SDCB.

*FSCD 112 III 120 [124], *FSCD 56 III 233 [236-237]

If the claim has been brought before an #arbitral tribunal without #jurisdiction, a new #time limit should be set by analogous application of Article 139 CO.

*FSCD 112 III 120 [125-126]

There is no #*lis pendens* between proceedings for the provisional #SADOSP and an #action on the #merits brought before an #arbitral tribunal seeking a declaration that the debtor owes a debt to the creditor.

FSCD 136 III 583 [586]

Article 182

VI. Procedure 1. Principle

¹ The parties may, directly or by reference to rules of arbitration, determine the arbitral procedure; they may also submit the arbitral procedure to a procedural law of their choice.

² If the parties have not determined the procedure, the arbitral tribunal shall determine it to the extent necessary, either directly or by reference to a statute or to rules of arbitration.

³ Regardless of the procedure chosen, the arbitral tribunal shall ensure equal treatment of the parties and their right to be heard in adversarial proceedings.

VI. Verfahren 1. Grundsatz

¹ Die Parteien können das schiedsrichterliche Verfahren selber oder durch Verweis auf eine schiedsgerichtliche Verfahrensordnung regeln; sie können es auch einem Verfahrensrecht ihrer Wahl unterstellen.

² Haben die Parteien das Verfahren nicht selber geregelt, so wird dieses, soweit nötig, vom Schiedsgericht festgelegt, sei es direkt, sei es durch Bezugnahme auf ein Gesetz oder eine schiedsgerichtliche Verfahrensordnung.

³ Unabhängig vom gewählten Verfahren muss das Schiedsgericht in allen Fällen die Gleichbehandlung der Parteien sowie ihren Anspruch auf rechtliches Gehör in einem kontradiktorischen Verfahren gewährleisten.

VI. Procédure 1. Principe

¹ Les parties peuvent, directement ou par référence à un règlement d'arbitrage, régler la procédure arbitrale; elles peuvent aussi soumettre celle-ci à la loi de procédure de leur choix.

² Si les parties n'ont pas réglé la procédure, celle-ci sera, au besoin, fixée par le tribunal arbitral, soit directement, soit par référence à une loi ou un règlement d'arbitrage.

³ Quelle que soit la procédure choisie, le tribunal arbitral doit garantir l'égalité entre les parties et leur droit d'être entendues en procédure contradictoire.

VI. Procedura
1. Principio

¹ Le parti possono regolare la procedura arbitrale direttamente o mediante richiamo di un ordinamento procedurale arbitrale; possono anche dichiarare applicabile un diritto procedurale di loro scelta.

² Se non regolata dalle parti medesime, la procedura, per quanto necessario, è stabilita dal tribunale arbitrale, sia direttamente sia con riferimento a una legge o a un ordinamento procedurale arbitrale.

³ Indipendentemente dalla procedura scelta, il tribunale arbitrale deve garantire in ogni caso la parità di trattamento delle parti, nonché il loro diritto d'essere sentite in contraddittorio.

1 Determination by Agreement of the Parties (1)

1.1 Direct Determination by the Parties

The agreement between the parties with respect to the arbitral procedure binds the #arbitral tribunal and excludes thus any contrary decision by the #arbitral tribunal with regard to the procedure. This agreement may be part of the #arbitration agreement or be concluded later. It can even be concluded after the #constitution of the #arbitral tribunal and without its approval, in which case it supersedes the decisions taken by the #arbitral tribunal in the meantime. Taking into account the importance of #party autonomy, the decision of the #arbitral tribunal determining certain procedural issues is *ipso facto* null and void as soon as the parties later agree on the same points. Such an agreement is not subject to the formal requirements of Article 6 fConcordat as it is not an #arbitration agreement but an agreement on procedural aspects. This is why it can be concluded without any particular form, even by #implied actions, provided it expresses the common intent of the parties.

*VS 02.12.2005 c. 2a

1.2 Reference to Arbitration Rules

The parties may organize the #arbitral proceedings as they wish, particularly by way of reference to a set of arbitration rules (Art. 182(1) PILA) as long as the #arbitral tribunal guarantees #equal treatment and their #right to be heard in #adversarial proceedings.

FSCD 142 III 360 [362], FSCD 4A_246/2014 c. 7.2.2

The doctrine is not unanimous with regard to the question whether in the event of a change in the rules of a permanent #arbitral institution the new or the old version is decisive. In case of doubt, the text currently in force applies and not the one in force at the time when the parties entered into the #arbitration agreement. However, the old version prevails compared to the new one if the changes fundamentally alter the structure of the rules.

FSCD 4P.253/2003 c. 5.4, FSCD 14.06.1990 [(1994) ASA p. 228], *VD 22.08.2007 c. 3cb

If the parties have agreed in their #arbitration agreement on the application of the ICC Arbitration Rules, but they disagree on whether the 1975 or the 1988 version is applicable, and if the #arbitration agreement provides further that the fCCP/BE applies as a supplement to the ICC Arbitration Rules, it has to be examined whether the dispute can be resolved by a thorough examination of the hypothetical intent of the parties, before the fCCP/BE is consulted as a supplement.

FSCD 14.06.1990 [(1994) ASA p. 228]

The agreement of the parties – to the extent it constitutes an agreement on procedural issues – has to be interpreted according to the principles applying to the #validity of contracts. Therefore, one has to examine by simultaneously going back in time what the parties would have stipulated in #good faith if they had

considered the problem. The #arbitrator has to consider the nature and the scope of the contract and to take into account all the circumstances of the case.

FSCD 14.06.1990 [(1994) ASA p. 228]

1.3 Reference to Procedural Law

There is no valid exclusion of Chapter 12 PILA if an #arbitration agreement which simply provides that the proceedings are governed "*nach dem Schw. Konkordat über Schiedsgerichtsbarkeit*" without mentioning Chapter 12 PILA and without in particular containing an explicit exclusion of the provisions of Chapter 12 PILA. In their further submissions to the #arbitral tribunal, the parties have repeatedly referred to the fConcordat and, in particular, have not objected to the Constitutive Order in which the sole #arbitrator declares the "mandatory provisions of the Concordat" to be applicable. However, the fact that the parties expressly waived the application of the PILA in written form is not asserted by the #appellant and is also not apparent. The reference to the fConcordat in the #arbitration agreement is rather to be interpreted as a #choice of law within the meaning of Article 182(1) PILA. According to this provision, the parties may regulate the #arbitral proceedings themselves or by reference to arbitral rules of procedure; they may also subject it to a procedural law of their choice. If the parties declare that the proceedings are governed by the fConcordat without simultaneously excluding the PILA as *lex arbitri*, this can only mean a #choice of law within the meaning of Article 182(1) PILA.

FSCD 4A_254/2013 c. 1.2.4

The Federal Supreme Court left open the question of the scope of the parties' reference to a procedural law. For part of the doctrine, such a reference applies only to the procedural rules in a narrow sense, excluding in particular rules with respect to the #costs.

FSCD 4P.280/2005 c. 2.2.1

1.4 General Procedural Duties of the Arbitral Tribunal and the Parties

The principle of #good faith has a general scope so that it also governs #arbitral proceedings whether domestic or international.

FSCD 4A_65/2018 c. 3.2.3.3.1, FSCD 4A_247/2017 c. 5.1.2, FSCD 4A_600/2016 c. 1.1.4, FSCD 4A_136/2015 c. 2.2.3.4, FSCD 4A_374/2014 c. 4.2.2, FSCD 4A_214/2013 c. 4.3.1

The #arbitrator shall actively advance the proceedings and refrain from all acts which could jeopardise the orderly conduct of the proceedings. This obligation represents an accessory contractual duty of the #arbitrator.

*FSCD 111 Ia 72 [76]

One of the goals of arbitration is to allow the speedy resolution of disputes. Therefore, the principle of #good faith imposes on the parties a general obligation to abstain from anything which could, without being an absolute necessity, delay the normal course of the #arbitral proceedings.

*FSCD 111 Ia 259 [262], *FSCD 111 Ia 72 [75], *FSCD 109 Ia 81 [83], *FSCD 108 Ia 197 [201], *VD 27.04.2012 c. 3.1, VD 05.01.2011, AG 23.07.1992 [(1995) ASA p. 242]

1.5 Modifications of the Prayers for Relief

The #admissibility of modifications of the #prayers for relief depends on the applicable procedural law, in particular on the #*lis pendens* of the #arbitral proceedings created by the filing of the statement of claim and the #adversarial maxim, as well as on the strictness of its possible application. In most of the [former] procedural codes in force in Switzerland, these formal principles are not stated in a uniform way but are regulated differently. As most of the [former] codes on civil procedure in Switzerland allow for amendments to the #prayers for relief requested by a party, provided that the #facts initially asserted has not changed, a modification of the #prayers for relief does not violate procedural #public policy. Procedural #public policy is in any case not violated if the solution adopted by the #award is compatible with some procedural rule in force in Switzerland.

FSCD 30.12.1994 [(1995) ASA p. 221-222]

1.6 Modifications of the Reasons for the Claim

The question of #admissibility of modifications with regard to the #reasons for a claim in international #arbitral proceedings does not fall within the scope of application of Article 190(2)(c) PILA. The limits to such modifications result from the scope of application of the #arbitration agreement or depend on the procedural rules chosen by the parties (Art. 182 PILA). In the first case (*extra potestatem*), the parties have to invoke exclusively Article 190(2)(b) PILA if they intend to contest the #arbitrators' #jurisdiction to decide the dispute (FSCD 116 II 639 [641-642]); in the second case, the violation of mandatory procedural principles pursuant to Article 182(3) PILA can be submitted to the Federal Supreme Court by a #motion to set aside based on Article 190(2)(d) & (e) PILA.

FSCD 117 II 346 [347-348], FSCD 30.12.1994 [(1995) ASA p. 220-221]

2 Determination by the Arbitral Tribunal (2)

2.1 Supplementation of Contracts

2.1.1 General Admissibility

Chapter 12 PILA does not contain any specific provision which bans the #arbitral tribunal from supplementing a contract, even without an express authorisation by the parties. The #arbitrator who supplements a contract does not depart from the rules of law due to the supplementation as such, because it only applies the relevant legal provisions which authorise supplementation of the contract.

FSCD 4A_220/2007 c. 6.2, FSCD 4P.114/2001 c. 2c/bb/aaa

Swiss law authorises the State courts to supplement a contract that has gaps by determining the hypothetical intent of the parties. It does not require an express authorisation by the parties. Therefore, if the State court has the right to supplement on its own motion a contract subject to Swiss law, or a foreign law authorising the supplementation of a contract, there is no reason to deny this right to an #arbitral tribunal having its #seat in Switzerland.

FSCD 4P.114/2001 c. 2c/bb/aaa

2.1.2 Applicable Law

The Federal Supreme Court left open the question which law governs the right of the #arbitral tribunal to supplement a contract. Some legal scholars are of the opinion that this right depends exclusively on the *lex arbitri*, whereas the law applicable to the #merits states the conditions of the supplementation. Other legal scholars are of the opinion that if the *lex arbitri* does not contain any express provision on the #arbitrators' powers to supplement a contract, then one has to refer to the procedural rules of the State of the #arbitral tribunal's #seat (*lex fori*) and to apply to the #arbitral tribunal the provisions of these rules regarding the powers of the State courts in this field. Finally, if these rules are silent in this respect, one has to refer to the substantive law applicable to the #merits (*lex causae*).

FSCD 4P.114/2001 c. 2c/bb/ccc

2.2 Stay of the Arbitral Proceedings

- See also Article 190(2)(b) PILA, section 2b.6

2.2.1 In General

In general, a #stay of the proceedings is only justified in special cases, when specific rules provide for a #stay or when an imperative reason commands it.

FSCD 133 III 139 [143], FSCD 4P.64/2004 c. 3.2

There is such a reason if circumstances arise which could lead to the loss of the legal personality of one of the parties or its #standing to sue, or if legal or factual

circumstances, decisive for the outcome of the case but not within the #arbitral tribunal's #jurisdiction, have to be clarified.

FSCD 133 III 139 [143], FSCD 127 III 279 [283], FSCD 119 II 386 [389-390], FSCD 4P.64/2004 c. 3.2

The #arbitral tribunal may also #stay the proceedings if it considers this measure appropriate taking into account the interests of the parties; however, in case of doubt, the principle of speed of the proceedings should prevail as the #stay could possibly amount to a #denial of justice or an unjustified delay.

FSCD 133 III 139 [143], FSCD 4P.64/2004 c. 3.2

The #stay can in particular be justified until a decision is rendered by another authority, if this authority has to decide a #preliminary issue which the #arbitral tribunal otherwise would have to decide itself. However, in such a case, none of the parties may require this measure based on its #right to be heard.

FSCD 133 III 139 [143-144]

Apart from cases of imperative reasons for the #stay, this measure depends on the discretionary power of the authority or the #arbitral tribunal. In ordinary proceedings, apart from cases of excess or abuse, the exercise of this power can in principle not be reviewed by the Federal Supreme Court (FSCD 120 Ib 156 [160]). The same must apply to the field of international arbitration where the #appeal to the Federal Supreme Court is admissible, with regard to procedural issues, only for the violation of fundamental principles. In general, the #stay of the proceedings, granted or dismissed by the #arbitral tribunal by taking into account the interests of the parties, does involve neither the #equality of the parties nor their #right to be heard in #adversarial proceedings pursuant to Articles 182(3) and 190(2)(d) PILA.

FSCD 133 III 139 [144]

The difficulties which arise in general with respect to evidentiary measures due to the existence of a criminal investigation do not constitute imperative reasons for the #stay of the #arbitral proceedings. This is in particular the case when the #arbitral tribunal informs the parties beforehand that it will take measures adapted to the circumstances, if need be.

FSCD 133 III 139 [145]

In general, the decision to #stay the proceedings is within the discretion of the court seized. When exercising this discretion, the judge has to weigh the interests of the parties. In borderline cases, the interest of speed prevails.

FSCD 133 III 139 [144], FSCD 119 II 386 [389], *FSCD 109 Ia 81 [83-85]

Cases in which evidentiary problems have to be resolved do not fall within this category. The possibility of an absence of #evidence is a risk inherent in civil procedure. In such cases, the provisions regarding the #burden of proof are decisive.

FSCD 133 III 139 [144], FSCD 119 II 386 [390]

In order to alleviate the severity of this solution, the legislator opens, in principle, to the party which was not able to offer in time the conclusive #evidence, the possibility of a #revision. This means is also available in the context of the proceedings of Articles 176 et seq. PILA, even if not explicitly

mentioned. It is true that the #arbitral tribunal can #stay the proceedings pending a decision in another matter in order to resolve a #preliminary issue. However, the party in question cannot invoke its #right to be heard to impose a #stay.

FSCD 119 II 386 [390]

The parties may request that the proceedings be completed within a reasonable #time limit. The Federal Supreme Court derived this right from Article 8 FC. Article 6 ECHR also provides expressly for it and therefore this right imposes certain legal limits on a #stay of proceedings pending a decision in parallel proceedings.

FSCD 119 II 386 [389]

A #stay of the proceedings may be granted only exceptionally, in particular when a decision to be rendered by a competent authority is expected, which will determine a #preliminary issue in the #arbitral proceedings. But even in such a situation, the #case law is extremely restrictive.

FSCD 119 II 386 [389]

In arbitration, except in cases of the specific problem of the legal existence or the #standing to sue of a party and in the cases of joint requests for a #stay, a party may obtain a #stay only if issues have to be clarified which are decisive for the outcome of the dispute and which are not within the #jurisdiction of the #arbitral tribunal.

FSCD 119 II 386 [389-390]

The decision on the #stay of the #arbitral proceedings is in principle based on considerations of #procedural economy and of #discretion.

*FSCD 116 Ia 154 [158]

The interests of the party resisting the request for a #stay of the #arbitral proceedings shall in principle prevail over the ones of the requesting party, if the latter does not prove that it has taken all measures in its power to prevent or limit the delay resulting from its request.

*FSCD 116 Ia 154 [158-160], *FSCD 108 Ia 197 [201]

The principle according to which the criminal proceedings come before the civil proceedings in the same matter ("*le penal tient le civil en l'état*"), is not part of the fundamental principles of the legal order and of the Swiss system of values.

FSCD 119 II 386 [390]

There is **no ground to #stay** the #arbitral proceedings:

- when a party invokes evidentiary problems and requests the #stay of the #arbitral proceedings until the termination of criminal proceedings pending abroad, alleging that the evidentiary result of these criminal proceedings will enable the establishment of relevant #facts in the #arbitral proceedings;
FSCD 119 II 386
- when a party has filed a #motion for setting aside against an interim #award on #jurisdiction of the #arbitral tribunal, the #arbitrators can in principle continue with the proceedings on the #merits notwithstanding the pending

#motion for setting aside the positive interim #award on #jurisdiction. However, when deciding on the #stay of the proceedings, the #arbitral tribunal must take into account considerations of #procedural economy, i.e. considerations of practicability.

*FSCD 109 Ia 81 [84-85]

2.2.2 In Particular: *Lis pendens* (Art. 9 PILA)

The rule of Article 9 PILA, which is based on #public policy considerations, also applies to #arbitral tribunals having their #seat in Switzerland.

FSCD 127 III 279 [285]

2.2.3 Appeal to the Federal Supreme Court

Apart from cases of imperative reasons for the #stay, this measure depends on the discretionary power of the authority of the #arbitral tribunal. In ordinary proceedings, apart from cases of excess or abuse, the exercise of this power can in principle not be reviewed by the Federal Supreme Court (FSCD 120 Ib 156 [160]). The same must apply to the field of international arbitration where the #appeal to the Federal Supreme Court, with regard to procedural issues, is only admissible with respect to the violation of fundamental principles. In general, the #stay of the proceedings, granted or dismissed by the #arbitral tribunal by taking into account the interests of the parties, does involve neither the #equality of the parties nor their #right to be heard in #adversarial proceedings pursuant to Articles 182(3) and 190(2)(d) PILA.

FSCD 133 III 139 [144]

To the extent that the #stay depends on the weighing of the parties' interests and is granted or rejected within the #discretion of the #arbitral tribunal, the fundamental principles of the #equal treatment of the parties and their #right to be heard pursuant to Article 190(2)(d) PILA, respectively Article 182(3) PILA, are in principle not violated.

FSCD 119 II 386 [389-390], FSCD 4P.64/2004 c. 3.2

The reason for this is that apart from the duty to take into account mandatory considerations, the decision on the #stay is part of the largely discretionary conduct of the proceedings. As a rule, the Federal Supreme Court does not interfere with such discretionary decisions. This has to apply all the more to #motions for setting aside against international #arbitral awards, which are only available for violations of fundamental procedural rights.

FSCD 4P.64/2004 c. 3.2

2.3 Arbitrators' Fees and Expenses

2.3.1 Principle

The #arbitrators have a contractual claim to #fees and to the reimbursement of expenses (Arts. 394(3) & 402(1) CO).

FSCD 4P.2/2003 c. 3.1, SZ 23.08.2010 c. 4a/aa

The proceedings before the #arbitral tribunal shall be financed by the parties.

SZ 23.08.2010 c. 4a/aa

The parties are jointly and severally obliged to pay the #arbitrators. The creditors of the claim are the individual #arbitrators, as far as the #fees and the individual #arbitrators' expenses are concerned.

SZ 23.08.2010 c. 4a/aa

2.3.2 Advance on Costs

The #advances on costs paid by the parties shall secure the #arbitrators' claim to #fees. Therefore, #advances exclusively serve the interests of the #arbitral tribunal, unlike their possible role in State court proceedings which is to secure the payment of the #costs of the parties (cf. Art. 150(2) fSOFJ). This is why the #arbitrators are not obliged, contrary to the State courts, to have the #costs of the proceedings secured by #advances on costs. They can provisionally or definitively waive #advances as well as an increase of the #advances during the proceedings.

FSCD 4P.263/2002 c. 5.4, FSCD 4P.2/2003 c. 3.1, SZ 23.08.2010 c. 4b/bb

According to both Article 30 fConcordat and the PILA, the #arbitral tribunal may request #advances on costs from the parties in order to secure the foreseeable #costs of the #arbitral proceedings. The PILA does not contain a provision on the obligation to pay an advance, nor does it regulate the consequences of non-payment. In the field of arbitration, however, the payment of advances is so common that in case of doubt the right to the #advance is to be regarded as tacitly agreed; the right to the #advance therefore also exists for #arbitral tribunals in the field of the PILA.

SZ 23.08.2010 c. 4a/aa

Specifically, pursuant to Article 30(1) fConcordat, the #arbitral tribunal may demand an advance payment for the presumed #costs of the proceedings and make the conduct of the proceedings dependent on its performance. It determines the amount of the #advance for each party. The CCP has adopted this rule but makes the determination of the amount of the #advance by the #arbitral tribunal subject to the condition that the parties have not agreed otherwise (Art. 378(1) CCP).

SZ 23.08.2010 c. 4a/aa

The #arbitral tribunal has great discretion with regard to the #advance on costs. As a rule, an #advance on costs is imposed on both parties.

SZ 23.08.2010 c. 4a/aa

It shall be for the #arbitral tribunal as such to request such #advance and to determine its amount. In the absence of any other agreement, the conditions and the apportionment of the #advance shall also be determined by the #arbitral tribunal.

SZ 23.08.2010 c. 4b/b

Finally, it should be noted that the #arbitral tribunal is not obliged to act before receipt of a requested reasonable #advance payment and may also make the

notification of the #arbitral award dependent on the payment of the #advance payment or of the additional advance. If the #arbitral tribunal has the possibility to request an #advance on costs from the parties based on Article 30 fConcordat right at the beginning of its activities or to suspend the proceedings until receipt of the advance payment, the expenditure is likely to be very limited until then.

SZ 23.08.2010 c. 4b/dd

2.3.3 Amount

The #costs of the proceedings mentioned in Article 30 fConcordat are the #fees and expenses of the #arbitrators as well as the remuneration of any #secretary of the #arbitral tribunal.

SZ 23.08.2010 c. 4a/aa

In the absence of any applicable fee schedule, the amount of the #arbitrators' #fees must correspond to the usual compensation at the #seat of the arbitration. When there is no usage, one speaks of appropriate compensation. One can take inspiration from professional fee schedules, in particular if the #arbitrators are attorneys-at-law, or from the fee schedules of #arbitral institutions, by taking into account the time devoted, the importance of the case, the particular qualifications of the #arbitrators as well as the quality and the speediness with which the #arbitrators accomplished their mission. A supplement of #fees up to 50% is admissible for the presiding #arbitrator or the #arbitrator in charge of the drafting of the #award. The decisive criteria are therefore the importance of the work to be accomplished and the complexity of the case, the importance of the case for the parties and their financial situation, the responsibility incurred by the #arbitrators as well, to a certain extent, the #amount in dispute if it can be quantified, these different elements being interdependent. It is also admissible to take into account elements pertaining to the person of the #arbitrator, be it the #arbitrator's overheads, professional activity or situation.

*VS 22.12.2005 c. 6b

As the #arbitrators are not sponsored by the State, their #fees and expenses are of course completely paid by the parties and are, in general, higher than State court costs.

*VS 22.12.2005 c. 6b

2.3.4 Delayed Payment or Non-Payment of the Advance on Costs

The #formalism is excessive when the strict application of procedural rules is not justified by any interest worthy of protection, becomes an end in itself, complicates in an unbearable way the enforcement of substantive law or hinders in an inadmissible manner access to justice. According to well established #case law, there is no excessive rigour not to hear an #appeal if, in accordance with the applicable procedure, the case can only be heard provided that an #advance on costs is paid within a certain #time limit; however, the #appellant must have been informed in an appropriate way about the amount to pay, the #time limit for the payment and the consequences in case the #time limit is not respected.

FSCD 4A_692/2016 c. 6.2, FSCD 4A_600/2008 c. 5.2.2

The private law concept of the payment of #fees and #advances on costs for the activity of the #arbitrators also excludes an automatic application of the provisions for State courts with respect to the delay in the payment of #advances on costs. Rules on this issue lie within the autonomy of the parties or the #jurisdiction of the #arbitral tribunal, which must however respect the principle of #equal treatment of the parties (Art. 182(3) PILA) as well as other clear and undisputed procedural principles.

FSCD 4P.2/2003 c. 3.2

It follows from this that it lies within the procedural autonomy of the parties and, in their absence, within the #jurisdiction of the #arbitral tribunal to determine the legal consequences of the delayed payment of an #advance on costs.

FSCD 4P.2/2003 c. 3.3

As it is in the #arbitral tribunal's discretion to continue the proceedings notwithstanding the fact that the #advance on costs has not been paid in part or in total, the #arbitral tribunal may also fix a new #time limit for its payment and this irrespective of the grounds for the delay in payment.

FSCD 4P.2/2003 c. 3.3

It follows from the principle of #good faith in procedural matters that the tribunal must threaten the parties with the possible peremptory consequences of a delayed payment of the #advance on costs, if this is not clearly apparent from the applicable procedural rules.

FSCD 4P.2/2003 c. 3.4

As it lies within the #arbitral tribunal's discretion to continue the proceedings notwithstanding incomplete #advances on costs, the #arbitral tribunal also has to decide whether the non-defaulting party has to be granted the right to choose between the payment of the whole #advance on costs and the #waiver of the #arbitral proceedings. This means that this right to choose has to be granted expressly in a procedural order. This right cannot be exercised without authority, i.e. against the will of the #arbitral tribunal, by the party. It goes without saying that the additional request for the #advance on costs, and the granting of the right to choose in case of non-payment within the extended #time limit, can be linked in order to give the parties the possibility to save the #arbitral proceedings.

FSCD 4P.2/2003 c. 3.5

Only the party which has paid its share of the #advance on costs can have such a right to choose (cf. Art. 55 of the [former] Rules of the Zurich Chamber of Commerce).

FSCD 4P.2/2003 c. 3.6

In accordance with Article 30(1) fConcordat, the #arbitral tribunal may discontinue the proceedings until the #advance payment has been made.

SZ 23.08.2010 c. 4b/bb

If one party fails to pay the #advance requested from it pursuant to Article 30 fConcordat, the other party may, at its option, advance the entire costs - the #arbitral tribunal must grant this opportunity to the other party if the first one refuses to pay - or waive the #arbitral proceedings. If it waives the #arbitral

proceedings, the parties are no longer bound by the #arbitration agreement with regard to this dispute (Art. 30(2) fConcordat).

SZ 23.08.2010 c. 4b/bb

If the #advance is not paid in full, the #arbitrators may also act without the #advance, decide not to hear the case or terminate the #arbitrator's contract for #good cause. The #arbitral tribunal is therefore free to act nevertheless even if an #advance on costs is requested and, in the event, that the relevant request is not complied with.

SZ 23.08.2010 c. 4b/bb

2.3.5 Attachment of the Advance on Costs

The #costs of the #arbitral tribunal are assimilated to attorneys' #fees. With the #advance on costs, the money paid enters into the assets of the #arbitrators by commixtion.

*FSCD 06.04.2000 [(2001) ASA p. 308]

A payment of an #advance on costs is an anticipatory and conditional payment aimed at permitting the client to extinguish by compensation the claim of #fees and #costs as soon as it is due, as the #principal can, at the expiry or the revocation of the mandate, only claim the amount which has not been used.

*FSCD 06.04.2000 [(2001) ASA p. 308]

This is why an #advance of costs cannot be subject to an #attachment.

*FSCD 06.04.2000 [(2001) ASA p. 305-306]

2.3.6 Recourse Against Decision on Arbitrators' Fees

An #arbitral tribunal's #decision as to its #fees is a rendering of account which lacks the characteristics of an #award and cannot therefore be subject to setting aside proceedings.

FSCD 136 III 597 [604], FSCD 4A_254/2013 c. 2.2

Any disputes between the parties and the #arbitral tribunal as to the #arbitrators' compensation is to be decided by the competent State courts.

FSCD 136 III 597 [603]

The Federal Supreme Court, in its ruling FSCD 136 III 597, stated that Chapter 12 PILA contained no provision which would authorise the #arbitral tribunal to issue a binding decision on its #costs. Consequently, the decision on #costs in the #operative part of an #arbitral award is nothing more than an invoice which is non-binding on the parties, i.e. a description of a private law claim of the #arbitrator under the #arbitrator's contract (*receptum arbitri*). In the event of a dispute, a court of first instance has to decide on the #arbitrator's claim, which also corresponds to the solution of German or French law.

FSCD 4A_254/2013 c. 2.2

This is because the dispute concerning the #arbitrator's #fee is a dispute under the law of obligations between the #arbitrator on the one hand and the person seeking justice on the other. Only #adversarial proceedings before a court of first

instance (be it a State court or even an #arbitral tribunal) is suitable for the resolution of this dispute, since the dispute must be dealt with not only in legal but also in factual terms. In appeal proceedings before the Federal Supreme Court, the #arbitrator's #fee cannot, in any case, be reviewed in an appropriate manner, since the Federal Supreme Court proceedings are not aimed at the investigation of disputed #facts, but at the control of the law (cf. also Message on the Partial Revision of the Administration of Federal Justice of 28 February 2001, FF 2001 4338 et seq., according to which the function of the Federal Supreme Court as the supreme judicial authority is limited to a control of the law).

FSCD 4A_254/2013 c. 2.2

Consequently, the determination of the #arbitrator's #fee is not a challengeable decision within the meaning of Article 77 FSCA in conjunction with Article 190 PILA.

FSCD 4A_254/2013 c. 2.3

2.4 Publicly Known Facts

Publicly known #facts do not have to be alleged or proven. In order to be publicly known, a fact does not have to be constantly in the #arbitrator's mind. It is sufficient that it can be checked through publicly available sources. It has for instance been decided that the currency conversion rates are publicly known.

FSCD 22.02.1999 [(1999) ASA p. 544]

3 *Equal Treatment of the Parties and Right to Be Heard in Adversarial Proceedings (3)*

3.1 In General

The parties may organize the #arbitral proceedings as they wish, particularly by way of reference to a set of arbitration rules (Art. 182(1) PILA) as long as the #arbitral tribunal guarantees #equal treatment and their #right to be heard in #adversarial proceedings.

FSCD 142 III 360 [362], FSCD 4A_246/2014 c. 7.2.2

The “#right to be heard in #adversarial proceedings” encompasses two different legal notions: on the one hand, the proper meaning of the #right to be heard as it has been specified by the #case law of the Federal Supreme Court with regard to Article 8 FC and as it has been integrated into Article 25 fConcordat; on the other hand, the principle of #adversarial proceedings which is especially present in French and English law, a little bit less in Belgium and Germany.

FSCD 130 III 35 [38], FSCD 117 II 346 [347], FSCD 116 II 639 [643], FSCD 13.11.1998 [(1999) ASA p. 535], FSCD 20.10.1998 c. 3a, FSCD 17.07.1998 [4P.7/1998] [(2002) ASA p. 668], FSCD 15.06.1998 c. 2a, FSCD 25.11.1997 c. 3a, FSCD 06.09.1996 [(1997) ASA p. 306], FSCD 11.05.1992 [(1992) ASA p. 396], FSCD 23.10.1989 [(1990) ASA p. 52]

The #equal treatment of the parties and the #right to be heard in #adversarial proceedings is a minimal protection which the parties cannot waive.

FSCD 133 III 139 [143], FSCD 4A_623/2014 c. 3.1, FSCD 4A_324/2014 c. 3.2.1, FSCD 4A_402/2010 c. 3.1, FSCD 4P.105/2006 c. 7.1, FSCD 4P.88/2006 c. 3.1, FSCD 4P.23/2006 c. 3.1, FSCD 4P.26/2004 c. 3.1

Article 190(2)(d) PILA only guarantees the mandatory procedural principles pursuant to Article 182(3) PILA.

FSCD 130 III 35 [37-38], FSCD 120 II 155 [(1994) ASA p. 417], FSCD 119 II 386 [388-389], FSCD 117 II 346 [347], FSCD 116 II 373 [375], FSCD 4A_404/2017 c. 3.1.1, FSCD 4A_505/2017 c. 3.1.1, FSCD 4A_277/2017 c. 3.1, FSCD 4A_80/2017 c. 3.1, FSCD 4A_490/2016 c. 3.1.1, FSCD 4A_322/2015 c. 5, FSCD 4A_173/2016 c. 4.1, FSCD 4A_678/2015 c. 4.1, FSCD 4A_568/2015 c. 3.1, FSCD 4A_54/2015 c. 4.1, FSCD 4A_684/2014 c. 4.2, FSCD 4A_623/2014 c. 3.1, FSCD 4A_636/2014 c. 3.2, FSCD 4A_486/2014 c. 4.1, FSCD 4A_544/2014 c. 3.2.1, FSCD 4A_324/2014 c. 3.2.1, FSCD 4A_74/2014 c. 3.2.1 (not published in FSCD 140 III 477), FSCD 4A_678/2015 c. 4.1, FSCD 4A_636/2014 c. 3.2, FSCD 4A_178/2014 c. 5.1, FSCD 4A_330/2013 c. 3.1, FSCD 4A_274/2013 c. 3.1, FSCD 4A_95/2013 c. 3.1, FSCD 4A_672/2012 c. 3.1.1, FSCD 4A_522/2012 c. 3.1, FSCD 4A_407/2012 c. 4.1, FSCD 4A_76/2012 c. 3.1, FSCD 4A_682/2012 c. 4.1, FSCD 4A_360/2011 c. 4.1, FSCD 4A_528/2011 c. 2.1, FSCD 4A_526/2011 c. 2.1, FSCD 4A_162/2011 c. 2.1.2, FSCD 4A_402/2010 c. 3.1, FSCD 4P.105/2006 c. 7.1, FSCD 4P.88/2006 c. 3.1, FSCD 4P.23/2006 c. 3.1, FSCD 09.06.1998 [(1998) ASA p. 658], FSCD 25.11.1997 c. 1a, FSCD 24.03.1997 [(1997) ASA p. 320, 324-325], FSCD 06.09.1996 [(1997) ASA p. 306]

The violation of other procedural rules, in particular the set of arbitration rules chosen by the parties, does not have any effect on the regularity of the #award, provided it does not lead to a violation either of the #equal treatment of the

parties, or of the #right to be heard in #adversarial proceedings, or of #public policy within the meaning of Article 190(2)(e) PILA.

FSCD 120 II 155 [(1994) ASA p. 417], FSCD 119 II 386 [388-389], FSCD 117 II 346 [347], FSCD 116 II 373 [375], FSCD 4A_276/2012 c. 4.2.2, FSCD 4P.196/2003 c. 4.2.2.2, FSCD 22.02.1999 [(1999) ASA p. 541], FSCD 24.03.1997 [(1997) ASA p. 320], FSCD 06.09.1996 [(1997) ASA p. 306], FSCD 30.12.1994 [(1995) ASA p. 221], FSCD 17.08.1994 [(1995) ASA p. 203], FSCD 12.11.1991 [(1992) ASA p. 264]

A procedural rule contained in a set of arbitration rules does not become mandatory within the meaning of Article 182(3) PILA by the mere fact that the parties agreed on it.

FSCD 117 II 346 [348]

Compliance with provisions governing the proceedings in front of the #arbitral tribunal does not by itself rule out a violation of the #right to be heard which is guaranteed by Article 182(3) PILA irrespective of the procedure chosen.

FSCD 4A_70/2015 c. 3.2.2, FSCD 4A_312/2012 c. 4.3.1, FSCD 4A_274/2012 c. 3.2.1

The right to #equal treatment is largely consistent with the #right to be heard. In particular, it requires the #arbitral tribunal to treat the parties equally in all procedural matters and to conduct the proceedings in such a way that each party has the same opportunities to submit its points of view.

FSCD 4A_424/2011 c. 2.2

The #right to be heard and the equality between the parties are respected if the parties have the concrete possibility to be heard and to be treated equally. If they do not use this possibility, the rights granted mandatorily by Article 25 fConcordat are not violated.

*VD 23.04.2008 c. 4b

3.2 Equal Treatment of the Parties

➤ See also Article 190(2)(d) PILA

3.2.1 Definition, Content and Scope

The right of the parties to #equal treatment guaranteed by Articles 182(3) and 190(2)(d) PILA means that the proceedings have to be regulated and conducted in a way that each party has the same opportunity to present its case.

FSCD 142 III 360 [361], FSCD 4A_308/2018 c. 3.1, FSCD 4A_284/2018 c. 6.1.1, FSCD 4A_40/2018 c. 3.1, FSCD 4A_117/2018 c. 3.2, FSCD 4A_247/2017 c. 5.1.1, FSCD 4A_450/2017 c. 3.1, FSCD 4A_592/2017 c. 4.1.1, FSCD 4A_236/2017 c. 4.1, FSCD 4A_80/2017 c. 3.1.2, FSCD 4A_668/2016 c. 3.1, FSCD 4A_405/2016 c. 3.2, FSCD 4A_42/2016 c. 4.1, FSCD 4A_253/2014 c. 4.2, FSCD 4A_488/2011 c. 4.4.1, FSCD 4A_360/2011 c. 4.1, FSCD 4A_440/2010 c. 4.1 (not published in FSCD 137 III 85), FSCD 4A_234/2010 c. 4.1 (not published in FSCD 136 III 605), FSCD 4A_539/2008 c. 4.1, FSCD 4A_220/2007 c. 8.1, FSCD 4P.117/2004 c. 2.1, FSCD 4P.196/2003 c. 4.1

Article 182(3) PILA imposes on the #arbitral tribunal the duty to guarantee the equality of the parties, independently of the proceedings chosen. According to this principle, the #arbitral tribunal shall treat the parties in a similar way at all stages of the proceedings.

FSCD 133 III 139 [143], FSCD 4A_450/2017 c. 3.2.2, FSCD 4A_80/2017 c. 3.1.2, FSCD 4A_34/2015 c. 4.1.1 (not published in FSCD 141 III 495), FSCD 4A_172/2015 c. 4.1, FSCD 4A_54/2015 c. 4.1, FSCD 4A_636/2014 c. 3.2 & 4.2, FSCD 4A_544/2014 c. 3.2.1 & 3.4, FSCD 4A_74/2014 c. 3.2.6 (not published in FSCD 140 III 477), FSCD 4A_672/2012 c. 4.1.1, FSCD 4A_198/2012 c. 3.2.1, FSCD 4A_488/2011 c. 4.4.1, FSCD 4A_360/2011 c. 4.1, FSCD 4A_539/2008 c. 4.1, FSCD 4A_294/2008 c. 4.1, FSCD 4P.140/2004 c. 2, FSCD 4P.104/2004 c. 5.2

The #equal treatment of the parties, expressly provided for in Article 182(3) PILA, falls also within the scope of application of Article 190(2)(d) PILA. It implies that the proceedings be regulated and conducted in such a way that each party has an equal opportunity to present its case. The principle requires that the parties potentially have the same means, but the procedural possibilities can obviously be subject to reasonable conditions which are not discriminatory.

FSCD 129 III 445 [(2003) ASA p. 625], FSCD 4P.167/2002 c. 2.1

According to #case law and legal doctrine, #proceedings means the examination stage, namely the period between the #constitution of the #arbitral tribunal until the termination of the #proceedings, including oral arguments as the case may be, to the exclusion of the #deliberations of the #arbitral tribunal.

FSCD 4A_284/2018 c. 6.1.1, FSCD 4A_450/2017 c. 3.2.2, FSCD 4A_236/2017 c. 4.1, FSCD 4A_236/2017 c. 4.1, FSCD 4A_80/2017 c. 3.1.2, FSCD 4A_198/2012 c. 3.2.1, FSCD 4A_488/2011 4.4.1, FSCD 4A_360/2011 c. 4.1

The right of #equal treatment requires the #arbitral tribunal not to deprive one party of what it has granted the other.

FSCD 4A_284/2018 c. 6.1.1, FSCD 4A_236/2017 c. 4.1, FSCD 4A_80/2017 c. 3.1.2

The content of the right of the parties to #equal treatment is to a large extent the same as the #right to be heard.

FSCD 4A_342/2015 c. 4.2.3 (not published in FSCD 142 III 360), FSCD 4A_623/2014 c. 3.1, FSCD 4A_672/2012 c. 4.1.1, FSCD 4A_2/2007 c. 4, FSCD 4P.208/2004 c. 5.1, FSCD 4P.140/2004 c. 2, FSCD 4P.104/2004 c. 5.2, FSCD 4P.64/2004 c. 3.1

The right of the parties to #equal treatment requires that the #arbitral tribunal treat the parties equally in comparable situations, with respect to all procedural issues.

FSCD 4A_672/2012 c. 4.1.1, FSCD 4A_244/2007 c. 6.2, FSCD 4A_2/2007 c. 4, FSCD 4P.208/2004 c. 5.1, FSCD 4P.64/2004 c. 3.1, FSCD 4P.196/2002 c. 3.2, FSCD 4P.207/2002 c. 3, FSCD 4P.129/2002 c. 7.1, FSCD 4P.212/1999 c. 2a, FSCD 11.05.1992 [(1992) ASA p. 396], FSCD 12.11.1991 [(1992) ASA p. 264]

The guarantee of #equal treatment of the parties also applies to the #time limits within which the parties have to submit their #written briefs.

FSCD 4A_539/2008 c. 4.1

The violation of the right to submit #evidence and the unequal treatment of the parties do not necessarily go hand in hand. It is in fact conceivable that the right

to examine #witnesses is refused to all parties, in violation of their #right to submit evidence, in which case they would be treated equally.

FSCD 4P.196/2003 c. 4.2.1

The #right to be heard only has to be taken into account to the extent that the rights of the parties in the proceedings themselves are concerned and to the extent that the parties have a legal interest in #equal treatment.

FSCD 4P.129/2002 c. 7.1

The principle of #equal treatment will often barely have an independent effect compared to that of the #right to be heard, as the #arbitrator has to conduct the #arbitral proceedings in a way which allows both parties to effectively exercise their #right to be heard.

FSCD 11.05.1992 [(1992) ASA p. 396], FSCD 12.11.1991 [(1992) ASA p. 264],
*VD 25.03.2003 c. 1c

This does not prevent the #arbitral tribunal from taking different measures with regard to one party if important differences in its situation justify it.

FSCD 11.05.1992 [(1992) ASA p. 396]

In #arbitral proceedings, the #equal treatment of the parties does not have an autonomous and absolute scope of application.

*VD 25.03.2003 c. 2

3.2.2 Individual Cases

To fix different #time limits for the parties does not as such constitute a violation of the #equal treatment of the parties.

FSCD 4A_450/2017 c. 3.1, FSCD 4A_539/2008 c. 4.2.1

Granting a (short) grace period to a party does not in itself mean #unequal treatment of the parties.

FSCD 4A_405/2016 c. 3.3, FSCD 4A_539/2008 c. 4.2.1

It does not constitute #unequal treatment for an #arbitral tribunal to organize a procedure by hearing the #claimant first and the #respondent last.

FSCD 4A_342/2015 c. 4.2.3 (not published in FSCD 142 III 360)

If during a #hearing the #arbitral tribunal also intends to question the parties, it must expressly state so in the summons. The omission of such an indication constitutes a possible violation of the principle of #equal treatment of the parties to which the parties must immediately object.

*FSCD 113 Ia 67 [68]

3.3 Right to Be Heard

- See also Article 190(2)(d) PILA

3.3.1 Principle

In arbitration, every party has the right to take a position on the #facts which are essential for the decision, to present its legal arguments, to request relevant #evidence, to participate in the #hearings of the #arbitral tribunal and to have access to the file.

FSCD 142 III 360 [360], FSCD 142 III 284 [289], FSCD 130 III 35 [38], FSCD 127 III 576 [578-579], FSCD 116 II 639 [643], FSCD 4A_308/2018 c. 3.1, FSCD 4A_642/2017 c. 4.2.2.1, FSCD 4A_284/2018 c. 4.1, FSCD 4A_550/2017 c. 3.1, FSCD 4A_40/2018 c. 3.1, FSCD 4A_583/2017 c. 2.2.1, FSCD 4A_247/2017 c. 5.1.1, FSCD 4A_143/2018 c. 6, FSCD 4A_580/2017 c. 2.1.2, FSCD 4A_260/2017 c. 4.1, FSCD 4A_356/2018 c. 2.1, FSCD 4A_592/2017 c. 4.1.1, FSCD 4A_430/2017 c. 2.1, FSCD 4A_236/2017 c. 4.1, FSCD 4A_424/2017 c. 3.1, FSCD 4A_12/2017 c. 4.1 (not published in FSCD 143 III 578), FSCD 4A_318/2017 c. 3.1, FSCD 4A_316/2017 c. 3.1, FSCD 4A_80/2017 c. 3.1.1, FSCD 4A_532/2016 c. 4.1, FSCD 4A_34/2016 c. 4.5.2, FSCD 4A_470/2016 c. 3.1, FSCD 4A_40/2017 c. 4.1, FSCD 4A_490/2016 c. 3.1.1, FSCD 4A_405/2016 c. 3.2, FSCD 4A_704/2015 c. 5.1, FSCD 4A_512/2017 c. 7, FSCD 4A_478/2016 c. 3.1, FSCD 5A_294/2016 c. 4.1, FSCD 4A_322/2016 c. 3.1, FSCD 4A_259/2015 c. 3.2, FSCD 4A_173/2016 c. 4.1, FSCD 4A_82/2016 c. 4.1, FSCD 4A_42/2016 c. 4.1, FSCD 4A_678/2015 c. 4.1, FSCD 4A_568/2015 c. 3.1, FSCD 4A_568/2015 c. 4.1.1, FSCD 4A_172/2015 c. 4.1, FSCD 4A_54/2015 c. 4.1, FSCD 4A_246/2014 c. 6.1, FSCD 4A_684/2014 c. 4.2, FSCD 4A_709/2014 c. 5.1, FSCD 4A_623/2014 c. 3.2, FSCD 4A_599/2014 c. 3.2, FSCD 4A_324/2014 c. 3.2.1, FSCD 4A_636/2014 c. 3.2, FSCD 4A_486/2014 c. 4.1, FSCD 4A_544/2014 c. 3.2.1, FSCD 4A_199/2014 c. 5, FSCD 4A_606/2013 c. 4.1, FSCD 4A_74/2014 c. 3.2.1 (not published in FSCD 140 III 477), FSCD 4A_178/2014 c. 5.1, FSCD 4A_446/2013 c. 3, FSCD 4A_330/2013 c. 3.1, FSCD 4A_214/2013 c. 4.1, FSCD 4A_274/2013 c. 3.1, FSCD 4A_188/2013 c. 2, FSCD 4A_95/2013 c. 3.1, FSCD 4A_682/2012 c. 6.1, FSCD 4A_730/2012 c. 3.1, FSCD 4A_672/2012 c. 3.1.1, FSCD 4A_522/2012 c. 3.1, FSCD 4A_576/2012 c. 4.1, FSCD 4A_407/2012 c. 4.1, FSCD 4A_538/2012 c. 5.1, FSCD 4A_110/2012 c. 3.1, FSCD 4A_76/2012 c. 3.1, FSCD 4A_312/2012 c. 4.1, FSCD 4A_274/2012 c. 3.1, FSCD 4A_150/2012 c. 4.1, FSCD 4A_682/2012 c. 4.1, FSCD 4A_528/2011 c. 2.1, FSCD 4A_526/2011 c. 2.1, FSCD 4A_600/2010 c. 4.1, FSCD 4A_402/2010 c. 5, FSCD 4A_440/2010 c. 4.1 (not published in FSCD 137 III 85), FSCD 4A_234/2010 c. 4.1 (not published in FSCD 136 III 605), FSCD 4A_620/2009 c. 3.1, FSCD 4A_624/2009 c. 4.1, FSCD 4A_584/2009 c. 3.1, FSCD 4A_524/2009 c. 4.1, FSCD 4A_444/2009 c. 5.2.1, FSCD 4A_176/2008 c. 4, FSCD 4A_244/2007 c. 6.2, FSCD 4A_220/2007 c. 8.1, FSCD 4A_160/2007 c. 4.1, FSCD 4A_2/2007 c. 3.1, FSCD 4P.96/2002 c. 5.2.1, FSCD 4P.105/2006 c. 7.1, FSCD 4P.88/2006 c. 3.1, FSCD 4P.74/2006 c. 4, FSCD 4P.23/2006 c. 3.1, FSCD 4P.48/2005 c. 3.4.2.1, FSCD 4P.26/2004 c. 3.1, FSCD 4P.208/2004 c. 5.1, FSCD 4P.140/2004 c. 2, FSCD 4P.104/2004 c. 5.1, FSCD 4P.117/2004 c. 2.1, FSCD 4P.146/2004 c. 7.2, FSCD 4P.14/2004 c. 2.1, FSCD 4P.93/2004 c. 2, FSCD 4P.64/2004 c. 3.1, FSCD 4P.167/2002 c. 2.1, FSCD 4P.318/2001 c. 2.1, FSCD 4P.17/2002 c. 2b

The #right to be heard confers to every party the right to submit all factual and legal #claims on the #subject-matter in dispute and to submit all necessary #evidence, as well as the right to participate in the #hearings and to be assisted or represented before the #arbitrators.

FSCD 142 III 284 [289], FSCD 133 III 139 [143], FSCD 130 III 35 [38], FSCD 127 III 576 [578], FSCD 119 II 386 [388-389], FSCD 117 II 346 [347], FSCD 116 II 639 [643], FSCD 5A_163/2018 c. 3.1, FSCD 4A_345/2017 c. 2.1, FSCD 4A_587/2015 c. 3.1, FSCD 4A_497/2015 c. 4.2, FSCD 4A_322/2015 c. 4.1, FSCD 4A_599/2014 c. 3.2, FSCD 4A_446/2013 c. 3, FSCD 4A_50/2013 c. 4, FSCD 4A_330/2013 c. 3.1, FSCD 4A_522/2012 c. 3.1, FSCD 4A_407/2012 c. 4.1, FSCD 4A_335/2012 c. 2, FSCD 4A_150/2012 c. 4.1, FSCD 4A_682/2012 c. 4.1, FSCD 4A_528/2011 c. 2.1, FSCD 4A_526/2011 c. 2.1, FSCD 4A_631/2011 c. 3.1.2, FSCD 4A_424/2011 [4A_424/2011] c. 2.2, FSCD 4A_162/2011 c. 2.1.2, FSCD 4A_402/2010 c. 3.1, FSCD 4A_234/2010 c. 4.1 (not published in FSCD 136 III 605), FSCD 4A_620/2009 c. 3.1, FSCD 4A_584/2009 c. 3.1, FSCD 4A_488/2009 c. 4.1, FSCD 4A_444/2009 c. 5.2.1, FSCD 4A_352/2009 c. 4.2.1, FSCD 4A_539/2008 c. 5.1, FSCD 4A_294/2008 c. 3.1, FSCD 4A_244/2007 c. 6.2, FSCD 4P.115/2004 c. 3.1, FSCD 4P.196/2003 c. 4.1, FSCD 4P.149/2003 c. 3.1, FSCD 4P.129/2002 c. 7.1, FSCD 4P.200/2001 c. 3a, FSCD 13.11.1998 [(1999) ASA p. 535], FSCD 20.10.1998 c. 3a, FSCD 09.06.1998 [(1998) ASA p. 658], FSCD 06.09.1996 [(1997) ASA p. 306], FSCD 21.06.1995 [4P.243/1994] c. 3a, FSCD 11.05.1992 [(1992) ASA p. 396], FSCD 06.02.1992 c. 4a, FSCD 23.10.1989 [(1990) ASA p. 52], *VS 02.12.2005 c. 3a

The #right to be heard confers, in particular, the right of the parties to be heard on the #merits before a decision which affects their legal position is taken, to submit relevant #evidence with regard to the #facts which are material for the outcome of the case, to have access to the file, to be heard on relevant #offers of evidence, and to either participate in the taking of material #evidence or at least to be heard on the result of the taking of #evidence if it is such as to influence the decision.

FSCD 129 III 445 [(2003) ASA p. 624], FSCD 127 III 576 [578-579], FSCD 119 II 386 [388-389], FSCD 4A_634/2011 c. 2.1, FSCD 4A_436/2007 c. 4, FSCD 4A_450/2007 c. 4.2.1, FSCD 4P.208/2004 c. 5.1, FSCD 4P.115/2004 c. 3.1, FSCD 4P.207/2002 c. 4, FSCD 4P.114/2001 c. 5a, FSCD 4P.99/2000 c. 3a, FSCD 4P.212/1999 c. 2a, FSCD 08.09.1999 c. 7a, FSCD 22.02.1999 [(1999) ASA p. 541], FSCD 17.02.1999 [(2000) ASA p. 314-315], FSCD 17.07.1998 [4P.7/1998] [(2002) ASA p. 666], FSCD 15.06.1998 c. 2a, FSCD 09.06.1998 [(1998) ASA p. 658], FSCD 08.05.1998 c. 1a, FSCD 12.01.1998 c. 2a, FSCD 25.11.1997 c. 3a, FSCD 03.11.1997 c. 2a, FSCD 25.07.1997 [(2000) ASA p. 102], FSCD 24.03.1997 [(1997) ASA p. 324-325], FSCD 09.07.1996 [4P.114/1995] c. 1b and 1c, FSCD 10.06.1996 [(2000) ASA p. 769], FSCD 16.02.1996 c. 4a, FSCD 28.11.1995 c. 2

The #right to be heard encompasses the rights of the parties to participate in the proceedings and to exercise an influence on the decision-making process.

FSCD 127 III 576 [578], FSCD 4A_244/2007 c. 6.2, FSCD 4P.140/2004 c. 2, FSCD 4P.146/2004 c. 7.2, FSCD 4P.93/2004 c. 2, FSCD 4P.207/2002 c. 4

The #right to be heard is not absolute and unconditional but must be exercised in accordance with the applicable rules of procedure.

FSCD 4A_117/2017 c. 3.2

3.3.2 Constitutional Content

The right to be heard, as it is guaranteed by Articles 182(3) and 190(2)(d) PILA does not in principle have a different content than that given to it in constitutional law.

FSCD 142 III 360 [360], FSCD 4A_642/2017 c. 4.2.2.1, FSCD 4A_40/2018 c. 2.2, FSCD 5A_163/2018 c. 3.1, FSCD 4A_505/2017 c. 3.1.1, FSCD 4A_247/2017 c. 3.1.1, FSCD 4A_260/2017 c. 4.1, FSCD 4A_12/2017 c. 4.1 (not published in FSCD 143 III 578), FSCD 5A_294/2016 c. 4.1, FSCD 4A_606/2013 c. 4.1

The content of the #right to be heard is basically the same as the procedural guarantees derived from Article 29(2) FC, with the exception of the duty to give #reasons for the #award.

FSCD 142 III 284 [288-289], FSCD 130 III 35 [37-38], FSCD 129 III 445 [(2003) ASA p. 624], FSCD 127 III 576 [578], FSCD 119 II 386 [388], FSCD 117 II 346 [347], FSCD 116 II 373 [375], FSCD 4A_308/2018 c. 3.1, FSCD 4A_284/2018 c. 4.1, FSCD 4A_404/2017 c. 3.1.1, FSCD 4A_345/2017 c. 2.1, FSCD 4A_117/2018 c. 3.2, FSCD 4A_583/2017 c. 2.2.1, FSCD 4A_580/2017 c. 2.1.2, FSCD 4A_356/2018 c. 2.1, FSCD 4A_592/2017 c. 4.1.1, FSCD 4A_430/2017 c. 2.1, FSCD 4A_236/2017 c. 4.1, FSCD 4A_424/2017 c. 3.1, FSCD 4A_277/2017 c. 3.1, FSCD 4A_318/2017 c. 3.1, FSCD 4A_316/2017 c. 3.1, FSCD 4A_80/2017 c. 3.1.1, FSCD 4A_532/2016 c. 4.1, FSCD 4A_470/2016 c. 3.1, FSCD 4A_40/2017 c. 4.1, FSCD 4A_570/2016 c. 2.1, FSCD 4A_490/2016 c. 3.1.1, FSCD 4A_405/2016 c. 3.2, FSCD 4A_704/2015 c. 5.1, FSCD 4A_587/2015 c. 3.1, FSCD 4A_478/2016 c. 3.1, FSCD 4A_497/2015 c. 4.2, FSCD 4A_322/2016 c. 3.1, FSCD 4A_259/2015 c. 3.2, FSCD 4A_173/2016 c. 4.1, FSCD 4A_82/2016 c. 4.1, FSCD 4A_42/2016 c. 4.1, FSCD 4A_678/2015 c. 4.1, FSCD 4A_568/2015 c. 3.1, FSCD 4A_34/2015 c. 4.1.1 (not published in FSCD 141 III 495), FSCD 4A_172/2015 c. 4.1, FSCD 4A_54/2015 c. 4.1, FSCD 4A_246/2014 c. 6.1, FSCD 4A_684/2014 c. 4.1, FSCD 4A_709/2014 c. 5.1, FSCD 4A_623/2014 c. 3.1, FSCD 4A_636/2014 c. 3.2, FSCD 4A_486/2014 c. 4.1, FSCD 4A_544/2014 c. 3.2.1, FSCD 4A_253/2014 c. 4.2, FSCD 4A_324/2014 c. 3.2.1, FSCD 4A_199/2014 c. 5, FSCD 4A_74/2014 c. 3.2.1 (not published in FSCD 140 III 477), FSCD 4A_178/2014 c. 5.1, FSCD 4A_446/2013 c. 3, FSCD 4A_50/2013 c. 4, FSCD 4A_330/2013 c. 3.1, FSCD 4A_274/2013 c. 3.1, FSCD 4A_188/2013 c. 2, FSCD 4A_95/2013 c. 3.1, FSCD 4A_682/2012 c. 6.1, FSCD 4A_730/2012 c. 3.1, FSCD 4A_672/2012 c. 3.1.1, FSCD 4A_522/2012 c. 3.1, FSCD 4A_576/2012 c. 4.1, FSCD 4A_407/2012 c. 4.1, FSCD 4A_335/2012 c. 2, FSCD 4A_76/2012 c. 3.1, FSCD 4A_312/2012 c. 4.1, FSCD 4A_274/2012 c. 3.1, FSCD 4A_150/2012 c. 4.1, FSCD 4A_682/2012 c. 4.1, FSCD 4A_528/2011 c. 2.1, FSCD 4A_526/2011 c. 2.1, FSCD 4A_634/2011 c. 2.1, FSCD 4A_424/2011 [4A_424/2011] c. 2.2, FSCD 4A_162/2011 c. 2.1.2, FSCD 4A_600/2010 c. 4.1, FSCD 4A_402/2010 c. 3.1, FSCD 4A_440/2010 c. 4.1 (not published in FSCD 137 III 85), FSCD 4A_234/2010 c. 4.1 (not published in FSCD 136 III 605), FSCD 4A_620/2009 c. 3.1, FSCD 4A_624/2009 c. 4.1, FSCD 4A_584/2009 c. 3.1, FSCD 4A_524/2009 c. 4.1, FSCD 4A_444/2009 c. 5.2.1, FSCD 4A_352/2009 c. 4.2.1, FSCD 4A_539/2008 c. 5.1, FSCD 4A_176/2008 c. 4, FSCD 22.02.2008 [4A_244/2007] c. 6.2, FSCD 4A_220/2007 c. 8.1, FSCD 4A_160/2007 c. 4.1, FSCD 4A_2/2007 c. 3.1, FSCD 4P.96/2002 c. 5.2.1, FSCD 4P.105/2006 c. 7.1, FSCD 4P.88/2006 c. 3.1, FSCD 4P.74/2006 c. 4, FSCD 4P.23/2006 c. 3.1, FSCD 4P.48/2005 c. 3.4.2.1, FSCD 4P.26/2004 c. 3.1, FSCD 4P.117/2004 c. 2.1, FSCD 4P.208/2004 c. 5.1, FSCD 4P.140/2004 c. 2, FSCD 4P.104/2004 c. 5.1, FSCD 4P.146/2004 c. 7.2, FSCD 4P.93/2004 c. 2, FSCD 4P.64/2004 c. 3.1, FSCD 4P.270/2003 c. 3.3, FSCD 4P.14/2004 c. 2.1, FSCD 4P.196/2003 c. 4.1, FSCD 4P.149/2003 c. 3.1, FSCD 4P.115/2003 c. 4.2, FSCD 4P.129/2002 c. 7.1, FSCD 4P.167/2002 c. 2.1, FSCD 4P.207/2002 c. 4, FSCD 4P.71/2002 c. 2.2, FSCD c. 2.1, FSCD 4P.17/2002 c. 2b,

FSCD 4P.114/2001 c. 5a, FSCD 4P.260/2000 c. 6a, FSCD 4P.212/1999 c. 2a, FSCD 22.02.1999 [(1999) ASA p. 541], FSCD 08.05.1998 c. 1a, FSCD 12.01.1998 c. 2a, FSCD 03.11.1997 c. 2a, FSCD 25.07.1997 [(2000) ASA p. 102], FSCD 09.07.1996 [4P.114/1995] c. 1b & 1c, FSCD 10.06.1996 [(2000) ASA p. 769], FSCD 16.02.1996 c. 4a, FSCD 21.06.1995 [4P.243/1994] c. 3a, FSCD 17.08.1994 [(1995) ASA p. 203], FSCD 07.04.1993 [(1993) ASA p. 526-527], *VS 02.12.2005 c. 3a

From a substantive point of view, nothing changed compared to the #right to be heard according to Article 4 fFC whose violation has to be considered as a procedural #denial of justice.

FSCD 4P.99/2000 c. 3a, FSCD 09.06.1998 [(1998) ASA p. 658]

3.3.3 *Ne ultra petita*

➤ See also Article 190(2)(c) PILA

The rule *ne eat iudex ultra petita partium* guarantees a particular aspect of the #right to be heard, to the extent that it prevents the #arbitral tribunal from including in its #award #prayers for relief (or parts of them) on which the parties perhaps did not have the possibility to take a position with regard to the #facts or the law.

FSCD 120 II 172 [175], FSCD 116 II 80 [85]

The manner of collecting materials (whether based on #hearings or investigation) is not derived from the principle *ne eat iudex ultra petita* or from the #right to be heard. The principle *ne ultra petita* refers to whether and to what extent the #arbitral tribunal must limit itself to the submissions of the parties. The manner in which materials are collected is not prescribed there.

FSCD 4A_623/2014 c. 3.2

3.3.4 Right to be Heard on Factual Issues

In Switzerland, the #right to be heard relates mainly to the finding of the #facts.

FSCD 4A_322/2015 c. 4.1, FSCD 4A_634/2014 c. 4.1, FSCD 4A_446/2013 c. 3, FSCD 4A_188/2013 c. 2, FSCD 4A_110/2012 c. 3.1, FSCD 4A_46/2011 c. 5.1.1, FSCD 4A_392/2010 c. 5.1, FSCD 4A_400/2008 c. 3.1, *FSCD 4A_3/2009 c. 7.1

3.3.5 Right to Submit Evidence

3.3.5.1 *Principle: Right to Collaborate and Comment on the Taking of Evidence*

The #right to be heard encompasses either the right to collaborate in the taking of relevant #evidence or the right to comment on the results of the taking of #evidence, if the latter is susceptible to have an influence on the decision.

FSCD 4P.235/2001 c. 3e

The notion of results of the taking of #evidence is not the result of the assessment of the #evidence by the tribunal, but the result of the taking of #evidence.

FSCD 4P.235/2001 c. 3e

3.3.5.2 *Limitation: Timely and Formally Correct Submission of Evidence*

The right to have #evidence taken has to be exercised in time and in accordance with the applicable procedural rules.

FSCD 142 III 360 [361], FSCD 119 II 386 [389], FSCD 4A_65/2018 c. 3.2.1.2.5, FSCD 4A_277/2017 c. 3.1, FSCD 4A_587/2015 c. 3.1, FSCD 4A_497/2015 c. 4.2, FSCD 20.09.2016 c. 4.3.2, FSCD 4A_246/2014 c. 6.1, FSCD 4A_599/2014 c. 3.2, FSCD 4A_50/2013 c. 4, FSCD 4A_274/2013 c. 3.2, FSCD 4A_576/2012 c. 4.2.2, FSCD 4A_335/2012 c. 2, FSCD 4A_312/2012 c. 4.1, FSCD 4A_274/2012 c. 3.1, FSCD 4A_150/2012 c. 4.1, FSCD 4A_162/2011 c. 2.3.2, FSCD 4A_600/2010 c. 4.1, FSCD 4A_440/2010 c. 4.1 (not published in FSCD 137 III 85), FSCD 4A_234/2010 c. 4.1 (not published in FSCD 136 III 605), FSCD 4A_584/2009 c. 3.1, FSCD 4A_220/2007 c. 8.1, FSCD 4P.96/2002 c. 5.2.1, FSCD 4P.117/2004 c. 2.1, FSCD 4P.196/2003 c. 4.1, FSCD 4P.115/2003 c. 4.2, FSCD 4P.167/2002 c. 2.1, FSCD 4P.17/2002 c. 2b, FSCD 22.02.1999 [(1999) ASA p. 541], FSCD 12.01.1998 c. 3a, FSCD 10.06.1996 [(2000) ASA p. 769], FSCD 21.08.1990 c. 6c (not published in FSCD 116 II 373)

The #right to be heard gives the parties the right to prove their relevant factual #claims by submitting appropriate, timely and formally correct #evidence.

FSCD 119 II 386 [389], FSCD 4A_505/2017 c. 3.1.1, FSCD 4A_277/2017 c. 3.1, FSCD 4A_352/2009 c. 4.2.1, FSCD 4A_539/2008 c. 5.1, FSCD 4P.270/2003 c. 3.3, FSCD 4P.14/2004 c. 2.1, FSCD 4P.115/2003 c. 4.2, FSCD 22.09.1998 c. 2, FSCD 28.05.1998 c. 2e, *VS 02.12.2005 c. 3a

Article 29(2) FC guarantees to the parties the right to have relevant #evidence taken if it is offered in time and in accordance with the formal requirements. It must however be concrete #evidence, i.e. #evidence which is susceptible of being taken in the context of ordinary proceedings.

FSCD 119 II 386 [389], *FSCD 106 II 170 [171], FSCD 4P.115/2003 c. 4.2, FSCD 22.02.1999 [(1999) ASA p. 541], FSCD 17.07.1998 [4P.7/1998] [(2002) ASA p. 666], FSCD 15.06.1998 c. 2a, FSCD 25.11.1997 c. 3a, FSCD 10.06.1996 [(2000) ASA p. 769]

When #evidence is submitted late and accordingly not admitted, this is not in principle a violation of the #right to be heard.

FSCD 4A_259/2015 c. 3.2, FSCD 4A_709/2014 c. 5.2.2, FSCD 4A_178/2014 c. 5.3.3

3.3.5.3 *Limitation: Submission of Appropriate, Relevant and Decisive Evidence*

The #right to be heard does not include the right to request #evidence which is incapable of proving a fact.

FSCD 4A_246/2014 c. 6.1, FSCD 4A_486/2014 c. 5.1, FSCD 4A_312/2012 c. 4.1, FSCD 4A_274/2012 c. 3.1, FSCD 4A_150/2012 c. 4.1, FSCD 4A_600/2010 c. 4.1, FSCD 4P.114/2003 c. 2.2

The right to submit #evidence is not without limits. The parties have to be allowed to prove relevant claims by means of appropriate #evidence. They do not have an unconditional right to the taking of #evidence, especially not useless #evidence.

FSCD 4P.23/2006 c. 3.1, FSCD 4P.167/2002 c. 2.1, FSCD 12.01.1998 c. 3a, FSCD 06.09.1996 [(1997) ASA p. 306], FSCD 11.05.1992 [(1992) ASA p. 397]

The #arbitrator does not have a duty to take all #evidence submitted or requested by the parties, but only the #evidence which is decisive for the outcome of the case.

FSCD 22.01.1998 c. 4c

By making the relevance of the fact to be established a condition for the right to submit #evidence, this right is deprived of its purely procedural nature, which is in principle characteristic of the #right to be heard. In other words, the violation of this right cannot be examined on its own but must be examined in connection with the decision of the dispute.

FSCD 06.09.1996 [(1997) ASA p. 308], FSCD 10.06.1996 [(2000) ASA p. 770]

3.3.6 Free Assessment of the Evidence

The #arbitral tribunal may refuse to take #evidence, without violating the #right to be heard, if the #evidence is unpersuasive, if the fact to be proven is already established, if the fact is not relevant or if the #arbitral tribunal, by an anticipated assessment of the #evidence, comes to the conclusion that its conviction is already established and that the result of the requested evidentiary measure cannot modify it.

FSCD 142 III 360 [361], FSCD 116 II 639 [644], FSCD 4A_65/2018 c. 3.2.1.2.5, FSCD 4A_550/2017 c. 4.1, FSCD 4A_505/2017 c. 3.1.2, FSCD 4A_572/2015 c. 4.2.2, FSCD 4A_246/2014 c. 6.1, FSCD 4A_486/2014 c. 5.1, FSCD 4A_544/2014 c. 3.2.1, FSCD 4A_599/2014 c. 3.2, FSCD 4A_178/2014 c. 5.1, FSCD 4A_335/2012 c. 2, FSCD 4A_312/2012 c. 4.1, FSCD 4A_274/2012 c. 3.1, FSCD 4A_150/2012 c. 4.1, FSCD 4A_682/2012 c. 4.1, FSCD 4A_528/2011 c. 2.1, FSCD 4A_526/2011 c. 2.1, FSCD 4A_634/2011 c. 2.1, FSCD 4A_600/2010 c. 4.1, FSCD 4A_440/2010 c. 4.1 (not published in FSCD 137 III 85), FSCD 4A_234/2010 c. 4.1 (not published in FSCD 136 III 605), FSCD 4A_550/2009 c. 7.2, FSCD 4A_220/2007 c. 8.1, FSCD 4P.96/2002 c. 5.2.1, FSCD 4P.23/2006 c. 3.1, FSCD 4P.48/2005 c. 3.4.2.1, FSCD 4P.117/2004 c. 2.1, FSCD 4P.196/2003 c. 4.1, FSCD 4P.167/2002 c. 2.1, FSCD 12.01.1998 c. 2a

The principle of #procedural economy would be violated if an #arbitral tribunal was bound to take the #evidence on the sole ground that the parties requested it to do so even though one or more of the conditions justifying the recourse to such #evidence are not fulfilled in the ongoing #arbitral proceedings.

FSCD 4A_277/2017 c. 3.3

The #right to be heard does not require the #arbitral tribunal to request an opinion from the parties as to the significance of each exhibit produced.

FSCD 4A_34/2016 c. 4.5.2, FSCD 4A_322/2015 c. 4.1, FSCD 4A_599/2014 c. 3.2, FSCD 4A_214/2013 c. 4.1, FSCD 4A_538/2012 c. 5.1

The #right to be heard does not empower one of the parties to limit the autonomy of the #arbitral tribunal in assessing a specific exhibit to the purpose for which it produced the #evidence.

FSCD 4A_34/2016 c. 4.5.2, FSCD 4A_322/2015 c. 4.1, FSCD 4A_214/2013 c. 4.1, FSCD 4A_538/2012 c. 5.1

If each party could decide in advance what would be the evidentiary conclusion that the #arbitral tribunal would be authorized to draw from each exhibit produced, the principle of free assessment of the# evidence – one of the pillars of international arbitration– would be undermined.

FSCD 4A_34/2016 c. 4.5.2, FSCD 4A_322/2015 c. 4.1, FSCD 4A_214/2013 c. 4.1, FSCD 4A_538/2012 c. 5.1

The assessment of #evidence by an #arbitral tribunal or sole #arbitrator, whether it is anticipated or not, cannot be reviewed by the Federal Supreme Court when it is ruling on an #appeal in the field of international arbitration. This also applies to the critics formulated by the #appellant concerning the fixing of the amount of #costs and expenses of the #arbitral proceedings and the order for the interested party to pay these.

FSCD 4A_704/2015 c. 5.2

Objections concerning the substantive accuracy of an #expert opinion concern the assessment of the #evidence and fall outside the scope of a #challenge for the violation of the #right to be heard.

FSCD 4A_259/2015 c. 3.1

The factual consequences which an #arbitrator must draw from the statements and behaviour of a party or #witness, or from their silence or absence, belong to the assessment of #evidence.

FSCD 4A_34/2015 c. 4.3.2 (not published in FSCD 141 III 495)

The free assessment of #evidence is a prerogative which belongs to the #arbitrators and is considered by #case law as a cornerstone of #arbitration. This principle is also embodied in several arbitration rules.

FSCD 4A_322/2015 c. 4.1, FSCD 4A_214/2013 c. 4.3.1

The free assessment of #evidence means that the #arbitral tribunal may decide the evidentiary weight of each piece of #evidence in the arbitration file, no matter which party submitted the #evidence and regardless of the purpose for which it did so. The necessary consequence is that each party in an #arbitral proceeding is deemed to know that the #arbitrators will exercise their power to freely assess all the #evidence adduced and that they may therefore draw from an exhibit produced by a party some consequences diametrically opposed to the purpose given to this #evidence, or even to the scope both parties would agree to give to it. In other words, as a matter of principle, a party may not argue an element of surprise as to any factual findings by the #arbitral tribunal.

FSCD 4A_214/2013 c. 4.3.1

Consequently, it falls to the party to act *sua sponte* and in a timely manner by weighing all aspects of the probative value of a piece of #evidence it considers tendering and to consider the #evidence it or its opponent have already tendered, taking them into account in its argument, while knowing that the

#arbitrators may draw some other conclusions than those which the party may have suggested, even with the opposing party's approval. The corollary of this duty is that the #arbitrators are not obliged to seek the views of the parties in the process of their factual findings, barring some quite exceptional circumstances.

FSCD 4A_214/2013 c. 4.3.1

3.3.7 Anticipated Assessment of the Evidence

The #arbitral tribunal may refuse to take #evidence, without violating the #right to be heard, if the #evidence is not such as to found a conviction, if the fact to be proven is already established, if the fact is not relevant or if the #arbitral tribunal, by an anticipated assessment of #evidence, comes to the conclusion that its conviction is already established and that the result of the requested evidentiary measure cannot modify it. The Federal Supreme Court may only review an anticipated assessment of the #evidence under the extremely narrow #scope of review of #public policy.

FSCD 142 III 360 [361], FSCD 116 II 639 [644], FSCD 4A_65/2018 c. 3.2.1.2.5, FSCD 4A_550/2017 c. 4.1, FSCD 4A_505/2017 c. 3.1.2, FSCD 4A_277/2017 c. 3.1, FSCD 4A_587/2015 c. 3.1, FSCD 4A_497/2015 c. 4.2, FSCD 4A_246/2014 c. 6.1, FSCD 4A_486/2014 c. 5.1, FSCD 4A_544/2014 c. 3.2.1, FSCD 4A_178/2014 c. 5.1, FSCD 4A_335/2012 c. 2, FSCD 4A_312/2012 c. 4.1, FSCD 4A_274/2012 c. 3.1, FSCD 4A_150/2012 c. 4.1, FSCD 4A_682/2012 c. 4.1, FSCD 4A_528/2011 c. 2.1, FSCD 4A_526/2011 c. 2.1, FSCD 4A_600/2010 c. 4.1, FSCD 4A_234/2010 c. 4.1 (not published in FSCD 136 III 605), FSCD 4A_550/2009 c. 7.2, FSCD 4A_220/2007 c. 8.1, FSCD 4A_2/2007 c. 3.3, FSCD 4P.96/2002 c. 5.2.1, FSCD 4P.23/2006 c. 3.1, FSCD 4P.48/2005 c. 3.4.2.1, FSCD 4P.117/2004 c. 2.1, FSCD 4P.196/2003 c. 4.1, FSCD 4P.167/2002 c. 2.1, *VS 02.12.2005 c. 3a

The anticipated #assessment of #evidence by an international #arbitral tribunal can only be reviewed under the restricted viewpoint of a violation of the #right to be heard or other legal principles pertaining to #public policy.

FSCD 4P.48/2005 c. 3.4.2.1

The deciding authority may exclude submitted #evidence on the ground of an anticipated assessment which shows either that it will fail because it lacks probatory force or that it is unfit to modify the results of the #evidence already taken. This general principle also applies in the field of arbitration – international or based on the fConcordat – and in particular with regard to an #expert opinion.

FSCD 4P.115/2003 c. 4.2, FSCD 06.09.1996 [(1997) ASA p. 308], FSCD 10.06.1996 [(2000) ASA p. 770-771], FSCD 25.05.1992 c. 5b, *FSCD 17.03.1976 c. 8 (not published in FSCD 102 Ia 493)

If an international #arbitral tribunal comes to the conclusion based on an anticipated assessment of #evidence that a certain fact is already established, the setting aside of an #award rendered on this basis presupposes that the dismissal of the taking of the submitted #evidence violates a fundamental procedural principle, i.e. violates procedural #public policy within the meaning of Article 190(2)(e) PILA.

FSCD 12.01.1998 c. 2b

3.3.8 Right to Witnesses of Fact

It is not possible to derive from FSCD 124 V 90 c. 5b the right of a party to request the hearing of the author of a written #witness statement.

FSCD 4A_199/2014 c. 6.2.3, FSCD 4P.196/2003 c. 4.2.2.1

An entitlement to a #witness #hearing cannot be derived from the principle of #equal treatment of the parties.

FSCD 4A_162/2011 c. 2.3.3

A violation of the #right to be heard cannot be justified by the fact that a #witness presented by the opposing party did not appear before the #CAS.

FSCD 4A_612/2009 c. 5.3

The #arbitrator is not responsible for the non-appearance of a #witness regularly summoned or invited. The fact that an #arbitrator does not order *ex officio* a new convocation of the defaulting #witness, in the absence of an express request, does not amount to a violation of the #right to be heard of the party which requested the #hearing of the #witness.

FSCD 25.07.1997 [(2000) ASA p. 103]

3.3.9 Right to Expert Opinion

- See also Article 190(2)(d) PILA, section 2d.3.7; and Article 191 PILA, section 34.13

In international arbitration, especially in ICC arbitration, the Federal Supreme Court has recognized well before the entry into force of the PILA, the right to an #expert opinion subject to certain conditions.

FSCD 4A_505/2017 c. 3.1.2, FSCD 4A_450/2017 c. 4.2, FSCD 4A_277/2017 c. 3.1, FSCD 4P.115/2003 c. 4.2, FSCD 10.06.1996 [(2000) ASA p. 769], FSCD 17.03.1976 c. 8 (not published in *FSCD 102 Ia 493)

The party which wants to exercise this right must have expressly requested the taking of an #expert opinion. Furthermore, such an *ad hoc* request must have been filed in the agreed form and within the agreed #time limit, and the party must have accepted to advance the #costs. Finally, the #expert opinion must relate to relevant #facts, i.e. proper to influence the #award, to evidence these #facts, and appear necessary. This is only the case if, on the one hand, the #facts are of a technical nature or require, in any other way, specialized knowledge so that they cannot be established in another way, and if, on the other hand, the #arbitrators do not have themselves this knowledge.

FSCD 4A_505/2017 c. 3.1.2, FSCD 4A_450/2017 c. 4.2, FSCD 4A_277/2017 c. 3.1, FSCD 4P.115/2003 c. 4.2

The Federal Supreme Court has confirmed several times, under the PILA, the existence of such a guarantee, related to the right to submit #evidence and, more generally, to the #right to be heard within the meaning of Article 182(3) PILA.

FSCD 4A_450/2017 c. 4.2, FSCD 4A_277/2017 c. 3.1, FSCD 10.06.1996 c. 2a, FSCD 25.05.1992 c. 5b, FSCD 4P.115/2003 c. 4.2, FSCD 25.04.1995 c. 2 (not published in FSCD 121 III 331), FSCD 21.08.1990 c. 6c (not published in FSCD 116 II 373)

By making the relevance of the fact to be proved one of the prerequisites of the right to submit #evidence, one takes from the #right to be heard its purely formal character. In other words, the violation of this right cannot be assessed by itself but in relation to the solution reached for the dispute. Therefore, the State court seized by a #motion to set aside because of the dismissal of an #expert opinion will have to examine whether the taking of this #evidence could have led to a different #award, thus treating at the same time issues of assessment and of substance. However, as pursuant to Article 190(2)(e) PILA, the judge may review the assessment of #evidence, the application of the law and the solution found by the #arbitral tribunal only under the restricted aspect of #public policy, it can very often only exercise a very limited control with regard to the violation of the right to submit #evidence, even though the statute treats it as a #ground for setting aside in its own right.

FSCD 4A_277/2017 c. 3.1, FSCD 4P.115/2003 c. 4.2, FSCD 25.04.1995 c. 2b (not published in FSCD 121 III 331)

The #right to be heard does not encompass an unfettered right to interrogate an #expert called by the other party. The questioning of #witnesses and #experts requires management of the #proceedings and the #arbitral tribunal is not prevented, in principle, from putting #time limits on the questioning by the parties or from refusing certain questions, for instance, because they are not legally relevant, were already asked, or because the #arbitral tribunal considers the #facts to which the question relates as already established.

FSCD 4A_544/2014 c. 3.4

The fact that the #respondent's #expert was not summoned by the #respondent for the hearing does not violate the #appellant's #right to be heard.

FSCD 4A_612/2009 c. 5.3

Even if none of the parties files a request for an #expert opinion, the #arbitrator who does not have the necessary specific knowledge has to mandate an #expert if it needs explanations on certain specific technical problems, the knowledge of which determines the outcome of the dispute. However, also in this respect, the #right to be heard does not permit requesting the taking of an #expert opinion which appears to be useless or not relevant.

FSCD 4A_2/2007 c. 3.1, FSCD 11.05.1992 [(1992) ASA p. 397]

The Federal Supreme Court, when seized by a [former] #motion for constitutional review based on a violation of the #right to be heard, reviews only with respect to #arbitrariness the anticipated assessment of the #evidence made by the authority in order to reject a request for an #expert opinion (*FSCD 119 Ib 492 [505]). It cannot widen its #powers of review if the same question is raised in a #motion to set aside an #award rendered in international arbitration. To the

contrary, the notion of #public policy which represents the relevant criterion for the #award on the #merits and, in particular, of the assessment of the #evidence made by the #arbitrator, imposes even more restraint on the appeals instance in the examination of this issue.

FSCD 4P.115/2003 c. 4.2

The deciding authority may exclude submitted #evidence on the ground of an anticipated assessment which shows either that it will fail because it lacks probatory force or that it is unfit to modify the results of the #evidence already taken. This general principle also applies in the field of arbitration – international or based on the fConcordat – and in particular with regard to the #expert opinion.

FSCD 4P.115/2003 c. 4.2, FSCD 06.09.1996 [(1997) ASA p. 308], FSCD 10.06.1996 [(2000) ASA p. 770-771], FSCD 25.05.1992 c. 5b, *FSCD 17.03.1976 c. 8 (not published in FSCD 102 Ia 493)

The parties have a right to an #expert opinion subject to the following conditions

- The party claiming this right must expressly request the taking of an #expert opinion;
- The #expert opinion has to be requested in the proper form;
- The #expert opinion has to be requested in a timely manner;
- The requesting party must have accepted to advance the #costs related to the #expert opinion;
- The #expert opinion must concern legally material #facts, i.e. #facts which are susceptible to influence the substantive outcome of the #award;
- The #expert opinion must be able to establish the existence of such #facts;
- The #expert opinion must appear necessary. This is only the case if, on the one hand, technical #facts or #facts which otherwise require specific knowledge are at stake, so that they cannot be established in another way; and if, on the other hand, the #arbitrators themselves do not have this knowledge.

FSCD 06.09.1996 [(1997) ASA p. 307-308], FSCD 10.06.1996 [(2000) ASA p. 769-770], FSCD 25.04.1995 c. 2 (not published in FSCD 121 III 331), FSCD 12.07.1990 c. 6c (not published in FSCD 116 II 373), FSCD 17.03.1976 c. 8 (not published in FSCD 102 Ia 493)

The tribunal which dismisses a request for a relevant #expert opinion violates the #right to be heard, if it does not itself have the necessary technical knowledge to resolve the problem.

FSCD 11.05.1992 [(1992) ASA p. 397]

The right to comment on an #expert opinion is an integral part of the right to fair proceedings.

*FSCD 08.02.1978 [(1980) SJ p. 73-74]

3.3.10 Right to Be Heard on Legal Issues

3.3.10.1 Principle: No Right to Be Heard on Legal Interpretation of Facts

There is no constitutional right of the parties to be heard on the legal #interpretation of the #facts alleged by them during the proceedings. Neither does it follow from the #right to be heard that the parties' attention has to be drawn in

advance to the #facts which are relevant for the decision to the extent that these #facts have been alleged and proven in accordance with the rules.

FSCD 142 III 360 [361-362], FSCD 130 III 35 [39], FSCD 4A_301/2018 c. 4.2, FSCD 4A_284/2018 c. 5.1, FSCD 4A_505/2017 c. 3.1.1, FSCD 4A_345/2017 c. 2.1, FSCD 4A_56/2017 c. 3.1, FSCD 4A_220/2017 c. 3.1, FSCD 4A_324/2014 c. 4.1, FSCD 4A_544/2013 c. 3.2.1, FSCD 4A_476/2012 c. 4.2.1, FSCD 4A_407/2012 c. 5.1, FSCD 4A_214/2011 c. 5.1, FSCD 4A_374/2011 c. 2.4, FSCD 4A_428/2010 c. 4.2.1, FSCD 4A_444/2009 c. 5.2.1, FSCD 4A_240/2009 c. 3.2, FSCD 4A_42/2007 c. 7.1, FSCD 4P.134/2006 c. 6, FSCD 4P.105/2006 c. 7.2, FSCD 4P.104/2004 c. 5.4, FSCD 4P.117/2004 c. 2.1, FSCD 4P.146/2004 c. 7.2, FSCD 4P.14/2004 c. 2.2.4, FSCD 4P.196/2003 c. 4.1, FSCD 4P.17/2002 c. 2b, FSCD 4P.114/2001 c. 5a, FSCD 4P.260/2000 c. 6a, FSCD 17.07.1998 [4P.7/1998] [(2002) ASA p. 668]

In Switzerland, the #right to be heard in #adversarial proceedings has important restrictions with respect to legal issues. The #arbitrator, like the State courts, does not have to submit to the discussion by the parties the legal principles on which it will base its decision.

FSCD 130 III 35 [38-39], FSCD 4A_238/2018 c. 4.2, FSCD 4A_634/2014 c. 4.1, FSCD 4A_214/2011 c. 5.1, *FSCD 4A_3/2009 c. 7.1, FSCD 4P.4/2007 c. 4.1, FSCD 4P.117/2004 c. 2.1, FSCD 4P.14/2004 c. 2.2.4, FSCD 4P.196/2003 c. 4.1

Based on the rule *jura novit curia*, which applies not only to State courts but also to #arbitral tribunals, the legal position has to be determined *ex officio* in the context of the #facts validly alleged or determined during the #proceedings, without having to request the opinion of the parties and without being bound by their arguments.

FSCD 120 II 172 [175], FSCD 4P.200/2001 c. 3d, FSCD 28.11.1995 c. 2a

In Switzerland, the #right to be heard applies primarily to the finding of the #facts. The right of the parties to be questioned on legal issues is only recognized within limits. In general, according to the rule *jura novit curia*, State courts and #arbitral tribunals assess with unfettered powers the legal effect of the #facts and they can also decide based on rules which have not been pleaded by the parties. Therefore, insofar as the #arbitration agreement does not restrict the mission of the #arbitral tribunal to the sole legal arguments invoked by the parties, the parties do not have to be heard specifically with respect to the effect to be recognized to the rules of law.

FSCD 4A_525/2017 c. 3.1, FSCD 4A_34/2016 c. 4.1.2, FSCD 4A_716/2016 c. 3.1, FSCD 4A_136/2016 c. 5.1, FSCD 4A_202/2016 c. 3.1, FSCD 4A_322/2015 c. 4.1, FSCD 4A_634/2014 c. 4.1, FSCD 4A_554/2014 c. 2.1, FSCD 4A_599/2014 c. 3.2, FSCD 4A_446/2013 c. 3, FSCD 4A_188/2013 c. 2, FSCD 4A_110/2012 c. 3.1.1, FSCD 4A_46/2011 c. 5.1.1, FSCD 4A_392/2010 c. 5.1, FSCD 4A_254/2010 c. 3.1, FSCD 4A_10/2010 c. 2.1, FSCD 4A_464/2009 c. 6.1, FSCD 4A_400/2008 c. 3.1, *FSCD 4A_3/2009 c. 7.1, FSCD 4P.4/2007 c. 4.1, FSCD 4A_220/2007 c. 11.1, FSCD 4P.168/2006 c. 7.1

The principle of *jura novit curia* does not uniquely concern State courts but also governs #arbitral proceedings.

FSCD 4A_56/2017 c. 3.1

Neither Article 29 FC [Art. 4 fFC] nor Article 190(2)(d) PILA grant the parties the right to be specifically heard on the legal assessment of the #facts asserted in the

proceedings. The legal qualification is exclusively the tribunal's task which has to decide without being bound by the legal argumentation of the parties.

FSCD 16.02.1996 c. 4a

3.3.10.2 Exception: Limitation of Arbitral Tribunal's Task by Parties

Based on the rule *jura novit curia*, the #arbitrator is in principle not bound by the legal arguments developed by the parties, provided the parties did not limit the tribunal's task to the legal grounds submitted by the parties (with the possibility for a party contesting an #award which does not respect this limitation to challenge it based on a violation of the rule *ne eat judex ultra petita partium* or to plead the lack of #jurisdiction of the #arbitral tribunal, i.e. the grounds of Article 190(2)(b) & (c) PILA).

FSCD 130 III 35 [39], FSCD 4A_634/2014 c. 4.1, FSCD 4A_554/2014 c. 2.2, FSCD 4A_214/2013 c. 4.1, FSCD 4A_400/2008 c. 3.1, FSCD 4P.4/2007 c. 4.1

3.3.10.3 Exception: Decision Based on Unforeseeable Legal Ground

A party does not have the #right to be heard on the legal assessment of the #facts or, more generally on the legal line of argument to be followed, unless the #arbitral tribunal is looking to base its decision on a norm or legal ground which was not raised in the prior proceedings and which none of the present parties invoked and could not guess the importance of in the case in dispute.

FSCD 142 III 360 [361], FSCD 4A_238/2018 c. 4.2, FSCD 4A_404/2017 c. 3.1.1, FSCD 4A_505/2017 c. 3.1.1, FSCD 4A_345/2017 c. 2.1, FSCD 4A_247/2017 c. 5.1.1

However, such a #right to be heard on legal issues has to be recognised if a tribunal intends to base its decision on a provision or a legal ground which has not been invoked by the parties during the proceedings and which the parties could not reasonably have foreseen to be relevant for the decision in the case at hand. The parties should not be surprised by an unexpected legal argument.

FSCD 142 III 360 [361-362], FSCD 130 III 35 [39], FSCD 4A_338/2018 c. 5.2, FSCD 4A_301/2018 c. 4.2, FSCD 4A_284/2018 c. 5.1, FSCD 4A_438/2017 c. 2.3, FSCD 4A_238/2018 c. 4.2, FSCD 4A_404/2017 c. 3.1.1, FSCD 4A_525/2017 c. 3.1, FSCD 4A_505/2017 c. 3.1.1, FSCD 4A_56/2017 c. 3.1, FSCD 4A_220/2017 c. 3.1, FSCD 4A_34/2016 c. 4.1.2, FSCD 4A_478/2016 c. 3.4, FSCD 4A_716/2016 c. 3.1, FSCD 4A_136/2016 c. 5.1, FSCD 4A_202/2016 c. 3.1, FSCD 27.6.2016 c. 4.1, FSCD 4A_246/2014 c. 6.1, FSCD 4A_634/2014 c. 4.1, FSCD 4A_554/2014 c. 2.1, FSCD 4A_599/2014 c. 3.2, FSCD 4A_324/2014 c. 4.1, FSCD 4A_544/2013 c. 3.2.1, FSCD 4A_214/2013 c. 4.1, 4.3.1, FSCD 4A_188/2013 c. 2, FSCD 4A_476/2012 c. 4.2.1, FSCD 4A_407/2012 c. 5.1, FSCD 4A_538/2012 c. 5.1, FSCD 4A_110/2012 c. 3.1.1, FSCD 4A_374/2011 c. 2.4, FSCD 4A_46/2011 c. 5.1.1, FSCD 4A_402/2010 c. 4.2, FSCD 4A_428/2010 c. 4.2.1, FSCD 4A_464/2009 c. 6.1, FSCD 4A_444/2009 c. 5.2.1, FSCD 4A_240/2009 c. 3.2, *FSCD 4A_3/2009 c. 7.1, FSCD 4A_400/2008 c. 3.1, FSCD 4A_42/2007 c. 7.1, FSCD 4P.304/2006 c. 5.3, FSCD 4P.105/2006 c. 7.2, FSCD 4P.104/2004 c. 5.4, FSCD 4P.117/2004 c. 2.1, FSCD 4P.146/2004 c. 7.2, FSCD 4P.14/2004 c. 2.2.4, FSCD 4P.196/2003 c. 4.1, FSCD 4P.17/2002 c. 2b, FSCD 4P.114/2001 c. 5a, FSCD 4P.260/2000 c. 6a, FSCD 22.02.1999 [(1999) ASA p. 544], FSCD 17.07.1998 [4P.7/1998] [(2002) ASA p. 668], FSCD 22.07.1991 c. 4

This holds in particular true when the legal analysis by the tribunal has no relation to the elements to which the discussion between the parties during the proceedings referred.

FSCD 130 III 35 [41], FSCD 4P.14/2004 c. 2.2.4

Whether the application of law comes by surprise or not is a matter of discretion which the Federal Supreme Court reviews with restraint in the field of international arbitration. This aims at taking into account the specificities of the #arbitral proceedings – in particular the common intent of the parties not to submit their dispute to ordinary courts as well as the fact that the #arbitrators may come from different legal traditions – as well as at avoiding an abuse of the argument of surprising application of law so as to obtain a review of the #merits of the #award by the Federal Supreme Court.

FSCD 130 III 35 [39-40], FSCD 4A_525/2017 c. 3.1, FSCD 4A_34/2016 c. 4.1.2, FSCD 4A_716/2016 c. 3.1, FSCD 4A_136/2016 c. 5.1, FSCD 4A_202/2016 c. 3.1, FSCD 4A_322/2015 c. 4.1, FSCD 4A_634/2014 c. 4.1, FSCD 4A_554/2014 c. 2.1, FSCD 4A_188/2013 c. 2, FSCD 4A_407/2012 c. 5.1, FSCD 4A_374/2011 c. 2.4, FSCD 4A_46/2011 c. 5.1.1, FSCD 4A_392/2010 c. 5.1, FSCD 4A_428/2010 c. 4.2.1, FSCD 4A_464/2009 c. 6.1, FSCD 4A_240/2009 c. 3.2, FSCD 4A_400/2008 c. 3.1, FSCD 4A_42/2007 c. 7.1, FSCD 4P.134/2006 c. 6, FSCD 4P.105/2006 c. 7.2, FSCD 4P.104/2004 c. 5.4, FSCD 4P.146/2004 c. 7.2, FSCD 4P.114/2001 c. 5a, FSCD 4P.260/2000 c. 6b

In assessing whether the application of the law by the #arbitral tribunal is surprising, the Federal Supreme Court acts with restraint in the field of international arbitration.

FSCD 130 III 35 [38-40], FSCD 4A_338/2018 c. 5.2, FSCD 4A_301/2018 c. 4.1, FSCD 4A_525/2017 c. 3.1

This #case law, which the Federal Supreme Court applies restrictively, does not concern findings of #fact.

FSCD 4A_525/2017 c. 3.1, FSCD 4A_56/2017 c. 3.3.2, FSCD 4A_599/2014 c. 3.2, FSCD 4A_305/2013 c. 4, FSCD 4A_214/2013 c. 4.1, 4.3.1, FSCD 4A_538/2012 c. 5.1

The Federal Supreme Court has only rarely admitted the argument that the application of a law was by surprise. In the large majority of cases, it has rejected this argument.

FSCD 4A_525/2017 c. 3.1

Exceptionally, the judge or the #arbitrator has to question the parties when it considers basing its decision on a provision or a legal consideration which has not been mentioned during the proceedings and of which the parties could not anticipate the relevance. However, the importance of this exception is controversial in the field of international arbitration. Furthermore, to know what cannot be foreseen is a question of discretion. This is why the Federal Supreme Court applies this rule restrictively and takes into account the particularities of this type of proceedings by avoiding that the argument of surprise be used to achieve an examination on the #merits of #award by the Federal Supreme Court.

FSCD 4A_322/2015 c. 4.1, FSCD 4A_634/2014 c. 4.1, FSCD 4A_554/2014 c. 2.1, FSCD 4A_446/2013 c. 3, FSCD 4A_188/2013 c. 2, FSCD 4A_392/2010 c. 5.1, FSCD 4A_10/2010 c. 2.1, FSCD 4A_254/2010 c. 3.1, FSCD 4A_464/2009 c. 6.1, FSCD

4P.4/2007 c. 4.1, FSCD 4A_220/2007 c. 11.1, FSCD 4A_42/2007 c. 7.1, FSCD 4P.168/2006 c. 7.1, FSCD 4P.114/2001 c. 5a

Scholars are not in agreement on whether the question of foreseeability should be examined restrictively or generously.

FSCD 4P.146/2004 c. 7.2

3.3.10.4 Exception: Duty to Inform of Fundamental Technical Elements

Based on the rule *jura novit curia*, the #arbitrator is in principle not bound by the legal arguments submitted by the parties and the #arbitrator can apply *ex officio* another substantive provision to grant the #claimant's #prayers for relief, provided the #arbitrator respects the parties' #right to be heard. On the contrary, the specialised #arbitrator who has access to sources of information which are normally not available to the parties, has the duty to inform them about the fundamental technical elements on which its decision will be based. This applies all the more if the #arbitrator uses the knowledge of a third person who it hears as an #expert to form its conviction.

FSCD 130 III 35 [39], FSCD 4A_214/2011 c. 5.1, *FSCD 4A_3/2009 c. 7.1, FSCD 4A_400/2008 c. 3.1, FSCD 4P.4/2007 c. 4.1, FSCD 4P.304/2006 c. 5.3, FSCD 4P.14/2004 c. 2.2.4, FSCD 4P.114/2001 c. 5a, FSCD 17.07.1998 [4P.7/1998] [(2002) ASA p. 668-669], FSCD 08.02.1978 [(1980) SJ p. 73]

3.3.10.5 Individual Cases

Subjective #interpretation constitutes one of the two pillars on which the #interpretation of contracts under Swiss law is based, the second being objective #interpretation. In this area, there is therefore, *a priori*, hardly any place for a surprise effect capable of catching the parties off guard, whether or not they were invited by the #arbitral tribunal or the sole #arbitrator to respond to specific questions without any apparent connection with the issue raised by the case in point.

FSCD 4A_220/2017 c. 3.2

The application of the principle summed up by the adage *jura novit curia* and the exceptions to this principle may not depend on the citizenship of counsel for the parties; indeed, the parties submitted the contracts to Swiss law and choosing to waive the assistance of Swiss legal counsel, if that was the case, took this risk in the circumstances.

FSCD 4A_136/2016 c. 5.2

It is not certain that #CAS #arbitral awards can be considered as legal principles within the meaning of this #case law.

FSCD 4A_110/2012 c. 3.3.2

It was not unforeseeable for an #arbitrator to base its decision on the legal ground that the agreement was a simulated agreement given that the #evidence conclusively pointed to the existence of a simulated agreement.

FSCD 4A_254/2010 c. 3.3

When a party submits unclear or contradictory #prayers for relief – in this case with respect to the date from which interest should run – giving rise to a possible

misunderstanding as to the scope of its prayers, it cannot claim that the #arbitrator's decision in this regard is surprising.

FSCD 4A_10/2010 c. 2.2.2

The #right to be heard does not oblige the judge to inform the parties on the manner in which it intends to apply the law, nor on the #facts that it intends to consider as being established. The authority can be obliged to inform the party on these points only exceptionally, when due to particular circumstances, the party has no reason to expect the application of a specific norm; in such a case, the #right to be heard allows a party to obtain this information in order to be able to defend its interests knowingly.

FSCD 08.05.1998 c. 1b, FSCD 03.11.1997 c. 2b/aa

3.3.11 Right to Be Heard on the Allocation of Costs

The #right to be heard under Article 29(2) FC includes, in particular, the right to express an opinion on the #merits of the case before a decision is rendered which interferes with its legal position; in general, the #right to be heard enshrined in Article 29(2) FC constitutes a personal-related right of participation in the issuing of a decision which affects the legal position of the individual.

FSCD 4A_570/2016 c. 2.1

It is true that the parties must not always be heard specifically and in advance on the allocation of #costs; the court may waive an invitation to submit a statement on costs in particular if the #costs are allocated as usual - for example after uncontested victory and defeat - or if the parties need to know in accordance with the rules of procedure and the course of the proceedings that they can comment on the allocation of #costs and the compensation of the other party's #costs. However, if the distribution is not immediately clear, the parties have the right to express their views in advance. This applies in particular if a party submits #prayers for relief with respect to the allocation of #costs.

FSCD 4A_570/2016 c. 2.2

3.3.12 Minimal Duty to Examine the Relevant Issues

It follows from the #right to be heard a minimal duty for the authority to examine and to treat the relevant problems (FSCD 126 I 97 c. 2b). This duty has been extended to international arbitration, and therefore, to international sports arbitration.

FSCD 142 III 360 [361], FSCD 133 III 235 [248], FSCD 121 III 331 [333], FSCD 4A_308/2018 c. 3.2, FSCD 4A_284/2018 c. 4.1, FSCD 4A_550/2017 c. 3.1, FSCD 5A_163/2018 c. 3.1, FSCD 4A_114/2018 c. 3.2, FSCD 4A_578/2017 c. 3.1.1, FSCD 4A_502/2017 c. 3.1, FSCD 4A_491/2017 c. 4.1.1, FSCD 4A_170/2017 c. 4.1, FSCD 4A_478/2017 c. 3.2.1, FSCD 4A_583/2017 c. 2.2.1, FSCD 4A_247/2017 c. 4.2.1, FSCD 4A_580/2017 c. 2.1.2, FSCD 4A_450/2017 c. 4.1, FSCD 4A_260/2017 c. 2.2, FSCD 4A_56/2017 c. 3.1, FSCD 4A_356/2018 c. 2.1, FSCD 4A_430/2017 c. 2.1, FSCD 4A_236/2017 c. 4.1, FSCD 4A_424/2017 c. 3.1, FSCD 4A_12/2017 c. 4.1 (not published in FSCD 143 III 578), FSCD 4A_318/2017 c. 3.1, FSCD 4A_316/2017 c. 3.1, FSCD 4A_80/2017 c. 3.1.1, FSCD 4A_532/2016 c. 4.1, FSCD 4A_34/2016 c. 4.1.1, FSCD 4A_692/2016 c. 5.1, FSCD 4A_470/2016 c. 3.1, FSCD 4A_570/2016 c. 2.1, FSCD 4A_490/2016 c. 3.1.1, FSCD 4A_704/2015 c. 5.1, FSCD 4A_478/2016 c. 3.1, FSCD 4A_202/2016 c. 4.1, FSCD 4A_173/2016 c. 4.1, FSCD

4A_82/2016 c. 4.1, FSCD 4A_678/2015 c. 4.1, FSCD 4A_572/2015 c. 4.1, FSCD 4A_520/2015 c. 3.3.1, FSCD 4A_568/2015 c. 3.1, FSCD 4A_69/2015 c. 3.1, FSCD 4A_34/2015 c. 4.1.2 (not published in FSCD 141 III 495), FSCD 4A_172/2015 c. 4.1, FSCD 4A_54/2015 c. 4.1, 4.3.2, FSCD 4A_684/2014 c. 4.2, FSCD 4A_124/2015 c. 4, FSCD 4A_709/2014 c. 5.1, FSCD 4A_426/2014 c. 3.1, FSCD 4A_636/2014 c. 3.2, FSCD 4A_486/2014 c. 4.1, FSCD 4A_253/2014 c. 4.2, FSCD 4A_324/2014 c. 5.1, FSCD 4A_199/2014 c. 5, FSCD 4A_606/2013 c. 4.1, FSCD 4A_74/2014 c. 3.2.1 (not published in FSCD 140 III 477), FSCD 4A_178/2014 c. 5.1, FSCD 4A_450/2013 c. 3.1 & 4.1, FSCD 4A_564/2013 c. 3.1, FSCD 4A_304/2013 c. 4.2, FSCD 4A_446/2013 c. 3, FSCD 4A_460/2013 c. 3.1, FSCD 4A_93/2013 c. 5.2, FSCD 4A_188/2013 c. 2, FSCD 4A_439/2012 & 4A_457/2012 c. 5.1, FSCD 4A_730/2012 c. 3.1, FSCD 4A_669/2012 c. 3.1, FSCD 4A_576/2012 c. 4.1, FSCD 4A_635/2012 c. 5.2, FSCD 4A_110/2012 c. 3.1.2, FSCD 4A_150/2012 c. 3.1, FSCD 4A_488/2011 c. 5.1, FSCD 4A_428/2011 c. 4.1.2, FSCD 4A_360/2011 c. 5.1, FSCD 4A_424/2011 c. 2.2, FSCD 4A_162/2011 c. 2.1.2, FSCD 4A_482/2010 c. 3.2, FSCD 4A_10/2010 c. 2.1, FSCD 4A_433/2009 c. 2.1, FSCD 4A_620/2009 c. 3.1, FSCD 4A_624/2009 c. 4.1, FSCD 4A_584/2009 c. 3.1, FSCD 4A_524/2009 c. 4.1, FSCD 4A_550/2009 c. 5.1, FSCD 4A_352/2009 c. 4.2.1, FSCD 4A_539/2008 c. 5.1, FSCD 4A_176/2008 c. 4, FSCD 4A_220/2007 c. 10, FSCD 4A_18/2007 c. 5.1, FSCD 4P.105/2006 c. 7.1, FSCD 4P.88/2006 c. 3.1, FSCD 4P.26/2004 c. 3.2, FSCD 4P.71/2002 c. 2.2

This duty is violated if the #arbitral tribunal, by oversight or misunderstanding, does not take into consideration claims, arguments, #evidence and #offers of evidence submitted by one of the parties which are material for the decision to be rendered. It is up to the party complaining about the violation to show that the #arbitral tribunal has not examined certain factual, evidentiary or legal elements which it had correctly pleaded in favour of its #prayers for relief and that these elements would have had an influence on the outcome of the case.

FSCD 142 III 360 [361], FSCD 133 III 235 [248], FSCD 4A_308/2018 c. 3.2, FSCD 4A_284/2018 c. 4.1, FSCD 4A_550/2017 c. 3.1, FSCD 4A_114/2018 c. 3.2, FSCD 4A_578/2017 c. 3.1.1, FSCD 4A_502/2017 c. 3.1, FSCD 4A_491/2017 c. 4.1.1, FSCD 4A_170/2017 c. 4.1, FSCD 4A_478/2017 c. 3.2.1, FSCD 4A_583/2017 c. 2.2.1, FSCD 4A_247/2017 c. 4.2.1, FSCD 4A_580/2017 c. 2.1.2, FSCD 4A_450/2017 c. 4.1, FSCD 4A_260/2017 c. 4.1, FSCD 4A_56/2017 c. 3.1, FSCD 4A_430/2017 c. 2.1, FSCD 4A_236/2017 c. 4.1, FSCD 4A_424/2017 c. 3.1, FSCD 4A_12/2017 c. 4.1 (not published in FSCD 143 III 578), FSCD 4A_318/2017 c. 3.1, FSCD 4A_316/2017 c. 3.1, FSCD 4A_80/2017 c. 3.1.1, FSCD 4A_532/2016 c. 4.1, FSCD 4A_34/2016 c. 4.1.1, FSCD 4A_692/2016 c. 5.1, FSCD 4A_470/2016 c. 3.1, FSCD 4A_490/2016 c. 3.1.1, FSCD 4A_704/2015 c. 5.1, FSCD 4A_478/2016 c. 3.1, FSCD 4A_202/2016 c. 4.1, FSCD 4A_173/2016 c. 4.1, FSCD 4A_678/2015 c. 4.1, FSCD 4A_572/2015 c. 4.1, FSCD 4A_520/2015 c. 3.3.1, FSCD 4A_568/2015 c. 3.1, FSCD 4A_69/2015 c. 3.1, FSCD 4A_172/2015 c. 4.1, FSCD 4A_684/2014 c. 4.2, FSCD 4A_124/2015 c. 4, FSCD 4A_709/2014 c. 5.1, FSCD 4A_426/2014 c. 3.1, FSCD 4A_636/2014 c. 3.2, FSCD 4A_486/2014 c. 4.1, FSCD 4A_324/2014 c. 5.1, FSCD 4A_253/2014 c. 4.2, FSCD 4A_199/2014 c. 5, FSCD 4A_606/2013 c. 4.1, FSCD 4A_74/2014 c. 3.2.1 (not published in FSCD 140 III 477), FSCD 4A_178/2014 c. 5.1, 5.3.5, FSCD 07.04. 2014 [4A_450/2013] c. 3.1, 4.1, FSCD 4A_564/2013 c. 3.1, FSCD 4A_304/2013 c. 4.2, FSCD 4A_446/2013 c. 3, FSCD 4A_460/2013 c. 3.1, FSCD 4A_93/2013 c. 5.2, FSCD 4A_188/2013 c. 2, FSCD 4A_439/2012 & 4A_457/2012 c. 5.1, FSCD 4A_730/2012 c. 3.1, FSCD 4A_669/2012 c. 3.1, FSCD 4A_576/2012 c. 4.1, FSCD 4A_635/2012 c. 5.2, FSCD 4A_110/2012 c. 3.1.2, FSCD 4A_150/2012 c. 3.1, FSCD 4A_488/2011 c. 5.1, FSCD 4A_16/2012 c. 3.1, FSCD 4A_428/2011 c. 4.1.2, FSCD 4A_360/2011 c. 5.1, FSCD 4A_162/2011 c. 2.1.2, FSCD 4A_46/2011 c. 6.1, FSCD 4A_482/2010 c. 3.2, FSCD 4A_440/2010 c. 4.2.2 (not published in FSCD 137 III 85), FSCD 4A_386/2010 c.

7.2, FSCD 4A_433/2009 c. 2.1, FSCD 4A_620/2009 c. 3.1, FSCD 4A_624/2009 c. 4.1, FSCD 4A_524/2009 c. 4.1, FSCD 4A_352/2009 c. 4.2.1

If an arbitral decision is made without even addressing the elements apparently relevant to the outcome of the dispute, it is incumbent upon the #arbitral tribunal or the opposing party to justify this omission in their respective comments on the #appeal by either showing that, contrary to the #appellant's claims, the points in question were not relevant to the actual outcome or that they were implicitly dismissed by the #arbitral tribunal. On the other hand, the #arbitral tribunal does not have to deal with every single claim of the parties, which is why it cannot be accused of a violation of the #right to be heard, if it has dismissed neither expressly nor implicitly a claim which is immaterial for the decision.

FSCD 133 III 235 [249], FSCD 4A_308/2018 c. 3.2, FSCD 4A_532/2016 c. 4.1

It follows from the #right of the parties be heard that the parties also have the #right to be heard with respect to legally relevant submissions. Therefore, the deciding authority has to examine and to assess the information, arguments, #evidence and #offers of evidence submitted by the parties in the context of the #hearing and of the determination of the #facts, to the extent that they are important for the decision-making. What is relevant is revealed by the #reasons of the challenged decision or possibly by a different opinion of the appeals instance.

FSCD 121 III 331 [333], FSCD 4P.14/2004 c. 2.2, FSCD 4P.200/2001 c. 3d, FSCD 4P.99/2000 c. 3a, FSCD 4P.212/1999 c. 2a, FSCD 17.02.1999 [(2000) ASA p. 315]

The door opened by the #case law on the minimal duty of the #arbitral tribunal to examine and deal with relevant issues is narrow. It is only if a point of fact or law invoked by one of the parties appears necessary for the #decision to be rendered and it remains purely and simply ignored in the #reasons for the #award, without it being possible to understand why, that it must be admitted that the #right to be heard has been deprived of its substance, in the sense that the #arbitral tribunal simply did not rule on the dispute as it was presented to it.

FSCD 4A_491/2017 c. 4.2.3

The #arbitrators have to effectively hear and examine the parties' legally relevant #claims. This does not mean that the #arbitral tribunal has to deal explicitly with every argument put forward by the parties.

FSCD 4A_356/2018 c. 2.1, FSCD 4A_80/2017 c. 3.1.1, FSCD 4A_490/2016 c. 3.1.1, FSCD 4A_478/2016 c. 3.1, FSCD 4A_82/2016 c. 4.1, FSCD 4A_678/2015 c. 4.1, FSCD 4A_330/2013 c. 3.1, FSCD 4A_95/2013 c. 3.1, FSCD 4A_672/2012 c. 3.1.1, FSCD 4A_424/2011 c. 2.2, FSCD 4A_550/2009 c. 5.1, FSCD 4A_294/2008 c. 3.1, FSCD 4A_452/2007 c. 3.3

This does not mean, however, that the #arbitral tribunal must expressly deal with each of the parties' submissions.

FSCD 133 III 235 [249], FSCD 4A_114/2018 c. 3.2, FSCD 4A_583/2017 c. 2.2.1, FSCD 4A_470/2016 c. 3.1, FSCD 4A_172/2015 c. 4.1

It does not follow from the #right to be heard that the #arbitral tribunal must deal with all party submissions in detail and expressly refute each individual argument. Rather, it is sufficient for the #arbitral tribunal to state the essential

considerations on which it based its decision, so that the person concerned can challenge the decision with full knowledge.

FSCD 4A_125/2018 c. 4.2

The mere fact of mentioning an argument does not by itself lead to a rejection of the argument invoked.

FSCD 4A_150/2012 c. 3.2.1.3

It is not possible to derive from the fact that the #arbitral tribunal did simply not mention #evidence in the #reasons of its #award that the #arbitral tribunal overlooked it.

FSCD 4P.74/2006 c. 5.3

However, an authority does not violate the #right to be heard if it does not examine issues which it does – correctly - not consider as being decisive for the resolution of the case.

FSCD 4P.26/2004 c. 3.1

The #right to be heard obliges the authority to effectively hear and carefully and seriously examine the #claims and to take them into account when rendering its decision.

FSCD 12.01.1998 c. 3a

3.3.13 Duty to Ask Clarifying Questions

The duty of the judge to ask clarifying questions also applies in international arbitration proceedings. However, as the #arbitral proceedings are governed by the #adversarial maxim, it cannot be the task of the #arbitral tribunal to make up for the possible omissions of the parties regarding their #burden of claim and their #burden of proof, and this *ex officio* in the context of the judicial duty to ask clarifying questions.

FSCD 4A_597/2013 c. 3.2.2, FSCD 18.08.1992 c. 5b (not published in FSCD 118 II 359)

3.3.14 Restrictions on the Right to Be Heard

In Switzerland, the #right to be heard in #adversarial proceedings, far from being unfettered, is subject to significant restrictions in the field of international arbitration.

FSCD 142 III 360 [361], FSCD 4A_505/2017 c. 3.1.1, FSCD 4A_247/2017 c. 5.1.1, FSCD 4A_56/2017 c. 3.1, FSCD 4A_220/2017 c. 3.1

3.3.15 No Right to Sufficient Legal Representation

It is incumbent on the #appellant to be represented by counsel with the necessary language capacity in the #arbitral proceedings, which according to the agreement of the parties, were to be conducted in German.

FSCD 4A_597/2013 c. 3.2.1

3.3.16 No Right to a Double Exchange of Briefs

The guarantee of the #right to be heard does not encompass an absolute right to a double exchange of briefs, as long as the #claimant has the opportunity to state its position in one way or the other as to the #respondent's arguments and in particular as to any counterclaim.

FSCD 142 III 360 [362], FSCD 4A_247/2017 c. 5.1.1, FSCD 4A_356/2018 c. 2.4.2

With respect in particular to the right to a double exchange of briefs, the relatively strict requirements formulated by the Federal Supreme Court with respect to this subject in light of the #case law of the ECHR cannot be applied as they are to domestic and international arbitration.

FSCD 4A_247/2017 c. 5.1.1

The fact that according to Article R56 #CAS Code, only one set of written submissions is exchanged before the #hearing takes place according to Article R57 #CAS Code, at which the parties can comment orally, does not constitute a violation of the #right to be heard.

FSCD 4A_612/2009 c. 5.3

3.3.17 No Right to Oral Arguments

The right to oral arguments (*"les parties auront en tout état de cause encore la faculté de s'exprimer oralement avant que le Tribunal arbitral ne rende sa sentence"*) is not a mandatory procedural principle and its violation does not amount to a violation of the #right to be heard according to Article 29(2) FC, even though the parties had agreed on such a #hearing and the agreement has a binding effect on the #arbitral tribunal.

FSCD 142 III 360 [360], FSCD 117 II 346 [348], FSCD 4A_260/2017 c. 4.1, FSCD 4A_424/2017 c. 3.1, FSCD 4A_12/2017 c. 4.1 (not published in FSCD 143 III 578), FSCD 4A_318/2017 c. 3.1, FSCD 4A_316/2017 c. 3.1, FSCD 4A_40/2017 c. 4.1, FSCD 4A_704/2015 c. 5.1, FSCD 4A_404/2010 c. 5, FSCD 4A_220/2007 c. 8.1, FSCD 4A_220/2007 c. 4.1, FSCD 4P.96/2002 c. 5.2.1, FSCD 4P.117/2004 c. 2.1, FSCD 4P.196/2003 c. 4.1, FSCD 24.03.1997 [(1997) ASA p. 325], FSCD 21.06.1995 [4P.243/1994] c. 3b

An entitlement to a second #hearing cannot be derived from the principle of #equal treatment of the parties.

FSCD 4A_162/2011 c. 2.3.3

There is no violation of the #right to be heard if the #arbitrator is satisfied with a single #hearing, has omitted to take #evidence, does not either give the parties the possibility of oral arguments or the opportunity to substantiate once again the arguments brought forth in the written submissions, provided that the #terms of reference signed by the parties provide that the dispute has to be resolved as far as possible in one #hearing after the termination of the exchange of written briefs.

FSCD 22.12.1992 [(1996) ASA p. 649-650]

In #arbitral proceedings, there is in principle no right to present oral arguments. However, the procedural rules can provide for such a right. If the procedural

rules provide for oral arguments, the refusal of the #arbitral tribunal to let the party orally present their arguments represents a violation of the #right to be heard.

AR 05.08.1994 p. 7

3.3.18 No Right to a Stay of the Proceedings

Apart from cases of imperative reasons for the #stay, this measure depends on the discretionary power of the authority or the #arbitral tribunal. In ordinary proceedings, apart from cases of excess or abuse, the exercise of this power can in principle not be reviewed by the Federal Supreme Court (FSCD 120 Ib 156 [160]). The same must apply to the field of international arbitration where the #appeal to the Federal Supreme Court is admissible, with regard to procedural issues, only for the violation of fundamental principles. In general, the #stay of the proceedings, granted or dismissed by the #arbitral tribunal by taking into account the interests of the parties, does involve neither the #equality of the parties nor their #right to be heard in #adversarial proceedings pursuant to Articles 182(3) and 190(2)(d) PILA.

FSCD 133 III 139 [144]

3.3.19 No Duty to Take Minutes

Only #facts which could be relevant for the outcome of the case have to be in the file, i.e. in briefs, exhibits or in the #minutes. It is in particular not necessary that every contact, even the most insignificant, between the tribunal and the parties be recorded in #minutes. The #minutes may focus on the points which are relevant for the decision in the case at hand.

FSCD 01.09.1999 c. 3

In FSCD 116 II 373 c. 7b, the Federal Supreme Court refused to qualify the lack of #reasons as a violation of the #right to be heard and therefore to recognize it as a #ground for setting aside. It is all the less justified to recognize the taking of #minutes of an #oral hearing, in the essence thus of the parties' arguments, as a constitutional procedural guarantee in international arbitrations pursuant to the PILA, which does not expressly provide for a duty to take #minutes. #Minutes may be helpful and advisable for #setting aside proceedings against the #award; however, they are not indispensable.

FSCD 28.05.1998 c. 2a

3.3.20 No Duty to Draw the Parties' Attention to Decisive Facts

The #right to be heard does not imply that the judge must draw the parties' attention to the #facts which are decisive for the judgment (FSCD 108 Ia 293 [295]). This rule also applies in international arbitration (FSCD 130 III 35 [39]).

FSCD 142 III 360 [362], FSCD 4A_505/2017 c. 3.1.1, FSCD 4A_247/2017 c. 5.1.1, FSCD 4A_56/2017 c. 3.1, FSCD 4A_476/2012 c. 4.2.1, FSCD 4A_214/2011 c. 5.1, 5.2, FSCD 4A_428/2010 c. 4.2.1, FSCD 4A_450/2007 c. 4.2.2, FSCD 4P.105/2006 c. 7.2, FSCD 4P.196/2003 c. 4.1

An #arbitral tribunal is not bound to specifically warn a party of the decisive character of a factual element on the basis of which it is preparing to ground its decision, provided that this fact was alleged and proven in accordance with the rules.

FSCD 142 III 360 [361-362], FSCD 4A_238/2018 c. 4.2, FSCD 4A_247/2017 c. 5.1.1

The #right to be heard does not imply that the judge must draw the parties' attention to the #facts which are decisive for the judgment (FSCD 108 Ia 293 [295]), which rule applies also in international arbitration (FSCD 130 III 35 [39]). *A fortiori*, this guarantee does not oblige the judge or the #arbitrator to inform a party, before rendering its judgment or #award, that the evidence filed is not sufficient to establish a decisive fact.

FSCD 4A_214/2011 c. 5.1-5.2, FSCD 4A_428/2010 c. 4.2.1, FSCD 4A_450/2007 c. 4.2.2

3.3.21 No Right to a Formal Decision on the Evidence

It is not permitted based on the #right to be heard to request that an #arbitral tribunal issue a separate order as to the #admissibility of each piece of #evidence before the final #award is rendered and to give the parties an additional opportunity to state their views.

FSCD 4A_178/2014 c. 5.3.4

The right to #equal treatment and the #right to be heard do not require that the #arbitral tribunal introduce the #evidentiary proceedings by an evidentiary order [*Beweisbeschluss*], similar to the provisions of the fCCP/ZH to ensure that the tribunal and the parties are informed about the taking of #evidence.

FSCD 116 II 639 [644]

Article 29 FC [*Art. 4 fFC*] and Article 182(3) PILA do not provide for any right to a formal decision on the #evidence [*Beweisbeschluss*].

FSCD 116 II 639 [644], FSCD 28.05.1998 c. 2d, FSCD 21.06.1995 [4P.243/1994] c. 3d

3.3.22 No Right to a Correct Award

The #right to be heard does not encompass a right to a correct #award on the #merits. Therefore, it is not the task of the Federal Supreme Court to examine whether the #arbitral tribunal has taken into account and correctly understood all documents in the file.

FSCD 142 III 360 [362], FSCD 127 III 576 [578], FSCD 4A_114/2018 c. 3.4, FSCD 4A_580/2017 c. 3, FSCD 4A_80/2017 c. 4, FSCD 4A_173/2016 c. 4.2, FSCD 4A_678/2015 c. 4.2, FSCD 4A_356/2015 c. 5, FSCD 4A_568/2015 c. 3.2, FSCD 4A_54/2015 c. 4.4, FSCD 4A_684/2014 c. 4.2, FSCD 4A_74/2014 c. 3.2.6 (not published in FSCD 140 III 477), FSCD 4A_178/2014 c. 5.5, FSCD 4A_672/2012 c. 3.1.2, FSCD 4A_522/2012 c. 3.3.2, FSCD 4A_76/2012 c. 3.4, FSCD 4A_402/2010 c. 3.2, FSCD 4A_612/2009 c. 6.3.1, FSCD 4A_550/2009 c. 5.1, FSCD 4A_240/2009 c. 5.1, FSCD 4A_176/2008 c. 4.1.1, FSCD 4P.134/2006 c. 7, FSCD 4P.105/2006 c. 7.4, FSCD 4P.74/2006 c. 4, FSCD 17.07.1998 [4P.7/1998] [(2002) ASA p. 667], FSCD 15.06.1998 c. 2a, FSCD 23.10.1989 [(1990) ASA p. 53]

Determining whether the solution reached by the #arbitral tribunal was substantively correct or not does not fall within the scope of Article 190(2)(d) PILA or 190(2)(e) PILA.

FSCD 4A_44/2011 c. 3.1.2

3.3.23 No Duty to Give Reasons

- See also Article 189(2) PILA, section 2.5; Article 190(2)(d) PILA, section 2d.3.10; and Article 190(2)(e) PILA, section 2e.14.23

Following constant #case law, the #right to be heard pursuant to Articles 182(3) and 190(2)(d) PILA does not encompass the right to an #award stating the #reasons for the decision.

FSCD 142 III 360 [360-361], FSCD 134 III 186 [187], FSCD 133 III 235 [248], FSCD 130 III 125 [130], FSCD 128 III 234 [243], FSCD 116 II 373 [374], FSCD 4A_308/2018 c. 3.2, FSCD 4A_284/2018 c. 4.1, FSCD 4A_550/2017 c. 3.1, FSCD 5A_163/2018 c. 3.1, FSCD 4A_114/2018 c. 3.2, FSCD 4A_404/2017 c. 3.1.1, FSCD 4A_578/2017 c. 3.1.1, FSCD 4A_505/2017 c. 3.1.1, FSCD 4A_345/2017 c. 2.1, FSCD 4A_117/2018 c. 3.2, FSCD 4A_491/2017 c. 4.1.1, FSCD 4A_170/2017 c. 4.1, FSCD 4A_478/2017 c. 3.2.1, FSCD 4A_583/2017 c. 2.2.1, FSCD 4A_247/2017 c. 4.2.1, FSCD 4A_580/2017 c. 2.1.2 & 3, FSCD 4A_260/2017 c. 4.1, FSCD 4A_56/2017 c. 3.1, FSCD 4A_220/2017 c. 3.1, FSCD 4A_430/2017 c. 2.1, FSCD 4A_424/2017 c. 3.1, FSCD 4A_12/2017 c. 4.1 (not published in FSCD 143 III 578), FSCD 4A_318/2017 c. 3.1, FSCD 4A_316/2017 c. 3.1, FSCD 4A_80/2017 c. 3.1.1, FSCD 4A_532/2016 c. 4.1, FSCD 4A_692/2016 c. 5.2, FSCD 4A_470/2016 c. 3.1, FSCD 4A_490/2016 c. 3.1.1, FSCD 4A_704/2015 c. 5.1, FSCD 4A_202/2016 c. 4.1, FSCD 4A_173/2016 c. 4.1, FSCD 4A_678/2015 c. 4.1, FSCD 4A_40/2017 c. 4.1, FSCD 4A_259/2015 c. 3.2, FSCD 4A_572/2015 c. 4.1, FSCD 4A_520/2015 c. 3.3.1, FSCD 4A_568/2015 c. 3.1, FSCD 4A_69/2015 c. 3.1, FSCD 4A_34/2015 c. 4.1.2 (not published in FSCD 141 III 495), FSCD 4A_172/2015 c. 4.1, FSCD 4A_54/2015 c. 4.1, 4.3.2, FSCD 4A_246/2014 c. 6.1, FSCD 4A_684/2014 c. 4.1, FSCD 4A_124/2015 c. 4, FSCD 4A_709/2014 c. 5.1, FSCD 4A_426/2014 c. 3.1, FSCD 4A_636/2014 c. 3.2, FSCD 4A_486/2014 c. 4.1, FSCD 4A_324/2014 c. 5.1, FSCD 4A_199/2014 c. 5, FSCD 4A_606/2013 c. 4.1, FSCD 4A_74/2014 c. 3.2.1 (not published in FSCD 140 III 477), FSCD 4A_178/2014 c. 5.7, FSCD 4A_450/2013 c. 4.1, FSCD 4A_564/2013 c. 3.1, FSCD 4A_304/2013 c. 4.2, FSCD 4A_446/2013 c. 3, FSCD 4A_460/2013 c. 3.1, FSCD 4A_93/2013 c. 5.2, FSCD 4A_330/2013 c. 3.1, 3.3, FSCD 4A_188/2013 c. 2, FSCD 4A_95/2013 c. 3.1, 3.3, FSCD 4A_439/2012 & 4A_457/2012 c. 5.1, FSCD 4A_730/2012 c. 3.1, FSCD 4A_672/2012 c. 3.1.1, FSCD 4A_669/2012 c. 3.1, FSCD 4A_538/2012 c. 5.2, FSCD 4A_635/2012 c. 4.2, 5.2, FSCD 4A_76/2012 c. 3.2, FSCD 4A_110/2012 c. 3.1.2, FSCD 4A_150/2012 c. 3.1, FSCD 4A_488/2011 c. 5.1, FSCD 4A_360/2011 c. 5.1, FSCD 4A_528/2011 c. 3.2, FSCD 4A_526/2011 c. 3.2, FSCD 5A_634/2011 c. 2.2.1 & 2.2.2, FSCD 4A_162/2011 c. 2.1.2, 2.2.2, FSCD 4A_46/2011 c. 4.3.1, FSCD 4A_404/2010 c. 5, FSCD 4A_402/2010 c. 2.1.2, FSCD 4A_10/2010 c. 2.1, FSCD 4A_43/2010 c. 5.4, FSCD 4A_433/2009 c. 2.1, FSCD 4A_550/2009 c. 5.1, FSCD 4A_612/2009 c. 6.4, FSCD 4A_294/2008 c. 3.1, FSCD 4A_244/2007 c. 6.4, FSCD 4A_18/2007 c. 5.1, FSCD 4P.105/2006 c. 7.3, FSCD 4P.74/2006 c. 5.3, FSCD 4P.242/2004 c. 6.1, FSCD 4P.26/2004 c. 3.3, FSCD 4P.115/2004 c. 3.2

Nothing changed in this respect with the entry into force of Article 77 FSCA, because according to this provision, the #Appeal in Civil Matters is admissible against decisions of #arbitral tribunals under the conditions of Articles 190-192 PILA. Whereas the conditions for cantonal decisions subject to the #Appeal in Civil Matters follow the regime of Article 122 FSCA, decisions of #arbitral

tribunals within the meaning of Article 190 PILA are governed by Article 189 PILA. Pursuant to this provision, they are rendered in conformity with the procedural rules and in the form agreed upon by the parties (Art. 189(1) PILA), they shall possibly be in writing, supported by #reasons, dated and signed (Art. 189(2) PILA). #Case law derived from the possibility to waive the right to an #award supported by #reasons that this right is not part of the non-waivable principles of the #right to be heard within the meaning of Article 182(3) PILA and that its violation cannot be complained of pursuant to Article 190(2)(d) PILA.

FSCD 134 III 186 [187], FSCD 4A_244/2007 c. 6.4

The #right to be heard pursuant to Article 190(2)(d) PILA does not encompass the duty to give #reasons, which is not part of the principle of #adversarial proceedings.

FSCD 130 III 125 [130], FSCD 128 III 234 [243], FSCD 116 II 373 [375], FSCD 4P.172/1999 [(2001) ASA p. 791], AR 05.08.1994 p. 7

However, it cannot be denied that the #reasons for an #award – if and in so far as they are stated – may be important for other aspects of the #right to be heard guaranteed by Article 190(2)(d) PILA. The #reasons stated may in particular lead with sufficient clarity to the conclusion that the #arbitral tribunal did indeed not take into account at all the submissions of the parties. It is also based on the #reasons that one has to examine whether a factual #claim is relevant according to the legal opinion of the #arbitral tribunal.

FSCD 121 III 331 [333], FSCD 4P.207/2002 c. 4.1

Contrary to Article 36(h) in connection with Article 33(1)(e) fConcordat, Article 190(2) PILA does not mention the ground of lack of #reasons for the #award. This corresponds to the intent of the legislator to limit the possibilities to set aside #awards as compared to the fConcordat and the [former] codes on civil procedure of the Cantons which did not accede to the fConcordat. It would be completely opposite to the legislator's intent if the ground of lack of #reasons were to be included in the new regulation by equating the #right to be heard guaranteed by Article 190(2)(d) PILA to the #right to be heard derived from Article 8 FC which includes the duty to give #reasons.

FSCD 116 II 373 [375], ZH 30.06.2003 p. 5

The fact that the inclusion of the duty to give #reasons in the #right to be heard of Article 190(2)(d) PILA is not compatible with the PILA, is confirmed by the French version of this provision which limits the #right to be heard, contrary to the German and the Italian version, to the right of the parties “*d'être entendues en procédure contradictoire*” and which therefore does not include the mandatory stating of #reasons at the end of the #adversarial proceedings.

FSCD 116 II 373 [375]

An analysis of the text of the PILA leads to the same result. Article 190(2)(d) PILA mentions only the mandatory procedural rules of Article 182(3) PILA as #grounds for setting aside, but not the duty to give #reasons for the #award pursuant to Article 189(2) PILA.

FSCD 116 II 373 [375]

This principle also applies, if not more so, to a procedural order whose aim is to note that the pending matter has ended *ipso jure* and that it must be crossed off

the list. Undoubtedly, for this procedural decision, as for a decision on the #merits, it is necessary that the person who rendered it has treated all the pertinent arguments advanced by the parties. However, it is not necessary that it does so expressly or that lengthy texts are devoted to this point, at least when, as is the case here, the sanction for the non-respect of a procedural rule hardly leaves any margin of appreciation to the one who must rule on it.

FSCD 4A_692/2016 c. 5.2

In #arbitral proceedings, the parties may agree that the #award contain no #reasons. Therefore, the mandatory #right to be heard within the meaning of Article 190(2)(d) PILA cannot apply to the #reasons of the #award as such.

FSCD 4P.207/2002 c. 4.1

In #arbitral proceedings, the party does not have a particular right to #reasons, which permits it to challenge the #award on that specific ground. One cannot follow the doctrine which holds that #reasons are also part of the elementary requirements in arbitration, provided that the parties did not expressly waive them.

FSCD 4P.207/2002 c. 4.1

In general, no #reasons have to be given for the decision on the order for #costs.

FSCD 4P.99/2000 c. 5

3.3.24 Timeliness of the Claim of Violation of the Right to be Heard

According to the well-established #case law of the Federal Supreme Court, it is contrary to Article 2 CC (or Art. 52 CCP, as the case may be) to bring formal #grievances, which could have been raised at an earlier stage of the #proceedings, at a later date if the outcome was unfavourable. For example, a #challenge must be made immediately after knowledge of the #ground for challenge, with the consequence that otherwise it is forfeited.

FSCD 141 III 210 [216]

A party which considers that its #right to be heard is violated, or that another procedural error has been made, must complain about it immediately.

FSCD 127 III 576 [(2002) ASA p. 480], FSCD 119 II 386 [388], FSCD 116 II 639 [644], *FSCD 113 Ia 67 [67], FSCD 4A_668/2016 c. 3.1, FSCD 4A_690/2016 c. 3.1, FSCD 4A_392/2015 c. 4.2, FSCD 4A_54/2015 c. 3.1, FSCD 4A_620/2012 c. 4.2, FSCD 4A_682/2012 c. 3.1, FSCD 4A_16/2012 c. 3.3, FSCD 4A_617/2010 c. 3.1, FSCD 4P.129/2002 c. 7.1, FSCD 4P.212/1999 c. 3a, FSCD 25.11.1997 c. 3a, FSCD 25.07.1997 [(2000) ASA p. 103], FSCD 28.01.1997 [(1998) ASA p. 125], FSCD 21.06.1995 [4P.243/1994] c. 3a, FSCD 17.08.1994 [(1995) ASA p. 203], FSCD 15.12.1992 c. 3, *VS 02.12.2005 c. 3a

A party complaining of a violation of the #right to be heard, or of another procedural error, has to undertake all reasonable steps in order to be treated equally and to be heard, as soon as it becomes aware of the procedural flaw or could have become aware of it, if it had taken reasonable care. It is contrary to the principle of #good faith to only claim a procedural error in the context of the setting aside proceedings, even though the party would have had the possibility during the #arbitral proceedings to give the #arbitral tribunal the opportunity to cure the flaw by filing an appropriate #grievance.

FSCD 127 III 576 [(2002) ASA p. 480], FSCD 119 II 386 [388], FSCD 116 II 639 [644], *FSCD 113 Ia 67, FSCD 4A_668/2016 c. 3.1, FSCD 4A_690/2016 c. 3.1, FSCD 4A_173/2016 c. 2.1, FSCD 4A_428/2015 c. 3.1, FSCD 4A_54/2015 c. 3.1, FSCD 4A_324/2014 c. 3.2.2, FSCD 4A_178/2014 c. 5.7, FSCD 4A_620/2012 c. 4.2, FSCD 4A_476/2012 c. 3.1, FSCD 4A_407/2012 c. 3.1, FSCD 4A_244/2012 c. 3, FSCD 4A_682/2012 c. 3.1, FSCD 4A_16/2012 c. 3.3, FSCD 4A_617/2010 c. 3.1, FSCD 4A_254/2010 c. 2.3.2, FSCD 4P.129/2002 c. 7.1, FSCD 4P.212/1999 c. 3a, FSCD 25.07.1997 [(2000) ASA p. 103], FSCD 10.06.1996 [(2000) ASA p. 769]

A party which considers that its #right to be heard has been violated, or that another procedural error has been made, must complain thereof at the outset of the #arbitral proceedings. If it complains only after the rendering of an #award which is not favourable to it, it violates the principle of #good faith.

FSCD 119 II 386 [388], *FSCD 113 Ia 67, FSCD 4A_690/2016 c. 3.1, FSCD 4A_428/2015 c. 3.1, FSCD 4A_392/2015 c. 4.2, FSCD 4A_54/2015 c. 3.1, FSCD 4A_597/2013 c. 3.1, FSCD 4A_620/2012 c. 4.2, FSCD 4A_476/2012 c. 3.1, FSCD 4A_407/2012 c. 3.1, FSCD 4A_312/2012 c. 4.1, FSCD 4A_682/2012 c. 3.1, FSCD 4A_16/2012 c. 3.3, FSCD 4A_617/2010 c. 3.1, FSCD 4A_234/2010 c. 4.1 (not published in FSCD 136 III 605), FSCD 4P.17/2002 c. 2b, FSCD 4P.200/2001 c. 3a, FSCD 4P.114/2001 c. 3b, FSCD 17.07.1998 [4P.7/1998] [(2002) ASA p. 667], FSCD 15.06.1998 c. 2a, FSCD 28.05.1998 c. 2c, FSCD 25.11.1997 c. 3a, FSCD 25.07.1997 [(2000) ASA p. 103], FSCD 28.01.1997 [(1998) ASA p. 125], FSCD 10.06.1996 [(2000) ASA p. 769], FSCD 21.06.1995 [4P.243/1994] c. 3a, FSCD 17.08.1994 [(1995) ASA p. 203], FSCD 15.12.1992 c. 3, *VD 25.03.2003 c. 2

In order not to face the reproach of being late, the violation of the #right to be heard must be complained of before the #arbitral tribunal and not for the first time before the Federal Supreme Court.

FSCD 116 II 639 [644], FSCD 15.06.1998 c. 2a

It is not permissible to keep in reserve grievances concerning procedural defects which could have been rectified immediately and raise them only in the event of an unfavourable outcome of the #arbitral proceedings.

FSCD 4A_65/2018 c. 3.2.3.3.1, FSCD 4A_247/2017 c. 5.1.2

A party which considers itself to be a victim of a procedural error must raise this error straightaway in the #arbitral proceedings under penalty of foreclosure. Indeed, it is contrary to #good faith to only invoke a procedural error in the framework of the #appeal against the arbitral #award, even though the error could have been invoked during the #proceedings.

FSCD 4A_550/2017 c. 5.3.1, FSCD 4A_40/2018 c. 3.3.1, FSCD 4A_450/2017 c. 3.1, FSCD 4A_260/2017 c. 4.1, FSCD 4A_70/2015 c. 3.2.1, FSCD 4A_274/2012 c. 3.1, FSCD 4A_150/2012 c. 4.1, FSCD 4A_348/2009 c. 4

A party claiming to be harmed by a denial of the #right to be heard or any other procedural deficiency according to Article 190(2) PILA forfeits its right if it does not raise the issue in the #arbitral proceedings in a timely manner and does not take all appropriate steps to remedy the deficiency to the extent possible.

FSCD 4A_324/2014 c. 3.2.2

A remark made during the oral pleadings does not fulfil the requirements of a #grievance, especially when a violation of the #right to be heard is at stake.

FSCD 28.01.1997 [(1998) ASA p. 126]

The duty to react in time presupposes however that a means be at the disposal of the complaining party. Otherwise, the reproach not to complain immediately about a violation of the #right to be heard and to adopt a contradictory behaviour is groundless. In fact, the aforementioned duty does not request one to derogate from the applicable procedural rules and to seize the deciding authority without observing the possibilities, #time limits and forms provided for by the procedural rules. The principle of #good faith may not make up for the absence of a means of #appeal, in particular an #appeal of which the prerequisites provided for by the statute are not fulfilled.

FSCD 15.12.1992 c. 3

3.3.25 No Right to a Public Hearing

There is a right to a public #hearing in a case where there is a forced arbitration, where the applicant expressly requested a public #hearing and it was refused without any of the conditions listed in Article 6(1) ECHR being met and where there was a controversy on the #facts and the sanction imposed on the applicant was of an infamous nature, being likely to prejudice the applicant's professional integrity and recognition.

ECHR 02.10.2018 §§ 181-183

In principle, it is recognised that not only State courts, but also #arbitral tribunals must observe the guarantees flowing from the ECHR in their proceedings. Nevertheless, it is considered permissible for the parties to voluntarily submit to the #jurisdiction of an #arbitral tribunal that does not meet the requirements of Article 6 ECHR. If one takes into account the fact that it is not uncommon for #arbitral tribunals to be established (also) because the parties involved do not wish to make their dispute public, and if one also takes into account the practical difficulty of an #arbitral tribunal in conducting its proceedings in "public", it can be assumed that the parties to #arbitral proceedings waive the publicity of the proceedings. Accordingly, the conduct of public proceedings is not necessary, and the appeals authority has no reason to "make up" a public #hearing - which is provided for appeal proceedings pursuant to Section 243 fCCP/BS.

BS 11.11.2011 c. 4

3.3.26 Waiver of the Right to Be Heard

The Federal Supreme Court must review the issue of compliance with the #right to be heard in the context relevant to each arbitration without forgetting that a specific #waiver of this guarantee *ex ante* is admissible insofar as the decision in this respect is taken knowingly. This means that depending on the circumstanc-

es, different conclusions may be drawn as to compliance with the same aspect of the guarantee at issue provided of course that its core element was not affected.

FSCD 142 III 360 [363]

The #right to be heard is a fundamental right which is not subject to a limitation period and which the parties cannot validly waive. This is all the more true for #arbitral proceedings under the fConcordat, as the possibilities for the parties to be heard by an appeals instance are limited. However, one has to distinguish the essence of this right and the use which is made of it. Thus, a party may, by an express or implied #expression of intent, waive in advance, but based on sufficient knowledge of the consequences, certain aspects of the #right to be heard, e.g. to comment on the written submissions of the other party. Such a #waiver has to be made based on sufficient knowledge of the circumstances and should not be admitted without #good cause.

*VD 23.04.2008 c. 4b

3.4 Adversarial Proceedings

The principle of #adversarial proceedings guarantees to each party the right to comment on the #claims of the opposing party, to examine the #evidence submitted by it and to question it and to refute it with its own counter-evidence.

FSCD 142 III 360 [361], FSCD 133 III 139 [143], FSCD 130 III 35 [38], FSCD 119 II 386 [388-389], FSCD 117 II 346 [347-348], FSCD 116 II 639 [643], FSCD 4A_40/2018 c. 3.1, FSCD 4A_247/2017 c. 5.1.1, FSCD 4A_592/2017 c. 4.1.1, FSCD 4A_42/2016 c. 4.1, FSCD 4A_34/2015 c. 4.1.1 (not published in FSCD 141 III 495), FSCD 4A_486/2014 c. 6, FSCD 4A_70/2015 c. 3, FSCD 4A_440/2010 (not published in FSCD 137 III 85) c. 4.1, FSCD 4A_234/2010 c. 4.1 (not published in FSCD 136 III 605), FSCD 4A_220/2007 c. 8.1, FSCD 4P.104/2004 c. 5.3.1, FSCD 4P.117/2004 c. 2.1, FSCD 4P.196/2003 c. 4.1, FSCD 4P.167/2002 c. 2.1, FSCD 4P.200/2001 c. 3a, FSCD 4P.114/2001 c. 5a, FSCD 22.02.1999 [(1999) ASA p. 542], FSCD 13.11.1998 [(1999) ASA p. 535-536], FSCD 20.10.1998 c. 3a, FSCD 17.07.1998 [4P.7/1998] [(2002) ASA p. 668], FSCD 09.06.1998 [(1998) ASA p. 658], FSCD 22.01.1998 c. 4b, FSCD 28.01.1997 [(1998) ASA p. 125], FSCD 06.09.1996 [(1997) ASA p. 306], FSCD 11.05.1992 [(1992) ASA p. 396-397], FSCD 06.02.1992 c. 4a, FSCD 23.10.1989 [(1990) ASA p. 52]

The so-called right of reply [*Replikrecht*] does not depend on whether the submission is decisive for the outcome of the case. The exercise of the right of reply presupposes that the submissions filed by the other parties to the proceedings are served on the party.

FSCD 4P.104/2004 c. 5.3.1

The principle of #adversarial proceedings does not require that the parties should be able to answer each other's position indefinitely.

FSCD 4P.104/2004 c. 5.3.1

As for the other aspect of the #right to be heard derived from Article 29(2) FC, the principle of #adversarial proceedings is respected if every party has been given the possibility to invoke its means of defence, passivity equalling a #waiver to exercise this right. The #time limits given by the #arbitral tribunal have to be sufficient to allow the parties to submit their #evidence and to answer the

#evidence of the opposing party and every violation has to be immediately objected to, in order to respect the principle of #good faith in procedural matters.

FSCD 17.07.1998 [4P.7/1998] [(2002) ASA p. 668]

The principle of #adversarial proceedings does not prevent the #arbitral tribunal from taking into account a document in the file and to draw legal conclusions from it, even though this document has not been expressly referred to by the parties.

FSCD 22.01.1998 c. 4b

A violation of the principle of #adversarial proceedings has to be complained of during the course of the #arbitral proceedings.

FSCD 22.01.1998 c. 4b

Article 183

VI. Procedure 2. Provisional and Conserva- tory Measures

¹ Unless the parties have otherwise agreed, the arbitral tribunal may, on motion of one party, order provisional or conservatory measures.

² If the party concerned does not voluntarily comply with these measures, the arbitral tribunal may request the assistance of the State judge; the judge applies its own law.

³ The arbitral tribunal or the State judge may make the granting of provisional or conservatory measures subject to the provision of appropriate security.

VI. Verfahren 2. Vorsorgliche und sichernde Massnahmen

¹ Haben die Parteien nichts anders vereinbart, so kann das Schiedsgericht auf Antrag einer Partei vorsorgliche oder sichernde Massnahmen anordnen.

² Unterzieht sich der Betroffene nicht freiwillig der angeordneten Massnahme, so kann das Schiedsgericht den staatlichen Richter um Mitwirkung ersuchen; dieser wendet sein eigenes Recht an.

³ Das Schiedsgericht oder der staatliche Richter können die Anordnung vorsorglicher oder sichernder Massnahmen von der Leistung angemessener Sicherheiten abhängig machen.

VI. Procédure 2. Mesures provisionnelles et mesures conservatoires

¹ Sauf convention contraire, le tribunal arbitral peut ordonner des mesures provisionnelles ou des mesures conservatoires à la demande d'une partie.

² Si la partie concernée ne s'y soumet pas volontairement, le tribunal arbitral peut requérir le concours du juge compétent. Celui-ci applique son propre droit.

³ Le tribunal arbitral ou le juge peuvent subordonner les mesures provisionnelles ou les mesures conservatoires qu'ils ont été requis d'ordonner à la fourniture de sûretés appropriées.

VI. Procedura
2. Provvedimen-
ti cautelari e
conservativi

¹ Salvo diversa pattuizione delle parti, il tribunale arbitrale può, ad istanza di parte, ordinare provvedimenti cautelari e conservativi.

² Se la parte contro cui è ordinato il provvedimento non vi si sottopone spontaneamente, il tribunale arbitrale può chiedere la collaborazione del giudice competente; questi applica il suo proprio diritto.

³ Il tribunale arbitrale o il giudice possono subordinare l'attuazione dei provvedimenti cautelari o conservativi alla prestazione di adeguate garanzie.

1 *Jurisdiction of the Arbitral Tribunal (1)*

1.1 In General

The first assertion [*that the State courts always have exclusive #jurisdiction before the #constitution of the #arbitral tribunal*] is contrary to the wording of Article R37(3) #CAS Code according to which, before the transmission of the file to the #arbitral tribunal, the President of the seized Chamber has #jurisdiction to order #provisional measures. Contrary to a contractual #arbitration agreement which does not foresee another solution before the #constitution of the #arbitral tribunal for the parties, such a possibility is expressly stated in the #CAS Code.

VD 30.01.2018 c. III.d

With respect to the second assertion [*that the State courts must be seized in case of a particular emergency, for example in case of delay in the #constitution of the #arbitral tribunal due to the #challenge notably of the designated president*] it should be noted that the #CAS expressly foresees the possibility to obtain #provisional measures before the #constitution of the #arbitral tribunal, as well as a #challenge procedure in case of suspicion of partiality of the appointed President.

VD 30.01.2018 c. III.d

The parties are bound by an #arbitration agreement, establishing the exclusive #jurisdiction of the #CAS. In accordance with what is submitted by part of the doctrine, it is not arbitrary to consider that this exclusive #jurisdiction of the #CAS also applies to #provisional measures.

VD 05.12.2017 c. 3.4

Taking into account Article 10 PILA, State courts always have exclusive #jurisdiction before the #constitution of the #arbitral tribunal and also following the #constitution of the #arbitral tribunal, to the extent that the parties have excluded the #jurisdiction of the #arbitral tribunal. The State courts also have concurrent #jurisdiction with the #arbitral tribunal in order to ensure effective judicial protection. In a case where the State courts and the #arbitral tribunal have concurrent #jurisdiction, the principle of priority applies, according to which the authority seized first has #jurisdiction. One can however derogate from this principle in exceptional circumstances in case of a specific emergency.

VD 17.07.2014 c. 4bc

Article R37(1) of the #CAS Code confirms that until the referral to the #CAS, the State courts have exclusive #jurisdiction to order #provisional measures, after which the #arbitral tribunal and the State courts have concurrent #jurisdiction.

VD 17.07.2014 c. 4bc

According to Article R37(2) of the #CAS Code, State courts are also excluded from #proceedings concerning #provisional measures. This provision also regulates the issue of functional #jurisdiction.

BE 19.04.2012 c. III.2.c

Like Article 374 CCP, Article 183 PILA, which regulates #provisional measures within the framework of international arbitration, does not establish the exclusive #jurisdiction of the #arbitral tribunals to issue #provisional measures. The question, however, is whether the parties can bindingly determine the exclusive #jurisdiction of the #arbitral tribunal for #provisional measures. Since the parties are the masters of the proceedings, the question must in principle be answered in the affirmative.

BE 19.04.2012 c. III.2.e

The #CAS is a permanent #arbitral tribunal which is responsible worldwide for the resolution of all disputes in the field of sport in #arbitral proceedings and mediation (cf. Art. S12 #CAS Code). Since #provisional measures are expressly provided for in the #CAS Code and the #CAS is a permanent #arbitral tribunal which does not have to be constituted first, the exclusion of the State courts does not affect the right to effective legal protection or the guarantee of justice. Thus, the procedural guarantees of the FC (cf. Art. 29 et seq. FC) are not violated either.

BE 19.04.2012 c. III.2.f

In international relations, the #CAS was already responsible for #provisional measures before 2011 [*entry into force of the CCP*]. Within the framework of domestic arbitration, the parties may also regulate the proceedings themselves or by reference to arbitration rules (cf. Art. 373(1) CCP). They are thus also "master of the proceedings" in domestic #arbitral proceedings. The creation of a special #arbitral tribunal in the field of sports law was intended to circumvent ordinary State courts. The #CAS can decide on #provisional measures within a reasonable period of time and has in-depth expertise and a wealth of experience in sports law. It is also not clear why the present proceedings should be conducted differently from proceedings concerning the same issue in the international arena, especially as the present case mainly concerns an (enforcement) decision of the Swiss Football Association, based on a corresponding order of FIFA. Each member of the Swiss Football Association is bound by the rules - here the "*clause compromissoire*" - to which it undertook to be bound upon accession, otherwise an efficient and orderly (sports) operation would be excessively impeded or rendered impossible.

BE 19.04.2012 c. III.2.f

On the other hand, an exclusion of the State courts for #provisional measures would represent a disadvantage for the applicant insofar as the latter - after having obtained a #provisional measure from the #arbitral tribunal - would additionally have to request the State courts for #enforcement if the opposing party did not voluntarily submit to the measure (cf. Art. 374(2) CCP). In such a case, a #provisional measure procedure before an #arbitral tribunal could actually take longer than before a State court.

BE 19.04.2012 c. III.2.g

The #jurisdiction of the #arbitral tribunal to order #provisional or #conservatory measures does not prevent the parties from requesting such measures from the State courts.

VD 27.09.2011 c. IV d

The issue of whether it is possible to waive the right to request #provisional measures from State courts is left undecided.

VD 27.09.2011 c. IV c

It is generally admitted under Swiss law that State courts retain #jurisdiction to order #provisional measures in parallel with the #jurisdiction of the #arbitrators to order such measures. In this regard, Article 183(1) PILA does not exclude the #jurisdiction of the State judge.

GE 08.09.2010 c. 2

1.2 No Appeal of Decision on Provisional Measures

➤ See Article 190(1) PILA, section 1.4

A simple procedural order which may be modified or revoked during the proceedings cannot be appealed before the Federal Supreme Court. The same applies with respect to a decision on #provisional measures foreseen by Article 183 PILA.

FSCD 143 III 462 [464], FSCD 4A_384/2017 c. 1.2, FSCD 4A_692/2016 c. 2.3, FSCD 4A_446/2014 c. 3.1

Save in the case where the #arbitrator issues an actual #award on #provisional measures (as determined by its content and not the name attributed to it), it is not possible to bring an application to set aside against a decision on #provisional measures as it is not a final, partial or preliminary #award.

FSCD 136 III 200 [203], FSCD 4A_524/2016 c. 2.1, FSCD 4A_222/2015 c. 3.1.1, FSCD 4A_614/2010 c. 2.1, VD 17.07.2014 c. 4c

2 *Enforcement of Measures (2)*

2.1 No Coercive Power of the Arbitral Tribunal

The PILA does not give the #arbitrators any coercive powers. Therefore, a decision of the #arbitral tribunal on #provisional and #conservatory measures is not enforceable, so that the effectiveness of the measures ordered pursuant to Article 183 PILA is limited.

GE 08.02.1990 [(1990) SJ p. 199]

2.2 Competent Cantonal Courts

According to Article 380(3) fCCP/BE, the president of the tribunal at the #seat of the arbitration has #jurisdiction over the decisions and the tasks of Articles 179, 180, 183 to 185 and 193 PILA. The provisions on #summary proceedings (Art. 305 et seq. fCCP/BE) are to be applied by analogy.

FSCD 119 Ia 421 [422]

If the #arbitrators request the collaboration of a State court in order to force a party to comply with the measures they ordered, they do not necessarily address this request to the judge at the #seat of the #arbitral tribunal, but to the judge which has #jurisdiction to order the #provisional measures, be it the judge of the domicile of the party in question, or the judge at the place of the goods forming the #subject-matter in dispute.

GE 08.02.1990 [(1990) SJ p. 199-200]

2.3 Relationship with Article 10 PILA

An #arbitration agreement providing for the #seat of the #arbitral tribunal abroad does not prevent a Swiss court which has #jurisdiction pursuant to Article 10 PILA from ordering #provisional measures, even if these measures are in connection with #arbitral proceedings pending abroad.

ZG 20.10.1989 [(1989-90) GVP p. 108]

3 *Security (3)*

Article 184

VI. Procedure 3. Taking of Evidence

¹ The arbitral tribunal shall conduct the taking of evidence itself.

² If the assistance of State judiciary authorities is necessary for the taking of evidence, the arbitral tribunal or a party with the consent of the arbitral tribunal, may request the assistance of the State judge at the seat of the arbitral tribunal; the judge shall apply its own law.

VI. Verfahren 3. Beweisauf- nahme

¹ Das Schiedsgericht nimmt die Beweise selber ab.

² Ist für die Durchführung des Beweisverfahrens staatliche Rechtshilfe erforderlich, so kann das Schiedsgericht oder eine Partei mit Zustimmung des Schiedsgerichtes den staatlichen Richter am Sitz des Schiedsgerichtes um Mitwirkung ersuchen; dieser wendet sein eigenes Recht an.

VI. Procédure 3. Administra- tion des preuves

¹ Le tribunal arbitral procède lui-même à l'administration des preuves.

² Si l'aide des autorités judiciaires de l'Etat est nécessaire à l'administration de la preuve, le tribunal arbitral, ou les parties d'entente avec lui, peuvent requérir le concours du juge du siège du tribunal arbitral; ce juge applique son propre droit.

VI. Procedura 3. Assunzione delle prove

¹ Il tribunale arbitrale procede lui stesso all'assunzione delle prove.

² Se per l'esecuzione della procedura probatoria è necessaria l'assistenza delle autorità giudiziarie dello Stato, il tribunale arbitrale o, con il suo consenso, una parte può chiedere la collaborazione del giudice del luogo di sede del tribunale arbitrale; questo giudice applica il suo proprio diritto.

1 *Taking of Evidence by the Arbitral Tribunal (1)*

1.1 In General

➤ See also Article 182(3) PILA, section 3.3.5

The right to #equal treatment and the #right to be heard do not require that the #arbitral tribunal introduce the #evidentiary proceedings by an evidentiary order [*Beweisbeschluss*], similar to the provisions of the fCCP/ZH in order to ensure that the tribunal and the parties are informed about the taking of #evidence.

FSCD 116 II 639 [644]

Article 29 FC [*Art. 4 fFC*] and Article 182(3) PILA do not provide for any right to a formal decision on the #evidence [*Beweisbeschluss*].

FSCD 116 II 639 [644], FSCD 28.05.1998 c. 2d, FSCD 21.06.1995 [4P.243/1994] c. 3d

The #arbitral tribunal must take all #evidence offered in due form and time, as long as it is material.

FSCD 4P.167/2002 c. 2.1, *FSCD 106 II 170 [171]

The decision of a State court on the taking of #evidence does not prejudice the decision of an #arbitral tribunal on a similar request in parallel #proceedings.

GE 15.10.1999 [(2000) ASA p. 802]

1.2 Taking of Evidence and Stay of the Proceedings

Evidentiary problems may not justify a #stay of the proceedings. The possibility of the absence of #evidence is a risk inherent to civil procedure. In such cases, the provisions regarding the #burden of proof are decisive.

FSCD 119 II 386 [390]

In order to alleviate the severity of this solution, the legislator leaves open, in principle, to the party which was not able to offer the conclusive #evidence in time, the possibility of #revision. This means is also available in the context of the proceedings of Articles 176 et seq. PILA, even if not explicitly mentioned. It is true that the #arbitral tribunal may #stay the proceedings pending a decision in another matter in order to resolve a #preliminary question. However, the party in question cannot invoke its #right to be heard to impose a #stay.

FSCD 119 II 386 [390]

2 State Judicial Assistance (2)

2.1 Competent Cantonal Court

According to Article 380(3) fCCP/BE, the president of the tribunal at the #seat of the arbitration has #jurisdiction over the decisions and the tasks of Articles 179, 180, 183 to 185 and 193 PILA. The provisions on #summary proceedings (Art. 305 et seq. fCCP/BE) are to be applied by analogy.

FSCD 119 Ia 421 [422]

2.2 Individual Cases

The fact that the #arbitral tribunal does not *ex officio* request judicial assistance without having been invited to do so by one of the parties, does not constitute a violation of the #right to be heard, and more specifically of the right of the parties to participate in the #taking of evidence. There is only a violation of these rights if the #arbitral tribunal rejects without valid reason the request of one of the parties aiming at obtaining judicial assistance for the taking of relevant #evidence.

FSCD 119 II 271 [(1993) ASA p. 408]

The #appellant could have invoked Article 184(2) PILA in order to request the intervention of the State court at the #seat of the arbitration to try to obtain, if necessary, by #letters rogatory, disclosure of the sources upon which a third party based its forecasts and how it was prepared.

FSCD 4A_34/2015 c. 4.3.2 (not published in FSCD 141 III 495)

For the summons by the *Tribunal de première instance* of Geneva ordering a #witness having its domicile in Geneva to appear before an #arbitral tribunal having its #seat in Geneva according to Articles 320, 324(1) and (2), & 327 fCCP/GE, see GE 15.10.1990 [(1994) ASA p. 306] and GE 09.05.1990 [(1990) ASA p. 283]

Article 185

**VI. Procedure
4. Other
Judicial
Assistance**

For any further judicial assistance, the State judge at the seat of the arbitral tribunal shall have jurisdiction.

VI. Verfahren
4. Weitere
Mitwirkung des
staatlichen
Richters

Ist eine weitere Mitwirkung des staatlichen Richters erforderlich, so ist der Richter am Sitz des Schiedsgerichts zuständig.

VI. Procédure
4. Autres cas du
concours du
juge

Si l'aide de l'autorité judiciaire est nécessaire dans d'autres cas, on requerra le concours du juge du siège du tribunal arbitral.

VI. Procedura
4. Ulteriore
collaborazione
del giudice

Se è necessaria un'ulteriore collaborazione giudiziale, il giudice competente è quello del luogo di sede del tribunale arbitrale.

1 Extension of the Arbitrator's Office

The granting of an extension of the office of an #arbitral tribunal is within the scope of the cooperation by the State court pursuant to Article 185 PILA.

ZH 02.06.1992 p. 3-4

2 Appointment, Challenge and Replacement of an Arbitrator

The State court's #jurisdiction with respect to the appointment of an #arbitrator is subject to the substantive law prerequisite that there is no agreement between the parties on the appointment, #challenge and replacement of the #arbitrators.

ZH 25.08.2004 c. 3

3 Competent Cantonal Court

According to Article 380(3) fCCP/BE, the president of the tribunal at the #seat of the arbitration has #jurisdiction over the decisions and the tasks of Articles 179, 180, 183 to 185 and 193 PILA. The provisions on #summary proceedings (Art. 305 et seq. fCCP/BE) are to be applied by analogy.

FSCD 119 Ia 421 [422]

Article 186

VII. Jurisdiction

¹ The arbitral tribunal shall decide on its jurisdiction itself.

^{1bis} It shall decide on its jurisdiction notwithstanding an action on the same matter between the same parties already pending before a State Court or another arbitral tribunal, unless there are serious reasons to stay the proceedings.

² A plea of lack of jurisdiction must be raised prior to any defence on the merits.

³ The arbitral tribunal shall, as a rule, decide on its jurisdiction by a preliminary award.

VII. Zuständigkeit

¹ Das Schiedsgericht entscheidet selbst über seine Zuständigkeit.

^{1bis} Es entscheidet über seine Zuständigkeit ungeachtet einer bereits vor einem staatlichen Gericht oder einem anderen Schiedsgericht hängigen Klage über denselben Gegenstand zwischen denselben Parteien, es sei denn, dass beachtenswerte Gründe ein Aussetzen des Verfahrens erfordern.

² Die Einrede der Unzuständigkeit ist vor der Einlassung auf die Hauptsache zu erheben.

³ Das Schiedsgericht entscheidet über seine Zuständigkeit in der Regel durch Vorentscheid.

VII. Compétence

¹ Le tribunal arbitral statue sur sa propre compétence.

^{1bis} Il statue sur sa compétence sans égard à une action ayant le même objet déjà pendante entre les mêmes parties devant un autre tribunal étatique ou arbitral, sauf si des motifs sérieux commandent de suspendre la procédure.

² L'exception d'incompétence doit être soulevée préalablement à toute défense sur le fond.

³ En général, le tribunal arbitral statue sur sa compétence par une décision incidente.

VII. Competenza

¹ Il tribunale arbitrale decide da sé sulla propria competenza.

^{1bis} Il tribunale arbitrale decide sulla propria competenza anche quando un'azione concernente lo stesso oggetto è già pendente tra le stesse parti dinanzi a un tribunale statale o a un altro tribunale arbitrale, salvo che seri motivi richiedano una sospensione della procedura.

² L'eccezione d'incompetenza dev'essere proposta prima di qualsiasi atto difensivo nel merito.

³ Sulla propria competenza il tribunale arbitrale decide di regola in via pregiudiziale.

1 Own Jurisdiction (1)

1.1 Principle

- For the #motion to set aside based on a violation of the rules on #jurisdiction, see Article 190(2)(b) PILA
- For the #arbitration defence, see Article 178(3) PILA, section 3.8, and Article II(3) NYC

Swiss law gives priority to the #arbitral tribunal to decide on its own #jurisdiction, if this #jurisdiction is contested before it (Art. 8 fConcordat).

FSCD 128 III 50 [59-60], FSCD 121 III 495 [501-502], FSCD 121 III 38 [41], FSCD 120 II 155 [164], FSCD 118 Ia 20 [26-27], GE 17.02.2006 [C/10108/2004] c. 2.3

The authority of the #arbitral tribunal to decide on its own #jurisdiction does not mean that a State court seized by the same claim is deprived of the right to decide on its own #jurisdiction. Nor does it follow from this provision that the State court is obliged to #stay the proceedings, if they are prior, in order to give priority to the #arbitral tribunal. The rule concerning *#lis pendens* of Article 9 PILA applies, and this rule gives priority to the tribunal which is seized first.

FSCD 127 III 279 [286] [*since the entry into force of Article 186(1bis) PILA on 1 January 2007, this ruling has to be read with caution*]

The situation is only different – except for the disputed #admissibility of a declaratory #action regarding the existence, the #validity or the effects of an #arbitration agreement – if the State courts are first seized by a claim on the #merits and if an #arbitration defence is raised before the State court. If the State court declines its #jurisdiction, the #arbitral tribunal later seized is not bound by the State court's decision.

FSCD 120 II 155 [164]

However, if the State court admits its #jurisdiction, the #arbitral tribunal is bound because of the *#res judicata* effect of the decision.

FSCD 120 II 155 [164]

1.2 Requirements for the Jurisdiction of the Arbitral Tribunal

The #arbitral tribunal has #jurisdiction:

- if the #subject-matter in dispute is arbitrable within the meaning of Article 177 PILA;
- if the #arbitration agreement is valid within the meaning of Article 178 PILA with regard to its formal and substantive #validity;
- if the dispute falls within the scope of application of the #arbitration agreement; and
- if the parties had the #capacity and the authority to conclude such an agreement.

FSCD 118 II 353 [355], FSCD 06.09.1996 [(1997) ASA p. 299], FSCD 16.05.1995 [(1996) ASA p. 669]

1.3 Examination of the Requirements for Jurisdiction

1.3.1 In General

It is undoubtedly up to the #arbitral tribunal to examine whether the submitted dispute falls within its own #jurisdiction or within the #jurisdiction of the State courts, to decide whether a person called before it is bound or not by the #arbitration agreement. Therefore, from the point of view of #jurisdiction, the existence, the #validity and the scope of application of the #arbitration agreement are inseparable issues.

FSCD 128 III 50 [54], FSCD 120 II 155 [163-164], FSCD 4P.126/2001 c. 2a, GE 30.09.1998 [(1999) RSDIE p. 629]

Contrary to Article 8 fConcordat, Article 186 PILA does not list the questions on which the #arbitrator is authorised to decide in the context of the examination of its #jurisdiction.

FSCD 31.01.1992 c. 1a

1.3.2 Arbitrability

- See Article 177 PILA

1.3.3 Existence and Validity of the Arbitration Agreement

- See also Article 178 PILA

The #arbitral tribunal's #jurisdiction to decide the issue of the existence and #validity of an #arbitration agreement is not exclusive. Depending on the circumstances, another authority could have #jurisdiction to decide this question: this could be, e.g., the Swiss court confronted with an #arbitration defence (Art. 7 PILA) or – with limited #powers of review – the court requested to appoint an #arbitrator (Art. 179(3) PILA), or even another #arbitral tribunal, in the case of several #arbitration agreements. The conflicts which possibly result from this multitude of #jurisdictions have to be resolved by the rules governing the *#lis pendens* (Art. 9 PILA), the *#res judicata* or the #recognition and #enforcement of foreign #awards (Art. 25 et seq. PILA).

FSCD 127 III 279 [284], FSCD 121 III 495 [502] [*since the entry into force of Article 186(1bis) on 1 January 2007, this ruling has to be read with caution*]

When deciding on its own #jurisdiction, the #arbitral tribunal has in particular to examine the question of the existence and of the #validity of the #arbitration agreement.

FSCD 121 III 495 [501]

In this context, it is possible that the #arbitral tribunal also has to examine, at the request of the #respondent, whether a valid #arbitration agreement has been subsequently terminated by an agreement between the parties bound by it.

FSCD 121 III 495 [501]

Such #jurisdiction regarding decisions on repeal also logically include questions related to whether the agreement between the parties terminating the #arbitra-

tion agreement has been validly concluded or not, so that the said #arbitration agreement remains in force.

FSCD 121 III 495 [502]

1.3.4 Material Scope of Application of the Arbitration Agreement

- See also Article 178(2) PILA, section 2.10; and Article 190(2)(b) PILA, section 2b.12.8

An #arbitral tribunal only has #jurisdiction if, among other conditions, the dispute is covered by the #arbitration agreement.

FSCD 4P.60/2000 c. 3a, FSCD 06.09.1996 [(1997) ASA p. 299]

The #jurisdiction of the #arbitral tribunal presupposes that the #prayers for relief, respectively the #facts on which they are based, are covered by the #arbitration agreement. It is decisive from which factual circumstances #claimant wants to derive its claims; it is therefore inevitable and not objectionable that the claims are based on mere #claims.

FSCD 23.03.1999 c. 5a

As the #arbitral tribunal examines its #jurisdiction on the basis of the #request for arbitration, a later change in the grounds for the #claim - provided this is admissible under the applicable procedural rules - raises again the question of #jurisdiction.

FSCD 23.03.1999 c. 5a

The #jurisdiction of the #arbitral tribunal is determined according to the content of the #arbitration agreement, which must be determined by an #interpretation of the contractual provision. This #interpretation is not an empirical one but a normative one. This is why the Federal Supreme Court has unfettered #powers of review in the context of the #adversarial maxim. Contractual provisions have to be interpreted according to the principle of #good faith taking into account the circumstances of the conclusion of the contract and according to the meaning that reasonable parties would give to the wording of the contract. The court has to consider a reasonable #interpretation because it should not be assumed that the parties wanted an inappropriate solution.

FSCD 17.08.1995 [(1996) ASA p. 677-678]

Once the existence of an #arbitration agreement is established, there is no reason to interpret it restrictively. On the contrary it has to be assumed that the parties want, by concluding an #arbitration agreement, an all-encompassing #jurisdiction of the #arbitral tribunal.

ZH 22.05.1990 p. 15

1.3.5 Personal Scope of Application of the Arbitration Agreement

- See also Article 178(2) PILA, section 2.11; and Article 190(2)(b) PILA, section 2b.12.7

When the #arbitrators examine whether they have #jurisdiction, they have to resolve, among other issues, the question of the personal scope of application of

the #arbitration agreement. They have in particular to determine which parties are bound by the #arbitration agreement, and, as the case may be, whether one or several third parties who are not mentioned nevertheless enter into the scope of application.

FSCD 134 III 565 [567], FSCD 129 III 727 [733], FSCD 128 III 50 [54], FSCD 117 II 94 [98], FSCD 4A_232/2013 c. 3.2, FSCD 4A_627/2011 c. 3.2, FSCD 4A_376/2008 c. 8.3, FSCD 4P.126/2001 c. 2a, FSCD 4P.290/2000 c. 3b, FSCD 22.12.1992 [(1996) ASA p. 648]

When deciding on its own #jurisdiction, the #arbitral tribunal has to examine the #preliminary questions on which this #jurisdiction depends, such as whether the disputed claim, including the #arbitration agreement, has been validly assigned to the #claimant.

FSCD 128 III 50 [59-60], FSCD 09.07.1996 [4P.289/1995] c. 2a

It is without doubt up to the #arbitral tribunal to examine whether the submitted dispute is within its own #jurisdiction or within the #jurisdiction of the State courts, and to decide whether a person called before it is bound or not by the #arbitration agreement. Therefore, with regard to #jurisdiction, the questions of existence, #validity and scope of application of the #arbitration agreement are inseparable issues.

FSCD 120 II 155 [163-164]

1.3.6 Parties' Capacity and Authority

- See Article 178(2) PILA, section 2.11.13

1.3.7 Distinction between Treaty and Contract Claims

In international investment disputes, the procedural phase of protecting foreign investors against acts of the host State that infringe their rights, involves a fundamental distinction between contract claims and treaty claims: the first are claims that investors raise on the basis of the contract they have concluded with the host State or with another public person dependent on that State; the second are those based on a treaty concluded between the national State of investors and the host State for the mutual protection of their investors.

FSCD 144 III 559 [563], FSCD 141 III 495 [497-498]

#Investment protection treaties, whether bilateral or multilateral, contain substantive commitments taken from the past practice of international courts in the field of general international law, such as the requirement of fair and equitable treatment, the prohibition of discriminatory measures or the prohibition of expropriations and nationalisations without compensation. These treaties mainly contain a jurisdictional clause under which each State accepts in advance, for the benefit of national investors of the other State or States investing in its territory, that investment disputes may be brought against it by the investor before an independent #arbitral tribunal.

FSCD 141 III 495 [498]

Contract claims, on the other hand, are outside of the scope of the #investment treaty protection and its jurisdictional clauses. They should be brought before the

national courts of the host State or, if the investment contract contains an #arbitration agreement, the #arbitral tribunal designated by that clause.

FSCD 141 III 495 [498]

The risk is great for an investor who complains of a breach of the contract concluded with the host State, to have its contract claims left unanswered or to be dismissed by the courts of that same State, which are too favourable to a public law corporation of which they are part, or even obliged to act before an #arbitral tribunal lacking #independence. This is why some have had the idea of including in the investment protection treaties a compliance clause, also known as a cover clause, an elevator clause or a mirror effect clause, but more often than not called an #umbrella clause. Whatever its name, this clause refers to the provision of an #investment treaty by which each State party undertakes, in varying formulations, to respect any obligation concerning investments made by nationals of the other State.

FSCD 141 III 495 [498-499]

In other words, the #umbrella clause places the contract concluded by the investor with the host State directly under the protection of the bilateral or multilateral #investment treaty, which in a way shelters the contract under its umbrella, so that any breach of a contractual obligation is *ipso facto* coupled with a breach of an international commitment and the resulting claims can be invoked before the judicial body provided for by the treaty. This body will most often be an #arbitral tribunal acting under the aegis of an international arbitration institution, such as ICSID.

FSCD 141 III 495 [499]

1.4 Ex Officio Examination of Jurisdiction

1.4.1 Participating Parties

It seems to be doubtful whether the #arbitrators have a duty to examine the issue of their #jurisdiction under all aspects - which can be numerous - and to analyse *ex officio* whether circumstances, which do not have any relationship to the ones which have been raised in the defence of lack of #jurisdiction could oblige them to deny their #jurisdiction.

FSCD 128 III 50 [61], FSCD 4A_65/2018 c. 3.2.3.3.1

The #arbitral tribunal does not have to examine its #jurisdiction *ex officio*.

ZH 22.05.1990 p. 10

1.4.2 Defaulting Party

Pleadings on the #merits presuppose necessarily #implied actions of the party contesting the #arbitral tribunal's #jurisdiction, i.e. the participation of the party in the #arbitral proceedings. In other words, the consequences which the law attaches to pleadings on the #merits have effect only if the proceedings take place in an #adversarial way, a defaulting party not being able to cure the lack of #jurisdiction as it does not plead on the #merits. Therefore, the principle of #procedural economy justifies that the constituted #arbitral tribunal decides *ex*

officio – and preferably by a directly challengeable interim *award* – on its jurisdiction with regard to the defaulting party.

FSCD 120 III 155 [162], FSCD 4A_682/2012 c. 4.4.2.1

The *arbitral* tribunal must examine its jurisdiction *ex officio* in the light of the information available without having to go beyond or to conduct its own investigations.

FSCD 4A_676/2014 c. 3.2.3.1, FSCD 4A_682/2012 c. 4.4.2.1

1.5 Doubly Relevant Facts

➤ See also Article 190(2)(b) PILA, section 2b.12.10

When *facts* which are decisive as to the jurisdiction of the *tribunal* are also decisive as to the *merits* of the claim – in such a case, one refers to *doubly relevant facts* or to double relevance – the gathering of the *evidence* as to such *facts* is deferred to the stage in the proceedings during which the *merits* of the claim will be examined. This is the case in particular when jurisdiction depends on the nature of the claim.

FSCD 141 III 495 [508]

However, the theory of double relevance is exceptional and does not come into consideration when the jurisdiction of an *arbitral* tribunal is challenged because a party may not be compelled to accept that such a *tribunal* would decide as to its disputed rights and obligations if it has no jurisdiction to do so.

FSCD 143 III 462 [465], FSCD 141 III 495 [508], FSCD 128 III 50 [56-57], FSCD 121 III 495 [503], FSCD 4A_222/2015 c. 3.1.2, FSCD 4A_515/2012 c. 5.3.2.2, NE 28.04.2016 c. 1

According to the theory of *doubly relevant facts*, it is sufficient, depending on the circumstances, in order to admit the jurisdiction of a court, that the *facts* alleged with a certain likelihood on the basis of a claim represent at the same time the prerequisite of this jurisdiction and the necessary grounds for the claim asserted before the court.

FSCD 128 III 50 [56], FSCD 121 III 495 [503], FSCD 4A_515/2012 c. 5.3.2.2,

An *arbitral* tribunal which decides in an interim *award* on its jurisdiction, has to examine, without reservation, objections concerning the existence and the *validity* of a procedural agreement on which its jurisdiction depends, even if these objections overlap with those arising against the *validity* of the main contract, for instance when a contract is challenged because of a *defect* in consent.

FSCD 121 III 495 [502-503]

It is correct that the *arbitrators* then have to decide at the same time on the *validity* of the main contract. However, this is an inevitable consequence, which they could only avoid by not rendering an interim *award* on jurisdiction because the plea of lack of jurisdiction is too closely related to the decision on the *merits* to be taken separately.

FSCD 121 III 495 [503]

Therefore, if the #validity of the #arbitration agreement depends on the existence and the #validity of the main contract, the #arbitral tribunal can only admit its #jurisdiction if it admits the #validity of the main contract. This is why the #arbitral tribunal has to examine this issue thoroughly when rendering a decision on #jurisdiction.

FSCD 121 III 495 [503]

The issue in dispute effectively called into question the #jurisdiction of the #arbitral tribunal even though it also concerned the #standing to sue. It concerns a doubly relevant issue – the existence of a debt of X against B, on the basis of the tripartite contract, being a #preliminary issue with respect to the main issue consisting in deciding on the #jurisdiction or not of the #arbitral tribunal – that the #arbitral tribunal was obliged to deal with either in its preliminary #award or, as it did so, in its final #award.

FSCD 4A_34/2016 c. 3.4.1

As part of the examination of its #jurisdiction, the question whether the parties are bound by the #arbitration agreement has to be examined with unfettered #powers of review, even if this question depends on #facts which are also relevant for the examination of the #merits.

FSCD 4P.226/2004 c. 4.3.3

1.6 Binding Effect of the Decision on Jurisdiction of a Foreign State Court

If a foreign State court has admitted its #jurisdiction by a judgment which has to be recognised in Switzerland, the #arbitral tribunal having its #seat in Switzerland is bound by this decision.

FSCD 136 III 345 [348], FSCD 127 III 279 [284], FSCD 120 II 155 [164] [*since the entry into force of Article 186(1bis) PILA on 1 January 2007, this ruling has to be read with caution*]

The conflicts which possibly result from this multitude of #jurisdictions have to be resolved by the rules governing #lis pendens (Art. 9 PILA), #res judicata or the #recognition and #enforcement of foreign #awards (Art. 25 et seq. PILA).

FSCD 127 III 279 [284], FSCD 121 III 495 [502] [*since the entry into force of Article 186(1bis) PILA on 1 January 2007, this ruling has to be read with caution*]

1.7 Time Limit for the Filing of the Request for Arbitration

The view is *prima facie* convincing that the #time limit for bringing an #appeal before the #CAS (Art. 49 #CAS Code) must be considered as a peremptory #time limit which, if not complied with, does not result in a lack of #jurisdiction of the #CAS but entails the loss of the right to submit the decision under #appeal to any jurisdictional review and therefore the dismissal of the #appeal. However, it is not necessary to issue a definitive decision as to whether or not the failure to comply with the #time limit affects the #jurisdiction of the #CAS.

FSCD 4A_170/2017 c. 5.2, FSCD 4A_488/2011 c. 4.3.1

If the parties agreed that a #request for arbitration should be submitted to the #arbitral tribunal within a #time limit of 30 days after it was agreed that the difference or dispute could not be resolved by negotiations, this means that they wanted to exclude the #arbitrators' #jurisdiction after the expiry of this #time limit.

FSCD 17.08.1995 [(1996) ASA p. 678-679]

The #arbitration agreement according to which "the said difference or dispute shall be so referred by either party within the thirty days after it was agreed that the difference or dispute cannot be resolved by negotiation", does, notwithstanding the term "it was agreed", not require an express agreement between the parties on the failure of their negotiations.

FSCD 17.08.1995 [(1996) ASA p. 678]

1.8 Lack of Jurisdiction and *Res Judicata*

The fact that the #*res judicata* defence is granted does not entail that the #jurisdiction of the #arbitral tribunal has to be denied. In such a case, the #arbitral tribunal should render a decision not to hear the case based on #*res judicata* and not on lack of #jurisdiction. Therefore, even in the case of #*res judicata*, the #ground for challenge of Article 190(2)(b) PILA is not available. In such a case, only a violation of #public policy, i.e. the #ground for setting aside of Article 190(2)(e) PILA, could be envisaged.

FSCD 4A_633/2014 c. 2.4.2 (not published in FSCD 141 III 229), FSCD 1P.113/2000 c. 3b

1.9 Anti-Suit Injunction

Anti-suit injunctions are procedural prohibitions by which a court which considers itself to have #jurisdiction to decide an international dispute prohibits a party to proceedings pending before it from bringing an action before another (foreign) court whose #jurisdiction it considers to be non-existent or at least less well founded than its own, or from continuing proceedings there. These are actions with an identical or related #subject-matter or "parallel proceedings". Such anti-suit injunctions belong to the law on #jurisdiction and thus to the procedural law; they form a manifestation of the struggle for the (advantageous) #forum.

FSCD 138 III 304 [311-312]

In particular, courts from the Anglo-Saxon area enact anti-suit injunctions to prevent abusive forum-shopping. The cases of application are in particular the threatened or already initiated abusive conduct of litigation before foreign courts or the threatened or already occurred violation of agreements on #jurisdiction and arbitration or agreements concluded in a settlement on the subject matter of the settlement no longer to be litigated; further groups of cases form constellations in which several alternative fora are available or in which litigation abroad is perceived as grossly unfair.

FSCD 138 III 304 [312]

Anti-suit injunctions were declared by the ECJ in a preliminary ruling in 2004 as incompatible with the Brussels Convention (Convention of 27.09.1968 on

jurisdiction and the enforcement of judgments in civil and commercial matters (CFI [Court of First Instance]), even in the event that the party against whom the anti-suit injunction is granted starts legal proceedings before the other State court in bad faith and only to obstruct the proceedings already pending (judgment of the ECJ of 27.04.2004 in Case C-159/02 *Turner v. Grovit* 2004 ECR [European Court Reports] I-03565). The Court considered that it was an essential element of the principle of mutual trust between the Contracting States that, within the scope of the Convention, its rules on #jurisdiction, common to all the courts of the Contracting States, could be interpreted and applied by each of those courts with the same level of expertise. With limited exceptions, the Convention does not permit the #jurisdiction of a court to be reviewed by the court of another Contracting State. The prohibition by a court of the possibility for a party to bring an action before a foreign court or to continue proceedings before a foreign court affects its #jurisdiction to rule on the dispute (par. 24 of the judgment).

FSCD 138 III 304 [312-313]

In principle, this #case law must also be observed by the Swiss courts, insofar as the #jurisdiction regulated in the Lugano Convention is at stake. The Federal Supreme Court has never ruled on the #admissibility of anti-suit injunctions by Swiss courts outside the scope of the Lugano Convention. The Swiss doctrine is predominantly opposed to anti-suit injunctions, as they are contrary to civil law and constitutional law principles. In particular, it is argued that anti-suit injunctions are superfluous to deal with the problem of conflicting decisions. The principles on #*lis pendens* and #*res judicata* as well as the provisions on the #recognition and #enforcement of foreign judgments are sufficient for this, so that there is no interest in legal protection for the ordering of anti-suit injunctions which contradict the principle of #competence-competence. Such measures are problematic from the point of view of international consideration (comity) and also have the potential to escalate. There is a danger that the target court will subsequently pronounce an anti-anti-suit injunction, which would cut off the parties' access to both courts, with the result that not only will no contradictory judgments be pronounced, but none at all.

FSCD 138 III 304 [313-314]

Anti-suit injunctions do not violate the principles of public international law as they do not ignore the sovereignty of the States. To the contrary, their regularity with respect to the principles governing arbitration is more doubtful because they are contrary to the negative effect of #competence-competence, according to which State courts may decide on the #jurisdiction of an #arbitrator or an #arbitral tribunal only once the #arbitrators have already decided on their own #jurisdiction. It is true that this negative effect of the principle of #competence-competence is not as widely recognized as its positive effect, the NYC not appearing to recognize it (Art. II(3) NYC). However, the doctrine asserts that the use of an anti-suit injunction before the #arbitrators' decision on their own #jurisdiction is at least controversial. Be this as it may, the admission of an anti-suit injunction is subject, under English law, to strict requirements: first, the judge of the injunction must interpret the scope of application of the #arbitration agreement, and second, the judge has to assure that not to grant the injunction would cause a serious injustice to one of the parties.

GE 02.05.1995 c. C

The Swiss legal system does not know any “guardianship power” of the State courts over #arbitral tribunals. In fact, the Swiss legal system completely adheres to the principle of #competence-competence with respect to its positive effect (through the NYC which Switzerland has ratified (see also Art. 7 PILA)), as well as its negative effect (Art. 186 PILA). The #jurisdiction of a State judge to decide on the #validity of an #arbitration agreement – which can in any case not lead to an anti-suit injunction – exists only if the State judge itself is seized by an #arbitration defence, its #powers of review being limited if the #seat of the #arbitral tribunal is in Switzerland and unfettered if it is abroad (FSCD 122 III 139; FSCD 121 III 38).

GE 02.05.1995 c. C

1bis *Parallel Proceedings*

The #jurisdiction of two #arbitral tribunals seized by a claim with the same object is governed by Article 186(1bis) PILA and not by Article 181 PILA.

FSCD 4A_210/2008 c. 3.3.1.4

According to Article 186(1bis) PILA, an international #arbitral tribunal having its #seat in Switzerland would not suspend proceedings anyway if the same #subject-matter of the dispute between the same parties had first been brought before a foreign State court, but would decide on its #jurisdiction irrespective of the proceedings already pending before the foreign State court.

BS 24.04.2014 c. 2.9

2 *Plea of Lack of Jurisdiction Prior to Pleadings on the Merits (2)*

2.1 Application of the Principle of Good Faith

This provision is an application of the principle of #good faith of Article 2 CC which applies to all fields of law, including civil procedure and arbitration.

FSCD 143 III 578 [585], FSCD 143 III 462 [465], FSCD 128 III 50 [57], FSCD 119 II 386 [388], *FSCD 113 Ia 67 [67-68], FSCD 4A_392/2015 c. 3.2.1, FSCD 4A_172/2015 c. 3.1, FSCD 4A_634/2014 c. 3.1, FSCD 4A_682/2012 c. 4.4.2.1, FSCD 4A_386/2010 c. 5.2, BS 02.01.1984 [(1985) ASA p. 22]

2.2 Proceeding on the Merits without Reservation

The rule of Article 186(2) PILA, as well as the more general one contained in Article 6 PILA, implies that the #arbitral tribunal before which the #respondent proceeds on the #merits without reservation acquires #jurisdiction by this very fact, in and of itself. Therefore, the party proceeding on the #merits without reservation in contentious #arbitral proceedings concerning an arbitration matter recognises, by #implied actions, the #jurisdiction of the #arbitral tribunal and forfeits definitively the right to raise the plea of lack of #jurisdiction of this tribunal.

FSCD 143 III 578 [585], FSCD 143 III 462 [465-466], FSCD 128 III 50 [57-58], FSCD 120 II 155 [164-165], FSCD 4A_298/2018 c. 4.2, FSCD 4A_300/2018 c. 4.2, FSCD 4A_436/2017, FSCD 4A_392/2015 c. 3.2.1, FSCD 4A_172/2015 c. 3.1, FSCD 4A_634/2014 c. 3.1, FSCD 4A_682/2012 c. 4.4.2.1, FSCD 4A_314/2012 c. 4, FSCD 4A_386/2010 c. 5.2, FSCD 4A_210/2008 c. 3.3.1.2, FSCD 30.06.1994 [(1997) ASA p. 101]

The #respondent may submit subsidiary #prayers for relief with regard to the #merits in case the plea of lack of #jurisdiction is dismissed. Such behaviour does not constitute an implied acceptance of the #arbitral tribunal's #jurisdiction.

FSCD 143 III 462 [466], FSCD 128 III 50 [58], FSCD 4A_392/2015 c. 3.2.1, FSCD 4A_386/2010 c. 5.2

If Article 8(2) fConcordat and Article 186(2) PILA provide that lack of #jurisdiction must be pleaded prior to proceeding on the #merits, it is because a party summoned before an #arbitral tribunal without #jurisdiction can cure this lack of #jurisdiction by proceeding on the #merits and thereby force the #arbitral tribunal to decide an arbitrable dispute in which this party is involved.

FSCD 120 II 155 [162]

An #appellant who initiated the two #arbitral proceedings itself thereby assumed that the #arbitral tribunals had #jurisdiction and for that reason, the #appellant may not be heard in front of the Federal Supreme Court with an objection to #jurisdiction.

FSCD 4A_424/2008 c. 2.3

The meaning of Article 186(2) PILA is that the #waiver of the plea of lack of #jurisdiction must also apply to specific objections related to the issue of #jurisdiction, i.e. not only with regard to the #validity of the #arbitration

agreement but also to its content and its scope of application. As the #arbitral tribunal has to examine its #jurisdiction only to the extent that it is disputed, its #jurisdiction has to be regarded as admitted to the extent it is not disputed. This means that the parties are barred from raising before a State court deciding on a #motion to set aside specific objections which they have not raised before the #arbitral tribunal, even though they have in principle contested the #jurisdiction of the #arbitral tribunal.

ZH 22.05.1990 p. 8-9

When examining whether a party has submitted to the #jurisdiction of an #arbitral tribunal in ICC #arbitral proceedings, it has to be taken into account:

- that the decisions of the #ICC International Court of Arbitration on the #jurisdiction of the #arbitral tribunal are not subject to a #motion to set aside before the Federal Supreme Court;
 - that a party is not obliged, in accordance with the principle of #good faith, to repeat its objections to the participation of an #arbitrator challenged without success before the #ICC International Court of Arbitration at every procedural stage of the #arbitral proceedings, even if the objection is only raised at the time of the #constitution of the #arbitral tribunal; and
 - that the declaration of a party representative at the end of a #hearing according to which its client has been given the #right to be heard cannot be qualified as implied acceptance of the #arbitral tribunal's #jurisdiction, in particular if the declaration preformulated by the #arbitral tribunal according to which the parties' representatives would not raise any objections against the conduct of today's #hearing, has ultimately been cancelled.
- FSCD 30.06.1994 [(1997) ASA p. 102]

2.3 Interpretation of the Plea of Lack of Jurisdiction

It results from the system of the provisions related to international arbitration (Arts. 176 to 194 PILA) that the federal legislator, by placing first the rules regarding #arbitrability (Art. 177 PILA) and the #arbitration agreement (Art. 178 PILA) and much later the rule regarding the plea of lack of #jurisdiction, has showed that it attached more weight to the fundamental prerequisite of the existence of an #arbitration agreement binding on the parties than to the rule of Article 186(2) PILA, in order to ensure the correct and fair course of the #arbitral proceedings.

FSCD 128 III 50 [58]

The #arbitrators have to take these considerations into account when they examine whether their #jurisdiction is disputed. There is no doubt that the simple act of raising vague and very general reservations is in principle not sufficient to conclude that the #jurisdiction is disputed. On the other hand, the opposite conclusion must not necessarily be drawn on the sole ground that the #respondent did not use the traditional formula "plea of lack of #jurisdiction". This is why the #arbitrators, in order to know whether their #jurisdiction is disputed by the #respondent, have to interpret the wording used by this party and, if the #arbitral proceedings are governed by Swiss law, apply Article 18 CO by analogy, as the judge does who has to interpret the declarations of a party in a trial. It is up to the #arbitrators to determine the meaning which can be attributed, objectively

and according to the principle of #good faith, to the (written and oral) declarations of the #respondent, without limiting the examination to the terms used, but by taking into account all the circumstances in which these declarations have been made.

FSCD 128 III 50 [59]

If there exists a doubt as to whether a party has raised a defence of lack of #jurisdiction, this doubt has to be decided according to the widest #interpretation, and the existence of a global defence to include not only the #capacity to sue or to be sued but also the #capacity to be a party.

FSCD 128 III 50 [60]

2.4 Form of Jurisdictional Defence

Article 186(2) PILA is not mandatory as to the manner in which the jurisdictional defence must be raised. Hence, the arbitration rules provide for the specific form and #time limits.

FSCD 4A_634/2014 c. 3.1, FSCD 4A_682/2012 c. 4.4.2.1

2.5 Timeliness of the Plea of Lack of Jurisdiction

- For the timeliness of other pleas of procedural flaws, see Article 177(1) PILA, section 1.15; Article 190(2)(a) PILA, section 2a.9; Article 190(2)(b) PILA, section 2b.2; Article 190(2)(c) PILA, section 2c.10; Article 190(2)(d) PILA, section 2d.5; and Article 190(2)(e) PILA, section 2e.14.4

If the lack of #jurisdiction is not raised prior to any pleadings on the #merits, it is not possible any longer to plead a lack of #jurisdiction of the #arbitral tribunal as a #ground for setting aside based on Article 190(2)(b) PILA. The same applies to the plea of lack of #arbitrability.

FSCD 130 III 125 [129], FSCD 120 II 155 [158], FSCD 119 II 271 [(1993) ASA p. 406], FSCD 118 II 353 [355], FSCD 4A_436/2017, FSCD 4A_18/2008 c. 3.2, FSCD 4P.105/2006 c. 6.3, ZH 30.06.2003 p. 6

According to the principles of acting in #good faith and of the prohibition of an #abuse of right which also apply in procedural law, the parties have to raise objections with respect to the #jurisdiction or the #composition of the #arbitral tribunal as soon as possible. Delayed procedural objections which violate these principles may be disregarded because of #waiver.

FSCD 130 III 66 [75], FSCD 4A_173/2016 c. 2.1, FSCD 4A_428/2015 c. 3.1, FSCD 4A_54/2015 c. 3.1, FSCD 4A_597/2013 c. 2.1, FSCD 4A_476/2012 c. 3.1, FSCD 4A_386/2010 c. 5.2, FSCD 4A_124/2010 c. 6.3.3.1, FSCD 4A_18/2008 c. 3.2, FSCD 4P.105/2006 c. 4, ZH 30.06.2003 p. 6

Article 186(2) PILA is not mandatory as to the manner in which the jurisdictional defence must be raised. Hence, the arbitration rules provide for the specific form and #time limits.

FSCD 4A_634/2014 c. 3.1, FSCD 4A_682/2012 c. 4.4.2.1

2.6 Defaulting Party

The party which defaults does not in general lose the right to plead a lack of jurisdiction, because its abstention cannot be assimilated to an implied acceptance of the arbitral tribunal's jurisdiction. Therefore, it can change its mind and intervene in the proceedings before a State court to contest the jurisdiction of the arbitral tribunal, reserving however its rights, paying due respect to the principle of good faith (Art. 2(1) CC). However, every party, even defaulting, has to challenge, in the fixed time limit, an interim award on jurisdiction which is to its disadvantage. If it does not do so, it will have to accept the arbitral tribunal's jurisdiction until the end of the arbitral proceedings, including the appeal proceedings, and the only question which remains open is whether it can plead the lack of jurisdiction in the context of the subsequent enforcement proceedings. To summarise, its lack of action does not prevent it from pleading a lack of jurisdiction, in general, but it forfeits the right to plead it in the arbitral proceedings *lato sensu*, as opposed to the proceedings concerning the recognition and the enforcement of the award.

FSCD 120 II 155 [164-165]

3 Preliminary Award on Jurisdiction (3)

3.1 Principle

- For the notion of partial #award, see Article 188 PILA, section 1
- For the notion of #award, see Article 189(1) PILA, section 1.1
- For the finality of the #award, see Article 190(1) PILA, section 1.2
- For the setting aside of preliminary #awards, see Article 190(3) PILA

If the #arbitral tribunal denies its #jurisdiction in its #award and thus terminates the proceedings, it renders a final #award, which can be challenged before the Federal Supreme Court for all #grounds listed in Article 190(2) PILA.

FSCD 143 III 462 [466], FSCD 4A_407/2017 c. 1.1, FSCD 4A_222/2015 c. 3.1.2, FSCD 4A_414/2012 c. 1.1, FSCD 4A_240/2012 c. 2.1, FSCD 4A_428/2011 c. 1.1, FSCD 4A_548/2009 c. 2.1, FSCD 4A_128/2008 c. 2.1, FSCD 4P.48/2005 c. 2.1

This means that the expression “decides on its #jurisdiction” which appears in Article 186(3) PILA is too wide in that it seems to admit the possibility to note the lack of #jurisdiction of the #arbitral tribunal by way of an interim #decision; this expression can only refer to the interim #decision by which the #arbitral tribunal declares that it has #jurisdiction.

FSCD 143 III 462 [466]

When an #arbitral tribunal rejects a jurisdictional defence in a separate #award, it issues a preliminary #award (Art. 186(3) PILA). Pursuant to Article 190(3) PILA, such an #award may be appealed to the Federal Supreme Court only on #grounds of improper #constitution (Art. 190(2)(a) PILA) or lack of #jurisdiction (Art. 190(2)(b) PILA) of the #arbitral tribunal.

FSCD 143 III 462 [465], FSCD 4A_407/2017 c. 1.1, FSCD 4A_628/2015 c. 1.1 (not published in FSCD 142 III 296), FSCD 4A_222/2015 c. 3.1.2, FSCD 4A_124/2014 c. 2.1, FSCD 4A_414/2012 c. 1.1, FSCD 4A_240/2012 c. 2.1, FSCD 4A_428/2011 c. 1.1, FSCD 4A_548/2009 c. 2.1, FSCD 4A_128/2008 c. 2.1, FSCD 4P.48/2005 c. 2.1

The manner of communication of the decision in dispute is an element to be taken into account in determining whether or not there is a preliminary #award on #jurisdiction within the meaning of Article 186(3) PILA.

FSCD 4A_222/2015 c. 3.2.1

When an #arbitral tribunal decides on the regularity of its #composition in a separate #award, it renders a preliminary #award (Art. 186(3) PILA). Pursuant to Article 190(3) PILA, the #award can be appealed to the Federal Supreme Court only on the grounds of irregular #composition (Art. 190(2)(a) PILA) or lack of #jurisdiction (Art. 190(2)(b) PILA).

FSCD 4A_146/2012 c. 2.1

3.2 No Mandatory Character

It is true that Article 186(3) PILA states a principle. However, this principle does not have any mandatory or absolute character. The #arbitral tribunal may join the issues of #jurisdiction and the #merits, especially if the circumstances pleaded on the basis of the claim of lack of #jurisdiction are too closely connected with the #merits to be examined separately. Furthermore, the violation of Article 186(3) PILA does not entail any sanction.

FSCD 143 III 462 [465], FSCD 4A_298/2018 c. 4.2, FSCD 4A_300/2018 c. 4.2, FSCD 4A_222/2015 c. 3.1.2, FSCD 31.01.1992 c. 1b/bb, FSCD 12.11.1991 [(1992) ASA p. 266-267]

It lies within the #arbitral tribunal's discretion to decide on #jurisdiction in a preliminary #award or to decide on it together with the main claim.

FSCD 06.07.1989 c. 3b

3.3 Consequences of the Negative Interim Award on Jurisdiction

#Arbitrators who deny their #jurisdiction in an #award have not finished their task once and forever. On a #motion to set aside, the Federal Supreme Court may assert the #jurisdiction of the very same #arbitral tribunal which then has to resume its activity and decide on the #merits. Article 40(4) fConcordat provides expressly that the same #arbitrators have to resume the proceedings after their #award has been set aside. This applies also under the PILA, even without a corresponding provision in this statute.

FSCD 117 II 94 [96], FSCD 4A_14/2012 c. 3.1.1 (not published in FSCD 138 III 270)

The fact that the Federal Supreme Court does not specifically send back the matter to the #arbitral tribunal does not constitute an implicit prohibition on the #arbitrators to decide the matter again. It is a well-established practice of the Federal Supreme Court not to formally send the matter back to the #arbitral tribunal.

FSCD 4A_14/2012 c. 3.1.1 (not published in FSCD 138 III 270)

3.4 Declaratory Action with Regard to Jurisdiction

A declaratory #action on the existence, the #validity or the effects of an #arbitration agreement can only be admitted with the greatest reticence.

FSCD 120 II 155 [164]

The rule in Article II(3) NYC applies exclusively to the case where a State court is seized of a dispute which should have been examined by an #arbitral tribunal. It does not apply to declaratory #actions regarding arbitral #jurisdiction, respectively lack of #jurisdiction.

*FSCD 26.01.1987 [(1987) SJ p. 230]

Article II(3) NYC does not exclude the right of a party to claim the absence or the #invalidity of an #arbitration agreement before the State courts by a

declaratory #action, but neither does it prescribe this. Therefore, it leaves it to the State courts to decide whether they prefer letting the #arbitrators decide on their own #jurisdiction or not.

*FSCD 26.01.1987 [(1987) SJ p. 230]

3.5 Motion to Set Aside a Preliminary Award on Jurisdiction

Preliminary and interim #decisions on #jurisdiction may be challenged by an #Appeal in Civil Matters (Art. 92(1) FSCA). According to Article 92(2) FSCA, these decisions can no longer be challenged later.

FSCD 4A_583/2017 c. 1.2, FSCD 4A_438/2008 c. 2.3, FSCD 4A_468/2007 c. 4

Article 187

**VIII. Decision
on the Merits
1. Applicable
Law**

¹ The arbitral tribunal shall decide the case according to the rules of law chosen by the parties or, in the absence thereof, according to the rules of law with which the case has the closest connection.

² The parties may authorise the arbitral tribunal to decide *ex aequo et bono*.

**VIII. Sach-
entscheid
1. Anwendbares
Recht**

¹ Das Schiedsgericht entscheidet die Streitsache nach dem von den Parteien gewählten Recht oder, bei Fehlen einer Rechtswahl, nach dem Recht, mit dem die Streitsache am engsten zusammenhängt.

² Die Parteien können das Schiedsgericht ermächtigen, nach Billigkeit zu entscheiden.

**VIII. Décision au
fond
1. Droit
applicable**

¹ Le tribunal arbitral statue selon les règles de droit choisies par les parties ou, à défaut, selon les règles de droit avec lesquelles la cause présente les liens les plus étroits.

² Les parties peuvent autoriser le tribunal arbitral à statuer en équité.

**VIII. Decisione
nel merito
1. Diritto
applicabile**

¹ Il tribunale arbitrale decide la controversia secondo il diritto scelto dalle parti o, in subordine, secondo il diritto con cui la fattispecie è più strettamente connessa.

² Le parti possono autorizzare il tribunale arbitrale a decidere secondo equità.

1 Law Applicable to the Merits (1)

1.1 Rules of Law Chosen by the Parties

1.2 *Jura novit arbiter*

In arbitration as well, the law is applied *ex officio* (*jura novit arbiter*) .

FSCD 4A_338/2018 c. 5.2, FSCD 4A_56/2017 c. 3.3.2

1.3 Different Legal Grounds

- See Article 190(2)(c) PILA, section 2c.5

1.4 Issues Not Determined by the Law Applicable to the Merits

The law according to which the #capacity to act and the #power of representation of a person signing an #arbitration agreement are examined, is not determined pursuant to the special #conflict-of-laws rule of Article 178(2) PILA which provides for alternative #connecting factors in order to avoid invalid #arbitration agreements. The applicable law is determined by the general #conflict-of-laws rules on the #capacity to act of #physical persons and corporate bodies (Arts. 35 et seq. & 154 et seq. PILA) as well as their representation (Arts. 126, 155 & 158 PILA).

*FSCD 96 I 334 [340], FSCD 01.09.1993 [(1996) ASA p. 626], FSCD 22.12.1992 [(1996) ASA p. 648]

This rule does not apply where problems of consent in the context of the #representation create normative contractual relationships because the #principal is liable towards the third party on the basis of the #apparent legal relationship it created and therefore of the positive protection of #good faith. Accordingly, contractual relationships or relationships similar to contracts created on the basis of #good faith are governed by the law applicable to the legal transaction founded normatively or on the basis of the #apparent legal relationship.

FSCD 01.09.1993 [(1996) ASA p. 626-627]

Therefore, one must examine according to the law applicable to the main contract whether the defence based on a lack of #power of representation could be excluded by the principle of #good faith.

FSCD 01.09.1993 [(1996) ASA p. 627]

The question has been left open as to whether and to what extent the protection of #good faith, or the specificities of the #power of attorney to enter into an #arbitration agreement, can require that Swiss *lex fori* replaces the law applicable to the #power of representation.

FSCD 22.12.1992 [(1996) ASA p. 648]

1.5 Mandatory Norms

1.5.1 No Application *Ex Officio*

The #arbitrator mandated to apply Swiss law has no duty to take into account normally applicable foreign law when none of the parties has invoked this law and if the #invalidity of the agreement because of such law has not been pleaded. For practical reasons it is not possible to expect from the #arbitrator, if none of the parties invokes foreign law, that it is aware of or that it should search systematically for the #mandatory norms (such as Art. 81 Rome Treaty [Art. 85 of the former Rome Treaty]) which could exist in all legal systems presenting a significant point of contact with the disputed legal relation. There is in any case no violation of #public policy if an #arbitrator does not take into account the foreign law in these circumstances.

FSCD 13.11.1998 [(1999) ASA p. 535]

1.5.2 Relationship with Article 19 PILA

Article 19 PILA does not oblige an international #arbitral tribunal, in particular in presence of a #choice of law, to apply foreign law to the contract; at least, the disregard of this law is not, as such, contrary to #public policy within the meaning of Article 190(2)(e) PILA. This opinion is all the more convincing because Article 187 PILA expressly reserves, in international arbitration, #party autonomy with regard to the choice of the applicable law and Article 19 PILA is a provision allowing the adaptation of the contract because this provision makes reference to the judge's discretionary power.

FSCD 30.12.1994 [(1995) ASA p. 225]

1.5.3 Article 81 Rome Treaty

The #arbitrator who denies its #jurisdiction to examine the application of Article 81 Rome Treaty [Art. 85 of the former Rome Treaty] violates Article 190(2)(b) PILA because it wrongly denies its #jurisdiction.

FSCD 118 II 193 [195], FSCD 13.11.1998 [(1999) ASA p. 533]

The Swiss judge or #arbitrator who has to decide on the #validity of a contractual agreement concerning markets in the European Union examines this issue in the light of Article 81 Rome Treaty [Art. 85 of the former Rome Treaty]. It must do so notwithstanding the fact that the parties agreed on the application of Swiss law to their contract. This examination is in any event mandatory if the #invalidity of the contract is invoked by a party before the judge or the #arbitrator.

FSCD 13.11.1998 [(1999) ASA p. 532]

1.5.4 Individual Cases

The Algerian provision forbidding different forms of #brokerage contracts is an excessively broad prohibitive measure of a protectionist nature whose purpose is to protect the State's monopoly over foreign trade. It cannot prevail over the

general and fundamental principles of Swiss law which protect the freedom of contract.

FSCD 17.04.1990 [(1993) ASA p. 253-254]

2 *Decision Ex Aequo et Bono (2)*

2.1 Decision in Equity

If an #arbitrator is mandated to decide as an *amiable compositeur* and therefore decides, with the exception of the #public policy provisions, *ex aequo et bono*, this does not prevent it from deciding on the basis of a certain law, if it considers that this is in conformity with an *ex aequo et bono* decision.

*FSCD 110 Ia 56 [58], VD 19.05.1999 p. 13

If the #arbitrators are empowered to decide in #equity (as *gütlicher Schlichter*, *amiabiles compositeurs*, *amichevoli compositori*), they are entitled to depart from the application of mandatory law, including procedural rules, with the exception however of #public policy provisions, and they are entitled to be guided by #equity.

*FSCD 107 Ib 63 [65], FSCD 4P.114/2001 c. 2c/bb/aaa

Even though the opinions on the notion of #equity may diverge, it is certain that the *amiabiles compositeurs* have much larger freedom of judgment – called for by the parties within the limits of their autonomy – than an #arbitrator called to decide in accordance with the law, who can only ground its decision in #equity if the law itself refers to this notion.

*FSCD 107 Ib 63 [65]

An #arbitral tribunal which decides as *amiabiles compositeurs*, and thereby departs from a contractual clause, does not violate #public policy if it had been authorised not to take into account this provision, and this even in the absence of the powers of an *amiable compositeur*.

FSCD 19.02.1990 [(1991) ASA p. 178-179]

2.2 Decision in Equity Instead of According to the Rules of Law

A decision rendered in #equity, instead of according to the rules of law chosen by the parties, does not violate #public policy if the application of the chosen rule of law would not have led to a fundamentally different result, which would also have been compatible with #public policy.

FSCD 116 II 634 [637]

Usurping the power to adjudicate *ex aequo et bono* is an irregularity that does not affect the #jurisdiction of the #arbitral tribunal but it raises the issue of the legal principles or the method according to which the dispute between the parties must be decided. The corresponding grievance is accordingly not in Article 190(2)(b) PILA. It may at most fall within Article 190(2)(e) PILA although this is disputed.

FSCD 4A_525/2017 c. 3.3.1, FSCD 4A_40/2017 c. 3, FSCA 4A_14/2012 c. 3.2.2 (not published in FSCD 138 III 270)

The Federal Supreme Court left open the issue as to whether the unauthorized use of the power to decide *ex aequo et bono* should be connected to Article 190(2)(b) PILA in the absence of a corresponding grievance (FSCD 14.11.1990 c.

2, not published in FSCD 116 II 634). The Court however considered the possibility of setting aside an #award on the basis of Article 190(2)(e) PILA if it produced a result inconsistent with #public policy (FSCD 116 II 634 [637]). The Court has left open the issue of whether the unauthorized use of the power to decide *ex aequo et bono* breaches #public policy within the meaning of Article 190(2)(e) PILA when the #award does not produce a result incompatible with #public policy (FSCD 4A_370/2007 c. 5.6).

FSCD 4A_14/2012 c. 3.2.2 (not published in FSCD 138 III 270)

2.3 Individual Cases

The Federal Supreme Court only intervenes with the greatest restraint when #arbitrariness is argued in the area of #fees. This is even more so in matters of international arbitration especially when the #arbitrators rule on the basis of equitable principles.

FSCD 4A_524/2009 c. 5.2.6.1

The question of whether the formulation "*arbitrato in via bonale*" gives the #arbitral tribunal the power to decide in #equity has been left open.

*FSCD 110 Ia 56 [58]

Article 188

**VII. Decision
on the Merits
2. Partial
Award**

Unless the parties otherwise agree, the arbitral tribunal may render partial awards.

VII. Sach-
entscheid
2. Teilentscheid

Haben die Parteien nichts anderes vereinbart, so kann das Schiedsgericht Teilentscheide treffen.

VII. Décision au
fond
2. Sentence
partielle

Sauf convention contraire, le tribunal arbitral peut rendre des sentences partielles.

VII. Decisione
nel merito
2. Decisione
parziale

Salvo diversa pattuizione delle parti, il tribunale arbitrale può emettere decisioni parziali.

1 Notion of Partial Award

- For the preliminary #award on #jurisdiction, see Article 186(3) PILA
- For the notion of arbitral #award, see Article 189(1) PILA, section 1.1
- For the finality of the #award, see Article 190(1) PILA, section 1.2
- For the setting aside of preliminary #awards, see Article 190(3) PILA

A partial #award terminates the #arbitral proceedings for a subset of the #subject-matter in dispute, by deciding upfront and in a complete way specific disputed claims and by suspending for the time being the proceedings for the other claims.

FSCD 136 III 597 [599], FSCD 130 III 76 [79], FSCD 4A_633/2014 c. 2.4.1 (not published in FSCD 141 III 229), FSCD 4A_596/2012 c. 3.2, FSCD 4P.237/2005 c. 3.1

If the #arbitral tribunal definitively decides on one of several disputed claims, it renders a partial #award strictly speaking, which is also referred to in the expression partial #award *stricto sensu* in Article 188 PILA.

FSCD 130 III 755 [756], FSCD 128 III 191 [194], FSCD 116 II 80 [82-83], FSCD 4A_614/2010 c. 2.1, FSCD 4A_254/2010 c. 2.3.1, FSCD 4A_80/2010 c. 1.1, FSCD 4A_584/2009 c. 2.2, FSCD 4A_370/2007 c. 2.3.1, FSCD 4P.4/2007 c. 2.1, FSCD 4P.74/2006 c. 2.1, FSCD 4P.114/2006 c. 4.2, FSCD 4P.74/2006 c. 2.1

According to well-established practice, it is also possible to make a distinction in arbitration between final #awards (*Endentscheide, décisions finales, decisioni finali*; not expressly mentioned in the PILA but indicated by the terms *Entscheid, sentence* and *lodo* in Art. 190(1) PILA tacitly implied), partial #awards (*Teilentscheide, sentences partielles, decisioni parziali*; Art. 188 PILA) as well as preliminary or interim #awards/decisions (*Vor- oder Zwischenentscheide, sentences préjudicielles ou incidentes, decisioni pregiudiziali*, Art. 190(3) PILA).

FSCD 130 III 76 [78]

An #award which definitively decides on part of a #prayer for relief is a partial #award.

FSCD 116 II 80 [82-83], FSCD 30.09.1993 [(1994) ASA p. 51]

An #award which dismissed in substance, and not form, the entire counterclaim (through an interpretation of the #operative part of the #award in light of the reasoning in the body of the #award) is a partial #award which can be appealed.

FSCD 4A_80/2010 c. 1.2

The notions of partial #award and interim #decision are not defined in the PILA which maintains in this respect the terminological imprecision of the fConcordat.

FSCD 116 II 80 [82], FSCD 115 II 288 [290-291]

The fact that a decision definitively adjudicates part of the dispute does not modify its qualification as a partial #award. If the above-mentioned prerequisites are fulfilled, the fact that a final decision is taken with regard to a part of the dispute is without importance.

FSCD 116 II 80 [82], FSCD 115 II 288 [292], FSCD 115 II 102 [104], FSCD 30.09.1993 [(1994) ASA p. 51]

These principles apply to all partial #awards, i.e. not only to preliminary and interim #decisions which clarify a procedural or substantive issue, but also to genuine partial #awards by which a decision is taken on a quantitative part of the claim (e.g. CHF 20,000 of claimed CHF 100,000, the rest of the disputed claim to be decided in one or more subsequent #awards) or on one of several disputed claims (in the case of several claims or, as in FSCD 115 II 102 and FSCD 115 II 288, where a #counterclaim has been submitted in addition to the main claim).

FSCD 116 II 80 [82-83]

If an #arbitral tribunal dismisses a request to extend the proceedings to third parties, it renders a partial #award within the meaning of Article 91(b) FSCA, as it definitively excludes the participation of the third parties from the proceedings.

FSCD 4A_376/2008 c. 2.3

If an #arbitral tribunal decides on one of several #prayers for relief concerning the same monetary claim without rendering a decision which is capable of #enforcement, the #arbitral tribunal does not decide on a specific part of the claim but recognizes only the existence of an element of this claim (*in casu*, that the disputed orders have been passed during the period fixed in the commission contract). By proceeding in this way, the #arbitral tribunal rendered an interim #decision and not a partial #award against which the #grievance of a violation of the #right to be heard would have been admissible.

FSCD 4A_438/2008 c. 2.3

The notion of a final partial #award has to be interpreted restrictively as to the possibility to challenge it by an immediate and separate #motion to set aside without waiting for the final #award.

FSCD 09.02.1998 [(1998) ASA p. 641]

2 **Res Judicata Effect**

The #arbitral tribunal violates procedural #public policy if it renders an #award without taking into account the #res judicata effect of a previous #award or if it departs, in its final #award, from the opinion it expressed in a partial #award deciding a #preliminary issue on the #merits.

FSCD 128 III 191 [194], *FSCD 112 Ia 166 [171], FSCD 17.07.1998 [4P.7/1998] [(2002) ASA p. 673]

With regard to the #res judicata effect of partial #awards [*Teilentscheide, sentences partielles*] *lato sensu*, one has to distinguish: genuine partial #awards [*echte Teilentscheide* or *Teilentscheide im engeren Sinne, sentences partielles proprement dites*] by which the #arbitral tribunal decides on a quantitatively limited part of the claims submitted or on one of several disputed claims, which have #res judicata effect, but only with regard to the claims on which the #arbitral tribunal has decided, to the exclusion of other or more far reaching #prayers for relief.

FSCD 128 III 191 [194]

Preliminary or interim #decisions [*Vor- oder Zwischenentscheide, sentences préjudicielles ou incidentes*] which decide substantive or procedural #preliminary issues do not have #res judicata effect. However, contrary to simple procedural orders which can be modified or set aside during the proceedings, such decisions are binding for the #arbitral tribunal which rendered them. For instance, the #arbitral tribunal which decided, by way of an interim #decision on the principle of #respondent's liability is bound by its decision on this point when it decides, in its final #award, on the monetary claims of #claimant.

FSCD 128 III 191 [194-195], FSCD 122 III 492 [494], FSCD 17.07.1998 [4P.7/1998] [(2002) ASA p. 672-673]

The #arbitral tribunal which recognises that a party has #standing presupposes that this party exists and that it has the #capacity to be a party before it. However, it cannot be derived from such a decision that it definitively decides these undisputed issues and that the #arbitral tribunal is bound by these assumptions until the end of the pending proceedings.

FSCD 128 III 191 [197]

This #res judicata effect can be linked to the prohibition of contradictory conduct of an authority or, by analogy, to the respect of the principle of #good faith between the administration and the citizens which must also govern the relationships between the tribunals – State or arbitral – and the parties.

FSCD 17.07.1998 [4P.7/1998] [(2002) ASA p. 673]

3 Motion to Set Aside Partial Awards

➤ See also Article 190(3) PILA

With regard to partial #awards *stricto sensu* within the meaning of Article 188 PILA, they can be challenged under the same conditions as final #awards, as they are – like final #awards – #awards within the meaning of Article 190(1) & (2) PILA.

FSCD 143 III 462 [466], FSCD 130 III 755 [760], FSCD 4A_392/2010 c. 2.2, FSCD 4A_370/2007 c. 2.3.1

The lack of #jurisdiction of the #arbitral tribunal which rendered the partial #award is therefore one of the grounds on which it can be attacked.

FSCD 143 III 462 [466]

Partial #awards have to be challenged within 30 days from their notification; otherwise the #motion for setting aside can no longer be heard. To allow the #appellant to challenge the partial #award in the context of a #motion for setting aside against the final #award would in fact be contrary to the goal of the immediate #motion for setting aside against a partial #award, which definitively decides on a part of the dispute.

FSCD 143 III 462 [466], FSCD 4A_370/2007 c. 2.3.1

The legislator wanted to establish specific and autonomous rules on the #admissibility of the [former] #motion for constitutional review against an international arbitral #award. This is why it established a pertinent provision – Article 188 PILA – for the partial #award *stricto sensu* rendered in this field. This provision constitutes a *lex specialis* with respect to Article 87 fSOFJ.

FSCD 130 III 755 [759]

Whether a #motion to set aside a partial #award *stricto sensu* can be heard or not does not depend on the existence of an irreparable harm within the meaning of Article 87 fSOFJ. Therefore, the link established by the former #case law between Article 87 fSOFJ and Article 190 PILA has to be broken once and for all. Thus, whether a #motion to set aside any kind of a partial #award *lato sensu* can be heard or not has to be examined exclusively on the basis of Article 190 PILA.

FSCD 130 III 755 [760]

Such partial #awards can be set aside in the same way as final #awards. All #grievances listed in Article 190(2) PILA are therefore available.

FSCD 130 III 755 [762], FSCD 4A_392/2010 c. 2.2, FSCD 4P.134/2006 c. 2.3, FSCD 4P.74/2006 c. 2.1

A #motion for the setting aside of an #award on the #ground of lack of #jurisdiction should be brought against the first partial and interim #award in which the #arbitral tribunal accepted its #jurisdiction and not a subsequent #award in which the #arbitral tribunal confirms its #jurisdiction.

FSCD 4A_444/2009 c. 4.1.1

Article 189

**VIII. Decision
on the Merits
3. Arbitral
Award**

¹ The arbitral award shall be rendered in conformity with the rules of procedure and in the form agreed upon by the parties.

² In the absence of such an agreement, the arbitral award shall be made by a majority, or, in the absence of a majority, by the presiding arbitrator alone. The award shall be in writing, supported by reasons, dated and signed. The signature of the presiding arbitrator is sufficient.

VIII. Sach-
entscheid
3. Schieds-
entscheid

¹ Der Entscheid ergeht nach dem Verfahren und in der Form, welche die Parteien vereinbart haben.

² Fehlt eine solche Vereinbarung, so wird er mit Stimmenmehrheit gefällt oder, falls sich keine Stimmenmehrheit ergibt, durch des Präsidenten des Schiedsgerichts. Der Entscheid ist schriftlich abzufassen, zu begründen, zu datieren und zu unterzeichnen. Es genügt die Unterschrift des Präsidenten.

VIII. Décision au
fond
3. Sentence
arbitrale

¹ La sentence arbitrale est rendue dans la procédure et selon la forme convenues par les parties.

² A défaut d'une telle convention, la sentence est rendue à la majorité ou, à défaut de majorité, par le président seul. Elle est écrite, motivée, datée et signée. La signature du président suffit.

VIII. Decisione
nel merito
3. Lodo

¹ Il lodo è prolatato secondo la procedura e la forma pattuite dalle parti.

² In mancanza di un tale pattuizione, il lodo è emesso a maggioranza di voti o, in subordine, dal presidente del tribunale arbitrale. È steso per scritto, motivato, datato e firmato. La firma del presidente è sufficiente.

1 Parties' Agreement as to Procedure and Form (1)

1.1 Notion of Arbitral Award

- For the preliminary #award on #jurisdiction, see Article 186(3) PILA
- For the notion of partial #award, see Article 188 PILA, section 1
- For the finality of the #award, see Article 190(1) PILA, section 1.2
- For the setting aside of preliminary #awards, see Article 190(3) PILA

An #award within the meaning of this provision is a decision based on an #arbitration agreement and rendered by a non-governmental tribunal which the parties have entrusted with the duty to decide a dispute of financial interest (Art. 177(1) PILA) and of an international character (Art. 176(1) PILA). A genuine arbitral #award presupposes that the #arbitral tribunal which renders it offers sufficient guarantees of #independence and #impartiality as derived from Article 30 FC.

FSCD 129 III 445 [(2003) ASA p. 604], FSCD 119 II 271 [275], FSCD 117 Ia 166 [168], *FSCD 125 I 389 [390], *FSCD *107 Ia 155 [158], FSCD 4A_374/2014 c. 4.3.2.1, FSCD 4A_126/2008 c. 1, FSCD 4P.149/2003 c. 1.1, FSCD 5P.427/2000 c. 1b, FSCD 31.03.1999 [(1998-2000) Digest CAS p. 776]

Otherwise the #award would not constitute a civil judgment enforceable all over Switzerland (Art. 122 FC).

FSCD 119 II 271 [275]

1.2 Addendum or Additional Award

A decision by which an arbitrator refused to issue an additional #award may be subject to a #motion to set aside. The principles set by #case law with regard to the #rectification of #awards must be applied *mutatis mutandis* to additional #awards.

FSCD 137 III 85 [86]

The filing of a request for an additional #award shall not stay the #time limit for bringing of setting aside proceedings against the initial #award. Similarly, the right to bring setting aside proceedings should not be subject to the prior submission of such a request.

FSCD 137 III 85 [87]

However, the possibility of bringing setting aside proceedings on the ground that the #arbitral tribunal failed to decide one of the claims should not prevent that party from requesting an additional #award from the #arbitral tribunal which could render the #appeal moot. In such a case, the setting aside proceedings should be stayed until the #arbitral tribunal has issued a decision as to the request that the #arbitral tribunal issue an additional #award.

FSCD 137 III 85 [87]

An addendum is an additional #award which the #arbitral tribunal renders when it has omitted to decide on a #claim or a #prayer for relief that has been submitted.

FSCD 131 III 164 [166], FSCD 4A_666/2012 c. 3.2

1.3 Correcting Award

- See also Article 189(1) PILA, section 1.3; Article 190(2) PILA, section 2.12; Article 190(2)(b) PILA, section 2b.5; and Article 191 PILA, section 35

A correcting #award in its broad meaning, i.e. an #award rendered upon a request for #correction or on the tribunal's own motion, independently of the decision taken in this #award, may be subject to a #motion to set aside.

FSCD 137 III 85 [86], FSCD 131 III 164 [168-169], FSCD 4P.154/2005 c. 1.2

A decision by which an #arbitrator refuses to issue a correcting #award must be issued as an appealable #award.

FSCD 137 III 85 [86]

The purpose of the #correcting award is to allow the #correction of a substantive error (miscalculation, clerical errors, typing errors, etc.) affecting an original #award, contrary to an error of reasoning or a legal error, which does not affect the binding effect of the #award.

FSCD 131 III 164 [168], FSCD 4P.154/2005 c. 1.1

Contrary to the additional #award *stricto sensu*, the correcting #award does not add anything to the original #award, which is not already contained in it.

FSCD 131 III 164 [166], FSCD 4A_433/2009 c. 1.3

The correcting #award is an accessory decision to the original #award which forms part of it. It follows the legal regime of the original #award.

FSCD 131 III 164 [166-167 & 170], FSCD 4A_486/2010 [4A_486/2010] c. 2.2, FSCD 4A_433/2009 c. 1.3, FSCD 4P.154/2005 c. 1.1, FSCD 4P.98/2005 c. 2

Being accessory to the original #award, the correcting #award shares its fate and becomes *ipso facto* invalid in the case that the original #award is set aside. Therefore, it is not a new #award, but a decision which is part of the #award, to take into account the wording of Article 36(3) (former Article 29(3)) ICC Arbitration Rules. Notwithstanding the coexistence of two formally distinct decisions, the connection which exists between them is thus an element which has to be taken into account in different respects, in particular for the #enforcement.

FSCD 131 III 164 [166-167], FSCD 130 III 755 [762-763]

It goes without saying that the party having succeeded in the arbitration may not enforce the entire monetary relief granted in the original #award and in the correcting #award. This would result in claiming twice the amount which has been granted. In other words: if the creditor claims successively the #enforcement of the two condemnations, the second time it can only claim the payment of the difference existing between the amounts which the opposing party has been ordered to pay in the original #award and in the correcting #award. It is neither excluded, as the case may be, that the creditor must return an amount of

money to its #obligor, i.e. in the case where the #obligor has claimed and obtained a #correction of the original #award in its favour.

FSCD 131 III 164 [167]

According to the accessory nature of the correcting #award, the #motion to set aside such a decision is subject to the same requirements of #admissibility as a #motion to set aside the original #award.

FSCD 131 III 164 [167-168], FSCD 4P.154/2005 c. 1.2

However, the proceedings relate only to the dismissal of the request for #correction and could not serve as a pretext to put into question the original #award. In case of success of the proceedings for setting aside a correcting #award, only the #award dismissing the request for #correction can be set aside.

FSCD 131 III 164 [169], FSCD 4P.154/2005 c. 1.2 and 2, FSCD 4P.98/2005 c. 2

The Federal Supreme Court firstly examines the #motion to set aside the original #award because if this motion is granted and the original #award is set aside, the correcting #award becomes *ipso facto* inexistent.

FSCD 131 III 164 [170], FSCD 130 III 755 [763], FSCD 4A_666/2012 c. 3.2, FSCD 4A_669/2012 c. 4, FSCD 4A_433/2009 c. 4, FSCD 4P.98/2005 c. 2

In order to simplify the issue and to avoid problems which may arise at the #enforcement stage due to the existence of a correcting #award and a new #award, which will have to be issued due to the setting aside of the initial #award, the correcting #award must also be set aside.

FSCD 4A_669/2012 c. 4

The correcting #award aims at correcting an element of the #operative part of the original #award which could be erroneous with regard to the decision of the #arbitral tribunal as it results from the #reasons of the #award.

FSCD 4P.154/2005 c. 1.1

If the #motion to set aside the original #award is dismissed, the #motion to set aside the correcting #award which is its accessory, does not become *de facto* baseless.

FSCD 4P.154/2005 c. 2

1.4 Preliminary Decision of the Arbitral Tribunal for Dormant Accounts

The decision rendered in preliminary examination proceedings before the Arbitral Tribunal for Dormant Accounts in Switzerland (with regard to the existence or the absence of the conditions under which the Tribunal can force a bank to enter into an #arbitration agreement with an applicant) is not an arbitral #award according to Articles 190 et seq. PILA respectively Article 85(c) fSOFJ.

FSCD 126 III 529 [534]

2 *Deliberations and Form of the Award (2)*

2.1 *Deliberations*

2.1.1 Importance

If the #arbitral tribunal is composed of several members, the #deliberations are an essential operation which must take place even if this is not expressly mentioned by the statute. This is, at the same time, a right of the parties, flowing – according to several scholars - from the #right to be heard, and a right and a duty of every single #arbitrator.

FSCD 4P.115/2003 c. 3.2

2.1.2 Form

The federal law does not say anything about the form of the #deliberations. This issue depends on the agreement between the parties or on the rules chosen by them. It is not excluded that the #deliberations take place by #circulation, if the #arbitrators agree – explicitly or by #implied actions – to proceed in this way.

FSCD 4P.115/2003 c. 3.2

Article 189(2) PILA and the #right of the parties to be heard mean that all #arbitrators must be present at the #deliberations and at the vote on the #award. However, this does not rule out the possibility that #deliberations may take place by way of correspondence, provided that the #arbitrators have agreed – explicitly or by #implied actions – to adopt this procedure and that the #arbitrator called upon to express its opinion knows precisely what the subject of these #deliberations is and what decision is to be taken.

FSCD 31.03.1999 [(1998-2000) Digest CAS p. 777], *FSCD 111 Ia 336 [338-339]

2.1.3 Presence of All Arbitrators

In Switzerland, Article 31(1) fConcordat requests that all #arbitrators participate in all #deliberations and every decision of the #arbitral tribunal. The new Swiss law on international arbitration does not expressly mention such a requirement, which flows however implicitly from Article 189 PILA and constitutes in any case a non-written rule of international #public policy applicable to all international arbitrations.

FSCD 4P.115/2003 c. 3.2

2.1.4 Confidentiality

The principle of #confidentiality of the #deliberations encompasses all opinions expressed in the course of the discussion, i.e. the manner in which a majority decision was reached.

FSCD 12.11.1991 [(1992) ASA p. 265]

There is no violation of #confidentiality if an #arbitrator divulges to a party the #operative part of a decision which has already been taken but not yet properly notified to both parties.

FSCD 4P.154/2005 c. 6.2, FSCD 12.11.1991 [(1992) ASA p. 264]

The Federal Supreme Court left open the question as to what would be the sanction for a violation of the #arbitrator's duty to observe the principle of #confidentiality.

FSCD 12.11.1991 [(1992) ASA p. 264-265]

2.1.5 Refusal to Collaborate

- For the #resignation and replacement of the #arbitrator, see Article 179(1) PILA, section 1.17

The #resignation of an #arbitrator has to be distinguished from the situation where a party-appointed #arbitrator does not formally resign from its functions but refuses to collaborate or obstructs the proceedings, in particular by not participating without good reason in the #deliberations of the #arbitral tribunal.

FSCD 128 III 234 [238], FSCD 4A_386/2010 c. 4.3.1

When an #arbitrator refuses to collaborate, the #arbitral tribunal continues to function regularly and the recalcitrant #arbitrator cannot block the #arbitral tribunal if it decides, by the majority of its members, to continue the proceedings and to render an #award, be it by #circulation.

FSCD 128 III 234 [238], FSCD 4A_386/2010 c. 4.3.1

This solution is justified by the very notion of #deliberations. One can assume that an #arbitrator has validly deliberated if it has been given the possibility to do so to the same extent as its co-#arbitrators. Like the principle of #adversarial proceedings which is satisfied if each party has been given the possibility to submit its claims, the prerequisite of #deliberations can be considered as satisfied when each #arbitrator has been given the possibility to submit its standpoint.

FSCD 128 III 234 [239], FSCD 4P.115/2003 c. 3.2

This solution which is justified in order to avoid that an #arbitrator paralyses the drafting of an #award by not participating in the #deliberations has been adopted by several #arbitral institutions (e.g. Art. 12.1 LCIA Rules).

FSCD 128 III 234 [239]

2.2 Even Number of Arbitrators

The choice of an even number of #arbitrators may cause difficulties in the case of equality of votes of the #arbitrators and may lead to a "draw" situation. Nevertheless, in a field dominated by #party autonomy, the appointment of an additional #arbitrator can only be imposed if the parties have agreed accordingly.

FSCD 121 I 81 [85]

If the parties did not agree on a system permitting a majority decision, it has to be admitted that the #award can only be rendered with unanimity if there are

only two #arbitrators. However, this intent of the parties must be unequivocal. They must have clearly indicated that an #award can only be rendered on the basis of an agreement between both #arbitrators. In fact, the arbitration is terminated if the #arbitrators are not able to agree. The parties then have no other possibility than to seize the State courts.

FSCD 121 I 81 [85]

As such a result is not at all satisfactory, it can only correspond to the parties' intent if there are exceptional circumstances. This is why one has to be very strict and admit that this is the case only in the presence of an agreement which does not allow for any other #interpretation.

FSCD 121 I 81 [85]

2.3 Written Form

Article 189(2) PILA provides that the #award shall be in writing. Based on the #autonomy of their will, the parties may waive the written form. This is rarely the case and happens only when there is no need for #enforcement. In practical terms, the #waiver of the written form amounts to a #waiver of a #motion to set aside the #award.

FSCD 16.10.1997 c. 4a

Final #decisions and preliminary or interim #decisions have to be considered the same way with respect to form: the written form is required, but with the possibility to waive this form, with or without an express or implied #waiver of the right to file a #motion to set aside the disputed decision.

FSCD 16.10.1997 c. 4a

2.4 Indication of the Parties

Contrary to the fConcordat (Art. 33(1)(b) & (1)(3)) the PILA does not expressly prescribe that the parties have to be indicated in the #award. However, as such an indication is indispensable for a possible #enforcement of the #award, this formal requirement also applies under the PILA.

ZH 05.07.2001 p. 2-3

2.5 No Mandatory Duty to Give Reasons

- See also Article 182(3) PILA, section 3.3.23; Article 190(2)(d) PILA, section 2d.3.10; and Article 190(2)(e) PILA, section 2e.14.23

According to Article 189(2) PILA, the #award shall be supported by #reasons provided that the parties did not agree to the contrary.

FSCD 130 III 125 [130]

The duty to give #reasons is not mandatory. The parties can waive their right to an #award supported by #reasons including after the issuance of the #award by #implied actions.

FSCD 130 III 125 [130], FSCD 4P.114/2004 c. 4

The duty of the #arbitrator to give at least summary #reasons for its #award, as provided for in Article 189 PILA, derives from the #right to be heard.

FSCD 06.07.1990 c. 3c

2.6 Signature of the Award

- See also Article 190(2)(a) PILA, section 2a.7

In principle, an arbitral #award is signed by all #arbitrators, even though the signature of the sole #arbitrator would be sufficient in Switzerland. The signature does not imply that the #arbitrator approves the #award but attests its participation in the #deliberations.

FSCD 4P.154/2005 c. 3.1

If the #arbitrators sign the #award before it is approved by the ICC, these signatures are premature, because no #award shall be rendered by the #arbitral tribunal until it has been approved by the #ICC International Court of Arbitration as to its form (Art. 21(3) ICC Arbitration Rules of 1988) and that the #award shall be deemed to be made on the date of its signature (Art. 22 ICC Arbitration Rules of 1988). However, the signature of the draft #award by the #arbitrators, without any reservation, means that the #arbitrators considered that their #deliberations have terminated and that they have formulated not only the #reasons but also the #operative part of their #award, since only the draft had to be approved by the ICC.

FSCD 25.05.1992 c. 2a

2.7 Res Judicata Effect

The #*res judicata* effect only applies to the #operative part of the judgment or #award. It does not apply to the #reasons. However, sometimes the #reasons have to be taken into account in order to ascertain the exact meaning, nature and scope of the #operative part.

FSCD 136 III 345 [347], FSCD 128 III 191 [195], FSCD 125 III 8 [13], FSCD 123 III 16 [18-19]

Final #awards have #*res judicata* effect.

FSCD 128 III 191 [194]

2.8 Dissenting Opinion

The #dissenting opinion is not part of the #award; nor does it affect the #reasons or the #operative part of the #award. Procedural flaws which could be invoked with regard to its drafting or its communication remain without effect on the #award. The #notification of the #dissenting opinion depends on the applicable procedural rules in the case at hand and on the applicable national law, not only of the State where the arbitration takes place but also of the State where the #award has to be performed.

FSCD 4A_322/2015 c. 2.2.1, FSCD 4A_319/2015 c. 4.2.2, FSCD 4A_584/2009 c. 3.3, FSCD 11.05.1992 [(1992) ASA p. 387], FSCD 25.05.1992 c. 2b

Therefore, such an opinion does not have to be taken into consideration by the Federal Supreme Court seized by a #motion to set aside an arbitral #award.

FSCD 4A_322/2015 c. 2.2.1

If the agreement does not provide for it or the majority consents to it, the minority #arbitrator may not require that the #dissenting opinion be enclosed with the #award or that it be communicated to the parties together with the #award. Even in this case, the #dissenting opinion remains an independent opinion.

FSCD 4A_319/2015 c. 4.2.2, FSCD 11.05.1992 [(1992) ASA p. 386], FSCD 25.05.1992 c. 2b

A #dissenting opinion should not contain arguments, which the #arbitrator did not raise during the #deliberations with its co-#arbitrators.

FSCD 4P.74/2006 c. 5.3

The PILA does not contain any provisions on the possibility for a minority #arbitrator to issue a #dissenting opinion to the #award.

FSCD 11.05.1992 [(1992) ASA p. 386], FSCD 25.05.1992 c. 2b

2.9 Absolute Nullity of the Award

An #award, even suffering from a serious irregularity, is not in principle null and void, but only capable of being set aside, an observation which applies in particular for the irregularities that the law has established as grounds for setting aside an #award, such as the fact for the #arbitral tribunal to wrongly declare that it has or does not have #jurisdiction.

FSCD 4A_407/2017 c. 2.2.2.1, GE 23.01.2018 c. 3.4

If the arbitral #award can be set aside before a State court as is the case in Switzerland, grounds for absolute nullity of the #award which have to be examined *ex officio* and at any time have to be admitted with restraint, because the dispute definitively adjudicated by arbitration should in principle not be called into question. Therefore, the #award is null and void only in exceptional cases, i.e. when the #subject-matter of the dispute lacks #arbitrability, if a non-arbitrator exercises arbitrarily the decision-making power, or if there is a concrete impossibility to enforce the #award.

FSCD 4A_407/2017 c. 2.2.2.1, FSCD 21.06.1995 [4P.267/1994] c. 3a

The nullity, i.e. absolute invalidity, of a judgment must be observed at all times and by all State instances *ex officio* and may also be established in #appeal proceedings, even if the #appeal is inadmissible. This also applies to the nullity of an arbitral #award which, according to Article 387 CCP, has the effect of a final and enforceable judicial decision.

FSCD 4A_618/2015 & 4A_634/2015 c. 4.1

The nullity of a decision can only be assumed if the defect attached to it is particularly serious, if it is obvious or at least easily recognisable and if, moreover, legal #certainty is not seriously jeopardised by the assumption of nullity. In the case of arbitral #awards, such a serious defect may exist, in particular, if there are no indications of the existence of a formally valid

#arbitration agreement, so that it almost appears as an assumption if an #arbitral tribunal declares itself to have #jurisdiction.

FSCD 4A_618/2015 & 4A_634/2015 c. 4.1

Some of the legal doctrine considers that an arbitral #award is null and void if there is a fundamental internal contradiction, i.e. if the #award is absurd to the extent that it adds confusion and is contradictory to #public policy. This doctrine may be followed to the extent that an arbitral #award cannot have effects which are internally contradictory, or which cannot at all be reconciled with the #reasons stated. However, incomprehensible #awards are not necessarily absurd; they have to be explained and clarified to the extent possible. This opinion is confirmed if one considers that an internal contradiction in the #award does not lead to its absolute nullity but allows at the outmost challenging it for a violation of #public policy. Therefore an #award can only be considered null and void with respect to its content in exceptional cases.

FSCD 21.06.1995 [4P.267/1994] c. 3a

The absolute nullity, which can be invoked at any time, of a decision relating to arbitration, will only be declared in extreme cases, such as in the case of a lack of #arbitrability of the dispute, and must remain the exception.

GE 23.01.2018 c. 3.4

The Federal Supreme Court finally held [in FSCD 130 III 125] that it is conceivable that an arbitral #award should be denied its status as a decision because of its form, and that it cannot be recognized as such, so that the person concerned has no reason to challenge the non-decision. It is also conceivable, in particular in cases where no #arbitration agreement has been concluded and no procedure has taken place for the decision to be affected by a defect of such seriousness that it must be qualified as void.

GE 23.01.2018 c. 3.4

Some of the legal doctrine considers that an arbitral #award on a non-arbitrable #subject-matter is null and void because #arbitrability is not at the parties' disposal and because it has to be examined by the #arbitral tribunal *ex officio* at any time.

ZH 30.06.2003 p. 7

Article 190

IX. Finality, Motion to Set Aside

1. Principle

¹ **The award is final from its notification.**

² **The award can be set aside:**

- a. if the sole arbitrator was not properly appointed or if the arbitral tribunal was not properly constituted;**
- b. if the arbitral tribunal wrongly accepted or declined jurisdiction;**
- c. if the arbitral tribunal's decision went beyond the claims submitted to it, or failed to decide one of the items of the claim;**
- d. if the principle of equal treatment of the parties or the right of the parties to be heard in adversarial proceedings was violated;**
- e. if the award is incompatible with public policy.**

³ **Preliminary awards can be set aside on the grounds of the above 2(a) and 2(b); the time limit runs from the notification of the preliminary award.**

IX. Endgültig- keit, Anfechtung 1. Grundsatz

¹ Mit der Eröffnung ist der Entscheid endgültig.

² Der Entscheid kann nur angefochten werden:

- a. wenn der Einzelschiedsrichter vorschriftswidrig ernannt oder das Schiedsgericht vorschriftswidrig zusammengesetzt wurde;
- b. wenn sich das Schiedsgericht zu Unrecht für zuständig oder unzuständig erklärt hat;
- c. wenn das Schiedsgericht über Streitpunkte entschieden hat, die ihm nicht unterbreitet wurden oder wenn es Rechtsbegehren unbeurteilt gelassen hat;
- d. wenn der Grundsatz der Gleichbehandlung der Parteien oder der Grundsatz des rechtlichen Gehörs verletzt wurde;
- e. wenn der Entscheid mit dem Ordre public unvereinbar ist.

³ Vorentscheide können nur aus den in Absatz 2, Buchstaben a und b genannten Gründen angefochten werden; die Beschwerdefrist beginnt mit der Zustellung des Vorentscheides.

IX. Caractère
définitif.
Recours
1. Principe

- ¹ La sentence est définitive dès sa communication.
- ² Elle ne peut être attaquée que:
 - a. Lorsque l'arbitre unique a été irrégulièrement désigné ou le tribunal arbitral irrégulièrement composé;
 - b. Lorsque le tribunal arbitral s'est déclaré à tort compétent ou incompétent;
 - c. Lorsque le tribunal arbitral a statué au-delà des demandes dont il était saisi ou lorsqu'il a omis de se prononcer sur un des chefs de la demande;
 - d. Lorsque l'égalité des parties ou leur droit d'être entendues en procédure contradictoire n'a pas été respecté;
 - e. Lorsque la sentence est incompatible avec l'ordre public.
- ³ En cas de décision incidente, seul le recours pour les motifs prévus à l'al. 2, let. a et b, est ouvert; le délai court dès la communication de la décision.

IX. Carattere
definitivo.
Impugnazione
1. Principio

- ¹ Notificato che sia, il lodo è definitivo.
- ² Il lodo può essere impugnato soltanto se:
 - a. l'arbitro unico è stato nominato irregolarmente o il tribunale arbitrale è stato costituito irregolarmente;
 - b. il tribunale arbitrale si è dichiarato, a torto, competente o incompetente;
 - c. il tribunale arbitrale ha deciso punti litigiosi che non gli erano stati sottoposti o ha ommesso di giudicare determinate conclusioni;
 - d. è stato violato il principio della parità di trattamento delle parti o il loro diritto di essere sentite;
 - e. è incompatibile con l'ordine pubblico.
- ³ Le decisioni pregiudiziali possono essere impugunate soltanto in virtù del capoverso 2 lettere a e b; il termine di ricorso decorre dalla notificazione della decisione.

1 **Finality (1)**

1.1 **Awards Subject to the Appeal in Civil Matters**

- For the preliminary #award on #jurisdiction, see Article 186(3) PILA
- For the notion of partial #award, see Article 188 PILA, section 1
- For the notion of #award, see Article 189(1) PILA, section 1.1
- For the setting aside of preliminary #awards, see Article 190(3) PILA

The #Appeal in Civil Matters foreseen by Article 77(1) FSCA in connection with Articles 190 to 192 PILA is only admissible against an #award, whether it is final, partial, preliminary or additional.

FSCD 144 III 120 [121], FSCD 140 III 520 [523], FSCD 4A_238/2018 c. 2.2, FSCD 4A_491/2017 c. 2.1, FSCD 4A_384/2017 c. 1.2, FSCD 4A_446/2014 c. 3.1

Setting aside proceedings are only allowed against arbitral #awards.

FSCD 143 III 462 [464], FSCD 137 III 85 [86], FSCD 136 III 597 [599], FSCD 136 III 200 [203], FSCD 4A_692/2016 c. 2.3, FSCD 4A_555/2016 c. 3.1, FSCD 4A_524/2016 c. 2.1, FSCD 4A_222/2015 c. 3.1.1, FSCD 4A_511/2013 c. 1.2.1, FSCD 4A_596/2012 c. 3.1, FSCD 4A_614/2010 c. 2.1

The decision to be appealed may be a final #award terminating the #arbitral proceedings on the #merits or on procedural grounds, a partial #award addressing in part the claim in dispute or one of the claims invoked, or even a preliminary #award deciding one or several preliminary issues on the #merits or procedure.

FSCD 143 III 462 [464], FSCD 142 III 284 [286], FSCD 140 III 520 [523], FSCD 4A_491/2017 c. 2.1, FSCD 4A_583/2017 c. 1.2, FSCD 4A_692/2016 c. 2.3, FSCD 4A_555/2016 c. 3.1, FSCD 4A_524/2016 c. 2.1, FSCD 4A_222/2015 c. 3.1.1, FSCD 4A_335/2014 c. 3.1.1, FSCD 4A_446/2014 c. 3.1, FSCD 4A_146/2012 c. 2.1, FSCD 4A_428/2011 c. 1.1

In conclusion, three categories of #awards may be directly challenged before the Federal Supreme Court: first, final #awards, in all cases provided for in Article 190(2) PILA; second, partial #awards *stricto sensu*, in the same cases; third, preliminary and interim #decisions, only for the grounds listed in Article 190(2)(a) and (b) PILA.

FSCD 136 III 200 [203], FSCD 130 III 755 [761], FSCD 4A_584/2009 c. 2.2

According to well-established practice, it is possible to make a distinction also in arbitration between final #awards (*Endentscheide*, *décisions finales*, *decisioni finali*; not expressly mentioned in the PILA but indicated by the terms *Entscheid*, *sentence* and *lodo* in Art. 190(1) PILA tacitly implied), partial #awards (*Teilentscheide*, *sentences partielles*, *decisioni parziali*; Art. 188 PILA) as well as preliminary or interim #decisions (*Vor- oder Zwischenentscheide*, *sentences incidentes*, *decisioni pregiudiziali*, Art. 190(3) PILA).

FSCD 130 III 76 [78]

The #Appeal in Civil Matters pursuant to Article 77 FSCA in conjunction with Article 389 et seq. CCP is only admissible against arbitral #awards.

FSCD 4A_546/2016 c. 1.2

According to the aforementioned decision FSCD 136 III 597, the decision on the obligation to bear and to reimburse #costs is a challengeable part of the arbitral #award, since - unlike the determination of the #arbitrator's #fees - it regulates the relationship between the parties (and not between them and the #arbitrator). This is covered by the #arbitration agreement and thus by the #arbitrator's decision-making competence (FSCD 136 III 597 c. 5.2.1 p. 603).

FSCD 4A_254/2013 c. 3.1

Among the [*domestic*] arbitral #awards challengeable by an #Appeal in Civil Matters are the final #awards by which an #arbitral tribunal grants, rejects or refuses to hear a claim in whole or in part (Art. 392(a) CCP, 2nd variant). Further, partial #awards are challengeable if they conclude the #arbitral proceedings for a quantitative part of the #subject-matter of the dispute by comprehensively assessing individual disputed claims in advance and suspending the proceedings concerning the others for the time being (Art. 392(a) CCP, 1st Variant). Finally, for the reasons set out in Article 393(a) & (b) CCP, interim #awards may also be challenged, when the #arbitral tribunal makes a separate preliminary #decision on a procedural or substantive question.

FSCD 4A_546/2016 c. 1.2.1

1.2 Notion of Final Award

1.2.1 In General

The (complete) final #award by which the #arbitral tribunal entirely or partially grants, dismisses or does not hear the claim, puts an end to the proceedings before the #arbitral tribunal and terminates the proceedings.

FSCD 136 III 597 [599], FSCD 130 III 76 [78-79], FSCD 4A_596/2012 c. 3.2, FSCD 4A_614/2010 c. 2.1

The final #award is a decision which puts an end to the proceedings, be it by a decision on the #merits, be it for procedural reasons. On the contrary, an interim #decision is a decision rendered during the proceedings and which only represents a step on the way to the final #award. Its subject can be a procedural issue, but also – in an anticipatory way – a question on the #merits.

FSCD 116 II 80 [82], FSCD 115 II 288 [292], FSCD 115 II 102 [104], FSCD 30.09.1993 [(1994) ASA p. 51], FSCD 15.12.1992 c. 2, ZH 11.02.2005 c. III.1

The attacked decision is a final #award, given that the #arbitrator refused once and for all to deal with the appeal of the #appellant after having examined in advance the question of the #admissibility of this legal ground.

FSCD 4A_170/2017 c. 3.1

By terminating the pending arbitration for a reason based on the applicable procedural rules, the #arbitral tribunal renders a final #award.

FSCD 4A_314/2012 c. 2, FSCD 4P.280/2005 c. 1

Once the final #award is issued, the #arbitral tribunal becomes *functus officio*.

FSCD 4A_14/2012 c. 3.1.1 (not published in FSCD 138 III 270)

1.2.2 In Sports Arbitration

The same definition [of final #award] does not seem suitable for the specificities of sports arbitration, in particular to the recourse to the #CAS by way of an #appeal against a decision of a sport #federation. As an #appeal #jurisdiction, the #CAS panel will issue a final #award within the meaning of this definition i.e. an #award putting an end to the #arbitral proceedings at hand. However, the proceedings between the parties on the #merits will not necessarily be terminated by the #award. They will continue if the panel sets aside the decision under appeal and sends the matter back to the sport #federation involved with an invitation to resume the proceedings and issue a new decision. Considered in this way, the proceedings initiated in the sport #federation and then continued in the #CAS on #appeal are similar to an ordinary State procedure subject to the requirement of double instance.

FSCD 140 III 520 [523-524]

However, whether the proceedings are terminated or not does not only depend on the proceedings conducted in the body before the Federal Supreme Court but also on the proceedings before the body whose decision was challenged in the first place; the decision under #appeal must therefore be examined to determine if it closes the first instance proceedings. According to this principle, the decision by which an #appeal body sets aside the decision under #appeal and sends it back to the first instance body for investigation and a new decision on the #merits is considered preliminary by federal #case law, although it puts an end to the #appeal proceedings. The same principle must be applied by analogy to the #appeal proceedings in the #CAS, the idea being to ensure that the Federal Supreme Court will also deal with the matter only once, subject to the exceptions admitted by #case law in this field.

FSCD 140 III 520 [524]

1.3 Award on Jurisdiction

An #award by which the #arbitral tribunal declines its #jurisdiction is a final #award. An #award by which the #arbitral tribunal accepts its #jurisdiction is an interim #decision. According to Article 190(3) PILA, an interim #decision accepting #jurisdiction can only be set aside based on the #grounds of Article 190(2)(a) & (b) PILA. This limitation does not apply to a final #award declining #jurisdiction.

FSCD 4A_426/2017 c. 2, FSCD 4A_452/2007 c. 1.2 and 3.2

If the #arbitral tribunal declines #jurisdiction in its #award and thus terminates the proceedings, it renders a final #award, which can be appealed before the Federal Supreme Court for all #grounds set out in Article 190(2) PILA.

FSCD 4A_562/2009 c. 1.1, FSCD 4A_428/2008 c. 2.2, FSCD 4A_128/2008 c. 2.1, FSCD 4P.253/2003 c. 4.1, FSCD 16.10.1997 c. 4a, FSCD 26.04.1994 c. 4

If the #arbitral tribunal declines #jurisdiction with regard to one of several parties, such decision is a partial #award (Art. 91(b) FSCA), which may be appealed like a final #award pursuant to Article 190(2) PILA.

FSCD 4A_428/2008 c. 2.2

When an #arbitral tribunal accepts its #jurisdiction in a separate #award (and the proceedings continue), it renders a preliminary #award (Art. 186(3) PILA), which can only be appealed before the Federal Supreme Court on the #grounds set out in Article 190(3) PILA.

FSCD 4A_128/2008 c. 2.1, FSCD 4P.253/2003 c. 4.1

1.4 No Appeal of Procedural Orders

1.4.1 Principle

A simple procedural order which may be modified or revoked during the proceedings cannot be appealed before the Federal Supreme Court.

FSCD 144 III 120 [121], FSCD 143 III 462 [467], FSCD 136 III 597 [600], FSCD 136 III 200 [203], FSCD 136 III 200 [203], FSCD 122 III 492 [494], FSCD 4A_238/2018 c. 2.2, FSCD 4A_491/2017 c. 2.1, FSCD 4A_30/2018, FSCD 4A_384/2017 c. 1.2, FSCD 4A_692/2016 c. 2.3, FSCD 4A_546/2016 c. 1.2.2, FSCD 4A_555/2016 c. 3.1, FSCD 4A_524/2016 c. 2.1, FSCD 4A_222/2015 c. 3.1.1, FSCD 4A_446/2014 c. 3.1, FSCD 4A_282/2013 c. 5.3.2 (not published in FSCD 139 III 511), FSCD 4A_596/2012 c. 3.3, FSCD 4A_614/2010 c. 2.1-2.2, FSCD 4A_600/2008 c. 2.3

1.4.2 Decisions on Provisional Measures

A simple procedural order which may be modified or revoked during the proceedings cannot be appealed before the Federal Supreme Court. The same applies with respect to a decision on #provisional measures foreseen by Article 183 PILA.

FSCD 143 III 462 [464], FSCD 4A_384/2017 c. 1.2, FSCD 4A_692/2016 c. 2.3, FSCD 4A_446/2014 c. 3.1

Save in the case where the #arbitrator issues an actual #award on #provisional measures (as determined by its content and not the name attributed to it), it is not possible to bring a #motion to set aside against a decision on #interim measures as it is not a final, partial or preliminary #award.

FSCD 136 III 200 [203], FSCD 4A_524/2016 c. 2.1, FSCD 4A_222/2015 c. 3.1.1, FSCD 4A_614/2010 c. 2.1, VD 17.07.2014 c. 4c

1.4.3 Types of Procedural Orders

Procedural orders include a decision by which an #arbitral tribunal orders the payment of an #advance on costs.

FSCD 136 III 597 [600], FSCD 4A_546/2016 c. 1.2.2, FSCD 4A_596/2012 c. 3.3

Procedural orders include a decision by which an #arbitral tribunal temporarily stays the #proceedings.

FSCD 136 III 597 [600], FSCD 4A_546/2016 c. 1.2.2, FSCD 4A_555/2016 c. 3.1, FSCD 4A_524/2016 c. 2.1, FSCD 4A_222/2015 c. 3.1.1, FSCD 4A_446/2014 c. 3.1, FSCD 4A_596/2012 c. 3.3, FSCD 4A_428/2011 c. 5.1.1, FSCD 4A_614/2010 c. 2.1

Evidentiary orders of the #arbitral tribunal, in particular those concerning the production of documents are not procedural orders which can be appealed to the Federal Supreme Court.

FSCD 4A_30/2018, FSCD 4A_596/2012 c. 3.3

1.4.4 Exception: Implicit Decision on Jurisdiction

Procedural orders may nonetheless be subject to set aside proceedings if the #arbitral tribunal in adopting them also implicitly issued a decision on its #jurisdiction.

FSCD 136 III 597 [600], FSCD 4A_546/2016 c. 1.2.2, FSCD 4A_555/2016 c. 3.1, FSCD 4A_524/2016 c. 2.1, FSCD 4A_222/2015 c. 3.1.1, FSCD 4A_446/2014 c. 3.1, FSCD 4A_596/2012 c. 3.3, FSCD 4A_428/2011 c. 5.1.1, FSCD 4A_614/2010 c. 2.1, FSCD 4A_210/2008 c. 2.1

In other words, when issuing a procedural order, it necessarily issued a preliminary decision on #jurisdiction (or as to the regularity of its #composition if it was challenged) within the meaning of Art. 190(3) PILA.

FSCD 4A_524/2016 c. 2.1, FSCD 4A_222/2015 c. 3.1.1, FSCD 4A_446/2014 c. 3.1

1.5 Determining the Nature of Decision through its Content

However, it is not the denomination of the decision but its content which is decisive for the question whether the Federal Supreme Court hears an #appeal.

FSCD 143 III 462 [464], FSCD 142 III 284 [286], FSCD 140 III 520 [523], FSCD 136 III 597 [599], FSCD 136 III 200 [205], FSCD 4A_238/2018 c. 2.2, FSCD 4A_491/2017 c. 2.1, FSCD 4A_384/2017 c. 1.2, FSCD 4A_98/2017 c. 2.1, FSCD 4A_692/2016 c. 2.3, FSCD 4A_546/2016 c. 1.2, FSCD 4A_555/2016 c. 3.1, FSCD 4A_524/2016 c. 2.1, FSCD 4A_222/2015 c. 3.1.1, FSCD 4A_335/2014 c. 3.1.1, FSCD 4A_446/2014 c. 3.2, FSCD 4A_511/2013 c. 1.2.1, FSCD 4A_596/2012 c. 3.1, FSCD 4A_146/2012 c. 2.1, FSCD 4A_428/2011 c. 1.1, FSCD 4A_614/2010 c. 2.2, FSCD 4A_600/2008 c. 2.3, FSCD 4A_210/2008 c. 2.1

1.6 *Ex officio* Examination of the Nature of the Award

The Federal Supreme Court examines the nature of the #award *ex officio* as it is an issue concerning the #admissibility of the #appeal.

FSCD 140 III 520 [522-523]

1.7 Appeal of Decision Rendered by Deputy President of Arbitral Appeal Chamber

Whether the decision not to hear a case is rendered by the deputy president of an arbitral #appeal chamber rather than by an #arbitral tribunal (which has not yet been constituted), does not prevent the decision from being appealable before the Federal Supreme Court.

FSCD 4A_238/2018 c. 2.2, FSCD 4A_384/2017 c. 1.2, FSCD 4A_692/2016 c. 2.3, FSCD 4A_222/2015 c. 3.1.1, FSCD 4A_282/2013 c. 5.3.2 (not published in FSCD 139 III 511), FSCD 4A_600/2008 c. 2.3, FSCD 4A_126/2008 c. 1

1.8 No Appeal of Decisions of Sports Federations

The decision taken by the body of a sports #federation, even if this body is called an "arbitral tribunal" constitutes a mere #expression of intent issued by the #federation concerned; this is an act of governance and not a judicial act.

FSCD 136 III 345 [349], FSCD 119 II 27 [275], FSCD 4A_490/2017 c. 3.3.4, FSCD 4A_492/2016 c. 3.3.3, FSCD 4A_222/2015 c. 3.2.3.1, FSCD 4A_374/2014 c. 4.3

This also applies to the decisions taken by the jurisdictional bodies of FIFA, i.e. the Dispute Resolution Chamber.

FSCD 136 III 345 [349], FSCD 4A_492/2016 c. 3.3.3, FSCD 4A_222/2015 c. 3.2.3.1, FSCD 4A_374/2014 c. 4.3.2.1

Only an #award may be the object of an #appeal and not a possible sanction issued by a sport #federation.

FSCD 4A_198/2012 c. 3.3, FSCD 4A_458/2009 c. 4.4.8

Only an #award of an international #arbitral tribunal can be the object of setting aside proceedings. A decision made by an adjudicatory body of a sports #federation which may be appealed to the #CAS cannot be challenged in setting aside proceedings.

FSCD 4A_43/2010 c. 3.3

1.9 Notification of the Award

The PILA does not regulate the #notification of the #award. The issue depends primarily on the parties' agreement or on the rules chosen by them. If there is no agreement on this issue, it is up to the #arbitrator to decide on the way of communicating the #award. The #arbitrator has different possibilities at its disposal, but the usual form is the #notification by mail.

FSCD 136 III 200 c. 2.1.2, FSCD 4A_392/2010 c. 2.3.1, FSCD 4P.273/1999 [(2001) ASA p. 485]

A flaw affecting the #notification does not have to be taken into account if the #notification has nevertheless achieved its purpose.

FSCD 120 II 155 [(1994) ASA p. 416]

An #award is final from its notification which is when it has the same effects as an enforceable judicial decision.

FSCD 4A_14/2012 c. 3.1.1 (not published in FSCD 138 III 270)

Decisions are validly notified to the attorney-at-law, representative of a party, even if the representative did not yet submit a #power of attorney; in such a case, a direct #notification of the #award to the party would not be valid.

FSCD 4P.273/1999 [(2001) ASA p. 485]

The #notification of the #operative part of an #arbitral award is not sufficient for it to enter into force. An #arbitral award only enters into force once the #reasons have been notified.

VD 01.02.2012 IVb

2 Grounds for Setting Aside (2)

2.1 Principle

All #grounds for setting aside pursuant to Article 190(2) PILA are available against a final #award (Art. 190(3) PILA *a contrario*).

FSCD 130 III 755 [762], FSCD 4A_576/2012 c. 2, FSCD 4A_314/2012 c. 2, FSCD 4A_386/2010 c. 2, FSCD 4P.32/2007 c. 2.1, FSCD 4P.263/2002 c. 2.3

2.2 Exhaustive List

An #award can only be set aside for the #grounds exhaustively set out in Article 190(2) PILA.

FSCD 134 III 186 [187], FSCD 128 III 50 [53], FSCD 127 III 429 [431], FSCD 127 III 279 [282], FSCD 126 III 524 [526], FSCD 119 II 380 [383], FSCD 117 II 604 [606], FSCD 116 II 721 [725], FSCD 116 II 634 [636], FSCD 115 II 102 [105], FSCD 4A_308/2018 c. 2.3, FSCD 4A_301/2018 c. 3.1, FSCD 4A_284/2018 c. 2.3, FSCD 4A_438/2017 c. 1.2, FSCD 4A_238/2018 c. 3.2, FSCD 4A_114/2018 c. 2.2, FSCD 4A_345/2017 c. 1.2, FSCD 4A_583/2017 c. 1.3, FSCD 4A_136/2018, FSCD 4A_580/2017 c. 1.2, FSCD 4A_490/2017 c. 2.3, FSCD 4A_508/2017 c. 2.2, FSCD 4A_432/2017 c. 2.3, FSCD 4A_430/2017 c. 1.3, FSCD 4A_236/2017 c. 2.2, FSCD 4A_80/2017 c. 2.2, FSCD 4A_600/2016 c. 1.2, FSCD 4A_532/2016 c. 2.5, FSCD 4A_692/2016 c. 2.4, FSCD 4A_470/2016 c. 2.3, FSCD 4A_405/2016 c. 2.2, FSCD 4A_473/2016 c. 2.1, FSCD 4A_478/2016 c. 2.2, FSCD 4A_672/2016 c. 2.2, FSCD 4A_497/2015 c. 1.4, FSCD 4A_310/2016 c. 2.2, FSCD 4A_259/2015 c. 1.4, FSCD 4A_132/2016 c. 2.2, FSCD 4A_173/2016 c. 1.2, FSCD 4A_206/2016 c. 5, FSCD 4A_678/2015 c. 2.2, FSCD 4A_422/2015 c. 2 (not published in FSCD 142 III 284), FSCD 4A_428/2015 c. 2.2, FSCD 4A_568/2015 c. 2.2, FSCD 4A_172/2015 c. 2.3, FSCD 4A_378/2015 c. 3.1, FSCD 4A_54/2015 c. 2.2, FSCD 4A_143/2015 c. 1.2, FSCD 4A_684/2014 c. 2.2, FSCD 4A_544/2013 c. 2.2, FSCD 4A_623/2014 c. 2.4.1, FSCD 4A_599/2014 c. 2, FSCD 4A_636/2014 c. 2.2, FSCD 4A_698/2014, FSCD 4A_544/2014 c. 2.2, FSCD 4A_36/2015 c. 2, FSCD 4A_324/2014 c. 2.2, FSCD 4A_6/2014 c. 2.1 (not published in FSCD 140 III 520), FSCD 4A_178/2014 c. 2.2, FSCD 4A_530/2013 c. 3, FSCD 4A_448/2013 c. 2.2, FSCD 4A_362/2013 c. 2.2, FSCD 4A_304/2013 c. 2.2, FSCD 4A_540/2013 c. 3.1, FSCD 4A_93/2013 c. 2.3, FSCD 4A_305/2013 c. 2.2, FSCD 4A_330/2013 c. 2.2, FSCD 4A_274/2013 c. 2.2, FSCD 4A_67/2013 c. 1.3, FSCD 4A_95/2013 c. 2.2, FSCD 4A_476/2012 c. 2.3, FSCD 4A_41/2013, FSCD 4A_672/2012 c. 2.2, FSCD 4A_524/2012 c. 2.3, FSCD 4A_522/2012 c. 2.2, FSCD 4A_552/2012 c. 2.2, FSCD 4A_407/2012 c. 2.3, FSCD 4A_335/2012 c. 1.3, FSCD 4A_244/2012 c. 2.3, FSCD 4A_299/2012 c. 1.4, FSCD 4A_395/2012 c. 1, FSCD 4A_314/2012 c. 2, FSCD 4A_76/2012 c. 2.2, FSCD 4A_312/2012 c. 2, FSCD 4A_54/2012 c. 1.6, FSCD 4A_636/2011 c. 2.4, FSCD 4A_232/2012 c. 2.2, FSCD 4A_654/2011 c. 2.2, FSCD 4A_16/2012 c. 2.2, FSCD 4A_558/2011 c. 2.3 (not published in FSCD 138 III 322), FSCD 4A_528/2011 c. 1.3, FSCD 4A_526/2011 c. 1.2, FSCD 4A_602/2011 c. 2.2, FSCD 4A_454/2011 c. 2.1, FSCD 4A_214/2011 c. 1.3, FSCD 4A_426/2011 c. 2.2, FSCD 4A_162/2011 c. 1.2 & 2.1.2, FSCD 4A_254/2011 c. 5.1, FSCD 4A_617/2010 c. 2.3, FSCD 4A_404/2010 c. 3.3, FSCD 4A_600/2010 c. 3, FSCD 4A_326/2010 c. 1.2, FSCD 4A_402/2010 c. 1.2, FSCD 4A_386/2010 c. 2, FSCD 4A_428/2010 c. 1.2, FSCD 4A_414/2010 c. 1.2, FSCD 4A_43/2010 c. 3.4, FSCD 4A_338/2010, FSCD 4A_458/2009 c. 2.3.1, FSCD 4A_320/2009 c. 1.3, FSCD 4A_433/2009 c. 1.5, , FSCD 4A_456/2009 c. 2.5.1, FSCD 4A_490/2009 c. 1.2 (not published in FSCD 136 III 200), FSCD 4A_628/2009 c. 3, FSCD 4A_444/2009 c. 2, FSCD 4A_612/2009 c.

6.2.1, FSCD 4A_574/2009, FSCD 4A_550/2009 c. 2, FSCD 4A_256/2009 c. 2.3, FSCD 4A_258/2009 c. 2.3, FSCD 4A_240/2009 c. 1.3, FSCD 4A_62/2009 c. 2.2, FSCD 4A_96/2009 & 4A_94/2009 c. 2.2, FSCD 4A_612/2009 c. 2.2, FSCD 4A_424/2008 c. 2.2, FSCD 4A_438/2008 c. 2.7, FSCD 4A_294/2008 c. 2.4, FSCD 4A_258/2008 c. 3.4, FSCD 4A_176/2008 c. 2.1, FSCD 4A_194/2008 c. 3, FSCD 4A_128/2008 c. 2.2, FSCD 4A_18/2008 c. 2, FSCD 4A_506/2007 c. 2.2, FSCD 4A_244/2007 c. 4.2, FSCD 4A_370/2007 c. 2.4, FSCD 4A_450/2007 c. 2.2, FSCD 4A_352/2007 c. 4, FSCD 4P.4/2007 c. 2.1, FSCD 4A_220/2007 c. 5.1, FSCD 4A_160/2007 c. 2.2, FSCD 4A_42/2007 c. 4.2, FSCD 4A_17/2007 c. 3.2, FSCD 4A_18/2007 c. 2.2, FSCD 4P.32/2007 c. 2.1, FSCD 4P.206/2006 c. 2.1, FSCD 4A_2/2007 c. 2.2, FSCD 4P.304/2006 c. 3, FSCD 4P.105/2006 c. 7.3, FSCD 4P.88/2006 c. 2.2, FSCD 4P.54/2006 c. 1.3, FSCD 4P.23/2006 c. 1.2, FSCD 4P.298/2005 c. 1.2, FSCD 4P.146/2005 c. 3, FSCD 4P.48/2005 c. 2.1, FSCD 4P.253/2004 c. 1, FSCD 4P.26/2004 c. 2.2, FSCD 4P.226/2004 c. 2, FSCD 4P.208/2004 c. 3.1, FSCD 4P.115/2004 c. 1, FSCD 4P.62/2004 c. 1.1, FSCD 4P.140/2004 c. 1.1, FSCD 4P.104/2004 c. 3.2, FSCD 4P.64/2004 c. 2.2, FSCD 4P.270/2003 c. 1, FSCD 4P.253/2003 c. 4.1, FSCD 4P.196/2003 c. 2.1, FSCD 4P.202/2003 c. 1.1, FSCD 4P.149/2003 c. 1.1, FSCD 4P.115/2003 c. 2.1, FSCD 4P.137/2002 c. 3, FSCD 4P.263/2002 c. 2.3, FSCD 4P.250/2002 c. 1.1, FSCD 4P.207/2002 c. 2, FSCD 4P.129/2002 c. 2.1, FSCD 4P.198/2002 c. 1.1, FSCD 4P.40/2002 c. 1a, FSCD 4P.38/2002 c. 1a, FSCD 4P.235/2001 c. 1b, FSCD 4P.282/2001 c. 2a (not published in FSCD 128 III 191), FSCD 4P.200/2001 c. 1b, FSCD 4P.222/2001 c. 1a, FSCD 4P.114/2001 c. 1a, FSCD 4P.188/2001 c. 1c, FSCD 4P.143/2001 c. 2a, FSCD 4P.260/2000 c. 3b, FSCD 4P.212/1999 c. 1a, FSCD 23.03.1999 c. 3b, FSCD 19.11.1998 c. 7, 9a & 10, FSCD 30.12.1994 [(1995) ASA p. 223], 07.12.1994 c. 2, FSCD 17.08.1994 [(1995) ASA p. 201], FSCD 25.11.1993 [(1994) ASA p. 252], FSCD 08.02.1993 c. 3, FSCD 11.05.1992 [(1992) ASA p. 382]

If the #appellant does not invoke one of the #grounds listed at Article 190(2) PILA, the #appeal will be held inadmissible and the simplified procedure will be applied in conformity with Article 108(1) FSCA.

FSCD 4A_36/2015 c. 2

As the duration of the #arbitral proceedings is not listed in Article 190(2) PILA, this #grievance cannot be heard.

FSCD 4A_160/2007 c. 6, FSCD 4P.304/2006 c. 4.1

2.3 Hierarchy of the Grounds for Setting Aside

According to well established #case law, procedural #public policy within the meaning of Article 190(2)(e) PILA is a subsidiary guarantee which can only be invoked if none of the #grounds set out in Article 190 (2)(a)-(d) PILA apply.

FSCD 138 III 270 [276], FSCD 4A_170/2017 c. 6.1, FSCD 4A_668/2016 c. 4.1, FSCD 4A_690/2016 c. 4.1, FSCD 4A_342/2015 c. 5.1 (not published in FSCD 142 III 360)

The procedural #public policy guarantee is a precautionary norm for procedural breaches which the legislature did not consider when adopting the other sections of Article 190(2) PILA. It does not enable a party to raise an argument falling within Article 190(2)(a)-(d) PILA which is inadmissible for another reason.

FSCD 138 III 270 [276], FSCD 4A_510/2015 c. 5, FSCD 4A_246/2014 c. 7.1, FSCD 4A_304/2013 c. 5.1.2, FSCA 4A_232/2013 c. 5.1.1, FSCD 4A_576/2012 c. 5.1, FSCD 4A_276/2012 c. 4.1, FSCD 4A_312/2012 c. 5, FSCD 4A_488/2011 c. 4.5

The specific #grounds for setting aside contained in Article 190(2)(a)-(d) PILA prevail over the #ground of Article 190(2)(e) PILA.

FSCD 4A_510/2015 c. 5, FSCD 4A_392/2015 c. 4.2, FSCD 4A_709/2014 c. 6.1, FSCD 4A_426/2014 c. 4.2.1, FSCD 4A_486/2014 c. 8, FSCD 4A_304/2013 c. 5.1.2, FSCD 4A_312/2012 c. 5, FSCD 4A_488/2011 c. 4.5, FSCD 4A_682/2012 c. 4.3, FSCD 4A_530/2011 c. 3.2, FSCD 4A_604/2010 c. 2.2.2, FSCD 4A_600/2010 c. 4.3, FSCD 4P.105/2006 c. 5.3

An #appellant cannot argue a violation of procedural #public policy when it has already submitted in vain the same arguments alleging that there was a violation of substantive #public policy .

FSCD 4A_576/2012 c. 5.1, FSCD 4A_14/2012 c. 5.2.2 (not published in FSCD 138 III 270)

The Federal Supreme Court examines first the formal #grounds because their admission leads to the setting aside of the arbitral #award, without it being necessary to examine the #merits.

FSCD 03.11.1997 c. 1

According to the system of the #grounds for setting aside, the #ground for setting aside of Article 190(e) PILA relates primarily to violations of substantive law, whereas procedural flaws have to be appealed based on the #grounds of Article 190(a)-(d) PILA.

FSCD 06.07.1990 c. 4a

2.4 Limitation of the Possibilities for Setting Aside

The examination by the Federal Supreme Court of international arbitral #awards with regard to the #merits is limited to the issue of whether the arbitral #award is compatible with #public policy (Art. 190(2)(e) PILA).

FSCD 139 III 511 [514], FSCD 121 III 331 [333], FSCD 116 II 634 [636], FSCD 4A_525/2017 c. 3.3.4, FSCD 4A_173/2016 c. 2.2.2, FSCD 4A_568/2015 c. 4.1, FSCD 4A_54/2015 c. 4.4, FSCD 4A_684/2014 c. 4.2, FSCD 4A_597/2013 c. 4.1, FSCD 4A_304/2013 c. 2.2, FSCD 4A_330/2013 c. 3.3, FSCD 4A_524/2012 c. 2.2, FSCD 4A_522/2012 c. 4.2.2, FSCD 4A_276/2012 c. 3.1, FSCD 4A_76/2012 c. 4.1, FSCD 4A_150/2012 c. 5.1, FSCD 4A_654/2011 c. 4.1, FSCD 4A_16/2012 c. 4.1, FSCD 4A_326/2010 c. 3.1, FSCD 4A_402/2010 c. 2.1.2, FSCD 4A_394/2010 c. 5.1, FSCD 4A_414/2010 c. 2.1, FSCD 4A_320/2009 c. 4.1, FSCD 4A_624/2009 c. 3.1, FSCD 4A_4/2010 c. 3.1, FSCD 4A_488/2009 c. 3.1, FSCD 4A_444/2009 c. 4.2, FSCD 4A_550/2009 c. 6.1, FSCD 4A_258/2009 c. 4.1, FSCD 4A_256/2009 c. 4.1, FSCD 4A_260/2009 c. 3.1, FSCD 4A_240/2009 c. 4.1, FSCD 4A_17/2007 c. 4.1, FSCD 4P.304/2006 c. 3, FSCD 4P.114/2006 c. 6.5.3, FSCD 07.09.2007 [4P.134/2006] c. 5.1, FSCD 4P.88/2006 c. 4.1, FSCD 4P.146/2005 c. 3.1, FSCD 4P.260/2000 c. 3b, FSCD 09.07.1996 [4P.114/1995] c. 1a, FSCD 17.08.1994 [(1995) ASA p. 201]).

The PILA limits the possibilities for setting aside of partial and final #awards in two ways: on the one hand, the #appeal can only be filed with one instance, the Federal Supreme Court, which decides according to the procedure applicable to the [former] #motion for constitutional review, or the court of the Canton of the #arbitral tribunal's #seat which the parties, based on an agreement, can seize instead of the Federal Supreme Court (Art. 191(2) fPILA); on the other hand, the #award can only be set aside for the #grounds exhaustively listed in Article

190(2) PILA. These #grounds concern primarily procedural issues and the substantive review is limited to the question of whether the #award violates #public policy. They do not concern #arbitrariness based on findings manifestly contrary to the #facts as they result from the file or based on a clear violation of the law or of #equity, i.e. the #grounds for setting aside listed in Article 36(f) fConcordat.

FSCD 121 III 331 [333], FSCD 119 II 271 [(1993) ASA p. 409], FSCD 116 II 634 [636], FSCD 115 II 102 [105], FSCD 115 II 288 [291-292], FSCD 4A_17/2007 c. 4.1, FSCD 4P.304/2006 c. 5.1, FSCD 4P.200/2001 c. 1b, FSCD 4P.243/2000 p. 7 confirming ZH 22.09.2000, FSCD 09.07.1996 [4P.114/1995] c. 1a, FSCD 17.08.1994 [(1995) ASA p. 201]

To this extent, the possibilities of setting aside based on a substantive #denial of justice are narrowly limited.

FSCD 121 III 331 [333]

The legislator wanted, on purpose, to limit the #grounds for setting aside an #award, compared to Article 36 fConcordat, in order to reduce the possibilities of delaying the proceedings and in order to enhance the efficiency of arbitration.

FSCD 119 II 380 [382-383], FSCD 116 II 373 [374-375], FSCD 115 II 288 [291], FSCD 4A_530/2013 c. 4, FSCD 4P.304/2006 c. 3, FSCD 4P.146/2005 c. 3 and 3.1, FSCD 06.09.1996 [(1997) ASA p. 307], FSCD 09.07.1996 [4P.114/1995] c. 1a, FSCD 10.06.1996 [(2000) ASA p. 775], FSCD 01.03.1996 c. 2b/aa, FSCD 30.12.1994 [(1995) ASA p. 223], FSCD 08.02.1994 c. 2c

The PILA has considerably limited the possibilities for setting aside an #award, compared to the rules of the fConcordat, by the fact that Article 190(2) PILA only provides for a few procedural grounds for setting aside and limits the review with regard to the #merits to the question whether the #award is compatible with #public policy.

FSCD 117 II 94 [97], FSCD 115 II 288 [291-292], FSCD 4P.304/2006 c. 5.1, FSCD 4P.240/2006 c. 4.1, FSCD 10.06.1996 [(2000) ASA p. 775], FSCD 01.03.1996 c. 2b/aa

By limiting the possibilities for setting aside, and by concentrating the #appeals, the legislator wanted to take into account criticism to the effect that the possibilities of setting aside offered by the fConcordat, with its double #appeals instance, were too far reaching and took too much time and thus did not meet the goal and the needs of #arbitral proceedings, which are to provide speedy resolution of disputes.

FSCD 116 II 721 [728]

The limited judicial review of arbitral #awards pursuant to Article 77(1) FSJA in connection with Article 190(2) PILA applies to all international #arbitral proceedings including when the dispute concerns the employment relationship of a sportsman.

FSCD 4A_132/2016 c. 2.4, FSCD 4A_612/2009 c. 2.4.1

The Federal Supreme Court is not a #jurisdiction of #appeal and the legislator consciously and voluntarily restricted its #power of review when it is deciding on a setting aside application in international arbitration.

FSCD 4A_520/2015 c. 3.3.1

2.5 No Direct Grievance of a Violation of the ECHR

A violation of the ECHR may not be directly complained of in a #motion to set aside according to Article 190(2) PILA.

FSCD 142 III 360 [362], FSCD 4A_114/2018 c. 2.2, FSCD 4A_80/2017 c. 2.2, FSCD 4A_246/2014 c. 7.2.2, FSCD 4A_178/2014 c. 2.4, FSCD 4A_198/2012 c. 3.1, FSCD 4A_238/2011 c. 3.1.2, FSCD 4A_404/2010 c. 3.5.3, FSCD 4A_43/2010 c. 3.6.1, FSCD 4A_320/2009 c. 2, FSCD 4A_612/2009 c. 2.4.1, FSCD 4P.105/2006 c. 7.3

However, the principles arising from the ECHR may be resorted to in order to apply the guarantees of Article 190(2) PILA.

FSCD 142 III 360 [362], FSCD 4A_80/2017 c. 2.2, FSCD 4A_246/2014 c. 7.2.2, FSCD 4A_178/2014 c. 2.4, FSCD 4A_238/2011 c. 3.1.2, FSCD 4A_404/2010 c. 3.5.3, FSCD 4A_124/2010 c. 6.3.3.2, FSCD 4A_43/2010 c. 3.6.1, FSCD 4A_320/2009 c. 2, FSCD 4P.105/2006 c. 7.3

The ECHR is not directly applicable in arbitration. The violation of the provisions of this Convention does not figure among the exhaustive list of #grounds for setting aside of Article 190(2) PILA. However, it should not be excluded straightaway to take into account the principles underlying these provisions when examining the #grounds for setting aside listed in Article 190(2) PILA.

FSCD 4A_384/2017 c. 4.2.1, FSCD 4A_178/2014 c. 2.4, FSCD 4A_43/2010 c. 3.6.1, FSCD 4A_320/2009 c. 1.5.3, FSCD 4A_612/2009 c. 2.4.1, FSCD 4A_370/2007 c. 5.3.2, FSCD 4P.105/2006 c. 7.3, LU 23.04.2008 c. 4.4.5

It is not possible to broaden the judicial review, by reference to the right to a fair trial and the guarantee of an independent and impartial tribunal established by law found at Article 6(1) ECHR, in order to critique the fact that in the framework of an #appeal against an arbitral #award under Article 190(2) PILA, the law was wrongly applied or that there was a blatantly wrong factual finding.

FSCD 4A_132/2016 c. 2.4

A violation of the ECHR may not be directly complained of in a #motion to set aside according to Article 190(2) PILA. Otherwise, the admissible #grounds for setting aside would be widened, as the content of the #right to be heard within the meaning of Article 190(2)(d) PILA does not correspond to the content of the procedural guarantees resulting from Article 6(1) ECHR.

FSCD 4A_43/2010 c. 3.6.1, FSCD 4P.105/2006 c. 7.3

The provision of Article 6(1) ECHR does in any way not apply to the proceedings of voluntary arbitration. However, this does not exclude that the principles flowing from Article 6(1) ECHR can be used when concretising the procedural guarantees which can be invoked based on Article 190(2) PILA.

FSCD 4A_124/2010 c. 6.3.3.2, FSCD 4A_43/2010 c. 3.6.1, FSCD 4A_320/2009 c. 1.5.3, FSCD 4P.105/2006 c. 7.3

2.6 No Direct Grievance of a Violation of the Federal Constitution

A violation of the FC cannot be directly complained of in a #motion to set aside according to Article 190(2) PILA. The principles resulting from the FC can be applied in support of the guarantees given by Article 190(2) PILA.

FSCD 4A_384/2017 c. 4.2.1, FSCD 4A_668/2016 c. 4.3.2, FSCD 4A_473/2016 c. 2.1, FSCD 4A_355/2016 c. 2.1, FSCD 4A_178/2014 c. 2.4, FSCD 4A_404/2010 c. 3.5.3, FSCD 4A_124/2010 c. 6.3.3.2, FSCD 4A_43/2010 c. 3.6.1, FSCD 4A_320/2009 c. 1.5.3, FSCD 4A_612/2009 c. 2.4.1

2.7 No Setting Aside for Manifestly False Fact-Findings

A manifestly false #fact-finding or a #fact-finding contrary to the #facts as they result from the file is not as such sufficient for the setting aside of an international arbitral #award because the substantive examination by the Federal Supreme Court is limited to the question of whether the arbitral #award is compatible with #public policy, which is not identical to #arbitrariness. Therefore, the possibilities of setting aside based on a substantive #denial of justice is subject to narrow limits.

FSCD 121 III 331 [333], FSCD 115 II 288 [292], FSCD 115 II 102 [105], FSCD 26.05.1999 [(2000) ASA p. 334], FSCD 09.02.1998 [(1998) ASA p. 650], FSCD 24.03.1997 [(1997) ASA p. 327], FSCD 28.01.1997 [(1998) ASA p. 126-127], FSCD 11.05.1992 [(1992) ASA p. 400]

This situation has to be distinguished from the one where the #fact-finding which is manifestly erroneous or contrary to the file constitutes a procedural #denial of justice. This is for instance the case if #evidence submitted by the parties is negligently overlooked or misunderstood. Such a violation of the procedural #right of a party to be heard would lead to the setting aside of the #award independently of the chances of the disadvantaged party to succeed on the #merits.

FSCD 121 III 331 [333-334], FSCD 26.05.1999 [(2000) ASA p. 334], FSCD 20.10.1998 c. 3a, FSCD 09.02.1998 [(1998) ASA p. 650], FSCD 24.03.1997 [(1997) ASA p. 327], FSCD 28.01.1997 [(1998) ASA p. 126-127]

#Fact findings may only be challenged before the Federal Supreme Court by the #claim that the #facts have been established in violation of the procedural guarantees protected by law (in particular Art. 190(2)(d) PILA) or that they are incompatible with procedural #public policy.

FSCD 120 II 155 [166], FSCD 119 II 380 [383], FSCD 09.07.1996 [4P.114/1995] c. 1a, FSCD 30.12.1994 [(1995) ASA p. 223], FSCD 08.02.1994 c. 2c & 3, FSCD 06.07.1990 c. 1d

The purpose of limiting the possibilities of setting aside would be considerably impaired if the unfettered powers of review of the Federal Supreme Court to examine the grounds for setting aside of Article 190(2) PILA were to be understood in the sense that it allows reviewing with unfettered powers the fact-findings of the arbitral tribunal, as an appeals instance would do.

FSCD 119 II 380 [383], FSCD 4A_103/2011 c. 3.1.2, FSCD 4P.146/2005 c. 3.1, FSCD 4P.12/2000 c. 4a/aa, FSCD 08.12.1999 [(2000) ASA p. 551], FSCD 29.01.1996 [(1996) ASA p. 501], FSCD 30.12.1994 [(1995) ASA p. 223]

An arbitrary judicial interpretation of a fact does not constitute in itself a ground for appeal, as restrictively listed in Article 190(2) PILA, that could be possibly invoked against an award issued in the context of international arbitration.

FSCD 4A_716/2016 c. 3.2

The fact-findings of the arbitral tribunal may only be challenged by a motion to set aside based on a grievance of procedural errors (violation of the right to be heard, violation of procedural public policy), but not as being untenable from a substantive point of view.

FSCD 4P.48/2005 c. 3.1

The system of Article 190(2) PILA does not allow the Federal Supreme Court to review the facts at the basis of the award. Therefore, the submission of new documents to establish these facts is inadmissible.

FSCD 06.02.1992 c. 1c

2.8 No Setting Aside for Arbitrariness or Clear Violations of Law or Equity

The notion of public policy is more restrictive than the one of arbitrariness of Article 8 FC [Art. 4 fFC] and Article 36(f) fConcordat.

FSCD 138 III 322 [329], FSCD 132 III 389 [393], FSCD 121 III 331 [333], FSCD 120 II 155 [166], FSCD 119 II 271 [(1993) ASA p. 409], FSCD 117 II 604 [606], FSCD 116 II 634 [636-637], FSCD 115 II 288 [292], FSCD 4A_116/2016 c. 4.1, FSCD 4A_143/2015 c. 1.2, FSCD 4A_654/2011 c. 4.2, FSCD 4A_4/2010 c. 3.1, FSCD 4A_612/2009 c. 6.3.1, FSCD 4A_260/2009 c. 3.1 FSCD 4P.304/2006 c. 3, FSCD 4P.154/2006 c. 3.1, FSCD 4P.105/2006 c. 9, FSCD 4P.146/2005 c. 3.1 and 7.2.1, FSCD 4P.270/2003 c. 3.4, FSCD 4P.157/2000 c. 2, FSCD 22.09.1998 c. 2, FSCD 01.03.1996 c. 2b/aa, FSCD 17.08.1994 [(1995) ASA p. 201-202], FSCD 11.05.1992 [(1992) ASA p. 399], FSCD 13.03.1992 [(1992) ASA p. 365-366], FSCD 08.07.1992 c. 3a, FSCD 30.09.1991 c. 1a, FSCD 28.08.1990 c. 2, FSCD 25.07.1990 [(1991) SJ p. 13], FSCD 23.10.1989 [(1990) ASA p. 55]

Contrary to Article 36(f) fConcordat, which provides for the setting aside of arbitral awards for arbitrariness due to fact-findings manifestly contrary to the file or clear violations of law and equity, the new provisions in the PILA limit – according to the legislator's will – the grounds for setting aside in international arbitration. Even a manifestly false fact-finding or application of law is in and of itself not sufficient for setting aside an arbitral award.

FSCD 127 III 576 [578], FSCD 121 III 331 [333], FSCD 120 II 155 [166], FSCD 119 II 271 [(1993) ASA p. 409], FSCD 117 II 604 [606], FSCD 116 II 634 [636-

637], FSCD 115 II 288 [291-292], FSCD 115 II 102 [105], FSCD 4A_426/2017 c. 2, FSCD 4A_520/2015 c. 3.3.2, FSCD 4A_606/2013 c. 5.3, FSCD 4A_74/2014 c. 3.2.6 (not published in FSCD 140 III 477), FSCD 4A_360/2011 c. 4.1, FSCD 4A_444/2009 c. 4.2.1, FSCD 4A_550/2009 c. 3.2, FSCD 4A_240/2009 c. 5.1, FSCD 4A_18/2008 c. 2.2, FSCD 4P.304/2006 c. 5.1, FSCD 4P.134/2006 c. 3, FSCD 4P.134/2006 c. 7, FSCD 4P.146/2005 c. 3.1 & 7.2.1 & 11.1, FSCD 4P.242/2004 c. 7.1, FSCD 4P.253/2004 c. 3.1, FSCD 4P.140/2004 c. 2.1, FSCD 4P.200/2001 c. 1b, FSCD 4P.143/2001 c. 3a/aa, FSCD 4P.12/2000 c. 4a/aa, FSCD 08.09.1999 c. 3a & 4d & 6c, FSCD 22.02.1999 [(1999) ASA p. 539-540, 542], FSCD 14.12.1998 [(2000) Rivista dell'Arbitrato p. 142], FSCD 19.11.1998 c. 5a, FSCD 20.10.1998 c. 2b/aa, FSCD 17.07.1998 [4P.7/1998] c. 2a/aa, FSCD 15.06.1998 c. 2a and 3a, FSCD 08.05.1998 c. 2a, FSCD 22.01.1998 c. 2b, FSCD 03.11.1997 c. 4a, FSCD 01.03.1996 c. 2b/aa, FSCD 16.02.1996 c. 5a, FSCD 29.01.1996 [(1996) ASA p. 500-501], FSCD 07.12.1994 c. 2, FSCD 17.08.1994 [(1995) ASA p. 201], FSCD 08.02.1994 c. 3, FSCD 11.05.1992 [(1992) ASA p. 382], FSCD 25.07.1990 [(1991) SJ p. 13]

To hold that there is a violation of equality between the parties when an #arbitral tribunal does not take into account, inadvertently or for whatever reason, a pertinent rule of law invoked by a party or a decisive fact alleged by a party, would be tantamount to introducing the ground of #arbitrariness through #case law and under the cloak of Article 190(2)(d) PILA even though the federal legislature specifically refused to introduce the possibility of the setting aside of an international arbitral #award on such a #ground.

FSCD 4A_284/2018 c. 6.2, FSCD 4A_450/2017 c. 3.2.2, FSCD 4A_672/2012 c. 4.1.2, FSCD 4A_360/2011 c. 4.1

The criticism that the #arbitral tribunal failed to apply a legal provision that the #appellant deemed applicable or simply misapplied such a provision does not fall within the #grounds which are exhaustively enumerated in Article 190(2) PILA.

FSCD 4A_40/2017 c. 4.2

Articles 90 to 98 FSCA do not apply to a #motion to set aside an arbitral #award (Art. 77(2) FSCA) which, in particular, rules out the possibility of arguing that the law was applied arbitrarily.

FSCD 4A_214/2016 c. 3.1, FSCD 4A_378/2015 c. 3.1, FSCD 4A_304/2013 c. 2.2

The manner in which the #arbitrators interpreted the applicable law is not among the #grounds for appeal referred to in Article 190(2) PILA.

FSCD 4A_342/2015 c. 2.2.2 (not published in FSCD 142 III 360)

Disregard of the substantive law by an #arbitrator, even if arbitrary, is not among the #grounds for #appeal which are exhaustively enumerated at Article 190(2) PILA.

FSCD 4A_554/2014 c. 2.2

However, the #appellant again invokes a #ground for setting aside found in the CCP, namely the arbitrary plea pursuant to Article 393(e) CCP. Article 190(2) PILA, which is applicable here, does not contain a comparable #ground for setting aside.

FSCD 4A_254/2013 c. 3.2

The argument that the #arbitrator incorrectly applied the relevant arbitration rules does not fall within the #grounds for #appeal enumerated at Article 190(2) PILA.

FSCD 4A_198/2012 c. 3.1

The Federal Supreme Court cannot review whether the #arbitrator has correctly applied the law; even a clear violation of the law is not sufficient to violate #public policy.

FSCD 4A_509/2013 c. 3.2.2, FSCD 4A_600/2010 c. 3, FSCD 4A_4/2010 c. 3.2, FSCD 116 II 634 [637], FSCD 4P.105/2006 c. 6.2, FSCD 4P.222/2001 c. 2b, FSCD 26.05.1999 [(2000) ASA p. 335]

The #ground for setting aside for an obvious and arbitrary #denial of justice, which was included in the draft bill presented by the Swiss #Federal Council, has been deliberately eliminated during the parliamentary debates, in order to limit to a minimum the possibilities to set aside an #award. This is why the PILA does not recognize the general #ground for setting aside of #arbitrariness, whether it relates to #fact-findings or the application of law.

FSCD 30.12.1994 [(1995) ASA p. 223]

2.9 No Setting Aside for the Assessment of Evidence

The Federal Supreme Court, hearing an #Appeal in Civil Matters against an international #arbitral award, does not review the assessment of the #evidence by the #arbitral tribunal, even if it were to turn out arbitrary.

FSCD 4A_497/2015 c. 5.3, FSCD 4A_34/2015 c. 4.3.2 (not published in FSCD 141 III 495), FSCD 4A_497/2015 c. 4.2

The Federal Supreme Court cannot review the assessment of #evidence made in the context of an international arbitration, except under the very limited aspect of #public policy.

FSCD 4A_335/2012 c. 2.3, FSCD 4A_584/2009 c. 3.3, FSCD 4A_539/2008 c. 4.2.1

The argument that the #arbitral tribunal would have set excessive evidentiary requirements does not correspond to any #ground for #appeal prescribed by law (Art. 190(2) PILA).

FSCD 4A_522/2012 c. 3.3

When seized by a #motion to set aside according to Article 190(2)(e) PILA, the Federal Supreme Court cannot review the assessment of #evidence and the findings of #facts which results therefrom. It cannot examine whether the #arbitral tribunal has drawn reasonable conclusions on the basis of material #evidence.

FSCD 4A_360/2011 c. 4.1, FSCD 4A_394/2010 c. 4.2, FSCD 4A_96/2009 & 4A_94/2009 c. 3.2.2, FSCD 4P.304/2006 c. 5.1, FSCD 4P.146/2005 c. 3.1, 7.2.1 & 11.1, FSCD 4P.242/2004 c. 7.1, FSCD 4P.253/2004 c. 3.1, FSCD 4P.140/2004 c. 2.1 & 2.2.5, FSCD 4P.222/2001 c. 2b, FSCD 4P.12/2000 c. 4a/bb, FSCD 26.05.1999 [(2000) ASA p. 334], FSCD 22.02.1999 [(1999) ASA p. 539-540], FSCD 14.12.1998 [(2000) Rivista dell'Arbitrato p. 142], FSCD 19.11.1998 c. 5a & 5d/aa, FSCD 15.06.1998 c. 2a & 3b/bb, FSCD 28.05.1998 c. 2e, FSCD 25.11.1997 c. 3b, FSCD 25.07.1990 [(1991) SJ p. 14]

The question whether the #arbitrator, in order to establish #causality, has understood the succession of events is a pure question of the assessment of #evidence and of #fact-finding which cannot be examined in a #motion to set aside in international arbitration.

FSCD 4A_458/2009 c. 4.4.5, FSCD 4P.71/2002 c. 3.3

The conclusions that an #arbitral tribunal might have drawn or not from an #expert opinion are part of the assessment of #evidence, which is outside the scope of application of Article 190(2)(e) PILA.

FSCD 4P.96/2002 c. 6.1

The Federal Supreme Court may not review an anticipated assessment of #evidence, except under the extremely limited scope of review of #public policy.

FSCD 4P.117/2004 c. 2.1

The determination of the effective and common intent of the parties with respect to the content of the contract is an issue of fact.

FSCD 4P.250/2002 c. 2.3.1

The question whether medical certificates are convincing is a question of the assessment of #evidence which cannot found a #motion to set aside in international arbitration.

FSCD 4P.167/2002 c. 2.2

The question whether the intent of the parties has been correctly established is a pure issue of the assessment of #evidence which is part of the #fact-findings and which, in the absence of a #ground for setting aside provided for in Article 190(2) PILA, cannot be reviewed by the Federal Supreme Court.

FSCD 4P.124/2001 c. 2d

The assessment of #evidence and the application of law can only be reviewed by the Federal Supreme Court under the limited scope of a violation of #public policy.

FSCD 16.02.1998 c. 4

The factual consequences which an #arbitrator has to draw from the declarations or the behaviour of a party or a #witness, or even the silence or the absence of the latter, are part of the assessment of #evidence.

FSCD 25.07.1997 [(2000) ASA p. 103]

2.10 No Setting Aside for the Interpretation of a Contract

The Federal Supreme Court cannot review whether the #arbitrator has correctly interpreted a contractual clause, be it in order to determine the real or the hypothetical intent of the parties.

FSCD 116 II 634 [638], FSCD 4A_176/2008 c. 5.2, FSCD 4P.222/2001 c. 2b, FSCD 4P.12/2000 c. 4a/bb, FSCD 26.05.1999 [(2000) ASA p. 335], FSCD 22.02.1999 [ASA p. 540], FSCD 22.01.1998 c. 2c, FSCD 25.07.1990 [(1991) SJ p. 14]

The question whether the #arbitrator has correctly interpreted a contractual clause is an issue of #interpretation which cannot be reviewed on a #motion to set aside in international arbitration.

FSCD 4P.71/2002 c. 3.3, FSCD 14.12.1998 [(2000) Rivista dell'Arbitrato p. 142]

2.11 No Setting Aside for the Interpretation of Statutes

Following the example of the process of #interpretation of a contract and the consequences which follow logically from it, the #interpretation by an #arbitral tribunal of the provisions of #statutes of a private organism is also excluded from the scope of application of #public policy and cannot be reviewed by the Federal Supreme Court in the context of a #motion to set aside based on Article 190(2)(e) PILA.

FSCD 4A_258/2008 c. 4.2

2.12 Correcting Award

- See also Article 189(1) PILA, section 1.3; Article 190(2)(b) PILA, section 2b.5; and Article 191 PILA, section 35

In a [former] #motion for constitutional review against a correcting #award in the broad sense – i.e. an #award rendered following a request for #correction or on the #arbitral tribunal's own motion, irrespective of the decision taken in this #award –, the #appellant may claim that the #arbitral tribunal has rendered its #award (and not the original #award) in an irregular #composition (Art. 190(2)(a) PILA); that it wrongly accepted or declined its #jurisdiction to correct the original #award, that it has exceeded its #jurisdiction and has modified the very content of the #award (Art. 190(2)(b) PILA); that by rendering the correcting #award, it has decided *ultra petita* or has omitted to decide on one of the grounds for #correction (Art. 190(2)(c) PILA); that the correcting proceedings have not respected the #equal treatment of the parties and their #right to be heard (Art. 190(2)(d) PILA); finally, that the correcting #award is incompatible with substantive #public policy (quite a hypothetical case) or procedural #public policy (case already more probable) (Art. 190(2)(e) PILA).

FSCD 131 III 164 [169]

However, it is excluded that by a [former] #motion for constitutional review against the correcting #award, a party attacks for the first time or once more, the initial #award which it omitted to attack within the #time limits provided for this or which it attacked without success.

FSCD 131 III 164 [169]

2.13 Specificities of Investment Arbitration

The reasoning of the Federal Supreme Court when it rules on an application for the setting aside of a final #award rendered in the field of international investment disputes is not uniform but as it is subject to the general rule which applies to all types of arbitration, it depends on the grounds set out in the application to set aside.

FSCD 4A_157/2017 c. 3.3.4

2a *Incorrect Constitution of the Arbitral Tribunal (a)*

- For the #independence and #impartiality of the #arbitrators, see Article 180 PILA, section 1.3

2a.1 Principle

Like a state judge, an #arbitrator must offer sufficient guarantees of #independence and #impartiality. If an #arbitral tribunal lacks #independence or #impartiality, it shall be constituted incorrectly, respectively the sole #arbitrator shall be deemed to have been appointed incorrectly within the meaning of Article 190(2)(a) PILA.

FSCD 142 III 521 [536], FSCD 136 III 605 [608], FSCD 129 III 445 [449], FSCD 4A_284/2018 c. 6.1.2

Whoever enters into an #arbitration agreement and renounces in advance the constitutional right (Art. 30 FC) and the ECHR (Art. 6(1) ECHR) to have the case heard by a tribunal established by law (FSCD 128 III 50 at 2c/aa p. 58) may reasonably expect that the members of the #arbitral tribunal or the sole #arbitrator will not only offer sufficient guarantees of #independence and #impartiality but also meet the requirements that the parties mutually agreed upon (number, qualifications, appointment procedure) or which result from the arbitration rules they adopted or even the legal provisions applicable in the alternative (see Art. 179(2) PILA).

FSCD 139 III 511 [514], FSCD 4A_322/2016 c. 2.1

Following the example of a State court, an #arbitral tribunal has to present sufficient guarantees of #independence and #impartiality. The violation of this principle leads to an incorrect #constitution within the meaning of Article 190(2)(a) PILA.

FSCD 129 III 445 [449], *FSCD 125 I 389 [390], FSCD 119 II 271 [275], FSCD 118 II 359 [361], FSCD 4A_505/2017 c. 4.2.1, FSCD 4A_236/2017 c. 3.1.1, FSCD 4A_598/2014 c. 2.2.1, FSCD 4A_620/2012 c. 3.1, FSCD 4A_428/2011 c. 2.1, FSCD 4A_210/2008 c. 4.2, FSCD 4A_176/2008 c. 3.3, FSCD 4A_506/2007 c. 3.1.1, FSCD 4P.4/2007 c. 3.1, FSCD 4A_160/2007 c. 5.2, FSCD 4P.196/2003 c. 3.1, FSCD 4P.263/2002 c. 5.1, FSCD 4P.188/2001 c. 2b

"Arbitral tribunal" within the meaning of Article 190(2)(a) PILA is only the tribunal which has actually rendered the challenged decision and not a previous #arbitral tribunal.

FSCD 118 II 359 [360]

The determination of whether an #award can be set aside on the ground of Article 190(2)(a) PILA cannot depend upon whether or not a possible future #award on the #merits may be recognized and enforced under the NYC.

FSCD 4A_146/2012 c. 3.3

If the #appellant challenges the refusal to dismiss an #arbitrator in a [*former*] #motion for constitutional review aiming at the setting aside of the #final award by invoking a violation of Article 30 FC, such a #ground for challenge is admissible with regard to Article 84(1)(a) fSOFJ. The question of whether such a

#ground for challenge is also admissible under Article 85(c) fSOFJ and Article 190(2)(a) PILA has been left open.

FSCD 09.02.1998 [(1998) ASA p. 643]

2a.2 Scope

Article 190(2)(a) PILA covers two grievances: the breach of the contractual (Art. 179(1) PILA) or legal (Art. 179(2) PILA) rules on the appointment of #arbitrators and the breach of the rules concerning the #impartiality and the #independence of the #arbitrators.

FSCD 140 III 75 [84], FSCD 139 III 511 [513], FSCD 4A_704/2015 c. 3.1, FSCD 4A_709/2014 c. 3.2.1, FSCD 4A_606/2013 c. 5.1, FSCD 4A_146/2012 c. 3.2

The regularity of the #constitution of the #arbitral tribunal only means the manner in which the #arbitrators were appointed (Art. 179 PILA) and the issues concerning their #independence (Art. 180 PILA). Other issues either fall within the jurisdictional defence (Art. 190(2)(b) PILA) or within one of the other specific #grounds of #appeal set forth at Article 190(2) (c)-(e) PILA, such as the incompatibility with #public policy (Art. 190(2)(e) PILA).

FSCD 139 III 511 [513-514], FSCD 4A_322/2016 c. 2.1, FSCD 4A_538/2012 c. 4.3.2

The argument that the #arbitral tribunal was irregularly composed also includes a scenario in which the #arbitral tribunal was constituted in breach of the parties' agreement. This is the case when the number of #arbitrators specified in the #arbitration agreement is not complied with. It is left open whether there should be any exception to this principle or if derogations should be allowed when the failure to comply with the requirements does not really have an impact on the #constitution of the #arbitral tribunal.

FSCD 139 III 511 [515]

This #ground for setting aside does not only apply to a structural (and persisting) but also to a subsequent incorrect #constitution of the #arbitral tribunal.

FSCD 117 Ia 166

Article 190(2)(a) PILA does not entitle the parties to complain about all procedural flaws of which the arbitral #award could be affected. Only the flaws permitting to evidence an incorrect #composition within the meaning of this provision are relevant.

FSCD 4P.154/2005 c. 3

2a.3 Violation of Number of Arbitrators agreed upon by the Parties

The argument that the #arbitral tribunal was irregularly composed also includes a scenario in which the #arbitral tribunal was constituted in breach of the parties' agreement. This is the case when the number of #arbitrators specified in the #arbitration agreement is not complied with.

FSCD 139 III 511 [515], FSCD 4A_709/2014 c. 3.2.1

It is left open whether there should be any exception to this principle or if derogations should be allowed when the failure to comply with the requirements does not really have an impact on the #constitution of the #arbitral tribunal. However, the number of #arbitrators is not in this category of deficiencies. To the contrary it is an important element to which the law devotes a specific provision – Article 360 CCP – applicable to international arbitration by analogy pursuant to the reference at Article 179(2) PILA. Indeed, the system of a three-member #arbitral tribunal, while certainly more expensive than a sole #arbitrator, does provide some undeniable advantages in comparison: it allows for a broader scope of opinions as to the arguments submitted than when the outcome of the dispute is left to the wisdom of an individual, which in principle should reduce the risk of error; moreover, it enables each party to have its point of view indirectly represented in the #arbitral tribunal through the opportunity each party has to appoint its own #arbitrator, even if the latter must not turn into an advocate for “its” party, which should automatically increase the trust of the parties in the #arbitral tribunal; finally, it is the best way to take into account that the parties often come from some very different perspectives from the point of view of law, religion, culture, language, politics, and economy.

FSCD 139 III 511 [515]

2a.4 Violation of Qualifications Agreed Upon by the Parties

If the parties adopted #grounds for challenge going beyond the constitutional requirements, it is doubtful whether this can found the #ground for setting aside of Article 190(2)(a) PILA.

FSCD 4P.188/2001 c. 2e

The incorrectness relates to the content of the provisions of Article 179 PILA and Article 180 PILA. However, the first remedy constitutes the #challenge proceedings pursuant to Article 180 PILA.

FSCD 28.05.1998 c. 1b/aa

The violation of qualifications agreed upon only by the parties (Article 180(1)(a) PILA), and which go beyond the constitutional guarantees, does not entail the setting aside of the #award.

FSCD 30.06.1994 [(1997) ASA p. 104]

However, the #motion to set aside is available to claim a lack of #independence according to Article 180(1)(c) PILA.

FSCD 30.06.1994 [(1997) ASA p. 104]

2a.5 Award not Rendered by the Validly Appointed Arbitrators

The jurisdictional mission of an #arbitrator is eminently personal and the #arbitrator’s contract is concluded *intuitu personae*. This implies that the #arbitrator must fulfil its mission itself without delegating to a third party, even to a colleague working in the same firm if it is an attorney.

FSCD 4A_709/2014 c. 3.2.2

When the decision is to be made, it is therefore important that the #arbitrator should know the file, deliberate, and participate in shaping the will of the #arbitral tribunal. As a result, the presiding #arbitrator must keep intellectual control over the outcome of the dispute and the #co-arbitrators must contribute to the decision-making process.

FSCD 4A_709/2014 c. 3.2.2

An #award issued in violation of this unwritten rule may be set aside by way of an #Appeal in Civil Matters based on Article 190(2)(a) PILA.

FSCD 4A_709/2014 c. 3.2.2

The prohibition of delegating arbitral tasks to a third party does not necessarily exclude the #arbitrator from availing himself of the assistance of third parties. Thus it is generally admitted that Article 365(1) CCP, which gives the #arbitral tribunal the option of appointing a tribunal #secretary in a domestic arbitration, also applies to international arbitration, even though Chapter 12 PILA does contain such a provision or refer to the latter.

FSCD 4A_709/2014 c. 3.2.2

However, the parties may agree either in the #arbitration agreement or in a subsequent agreement to exclude the appointment of a tribunal #secretary.

FSCD 4A_709/2014 c. 3.2.2

The role of the tribunal #secretary is comparable to a clerk in State court proceedings: to organize the exchange of briefs, to prepare the hearings, to keep the minutes, to prepare the statements of costs, etc. They do not exclude some assistance in drafting the #award under the control of, and in accordance with, the directives from the #arbitral tribunal, or if it is not unanimous, from the majority of the #arbitrators, which presupposes that the #secretary participates in the #hearings and the #deliberations of the #arbitral tribunal. However, save in the case of a party agreement to the contrary, the #secretary is forbidden from carrying out any function of a judicial nature, which must remain the prerogative of the #arbitrators only.

FSCD 4A_709/2014 c. 3.2.2

External assistance may come from various other sources. The #arbitral tribunal must not abandon to its auxiliaries the prerogatives inherent in its mission, in particular that of deciding the dispute. In complex arbitrations of a commercial or technical nature, however, the #arbitral tribunal often calls upon external consultants to help it handle non-legal, delicate issues which it would not be able to fully master without being supported by #experts in the field concerned.

FSCD 4A_709/2014 c. 3.2.2

It is also admitted that when the parties did not agree on procedural rules, the #arbitral tribunal may, pursuant to Article 182(2) PILA, appoint a consultant at its own initiative without requesting the parties' prior consent.

FSCD 4A_709/2014 c. 3.2.2

Parties can agree that the arbitral #award will be completed and signed by an incomplete or truncated #arbitral tribunal.

FSCD 4A_602/2010 c. 3.1, VD 19.05.2010 c. 4

The #composition of the #arbitral tribunal is incorrect if the #award has not been rendered by the #arbitrators validly appointed, be it that the #tribunal was not complete, be it that a non-authorized person has taken part in the vote.

FSCD 4P.154/2005 c. 3

2a.6 Flawed Deliberations

The flaws affecting the #deliberations fall within the scope of application of Article 190(2)(a) PILA, which sanctions the incorrect #composition of the #arbitral tribunal, be it a structural flaw or an isolated problem. It is also possible to consider Article 190(2)(d) PILA (violation of the #equal treatment of the parties and their #right to be heard) or Article 190(2)(e) PILA (violation of procedural #public policy).

FSCD 4P.115/2003 c. 3.2

It is questionable whether the #appellant may ground its #motion to set aside at the same time on Article 190(2)(a) PILA and on the violation of the #equal treatment of the parties and the #right to be heard (Art. 190(2)(d) PILA).

FSCD 4P.115/2003 c. 3.4

It is doubtful whether the #claim derived from the alleged non conformity of the final #award with the draft submitted to the #ICC International Court of Arbitration constitutes a procedural flaw pursuant to Article 190(2)(a) PILA.

FSCD 11.05.1992 [(1992) ASA p. 392-393]

The question of applicability of Article 190(2)(a) PILA in case of an alleged violation of the #confidentiality of the #deliberations has been left open.

FSCD 12.11.1991 [(1992) ASA p. 265]

2a.7 Premature or Lack of Signature of the Award

➤ See also Article 189(2) PILA, section 2.6

In principle, an arbitral #award is signed by all #arbitrators, even though the signature of the sole presiding #arbitrator could be sufficient in Switzerland. The signature does not imply that the #arbitrator approves the #award but attests its participation in the #deliberations.

FSCD 4P.154/2005 c. 3.1

Therefore, under Article 190(2)(a) PILA, the absence of the signature of an #arbitrator has an effect only to the extent that it establishes that this #arbitrator did not participate in the decision.

FSCD 4P.154/2005 c. 3.1

The premature signing by the #arbitrators of the draft #award submitted to the #ICC International Court of Arbitration is not as such a #ground for setting aside pursuant to Article 190(2)(a) PILA.

FSCD 11.05.1992 [(1992) ASA p. 384]

2a.8 Irrelevance of Outcome of Award

The PILA does not require the #appellant to demonstrate that the arbitral #award would have been different if the #arbitral tribunal had been regularly composed.

FSCD 136 III 605 [613]

2a.9 Timeliness of the Plea of Incorrect Constitution

- For the timeliness of other pleas of procedural flaws, see Article 177(1) PILA, section 1.15; Article 180(2) PILA; Article 186(2) PILA, section 2.5; Article 190(2)(b) PILA, section 2b.2; Article 190(2)(c) PILA, section 2c.10; Article 190(2)(d) PILA, section 2d.5; and Article 190(2)(e) PILA, section 2e.14.4

According to the principle of #good faith, the right to invoke the #ground for setting aside based on the incorrect #constitution of the #arbitral tribunal is forfeited if the party does not claim it immediately, because this party is not entitled to hold back this #ground for setting aside in order to raise it only in case of a negative outcome of the #arbitral proceedings.

FSCD 136 III 605 [609], FSCD 129 III 445 [449], FSCD 126 III 249 [254], FSCD 4A_132/2016 c. 2.4, FSCD 4A_173/2016 c. 2.1, FSCD 4A_428/2015 c. 3.1, FSCD 4A_54/2015 c. 3.1, FSCD 4A_544/2014 c. 3.2.2, FSCD 4A_324/2014 c. 3.2.2, FSCD 4A_597/2013 c. 2.1, FSCD 4A_282/2013 c. 5.3.1 (not published in FSCD 139 III 511), FSCD 4A_620/2012 c. 3.2, FSCD 4A_476/2012 c. 3.1, FSCD 4A_244/2012 c. 3, FSCD 4A_16/2012 c. 3.3, FSCD 4A_428/2011 c. 2.1, FSCD 4A_617/2010 c. 3.1, FSCD 4A_233/2010 c. 3.2.2, FSCD 4A_612/2009 c. 3.1.2, FSCD 4A_234/2008 c. 2.2.1, FSCD 4A_506/2007 c. 3.1.2, FSCD 4A_160/2007 c. 5.2, FSCD 4P.196/2003 c. 3.2.1, FSCD 4P.188/2001 c. 2b

According to the principles of acting in #good faith and of the prohibition of #abuse of right which also apply in procedural law, the parties have to raise objections with respect to the #jurisdiction or the #composition of the #arbitral tribunal as soon as possible. Delayed procedural objections which violate these principles may be disregarded because of #waiver.

FSCD 130 III 66 [75], FSCD 126 III 249 [254], FSCD 4A_173/2016 c. 2.1, FSCD 4A_428/2015 c. 3.1, FSCD 4A_54/2015 c. 3.1, FSCD 4A_597/2013 c. 2.1, FSCD 4A_620/2012 c. 3.6, FSCD 4A_476/2012 c. 3.1, FSCD 4A_617/2010 c. 3.1, FSCD 4A_428/2010 c. 2.3, FSCD 4A_124/2010 c. 6.3.3.1, FSCD 4P.105/2006 c. 5.1, FSCD 4P.298/2005 c. 2.3, FSCD 4P.146/2005 c. 4.2

According to Article 359(2) CCP, the plea of lack of #jurisdiction of the #arbitral tribunal shall be raised prior to the pleadings on the #merits. This is a case of application of the principle of #good faith (cf. Art. 52 CCP), which must also be observed in the area of arbitration. In the absence of a corresponding objection, #jurisdiction is established by virtue of the pleadings on the #merits. Accordingly, the party which has taken position on the #merits without raising a corresponding objection acknowledges the #jurisdiction of the #arbitral tribunal and can subsequently no longer invoke its lack of #jurisdiction.

FSCD 128 III 50 [57], FSCD 4A_156/2016 c. 2.1, FSCD 4A_172/2015 c. 3.1

In the context of Article 190(2)(a) PILA, the only #grounds for #challenge which are admissible are those that could not have been pleaded before the rendering

of the #award. This rule applies not only to the #grounds for #challenge which the aggrieved party in fact knew, but also to those which it could have known by paying the necessary attention.

FSCD 119 II 271 [(1993) ASA p. 407-408], FSCD 28.05.1998 c. 1b/aa; see also FSCD 4A_234/2008 c. 2.2.1, FSCD 11.05.1992 [(1992) ASA p. 389]

One might expect from the party which wants to claim a ground for #challenge that it acts according to the agreed upon procedure (e.g. Art. 11(2) fICC Rules) and, in particular, that it observes the #time limit.

FSCD 4P.196/2003 c. 3.2.1, TI 19.06.1990 c. 7b [(1991) Rep p. 502]

A party may not invoke grounds for #challenge which it did not communicate to the #arbitral tribunal and the opposing party immediately after their discovery.

FSCD 08.09.1999 c. 1b

2a.10 Relationship with Decisions of the ICC

➤ See also Article 179(3) PILA, section 3.5

The Federal Supreme Court has admitted the indirect #appeal against decisions on #challenges rendered by private bodies based on the grounds that a legal order must reserve the possibility to examine an #award and #arbitral proceedings for their conformity with the rule of law including the #independence of an #arbitrator.

FSCD 136 III 605 [608], FSCD 128 III 330 [332], FSCD 118 II 359 [360-361], FSCD 4A_704/2015 c. 3.2, FSCD 4A_458/2009 c. 3.3.2, FSCD 4A_348/2009 c.3.1, FSCD 30.06.1994 [(1997) ASA p. 101]

The question has been left open whether a later #award, without regard to a negative decision of a State court, may be set aside based on Article 190(2)(a) PILA because of the participation of a challengeable #arbitrator or whether this possibility of setting aside shall be limited to cases in which a body agreed upon by the parties decides on the #challenge.

FSCD 128 III 330 [332], FSCD 122 I 370 [373]

The decisions of the #ICC International Court of Arbitration with regard to the appointment, confirmation or #challenge of the #arbitrators are not subject to an immediate #appeal. This does not change anything with respect to the necessity to claim as soon as possible the incorrect #constitution of the #arbitral tribunal, be it by a #motion to set aside a preliminary #award, because otherwise this right will be waived, provided there is no irreparable flaw, in particular a violation of mandatory provisions like Article 22 fSOFJ with regard to the mandatory #disqualification, to which Article 18 fConcordat refers.

FSCD 120 II 155 [(1994) ASA p. 415], FSCD 118 II 359 [361], FSCD 4A_704/2015 c. 3.2, FSCD 4A_539/2008 c. 3.1, FSCD 26.04.1994 c. 3

An international *#award* may be attacked by a *#motion* for setting aside pursuant to Article 190(2)(a) PILA by claiming *#grounds* for *#challenge* of an *#arbitrator* even if a private body appointed by the parties has already dismissed such a request during the *#arbitral* proceedings.

FSCD 118 II 359 [360-361], FSCD 4P.168/1999 [(2001) ASA p. 783], FSCD 30.06.1994 [(1997) ASA p. 101]

The appointment decision of a private authority mandated by the parties, *in casu* the *#ICC* International Court of Arbitration, does not bind the State courts. Even if this organ were a judicial instance, its decision, rendered in *#non-adversarial* proceedings, is not vested with *#res judicata*. Therefore, this leaves to the *#arbitrators*, and, upon a *#motion* to set aside, to the appeals instance, the possibility to examine in an independent way the *#jurisdiction* and the regularity of the *#constitution* of the *#tribunal*.

*FSCD 110 Ia 59 [61], *FSCD 102 Ia 493 [502], FSCD 11.05.1992 [(1992) ASA p. 390]

As the decision by which the ICC dismisses a *#challenge* of an *#arbitrator* is taken by a private authority, this decision does in any case not bind the Federal Supreme Court which can review with unfettered powers whether the circumstances claimed on the basis of the *#challenge* are proper to justify the *#grievance* of incorrect *#constitution* of the *#arbitral* tribunal.

FSCD 4A_505/2017 c. 4.1, FSCD 4A_704/2015 c. 3.2, FSCD 4A_598/2014 c. 2.1, FSCD 4A_539/2008 c. 3.1, FSCD 4A_210/2008 c. 4.1, FSCD 4P.4/2007 c. 3.2, FSCD 4P.196/2003 c. 3.2.1

The *#grievance* stating that the decision of the private body has been rendered in violation of the procedural rules and that the decision has not been correctly communicated respectively founded, cannot be heard, as this *#grievance* does not concern the correct *#composition* of the *#arbitral* tribunal and does not concern the *#arbitral* proceedings as such.

FSCD 4P.235/2001 c. 2b

The *#appeals* instances can examine in an independent way the *#jurisdiction* and the regularity of the *#composition* of the *#arbitral* tribunal, without taking into account a decision of the *#ICC* International Court of Arbitration, as this judicial organ renders its decisions in non-contentious proceedings.

FSCD 11.05.1992 [(1992) ASA p. 390]

2a.11 Consequences of the Setting Aside of the Award

In principle, it is possible to appoint the same *#arbitrator* again as an *#arbitrator* (Art. 368(3) CCP). A newly appointed *#arbitrator* must start the proceedings again from the beginning; *#evidence* taken by the challenged *#arbitral* tribunal must be submitted again before the new *#arbitral* tribunal, even if the same person is appointed as the new *#arbitrator*.

ZH 12.08.2016 c. 38.1-38.2

2a.12 Individual Cases

Claims based on inequality in the choice of #arbitrators in #multi-party #arbitral proceedings, the #arbitrator's ignorance of the applicable law, or appearance of partiality are not non-waivable party rights. If the aggrieved party does not invoke these #grievances during the #arbitral proceedings, and if this party does not establish in its #motion to set aside that it knew about these #facts only at a time when it could no longer raise them during the #arbitral proceedings, it waives the right to contest the regularity of the #arbitral tribunal's #composition.

FSCD 120 II 155 [(1994) ASA p. 415]

There is no violation of Article 190(2)(a) PILA where the #arbitration agreement provided that "each party shall appoint one arbitrator" and where, following the #appellant's failure to appoint an #arbitrator, the #respondent seized a State court to remedy its contractual party's failure to do so.

FSCD 4A_146/2012 c. 3.4

2b Wrong Acceptance or Declination of Jurisdiction (b)

- For the #jurisdiction of the #arbitral tribunal to decide on its own #jurisdiction, see Article 186 PILA

2b.1 Principle

The jurisdictional #grievance for domestic arbitration set out in Article 393(b) CCP corresponds to that of Article 190(2)(b) PILA for international arbitration (Message of 28 June 2006 on the CCP, para. 5.25.8 on Art. 391 draft CCP, FF 2006 7405).

FSCD 142 III 220 [223], FSCD 4A_459/2016 c. 2.1, FSCD 4A_82/2016 c. 2.2, FSCD 4A_390/2014 c. 3.1, FSCD 4A_627/2011 c. 3.1

The #motion for setting aside pursuant to Article 190(2)(b) PILA is available if the #arbitral tribunal has decided on claims for which it lacked #jurisdiction because there was no #arbitration agreement or because the #arbitration agreement was limited to issues not including the claims at hand (*extra potestatem*).

FSCD 134 III 260 [265], FSCD 130 III 125 [129], FSCD 116 II 639 [641-642], FSCD 4A_394/2017 c. 4.1, FSCD 4A_392/2015 c. 3.2.1, FSCD 4A_90/2014 c. 3.3.2, FSCD 4A_488/2011 c. 4.3.1, FSCD 4A_14/2012 c. 3.2.2 (not published in FSCD 138 III 270), FSCD 4A_103/2011 c. 3.1.1, FSCD 4A_482/2010 c. 4.1, FSCD 4A_386/2010 c. 5.2, FSCD 4A_428/2009 c. 3.2, FSCD 4A_210/2008 c. 3.1, FSCD 4P.295/2004 c. 3.1, FSCD 4P.114/2001 c. 2a, FSCD 4P.60/2000 c. 3a, FSCD 4P.12/2000 c. 6, FSCD 27.01.1999 c. 3, FSCD 21.06.1995 [4P.267/1994] c. 4a

An #arbitral tribunal only has #jurisdiction, among other conditions, if the dispute is covered by the terms of the #arbitration agreement and if the #arbitral tribunal itself does not exceed the limits given by the #request for arbitration and possibly the #terms of reference. Therefore, if a party claims that the #arbitral tribunal assumes powers which it did not have, by deciding a question not covered by the #arbitration agreement, this party raises a problem of #jurisdiction.

FSCD 134 III 260 [265], FSCD 4A_394/2017 c. 4.1, FSCD 4A_392/2015 c. 3.2.1, FSCD 4A_90/2014 c. 3.3.2, FSCD 4A_488/2011 c. 4.3.1, FSCD 4A_14/2012 c. 3.2.2 (not published in FSCD 138 III 270), FSCD 4A_103/2011 c. 3.1.1, FSCD 4A_482/2010 c. 4.1, FSCD 4A_386/2010 c. 5.2, FSCD 4A_428/2009 c. FSCD 4A_210/2008 c. 3.1, FSCD 4P.295/2004 c. 3.1, FSCD 4P.114/2001 c. 2a and 2b

The #arbitral tribunal has #jurisdiction if the dispute is arbitrable according to Article 177 PILA, if the #arbitration agreement is formally and substantively valid pursuant to Article 178 PILA and if the dispute is covered by this agreement, all these prerequisites being inseparable.

FSCD 133 III 139 [141], FSCD 4A_232/2013 c. 3.2, FSCD 4A_220/2007 c. 6.1

The question of #jurisdiction is decided in the last instance by the State court if it is validly invited to do so (Art. 36(b) fConcordat, Art. 190 (2)(b) PILA).

FSCD 121 III 495 [502], FSCD 121 III 38 [41], FSCD 120 II 155 [164]

The #motion to set aside for lack of #jurisdiction according to Article 85(c) fSOFJ allows claiming that the #arbitral tribunal was wrong in accepting or declining its #jurisdiction.

FSCD 118 II 193 [195], FSCD 117 II 94 [97], FSCD 09.06.1998 [(1998) ASA p. 655], FSCD 13.10.1992 [(1993) ASA p. 69-70]

Article 190(2)(b) PILA applies to the #jurisdiction or the lack of #jurisdiction, not only with respect to the whole dispute, but also to a particular contentious issue.

FSCD 118 II 193 [195]

When reviewing whether it has #jurisdiction to decide the dispute, the #arbitral tribunal must determine, *inter alia*, the objective or *ratione materiae* scope and the subjective or *ratione personae* scope of the #arbitration agreement. It must determine which disputes are covered by the agreement and which parties it binds. These jurisdictional issues must be resolved in light of Article 178(2) PILA.

FSCD 4A_232/2013 c. 3.2

Article 27 fICC Rules which establishes the system of the preliminary scrutiny of the #award by the #ICC Court of Arbitration does not regulate at all the material or personal #jurisdiction of the #arbitral tribunal which has rendered the #award. Therefore, a party cannot rely on this provision in the context of the #ground for setting aside of Article 190(2)(b) PILA.

FSCD 4A_210/2008 c. 3.3.1.6

Article 190(2)(b) PILA concerns the #jurisdiction *ratione materiae* of the #arbitrators to decide a certain dispute. Therefore, the review of the #facts normally concentrates on the applicability of the PILA to the dispute, the #validity and the scope of application of the #arbitration agreement as well as on the circle of implied persons. In other words, Article 190(2)(b) PILA applies when the #arbitral tribunal has decided an issue which is not covered by the #arbitration agreement (*extra potestate*).

FSCD 19.11.1998 c. 3b

The #motion to set aside pursuant to Article 190 PILA is also available if the #jurisdiction is contested because of a lack of #arbitrability or because there is no #arbitration agreement.

ZH 30.06.2003 p. 7

2b.2 Timeliness of the Plea of Wrongful Acceptance or Declination of Jurisdiction

- For the timeliness of other pleas of procedural flaws, see Article 177(1) PILA, section 1.15; Article 180(2) PILA; Article 186(2) PILA, section 2.5; Article 190(2)(a) PILA, section 2a.3; Article 190(2)(c) PILA, section 2c.10; Article 190(2)(d) PILA, section 2d.5; and Article 190(2)(e) PILA, section 2e.14.4

If the lack of #jurisdiction is not pleaded prior to any pleadings on the #merits, it is not possible any longer to plead the lack of #jurisdiction of the #arbitral

tribunal as a #ground for setting aside based on Article 190(2)(b) PILA. The same applies to the plea of lack of #arbitrability.

FSCD 130 III 125 [129], FSCD 120 II 155 [158], FSCD 119 II 271 [(1993) ASA p. 406], FSCD 118 II 353 [355], FSCD 4A_18/2008 c. 3.2, ZH 30.06.2003 p. 6

According to the principles of acting in #good faith and of the prohibition of #abuse of right which also apply in procedural law, the parties have to raise objections with respect to the #jurisdiction or the #composition of the #arbitral tribunal as soon as possible. Delayed procedural objections which violate these principles may be disregarded because of #waiver.

FSCD 130 III 66 [75], FSCD 119 II 386 [388], FSCD 4A_132/2016 c. 2.4, FSCD 4A_173/2016 c. 2.1, FSCD 4A_428/2015 c. 3.1, FSCD 4A_54/2015 c. 3.1, FSCD 4A_597/2013 c. 2.1, FSCD 4A_476/2012 c. 3.1, FSCD 4A_550/2012 c. 5, FSCD 4A_386/2010 c. 5.2, FSCD 4A_428/2010 c. 2.3, FSCD 4A_124/2010 c. 6.3.3.1, FSCD 4P.114/2006 c. 6.3, FSCD 4P.298/2005 c. 2.3, FSCD 4P.146/2005 c. 4.2, FSCD 4P.270/2003 c. 3.1, ZH 30.06.2003 [p. 6], FSCD 4P.38/2002c. 1a, FSCD 16.10.1997 c. 4b

2b.3 Tacit Waiver of the Right to Claim the Lack of Jurisdiction

- For the pleading on the #merits without reservation and the consequences on the plea of lack of #jurisdiction, see Article 186(2) PILA, section 2.2

2b.4 Modifications of the Reasons for the Claim

The question of #admissibility of modifications with regard to the #reasons for a claim in international #arbitral proceedings does not fall within the scope of application of Article 190(2)(c) PILA. The limits to such modifications result from the scope of application of the #arbitration agreement or depend on the procedural rules chosen by the parties (Art. 182 PILA). In the first case (*extra potestatem*), the parties have to invoke exclusively Article 190(2)(b) PILA, if they intend to contest the #arbitrators' #jurisdiction to decide the dispute (FSCD 116 II 639 [641-642]); in the second case, the violation of mandatory procedural principles pursuant to Article 182(3) PILA can be submitted to the Federal Supreme Court by a #motion to set aside based on Article 190(2)(d) & (e) PILA.

FSCD 117 II 346 [347-348], FSCD 30.12.1994 [(1995) ASA p. 220-221]

2b.5 Correcting Award

- See also Article 189(1) PILA, section 1.3; Article 190(2) PILA, section 2.12; and Article 191 PILA, section 35

With respect to a #motion to set aside a correcting #award, Article 190(2)(b) PILA allows one to claim that the #arbitral tribunal has wrongly accepted or declined its #jurisdiction to correct the original #award, or that it exceeded its #jurisdiction with respect to the #correction and modified the very content of the #award.

FSCD 4P.154/2005 c. 4

The correcting #award is part of the original #award. Therefore, it follows the same legal regime so that the rules agreed upon by the parties also apply to the #correcting award. If the parties have validly excluded the possibility of contesting the #jurisdiction of the #arbitral tribunal (according to Art. 190(1) PILA *in fine*), such an exclusion also applies in principle to the proceedings for #correction. However, one could ask oneself whether such exclusion shall also extend to the assessment of the issues of #jurisdiction which relate exclusively to the #correction proceedings. This is the case of the question whether the #arbitrators have exceeded their #jurisdiction with respect to #correction by modifying the very content of the initial #award, which the #case law has related to Article 190(2)(b) PILA.

FSCD 4P.154/2005 c. 4

2b.6 Stay of the Arbitral Proceedings and *Lis pendens*

- See also Article 182(2) PILA, section 2.2

The #stay of the proceedings in case of #*lis pendens* is a rule concerning #jurisdiction (FSCD 123 III 414 [418-419]) and not a simple procedural rule. The violation of this rule has to be complained of in the context of Article 190(2)(b) PILA.

FSCD 127 III 279 [283, 288], FSCD 4A_247/2017 c. 4.2.2.2, FSCD 4A_548/2009 c. 2.2

It is contrary to #public policy that there exist, in a certain legal system, two contradictory judicial decisions on the same claim between the same parties, which are equally and simultaneously enforceable.

FSCD 127 III 279 [283]

2b.7 Preliminary Conciliation or Mediation

The Federal Supreme Court examines arguments based on an alleged violation of a preliminary conciliation or mediation clause under Article 190(2)(b) PILA, implicitly admitting that such a grievance is not serious enough to fall within the scope of procedural #public policy as contemplated by Article 190(2)(e) PILA.

FSCD 142 III 296 [301], FSCD 4A_407/2017 c. 2.4.2, FSCD 4A_124/2014 c. 3.2, FSCD 4A_46/2011 c. 3.4

This does not mean that in the Court's mind this connection would necessarily dictate the solution to be adopted in order to properly sanction the filing of a #request for arbitration without accomplishing the mandatory prerequisite agreed upon by the parties.

FSCD 142 III 296 [301], FSCD 4A_124/2014 c. 3.2

The best possible solution is to #stay the arbitration together with a #time limit enabling the parties to proceed to mediation if the #claimant has already initiated the arbitration without complying with the mandatory prerequisite, or to resume and terminate a mediation procedure validly initiated but unduly terminated. It goes without saying that the #stay must be requested *in limine litis*. Furthermore, the #arbitral tribunal must indicate the conditions under which the pending

arbitration shall resume and give the parties a #time limit within which the mediation process must be concluded (save in case of exceptional circumstances) under penalty, so that a recalcitrant party cannot unjustifiably deprive its opponent from obtaining an #arbitral award on the #merits within a reasonable time simply by extending the mediation procedure as much as possible.

FSCD 142 III 296 [317-318]

The party which claims a violation of the duty of preliminary conciliation in a #motion to set aside an #award violates the prohibition of #abuse of right, if it had not suggested the conciliation to the other party before the arbitration.

FSCD 142 III 296 [310], FSCD 4A_18/2007 c. 4.3.3.1 and 4.3.3.2, FSCD 4P.67/2003 c. 4 (not published in FSCD 129 III 675)

The argument that the #arbitral tribunal disregarded a required prerequisite of conciliation or mediation relates to the exercise of #jurisdiction, more specifically #jurisdiction *ratione temporis* and accordingly falls within Article 190(2)(b) PILA.

FSCD 4A_407/2017 c. 2.4.2, FSCD 4A_124/2014 c. 3.2, FSCD 4A_488/2011 c. 4.3.1, FSCD 4A_18/2007 c. 4.2, FSCD 17.08.1995 c. 2

In order to know whether a mediation agreement contained in an #arbitration agreement provides for mandatory preliminary mediation or whether it only submits to the #arbitral tribunal all disputes which could not have been resolved amicably, one has to interpret the agreement in conformity with the general principles of #interpretation of private #expressions of intent.

FSCD 4A_124/2014 c. 3.4.1, FSCD 4A_18/2007 c. 4.3.2, FSCD 4A_46/2011 c. 3.5.2

The Federal Supreme Court left open the question of how the violation of a mediation agreement forbidding the parties to go to court or to an #arbitral tribunal without having previously resorted to this alternative dispute resolution method, has to be sanctioned.

FSCD 4A_18/2007 c. 4.3.1

Conciliation and mediation are of the same nature, except that the later generally uses more elaborate methods.

FSCD 4A_18/2007 c. 4.3.1

2b.8 Temporal Validity of the Arbitration Agreement

When an #arbitration agreement has been entered into, it can be terminated at any time, in particular during the #arbitral proceedings, by an agreement of the parties. In such a case, the #jurisdiction of the #arbitral tribunal lapses.

FSCD 4A_305/2013 c.3.2.1

The argument that the #arbitral tribunal disregarded the temporal #validity of the #arbitration agreement relates to the exercise of the #arbitral tribunal's #jurisdiction and accordingly falls within Article 190(2)(b) PILA.

FSCD 4A_488/2011 c. 4.3.1, FSCD 4A_18/2007 c. 4.2, FSCD 17.08.1995 c. 2

2b.9 Expiry of the Mission of the Arbitral Tribunal

An #award issued after the mission of the #arbitrator or the #arbitral tribunal expired is not null but it can be set aside on #appeal.

FSCD 140 III 75 [83]

The position of an #arbitrator or an #arbitral tribunal deciding beyond the time limit is not similar to that of an #arbitrator or an #arbitral tribunal which was not properly appointed or replaced; it is more similar to that of an #arbitrator or #arbitral tribunal, the appointment of which is beyond discussion, but which simply disregarded the #time limit set to its #jurisdiction. This procedural default should therefore be treated as a ground for #appeal within the meaning of Article 190(2)(b) PILA.

FSCD 140 III 75 [85]

The #arbitrator who does not respect the agreement concluded between itself and the two parties concerning the expiry of its mission, after numerous notifications have been sent to it without any result, is not in the same situation as the person who made a mistake of one day in calculating the deadline within which it must render its #award by virtue of the relevant provision of the arbitration rules.

FSCD 4A_188/2016 c. 4.2.3

2b.10 Jurisdiction and *Res Judicata* Defence

The fact that the #*res judicata* defence is granted does not entail that the #jurisdiction of the #arbitral tribunal has to be denied. In such a case, the #arbitral tribunal should render a decision not to hear the case based on #*res judicata* and not on lack of #jurisdiction. Therefore, even in the case of #*res judicata*, the #ground for #challenge of Article 190(2)(b) PILA is not available. In such a case, only a violation of #public policy, i.e. the #ground for setting aside of Article 190(2)(e) PILA, could be envisaged.

FSCD 1P.113/2000 c. 3b

2b.11 Jurisdiction and Notion of Investment

The Federal Supreme Court has had to determine the meaning of the notion of investment employed in a bilateral #investment treaty and to decide whether the activity carried out by the investor fell within the meaning of this notion.

FSCD 4A_157/2017 c. 3.3.4

An #arbitral tribunal is right to focus its attention on the text of the bilateral #investment treaty rather than trying to find in the arbitral #awards rendered in relation to other bilateral #investment treaties, the meaning to be given to the term investment used by the signatories to these treaties.

FSCD 4A_616/2015 c. 3.4.1

The Federal Supreme Court will only reluctantly depart from the unanimous opinion of an [#]arbitral tribunal composed of specialists with respect to the uncertain legal notion of investment.

FSCD 4A_616/2015 c. 3.4.1

2b.12 Scope of Review

- See also Article 191 PILA, sections 15 and 16

2b.12.1 Principle: Unfettered Powers of Review

Seized by a [#]grievance of [#]lack of jurisdiction, the Federal Supreme Court reviews with unfettered [#]powers of review the legal issues, including [#]preliminary questions which determine the [#]jurisdiction or the [#]lack of jurisdiction of the [#]arbitral tribunal.

FSCD 144 III 559 [563], FSCD 142 III 296 [301], FSCD 142 III 239 [244], FSCD 142 III 220 [224-225], FSCD 141 III 495 [496], FSCD 140 III 520 [526], FSCD 140 III 477 [477], FSCD 140 III 134 [138], FSCD 138 III 714 [719], FSCD 138 III 29 [34], FSCD 134 III 565 [567], FSCD 133 III 139 [141], FSCD 129 III 727 [733], FSCD 128 III 50 [54], FSCD 121 III 495 [503], FSCD 121 III 38 [41], FSCD 120 II 155 [164], FSCD 119 II 380 [382-383], FSCD 118 II 193 [195], FSCD 117 II 94 [97], FSCD 4A_394/2017 c. 4.1, FSCD 4A_65/2018 c. 2.4, FSCD 4A_314/2017 c. 2.1, FSCD 4A_170/2017 c. 5.1, FSCD 4A_583/2017 c. 2.1, FSCD 4A_490/2017 c. 3.1.1, FSCD 4A_432/2017 c. 3.1, FSCD 4A_157/2017 c. 3.3.4, FSCD 4A_407/2017 c. 2.1 FSCD 4A_150/2017 c. 3.1, FSCD 4A_34/2016 c. 3.1, FSCD 4A_490/2016 c. 2.2, FSCD 4A_473/2016 c. 2.1, FSCD 4A_492/2016 c. 3.1, FSCD 4A_672/2016 c. 3.1.1, FSCD 4A_459/2016 c. 2.1, FSCD 4A_116/2016 c. 4.2.3, FSCD 4A_310/2016 c. 3.1.1, FSCD 4A_616/2015 c. 3.1.1, FSCD 4A_82/2016 c. 2.2, FSCD 4A_392/2015 c. 3.1, FSCD 4A_562/2015 c. 1.3, FSCD 4A_176/2015 c. 3.1, FSCD 4A_136/2015 c. 2.1, FSCD 4A_676/2014 c. 3.1, FSCD 4A_390/2014 c. 3.1, FSCD 4A_118/2014 c. 3.4.1, FSCD 4A_90/2014 c. 3.1, FSCD 4A_124/2014 c. 3.2, FSCD 4A_302/2013 c. 4, FSCD 4A_450/2013 c. 3.1, FSCD 4A_305/2013 c. 3.1, FSCD 4A_232/2013 c. 3.1, FSCD 4A_682/2012 c. 4.2, FSCD 4A_515/2012 c. 2.5, FSCD 4A_388/2012 c. 3.1, FSCD 4A_538/2012 c. 4.2, FSCD 4A_244/2012 c. 4.1, FSCD 4A_414/2012 c. 2.2, FSCD 4A_240/2012 c. 2.4, FSCD 4A_488/2011 c. 4.3, FSCD 4A_654/2011 c. 3.2, FSCD 4A_627/2011 c. 3.1, FSCD 4A_428/2011 c. 3.2.1, FSCD 4A_103/2011 c. 3.1.1, FSCD 4A_46/2011 c. 3.2, FSCD 4A_44/2011 c. 2.2, FSCD 4A_482/2010 c. 4.1, FSCD 4A_579/2010 c. 2.1, FSCD 4A_386/2010 c. 5.2, FSCD 4A_456/2009 c. 3.2, FSCD 4A_428/2009 c. 3.2, FSCD 4A_96/2009 & 4A_94/2009 c. 3.2, FSCD 4A_424/2008 c. 3.3, FSCD 4A_460/2008 c. 5.1, FSCD 4A_392/2008 c. 3.2, FSCD 4A_376/2008 c. 6, FSCD 4A_438/2008 c. 3.1, FSCD 4A_210/2008 c. 3.1, FSCD 4A_452/2007 c. 2.1, FSCD 4A_244/2007 c. 5.1, FSCD 4A_220/2007 c. 6.1, FSCD 4A_160/2007 c. 3.1, FSCD 4A_42/2007 c. 5.1, FSCD 4A_18/2007 c. 4.2, FSCD 4P.32/2007 c. 3.1, FSCD 4P.114/2006 c. 6.2, FSCD 4P.105/2006 c. 6.1, FSCD 4P.298/2005 c. 2.1, FSCD 4P.48/2005 c. 3.1, FSCD 4P.226/2004 c. 4.1, FSCD 4P.168/2004 c. 2.1.2, FSCD 4P.146/2004 c. 5.1, FSCD 4P.114/2004 c. 3, FSCD 4P.253/2003 c. 4.2, FSCD 4P.149/2003 c. 2.1, FSCD 4P.137/2002 c. 3.1 & 5.1, FSCD 4P.129/2002 c. 6.1, FSCD 4P.38/2002c. 1b, FSCD 4P.114/2001 c. 2b, FSCD 4P.126/2001 c. 2a, FSCD 4P.113/2001 c. 1, FSCD 4P.124/2001 c. 2b, FSCD 4P.230/2000 c. 2a, FSCD 1P.113/2000 c. 4b, FSCD 23.03.1999 c. 5a, FSCD 27.01.1999 c. 3, FSCD 09.06.1998 [(1998) ASA p. 655], FSCD 16.10.1997 c. 4a, FSCD 20.08.1997 c. 2, FSCD 06.09.1996 [(1997) ASA p. 299], FSCD 29.01.1996 [(1996) ASA p. 501], FSCD 17.08.1995 [(1996) ASA p. 676], FSCD 16.05.1995

[(1996) ASA p. 670], FSCD 26.04.1994 c. 4, FSCD 01.09.1993 [(1996) ASA p. 624], FSCD 13.10.1992 [(1993) ASA p. 70], FSCD 06.02.1992 c. 2a

This does not entail that the Federal Supreme Court becomes a court of appeal. Therefore, it is not the Federal Supreme Court's duty to search itself, in the challenged *#award*, the legal arguments which could justify the granting of the *#grievance* based on Article 190(2)(b) PILA. On the contrary, it is up to the *#appellant* to draw the Federal Supreme Court's attention to them, in order to comply with the prerequisites of Article 42(2) FSCA.

FSCD 142 III 239 [244], FSCD 141 III 495 [496], FSCD 134 III 565 [567], FSCD 4A_314/2017 c. 2.1, FSCD 4A_407/2017 c. 2.1, FSCD 4A_34/2016 c. 3.1, FSCD 4A_473/2016 c. 2.1, FSCD 4A_616/2015 c. 3.1.1, FSCD 4A_392/2015 c. 3.1, FSCD 4A_136/2015 c. 2.1, FSCD 4A_676/2014 c. 3.1, FSCD 4A_90/2014 c. 3.1, FSCD 4A_450/2013 c. 3.1, FSCD 4A_232/2013 c. 3.1, FSCD 4A_682/2012 c. 4.2, FSCD 4A_515/2012 c. 2.5, FSCD 4A_538/2012 c. 4.2, FSCD 4A_414/2012 c. 2.2, FSCD 4A_240/2012 c. 2.4, FSCD 4A_428/2011 c. 3.2.1, FSCD 4A_548/2009 c. 3.1, FSCD 4A_376/2008 c. 6, FSCD 4A_160/2007 c. 3.1, FSCD 4P.32/2007 c. 3.1

If the Federal Supreme Court is seized by the *#grievance* of lack of *#jurisdiction* and if this *#grievance* is duly reasoned, the Federal Supreme Court examines with unfettered *#powers* of review all legal aspects (*jura novit curia*), which may lead it, as the case may be, to dismiss the *#grievance* for another reason than the one which is stated in the appealed *#award*, provided that the *#facts* established by the *#arbitral* tribunal allow it to substitute the *#reasons*. By doing this, the appeals instance does not infringe the powers recognized by law to the *#arbitral* tribunal to decide on its own *#jurisdiction*. A reservation must be made for the case where the *#facts* established in the appealed *#award* do not allow the Federal Supreme Court to decide knowingly on the alternative reason susceptible to ground the solution adopted by the *#arbitral* tribunal.

FSCD 142 III 239 [244], FSCD 4A_314/2017 c. 2.1, FSCD 4A_407/2017 c. 2.1 , FSCD 4A_34/2016 c. 3.1, FSCD 4A_473/2016 c. 2.1, FSCD 4A_388/2012 c. 3.1, FSCD 4A_392/2008 c. 3.2

The Federal Supreme Court can admit the *#grievance* of lack of *#jurisdiction* on the basis of a new legal argument developed before it by the *#appellant* grounded on *#facts* noted in the attacked *#award*.

FSCD 142 III 239 [244], FSCD 4A_314/2017 c. 2.1, FSCD 4A_407/2017 c. 2.1 , FSCD 4A_34/2016 c. 3.1, FSCD 4A_473/2016 c. 2.1

In the context of a *#motion* to set aside for lack of *#jurisdiction*, the Federal Supreme Court also examines the application of foreign law with unfettered *#powers* of review. However, it is one of the characteristics of the law that controversial opinions exist and that there are divergent opinions in the doctrine and *#case law* on a multitude of issues. It cannot be the task of a Swiss court to apply foreign substantive law in all respects autonomously and according to its own *#interpretation* principles. It has to follow the opinions in the foreign country with respect to controversial legal issues. The Federal Supreme Court accordingly follows a clearly dominant opinion and, in case of divergences between *#case law* and doctrine, it follows the *#case law* of the foreign supreme court in order to accommodate the principles of *#legal certainty* and coherence of *#case law*.

FSCD 142 III 296 [301-302], FSCD 138 III 714 [719], FSCD 141 III 229 [237], FSCD 4A_34/2016 c. 3.1, FSCD 4A_118/2014 c. 3.4.1, FSCD 4A_124/2014 c. 3.2,

FSCD 4A_538/2012 c. 4.2, FSCD 4A_414/2012 c. 2.2, FSCD 4A_631/2011 c. 3.1.1, FSCD 4A_428/2008 c. 3.1, FSCD 4P.137/2002 c. 7.2.1

In accordance with a general principle of procedure, one must first rely on the content and legal ground of the claim raised by the #claimant in order to decide #jurisdiction. The subject of the claim is defined by the party filing the claim, so that the #respondent does not have the power to modify it or to compel the #claimant to change its legal basis. The #claimant determines the issue it submits to the court and the latter gives the answer to the question asked. However, as to the legal assessment of the #facts submitted in support of the claim, the court is not bound by the #claimant's arguments.

FSCD 141 III 495 [508]

It results from the unchanged adoption of Article 36(b) fConcordat in Article 190(2)(b) PILA that the legislator had the clear intention that the State courts would continue to examine the question of #jurisdiction with unfettered #powers of review.

FSCD 117 II 94 [97], ZH 22.05.1990 p. 6-8

The principle that the Federal Supreme Court examines the legal aspects of the #appeal on the ground of a lack of #jurisdiction pursuant to Article 190(2)(b) PILA with unfettered #powers of review, including #preliminary substantive questions, the answers to which determine #jurisdiction, also applies to arbitral #awards relating to international investment disputes. For example, the Federal Supreme Court interpreted the concept of contract claims, treaty claims and the #umbrella clause in accordance with the Energy Charter Treaty of 17 December 1994 (FSCD 141 III 495 c. 3.2) or expressed its opinion on the concept of investment in a bilateral #investment treaty (FSCD 4A_616/2015 of 20.09.2016 c. 6; see also FSCD 4A_157/2017 of 14.12.2016 c. 3.3.4).

FSCD 144 III 559 [563]

The #grievance of Article 190(2)(b) PILA is not subject to the qualified requirements with respect to substantiation of certain constitutional #grievances, in particular the #grievance for #arbitrariness, but a criticism, which is purely in the nature of an #appeal, of the legal viewpoint of the #arbitral tribunal is in principle sufficient. The #appellant must only establish that the #arbitral tribunal has wrongly declined its #jurisdiction and explain why. If the answer to this question depends on the application of substantive law, it is sufficient if the #appellant shows in its #motion to set aside to what extent this law has, according to the #appellant, been violated.

FSCD 4P.48/2005 c. 3.1, FSCD 4P.137/2002 c. 5.1

If the question of #jurisdiction depends on the application of substantive law, it is sufficient if the #motion for setting aside states why this law is violated.

FSCD 4P.253/2003 c. 4.2

The unfettered examination by the Federal Supreme Court is limited to the allegedly illegal #reasons in the challenged decision, and the #reasons given by the #arbitral tribunal which have not been challenged cannot be reviewed. Therefore, multiple #reasons must all be challenged and mere partial challenges have the effect that the #grievance cannot be heard.

FSCD 4P.137/2002 c. 5.1

This unfettered examination always applies within the limits of the proceedings of the [former] #motion for constitutional review. The unfettered review does not entail that the Federal Supreme Court becomes an appeals instance. Therefore, if an #appellant in order to dispute the #jurisdiction of an #arbitral tribunal alleges that the tribunal has violated applicable foreign law, the Federal Supreme Court does not examine *ex officio* the status of this law. It only analyses the #grievances submitted, and duly established on this point, in the #motion to set aside (Art. 190(1)(b) PILA).

FSCD 4P.114/2001 c. 2b

If the real intent of the parties cannot be determined, it is a question of law, reviewed by the Federal Supreme Court with unfettered #powers of review on a #motion to set aside for lack of #jurisdiction of the #arbitral tribunal, to determine how an #expression of intent has to be understood by its addressee according to the principle of #good faith. However, in order to decide this legal issue, one has to take into account the content of the #expression of intent and the factual circumstances. According to the principle of #good faith, the person who makes an #expression of intent addressed to another person is bound by its #expression of intent according to the meaning which the addressee can and must give it in #good faith depending on all the circumstances. It is without importance if the author of the #expression of intent was not aware of the scope of what it said, if the addressee could not know this. The #interpretation pursuant to the principle of #good faith is the one of an honest and reasonable person.

FSCD 4P.126/2001 c. 2e/bb

This review is very broad because it may relate to issues such as the existence and the #validity of the #arbitration agreement, the #arbitrability of the dispute or the question of whether the claim enters into the provisions of the #arbitration agreement.

FSCD 26.04.1994 c. 4

2b.12.2 Restriction: Facts on the Basis of Jurisdiction

The Federal Supreme Court does not review findings of #facts of the appealed #arbitral award, even in the context of the #motion to set aside for lack of #jurisdiction, since it is bound by the #facts established by the #arbitral tribunal and can neither supplement nor correct them (cf. Art. 77(2) FSCA in conjunction with Art. 97 and 105(2) FSCA). Only if admissible objections within the meaning of Article 393 CCP are raised against the findings of #facts or, exceptionally, if new #facts are taken into account (Art. 99 FSCA), can the Federal Supreme Court review the findings of #facts of the appealed arbitral #award.

FSCD 144 III 559 [563], FSCD 142 III 239 [244], FSCD 142 III 220 [224], FSCD 140 III 477 [477], FSCD 138 III 29 [34], FSCD 133 III 139 [141], FSCD 4A_583/2017 c. 2.1, FSCD 4A_490/2017 c. 3.1.1, FSCD 4A_492/2016 c. 3.1, FSCD 4A_459/2016 c. 2.1, FSCD 4A_82/2016 c. 2.2

The Federal Supreme Court examines the factual findings of the challenged arbitral award in the context of setting aside proceedings based on lack of jurisdiction only if the appellant submits admissible grievances within the meaning of Article 190(2) PILA or if, by way of exception, new facts or new evidence within the meaning of Article 99 FSCA are taken into account in the proceedings on the Appeal in Civil Matters.

FSCD 142 III 239 [244], FSCD 142 III 220 [224], FSCD 141 III 495 [496], FSCD 140 III 477 [477], FSCD 140 III 520 [526], FSCD 138 III 29 [34], FSCD 133 III 139 [141], FSCD 129 III 727 [733], FSCD 128 III 50 [54], FSCD 119 II 380 [383], FSCD 4A_394/2017 c. 4.1, FSCD 4A_314/2017 c. 2.1, FSCD 4A_170/2017 c. 5.1, FSCD 4A_583/2017 c. 2.1, FSCD 4A_432/2017 c. 3.1, FSCD 4A_407/2017 c. 2.1, FSCD 4A_436/2017, FSCD 4A_150/2017 c. 3.1, FSCD 4A_34/2016 c. 3.1, FSCD 4A_490/2016 c. 2.2, FSCD 4A_473/2016 c. 2.1, FSCD 4A_672/2016 c. 3.1.1, FSCD 4A_310/2016 c. 3.1.1, FSCD 4A_616/2015 c. 3.1.2, FSCD 4A_82/2016 c. 2.2, FSCD 4A_392/2015 c. 3.1, FSCD 4A_562/2015 c. 1.3, FSCD 4A_176/2015 c. 3.1, FSCD 4A_136/2015 c. 2.1, FSCD 4A_676/2014 c. 3.1, 3.2.3.1, FSCD 4A_390/2014 c. 3.1, FSCD 4A_90/2014 c. 3.1, FSCD 4A_302/2013 c. 4, FSCD 4A_305/2013 c. 3.1, FSCD 4A_232/2013 c. 3.1, FSCD 4A_682/2012 c. 4.2, FSCD 4A_388/2012 c. 3.1, FSCD 4A_538/2012 c. 4.2, FSCD 4A_244/2012 c. 4.1, FSCD 4A_488/2011 c. 4.3, FSCD 4A_654/2011 c. 3.2, FSCD 4A_627/2011 c. 3.1, FSCD 4A_103/2011 c. 3.1.1, FSCD 4A_46/2011 c. 3.2, FSCD 4A_44/2011 c. 2.2, FSCD 4A_404/2010 c. 4.2.1, FSCD 4A_640/2010 c. 3.2.1, FSCD 4A_482/2010 c. 4.1, FSCD 4A_579/2010 c. 2.1, FSCD 4A_428/2010 c. 1.3, FSCD 4A_456/2009 c. 3.2, FSCD 4A_548/2009 c. 3.1, FSCD 4A_96/2009 & 4A_94/2009 c. 3.2, FSCD 4A_460/2008 c. 5.1, FSCD 4A_392/2008 c. 3.2, FSCD 4A_438/2008 c. 3.1, FSCD 4A_452/2007 c. 2.1, FSCD 4A_370/2007 c. 4.1, 4A_244/2007 c. 5.1, FSCD 4A_220/2007 c. 6.1, FSCD 4A_160/2007 c. 3.1, FSCD 4A_42/2007 c. 5.1, FSCD 4A_18/2007 c. 4.2, FSCD 4P.168/2004 c. 2.1.2, FSCD 4P.253/2003 c. 4.2, FSCD 4P.149/2003 c. 2.1, FSCD 4P.38/2002 c. 1b, FSCD 27.01.1999 c. 3

Since the appeal against an interim decision (Art. 190(3) PILA) for lack of jurisdiction of the arbitral tribunal (Art. 190(2)(b) PILA) is to be assessed by the Federal Supreme Court on the basis of the arbitral tribunal's findings of fact, which are free from any claims of a violation of fundamental procedural rights, the further grievances under Article 190(2) PILA may also be invoked in the context of such an appeal, provided that they directly concern the jurisdiction of the arbitral tribunal.

FSCD 140 III 477 [479], FSCD 140 III 520 [525], FSCD 4A_398/2017 c. 3.3 (not published in FSCD 144 III 559)

Whoever invokes the exception from the rule that the Federal Supreme Court is bound by the facts established by the arbitral tribunal and wishes to have the facts corrected or supplemented on the basis of this exception, has to demonstrate with references to the file that the corresponding substantive claims have already been made in conformity with the procedural rules in the arbitral proceedings.

FSCD 4A_398/2017 c. 3.3 (not published in FSCD 144 III 559), FSCD 4A_459/2016 c. 2.1, FSCD 4A_82/2016 c. 2.2

The Federal Supreme Court examines the facts on which the challenged award is based – even with respect to an interim award on the arbitral tribunal's jurisdiction – only if one of the grounds for setting aside mentioned in Article 190(2) PILA is invoked against the fact-findings (e.g. if the ignorance of a

relevant fact which has been duly established leads to a violation of #public policy), or if new #facts or #evidence are exceptionally taken into account in the context of the proceedings on a [former] #motion for constitutional review.

FSCD 129 III 727 [733], FSCD 128 III 50 [54], FSCD 119 II 380 [383], FSCD 4A_616/2015 c. 3.1.2, FSCD 4A_428/2010 c. 1.3, FSCD 4P.32/2007 c. 3.1, FSCD 4P.40/2002 c. 1b, FSCD 4P.114/2001 c. 2b, FSCD 4P.126/2001 c. 2a, FSCD 4P.124/2001 c. 2b, FSCD 4P.290/2000 c. 3b, FSCD 1P.113/2000 c. 4b/bb, FSCD 06.09.1996 [(1997) ASA p. 303, 307], FSCD 29.01.1996 [(1996) ASA p. 501]

With respect to the #fact-finding, it does not matter whether the Federal Supreme Court is seized in the context of a procedural #ground for setting aside according to Article 190(2)(a)-(d) PILA or in the context of a ground on the #merits of Article 190(2)(e) PILA. It is true that in the context of Article 190(2)(b) PILA, the Federal Supreme Court examines with unfettered #powers of review possible #preliminary questions on the #merits, but exclusively to the extent that these questions have to be resolved in order to decide on the #jurisdiction of the #arbitral tribunal.

FSCD 128 III 50 [54], FSCD 119 II 380 [383], FSCD 118 II 193 [195], FSCD 117 II 94 [97], FSCD 4A_103/2011 c. 3.1.2, FSCD 4P.126/2001 c. 2a, FSCD 4P.290/2000 c. 3b, FSCD 29.01.1996 [(1996) ASA p. 501]

Apart from the exceptional cases where new #facts or #evidence can be taken into account in the proceedings on a [former] #motion for constitutional review [Art. 95 fSOFJ], the Federal Supreme Court examines decisions on #jurisdiction with regard to facts only to the extent that there are sufficiently substantiated #grievances according to which #fact-findings have been made in violation of statutory procedural guarantees (especially Art. 190(2)(d) PILA in connection with Art. 182(3) PILA) or in a manner incompatible with procedural #public policy.

FSCD 120 II 155 [166], FSCD 119 II 380 [382-383], FSCD 4A_103/2011 c. 3.1.2, FSCD 4P.129/2002 c. 6.1, FSCD 09.06.1998 [(1998) ASA p. 655-656], FSCD 29.01.1996 [(1996) ASA p. 501-502], FSCD 17.08.1995 [(1996) ASA p. 677], FSCD 16.05.1995 [(1996) ASA p. 670]

The unfettered #powers of review in the context of a #motion to set aside for lack of #jurisdiction pursuant to Article 190(2)(b) PILA do not mean that the Federal Supreme Court reviews without limitations the #fact-findings of the #arbitral tribunal as an appeals instance would do. On the contrary, the Federal Supreme Court is bound by the #fact-findings of the #arbitral tribunal and examines their determination by the #arbitral tribunal only to the extent that the #appellant duly invokes a violation of procedural guarantees (Art. 190(2)(d) PILA in connection with Art. 182(3) PILA) or a violation of procedural #public policy.

FSCD 120 II 155 [166], FSCD 119 II 380 [383], FSCD 4P.129/2002 c. 6.1, FSCD 1P.113/2000 c. 4b/bb

It is true that the Federal Supreme Court examines a #motion to set aside for lack of #jurisdiction pursuant to Article 190(2)(b) PILA with unfettered #powers of review, to the extent that substantive elements for the decision are challenged, which can be attacked in a #motion to set aside an #award on the #merits only if they violate #public policy. However, these unfettered #powers of review apply only to the legal subsumption of the #facts determined by the #arbitral tribunal.

FSCD 4A_103/2011 c. 3.1.2, FSCD 29.01.1996 [(1996) ASA p. 501]

With respect to the *facts*, the Federal Supreme Court bases itself on the findings of the *arbitral tribunal*, except if these findings are successfully challenged by a *grievance* pursuant to Article 190(2)(d) PILA or Article 190(2)(e) PILA, new *claims* are exceptionally admitted or the Federal Supreme Court orders additional examinations of the *facts* during the *appeal proceedings* (Art. 95 SFOFJ).

FSCD 4P.146/2004 c. 5.1, FSCD 4P.137/2002 c. 3.1

2b.12.3 Preliminary Issues on the Merits

The unfettered *powers of review* of a cantonal court, seized by a *motion to set aside* pursuant to Article 36(b) *fConcordat*, also encompass *preliminary issues* on the *merits*, even though these questions can only be reviewed with regard to *arbitrariness* in a *motion to set aside* the decision on the *merits*.

FSCD 119 II 380 [383], FSCD 118 II 193 [195], FSCD 117 II 94 [97], *FSCD 102 Ia 575 [577-579], FSCD 4P.137/2002 c. 3.1, FSCD 09.06.1998 [(1998) ASA p. 655], FSCD 06.09.1996 [(1997) ASA p. 299], FSCD 29.01.1996 [(1996) ASA p. 501], FSCD 16.05.1995 [(1996) ASA p. 670], FSCD 01.09.1993 [(1996) ASA p. 624], FSCD 13.10.1992 [(1993) ASA p. 70]

Notwithstanding the limited possibilities of setting aside under the PILA, the same must apply to this new statute. The Federal Supreme Court seized by a *motion to set aside* pursuant to Article 190(2)(b) PILA must also examine all issues which determine the *jurisdiction* or the lack of *jurisdiction* of the *arbitral tribunal*. If the decision regarding *jurisdiction* presupposes the review of *preliminary issues* on the *merits*, such issues are to be examined with unfettered *powers of review* in setting aside proceedings pursuant to Article 190(2)(b) PILA.

FSCD 119 II 380 [383], FSCD 118 II 193 [195], FSCD 117 II 94 [97], *FSCD 102 Ia 575 [577-579], FSCD 4P.114/2001 c. 2b, FSCD 4P.126/2001 c. 2a, FSCD 4P.290/2000 c. 3b, FSCD 09.06.1998 [(1998) ASA p. 655], FSCD 06.09.1996 [(1997) ASA p. 299], FSCD 29.01.1996 [(1996) ASA p. 501], FSCD 16.05.1995 [(1996) ASA p. 670], FSCD 01.09.1993 [(1996) ASA p. 624], FSCD 13.10.1992 [(1993) ASA p. 70], FSCD 31.01.1992 c. 1a

2b.12.4 Application of Chapter 12 PILA

On a motion based on Article 190(2)(b) PILA, the court may examine whether Chapter 12 PILA is applicable to the *arbitral proceedings* at all. It can in particular determine whether the parties validly submitted their dispute to [*the former*] cantonal law pursuant to Article 176(2) *fPILA*. The interim *decision* will be set aside if an *arbitral tribunal* has ruled, in violation of Article 176 *fPILA*, that it has *jurisdiction* under the PILA.

FSCD 115 II 390 [395]

If an *arbitral tribunal* declines in an interim *decision* to apply [*the former*] cantonal law [i.e. *fConcordat*] and decides that it has *jurisdiction* under Chapter 12 PILA, the interim *decision* is subject to a *motion to set aside* pursuant to Article 190(2)(b) PILA for violation of Article 176 *fPILA*.

FSCD 115 II 390 [395]

2b.12.5 Lack of Arbitrability

- See also Article 177 PILA

A #motion to set aside is admissible where #jurisdiction is contested because the #matter in dispute is not arbitrable.

FSCD 118 II 193 [195], FSCD 4A_388/2012 c. 3.1, FSCD 13.10.1992 [(1993) ASA p. 70]

The #grievance based on the lack of #arbitrability falls under Article 190(2)(b) PILA and not under Article 190(2)(e) PILA (incompatibility with #public policy).

FSCD 4A_370/2007 c. 5.2.2

2b.12.6 Existence, Validity and Scope of Application of the Arbitration Agreement

- See also Article 178 PILA

Concerning the question of #jurisdiction, the existence, the #validity and the scope of application of the #arbitration agreement are inseparable issues.

FSCD 128 III 50 [54], FSCD 120 II 155 [163], FSCD 4P.298/2005 c. 2.2, FSCD 4P.226/2004 c. 4.3.1

The #motion to set aside for lack of #jurisdiction raises the problem of the #validity, the content and the scope of application of the #arbitration agreement. One must examine in particular which parties are bound by the #arbitration agreement.

FSCD 117 II 94 [98], FSCD 4P.290/2000 c. 3b, FSCD 13.10.1992 [(1993) ASA p. 70]

The plea of lack of #jurisdiction of the #arbitral tribunal can be based on the absence of a valid #arbitration agreement.

FSCD 117 II 94 [98], FSCD 16.05.1995 [(1996) ASA p. 671], FSCD 13.10.1992 [(1993) ASA p. 70]

A party cannot in #good faith challenge the #validity of a contract and an #arbitration agreement contained therein in a #motion to set aside when it has performed in part its obligations under the contract.

FSCD 4A_579/2010 c. 2.2.1

A party commits an #abuse of right if it claims that the #arbitration agreement is invalid in a #motion to set aside after having expressly declared in the #terms of reference that a valid #arbitration agreement providing for #arbitral proceedings has been concluded in a contract.

ZH 22.05.1990 p. 10-11

2b.12.7 Personal Scope of Application

- See also Article 178(2) PILA, section 2.11; and Article 186(1) PILA, section 1.3.5

When the #arbitrators examine whether they have #jurisdiction to decide the dispute submitted to them, they have to resolve, among other issues, the question of the personal scope of application of the #arbitration agreement. They have in particular to determine which parties are bound by the #arbitration agreement, and, as the case may be, whether one or several third parties who are not mentioned enter nevertheless into the scope of application. Such an issue falls therefore within the #ground for setting aside of Article 190(2)(b) PILA.

FSCD 134 III 565 [567], FSCD 129 III 727 [733], FSCD 128 III 50 [54], FSCD 117 II 94 [98], FSCD 4A_459/2016 c. 2.1, FSCD 4A_310/2016 c. 3.1.1, FSCD 4A_232/2013 c. 3.2, FSCD 4A_627/2011 c. 3.2, FSCD 4A_376/2008 c. 8.3, FSCD 4A_244/2007 c. 5.1, FSCD 4P.298/2005 c. 2.2, FSCD 4P.226/2004 c. 4.3.1, FSCD 4P.126/2001 c. 2a, FSCD 4P.290/2000 c. 3b, FSCD 22.12.1992 [(1996) ASA p. 648]

The question which parties are bound by the #arbitration agreement is one of the #preliminary issues on the #merits that the Federal Supreme Court has to examine.

FSCD 128 III 50 [54], FSCD 117 II 94 [98], FSCD 4A_244/2007 c. 5.1, FSCD 4P.137/2002 c. 3.2, FSCD 4P.290/2000 c. 3b, FSCD 22.12.1992 [(1996) ASA p. 648]

The Federal Supreme Court may in particular examine with unfettered #powers of review the #preliminary issue of the #validity of an #assignment, on which #assignment or the transfer of the #arbitration agreement depends.

FSCD 128 III 50 [54]

The issue of whether the individuals acting in the #arbitral proceedings on the #respondent's behalf had the authority to do so is an issue concerning the #jurisdiction *ratione personae* and must be reviewed in light of Article 190(2)(b) PILA.

FSCD 4A_446/2014 c. 3.3.2, FSCD 4A_118/2014 c. 3.1, FSCD 4A_538/2012 c. 4.3.3

The question of the #arbitral tribunal's #jurisdiction also includes the issue of the personal scope of the #arbitration agreement. Whether all parties are bound by it is a question of their #capacity to be a party to the #arbitral proceedings and thus a condition to hear the case [*Sachurteilsvoraussetzung* or *Eintretensvoraussetzung*].

FSCD 4A_244/2007 c. 5.1, FSCD 4P.298/2005 c. 2.2, FSCD 4P.226/2004 c. 4.3

2b.12.8 Material Scope of Application

- See Article 178(2) PILA, section 2.10; and Article 186(1) PILA, section 1.3.4

2b.12.9 Scope of Application with Respect to Time

- See Article 178(2) PILA, section 2.12

2b.12.10 Doubly Relevant Facts

- See also Article 186(1) PILA, section 1.5

When decisive #facts as to the #jurisdiction of the #tribunal are also decisive as to the #merits of the claim – in such a case, one refers to #doubly relevant #facts or to double relevance – the gathering of the #evidence as to such #facts is deferred to the stage in the proceedings during which the #merits of the claim will be examined. This is the case in particular when #jurisdiction depends on the nature of the claim.

FSCD 141 III 495 [508]

However, the theory of #double relevance does not come into consideration when the #jurisdiction of an #arbitral tribunal is challenged because a party may not be compelled to accept that such a #tribunal would decide as to its disputed rights and obligations if it has no #jurisdiction to do so.

FSCD 141 III 495 [508]

The so-called theory of #doubly relevant #facts does not enter into consideration when the #arbitral tribunal's #jurisdiction and in particular the personal scope of application of the #arbitration agreement is disputed. The reason for this lies in the fact that it is excluded to force a party before an #arbitral tribunal, if there is no #arbitration agreement with respect to the disputed claims and duties.

FSCD 4P.32/2007 c. 4, FSCD 4P.298/2005 c. 2.2, FSCD 4P.226/2004 c. 4.3.1

If a fact is doubly relevant, i.e. for the question whether to hear the claim or not as well as for its substantive examination, it is only examined in one single step.

FSCD 4P.298/2005 c. 2.2, FSCD 4P.226/2004 c. 4.3.1

According to #case law, this control generally only takes place in the context of the substantive examination.

FSCD 4P.298/2005 c. 2.2, FSCD 4P.226/2004 c. 4.3.1

2b.12.11 Standing to Sue and Capacity to Be a Party

➤ See also Article 178(2) PILA, section 2.11.13

The question of the #capacity to be a party has to be examined in connection with an #appeal for the wrongful acceptance or declination of #jurisdiction pursuant to Article 190(2)(b) PILA.

FSCD 138 III 714 [719], FSCD 117 II 94 [98], FSCD 4A_118/2014 c. 3.1, FSCD 4A_414/2012 c. 1.2, FSCD 4A_428/2008 c. 3.1, FSCD 13.10.1992 c. 6a

A #motion to set aside an arbitral #award deciding that the #claimant has the #capacity to sue cannot be heard.

FSCD 4P.290/2000 c. 3b, FSCD 16.05.1995 [(1996) ASA p. 670]

However, the #jurisdiction can be challenged on the ground that the #claimant or the #respondent is not a party to the #arbitration agreement, an issue which should not be confused with the lack of #capacity to sue [*Aktivlegitimation, légitimation active*] or to be sued [*Passivlegitimation, légitimation passive*], which is a substantive issue.

FSCD 4A_562/2015 c. 5, FSCD 4P.290/2000 c. 3b

2b.13 Relationship with Article 190(2)(c) PILA

Based on the rule *jura novit curia*, the #arbitrator is in principle not bound by the legal arguments developed by the parties, provided the parties did not limit the tribunal's task to the legal grounds submitted by the parties (with the possibility for a party contesting an #award which does not respect this limitation to challenge it based on a violation of the rule *ne eat judex ultra petita partium* or to plead the lack of #jurisdiction of the #arbitral tribunal, i.e. the #grounds of Art. 190(2)(b) and (c) PILA).

FSCD 130 III 35 [39], FSCD 4A_634/2014 c. 4.1, FSCD 4A_554/2014 c. 2.2, FSCD 4A_214/2013 c. 4.1, FSCD 4A_400/2008 c. 3.1, FSCD 4P.4/2007 c. 4.1

If the #arbitral tribunal lacks #jurisdiction on claims because there is no, or only a limited, #arbitration agreement (*extra potestatem*), a #motion to set aside can only be filed based on Article 190(2)(b) PILA.

FSCD 116 II 639 [641-642], FSCD 21.06.1995 [4P.267/1994] c. 4a, FSCD 06.02.1992 c. 3a

If the #arbitral tribunal decides an issue which is not contained in the #terms of reference, the #award may be set aside because of a violation of Article 190(2)(b) PILA. To the contrary, if the #arbitral tribunal examines a disputed issue, but the decision goes beyond the limits fixed by the parties' #prayers for relief, the #award may be set aside for a violation of Article 190(2)(c) PILA. Such is for instance the case when the #arbitrators, called to decide on the #validity of a contract grant damages.

FSCD 19.11.1998 c. 6a

2b.14 Relationship with Article 190(2)(e) PILA

2b.14.1 In General

The fact that the *res judicata* defence is granted does not entail that the jurisdiction of the arbitral tribunal has to be denied. In such a case, the arbitral tribunal should render a decision not to hear the case based on *res judicata* and not on the basis of a lack of jurisdiction. Therefore, even in the case of *res judicata*, the ground for challenge of Article 190(2)(b) PILA is not available. In such a case, only a violation of public policy, i.e. the ground for setting aside of Article 190(2)(e) PILA, could be envisaged.

FSCD 1P.113/2000 c. 3b

2b.14.2 Competition Law

- See also Article 177(1) PILA, section 1.10; and Article 190(2)(e) PILA, section 2e.13.25

The Swiss judge or arbitrator who has to decide on the validity of a contractual agreement concerning markets in the European Union examines this issue in the light of Article 81 Rome Treaty [Art. 85 of the former Rome Treaty]. It must do so notwithstanding the fact that the parties agreed on the application of Swiss law to their contract. This examination is in any event mandatory if the invalidity of the contract is pleaded by a party before the judge or the arbitrator.

FSCD 132 III 389 [398], FSCD 13.11.1998 [(1999) ASA p. 532]

The arbitrator who denies its jurisdiction to examine this issue violates Article 190(2)(b) PILA.

FSCD 132 III 389 [398]

Certain commentators are of the opinion that it is paradoxical and somewhat artificial to oblige an arbitrator to decide on the validity of a contract with respect to a foreign mandatory law and at the same time to abstain from reviewing the manner in which this law has been applied by stating that this law is not part of public policy. They reproach in particular the Federal Supreme Court for treating the same issue – i.e. the obligation of the arbitrator to take into account the law of the European Union – in a different way depending on the formal aspect under which the motion to set aside is brought before the Federal Supreme Court: jurisdiction of the arbitral tribunal (Art. 190(2)(b) PILA) or violation of public policy (Art. 190(2)(e) PILA).

FSCD 132 III 389 [398-399]

However, this contradiction is only apparent if one remembers that in the *Westland* case, the Federal Supreme Court indicated that public policy within the meaning of Article 190(2)(e) PILA has to be distinguished from public policy, which the arbitral tribunal has to take into account when applying the law (FSCD 120 II 155 [168]). In other words, the public policy of the arbitrator is not the public policy of the judge deciding on a motion to set aside. Therefore, there is no contradiction in considering, on the one hand, that the arbitral tribunal violates Article 190(2)(b) PILA (in connection with Art. 187(1) PILA) if it

dismisses its #jurisdiction to examine the application of a foreign mandatory law such as European or Italian competition law, when a party requests it to do so, and, on the other hand, to refuse to examine the manner in which an #arbitral tribunal has applied this very law because this law is not part of #public policy within the meaning of Article 190(2)(e) PILA.

FSCD 132 III 389 [399]

Furthermore, this solution allows avoiding the difficulties the Federal Supreme Court could encounter if it had to review this. Finally, if the Federal Supreme Court had to review the way in which an #arbitral tribunal applied EU law, the Federal Supreme Court could not ensure the correct #interpretation of this law by requesting the ECJ to give a preliminary ruling on this question, contrary to the authorities of EU Member States (Art. 234 EU Treaty). It would thus risk rendering judgments which could depart from the #case law of the ECJ. This would be a source of uncertainty and would considerably harm the authority of the Supreme Court of the country. Furthermore, the efficiency of the review of the application of EU law by the Federal Supreme Court would in any case be considerably limited by the very restricted #powers of review with regard to the #arbitral tribunal's #fact-findings.

FSCD 132 III 389 [399-400]

2b.15 Pseudo Arbitral Tribunal

The question of the effects of an #award rendered by a pseudo #arbitral tribunal which has usurped its #jurisdiction has been left open.

FSCD 120 II 155 [164]

An #arbitral tribunal may not hear a dispute against a party which did not participate or, at least has not been invited to participate, in its #constitution pursuant to Article 179 PILA. Before ruling on its #jurisdiction to decide on #prayers for relief and to adjudicate a dispute, a tribunal must be constituted. It is only once it is constituted, with the participation of the third party, that it can decide whether it has #jurisdiction to integrate the third party into the proceedings. An #arbitral tribunal is deemed to be constituted when it has accepted its mission with respect to all parties and for the dispute for which it is seized, i.e. for a specific and existent case. Without being constituted with respect to a party, the #arbitral tribunal has no adjudicative powers over this party. Therefore, every judgment or every decision it renders with respect to this party must be considered as inexistent and does not have to be taken into consideration.

FSCD 11.11.1994 c. 3

Following a general procedural principle, an inexistent decision [*Nichturteil*, *Scheinurteil*] does not have to be taken into account. This is in particular the case of a “decision” rendered by a person without any jurisdictional powers. At the most, a negative declaratory #action for the declaration of this inexistence could be envisaged, provided that the party could show a sufficient legal interest in such a declaration. The same holds true in arbitration. Therefore, the #award rendered by an incomplete #arbitral tribunal because one of its members has not accepted its nomination and has not been replaced, is a legally inexistent #award, which may at least be set aside.

FSCD 26.04.1994 c. 4c

A person who does not have the function of an #arbitrator cannot decide on its own #jurisdiction.

FSCD 26.04.1994 c. 4c/aa

It is not admissible that a party ignores all the procedural rules to which it has subjected itself – in particular with respect to the appointment of the #arbitrator –, that this party addresses itself unilaterally to a person of its choice and succeeds in making the Federal Supreme Court review the “decisions” rendered by a person who does not have the quality of an #arbitrator.

FSCD 26.04.1994 c. 4c/bb

2b.16 Effects of the Federal Supreme Court’s Ruling on Jurisdiction

➤ See also Article 191 PILA, section 17.3

#Arbitrators who deny their #jurisdiction in an #award have not finished their task once and forever. On a #motion to set aside, the Federal Supreme Court may assert the #jurisdiction of the very same #arbitral tribunal which has then to resume its activity and decide on the #merits. Article 40(4) fConcordat expressly provides that the same #arbitrators have to resume the proceedings after their #award has been set aside. This also applies under the PILA, even without a corresponding provision in this statute.

FSCD 117 II 94 [96]

If the #arbitral tribunal has wrongly declined its #jurisdiction, the State court confirms the contrary by upholding the motion. Even though the [*former*] #motion for constitutional review leads in principle only to the setting aside of the #award, there have been exceptions – already before the entry into force of the PILA - to the principle of restraint with regard to cantonal autonomy with respect to decisions on #jurisdiction (*FSCD 102 Ia 575 [576-577]). As international arbitration is exclusively governed by federal law, i.e. Chapter 12 PILA, there is all the more no reason merely to set aside the #award on #jurisdiction when granting a #motion to set aside based on #jurisdiction. With regard to the principle of #legal certainty, the Federal Supreme Court has to determine the consequences of the setting aside by settling the question of #jurisdiction in the #operative part of its decision on the #motion to set aside.

FSCD 117 II 94 [95-96]

2b.17 Individual Cases

An #arbitral tribunal **exceeded its #jurisdiction**:

- when it set aside the #operative part of the DRC [FIFA Dispute Resolution Chamber] #award which exclusively concerned the dispute between the #appellant and the player when the player had previously withdrawn its #appeal.
FSCD 140 III 520 [528]
- when there was no valid #arbitration agreement. A mere reference to #CAS appeal proceedings contained in a letter sent to an athlete by an international association stating that an #appeal against a decision made by a disciplinary commission of such association could be made with the #CAS is not sufficient to constitute a valid #arbitration agreement.
FSCD 4A_456/2009 c. 3.3.1

An #arbitral tribunal did **not exceed its #jurisdiction**:

- when it ruled on the issues of the #admissibility and consequences of the #appellant's withdrawal of its claims.
FSCD 4A_394/2017 c. 4.3.7
- when it issues a #decision on the #merits and imposes a disciplinary sanction on an athlete pursuant to Article R57 of the #CAS Code.
FSCD 4A_90/2014 c. 3.3.2, FSCD 4A_386/2010 c. 5.3.4
- when it heard a dispute before the parties had complied with a mandatory DAB proceeding when the #constitution of the *ad hoc* DAB had begun after the completion of the works, at a time when the parties' positions were undoubtedly already irreconcilable, and therefore that it was unlikely that DAB proceedings would prevent the dispute from subsequently being submitted to arbitration, when the DAB was not operational even though 15 months had passed since the contractor's referral and when the owner had dragged its feet in the process of constituting the DAB.
FSCD 4A_124/2014 c. 3.5
- when it heard a dispute concerning the payment of outstanding invoices brought by the party that held the claim under the contract even though in fact a third party was receiving payment for the goods.
FSCD 4A_232/2013 c. 3.3.1
- when it heard a #claim for damages arising from the breach of an #arbitration agreement and clearly explained that it did not intend to impinge on the exclusive #jurisdiction of the State courts in question to award #costs in their own proceedings.
FSCD 4A_232/2013 c. 3.4
- when it heard a civil #claim for damages when a party had filed a criminal #claim in relation to the same dispute which would be subject to enforcement by the State.
FSCD 4A_41/2013

- when it interpreted the concept of material breach in a contract subject to Swiss law according to the CISG and the Unidroit Principles of International Commercial Contracts.
FSCD 4A_240/2009 c. 2.2

2c Award Ultra or Extra Petita (c)

2c.1 Principle

Article 190(2)(c) PILA allows attacking an arbitral #award when the #arbitral tribunal has decided beyond the submitted #prayers for relief. This is the case when the #arbitral tribunal grants more or something different (decision *ultra* or *extra petita*) to a party than what this party requested, or when the #award does not decide on an issue although the #arbitral tribunal had #jurisdiction to do so (decision *infra petita*). The Federal Supreme Court treats this last case as a sub-category of #denial of justice.

FSCD 122 III 492 [(2002) ASA p. 263], FSCD 120 II 172 [175], FSCD 116 II 81 [85], FSCD 116 II 639 [641], FSCD 4A_284/2018 c. 3.1, FSCD 4A_580/2017 c. 2.1.1, FSCD 4A_508/2017 c. 3.1, FSCD 4A_684/2014 c. 3.2.1, FSCD 4A_378/2014 c. 3.1, FSCD 4A_398/2013 c. 3.1, FSCD 4A_232/2013 c. 4.2, FSCD 4A_635/2012 c. 4.2, FSCD 4A_440/2010 c. 3.1 (not published in FSCD 137 III 85), FSCD 4A_464/2009 c. 4.1, FSCD 4A_416/2008 c. 6, FSCD 4A_220/2007 c. 7.2, FSCD 4P.168/2006 c. 7.2, FSCD 4P.54/2006 c. 2.1, FSCD 4P.154/2005 c. 5, FSCD 4P.200/2001 c. 3b, FSCD 4P.114/2001 c. 3a, FSCD 19.11.1998 c. 6a, FSCD 20.10.1998 c. 2a/aa, FSCD 16.02.1996 c. 3, FSCD 21.06.1995 [4P.267/1994] c. 4a, FSCD 21.06.1995 [4P.243/1994] c. 4a, FSCD 30.12.1994 [(1995) ASA p. 219], FSCD 11.05.1992 [(1992) ASA p. 395], FSCD 30.04.1992 c. 2a

In accordance with Article 393(c) CCP, an #award rendered in a domestic arbitration may be challenged if the #arbitral tribunal has decided on points of the dispute that were not submitted to it or has failed to decide on certain #prayers for relief. The latter ground for #appeal corresponds to that for international arbitration in Article 190(2)(c) PILA, which is why the #case law developed in this area also applies to domestic arbitration.

FSCD 4A_253/2014 c. 4.2

The parties may change their #prayers for relief in the course of the proceedings to the extent fixed by the applicable procedural rules. The principle of #party disposition on which the rule "*ne eat judex ultra petita partium*" is based is respected if the last version of the #prayers for relief is the basis for the #award.

FSCD 28.05.1998 c. 3b

Article 190(2)(c) PILA does not allow a #motion to set aside if the subject of the claim has not been modified, but merely limited in a restrictive way.

FSCD 16.02.1996 c. 3

To know whether and under what conditions the claims could be increased is an issue which is governed by the applicable procedural rules and has nothing to do with the #ground for setting aside of Article 190(2)(c) PILA.

FSCD 08.02.1993 c. 3a

2c.2 *Ultra* or *Extra Petita*

2c.2.1 Granting Something More or Else than Requested

The #arbitrator does not decide beyond the #prayers for relief if it grants at the end not more than the total amount requested by #claimant, but evaluates certain elements of the claim differently than the #claimant, or if when seized by a negative declaratory #action which it considers ill-founded, it grants the existence of the disputed legal relationship in the #operative part of its #award instead of dismissing this claim.

FSCD 122 III 492 [(2002) ASA p. 263], FSCD 4A_404/2017 c. 3.2.1, FSCD 4A_314/2017 c. 3.2.1, FSCD 4A_50/2017 c. 3.1, FSCD 4A_218/2015 c. 3.1, FSCD 4A_684/2014 c. 3.2.2, FSCD 4A_709/2014 c. 4.1, FSCD 4A_440/2010 c. 3.1 (not published in FSCD 137 III 85), FSCD 4A_464/2009 c. 4.1, FSCD 4A_220/2007 c. 7.2, FSCD 4P.114/2001 c.3a, FSCD 06.05.1996 c. 3b

Article 190(2)(c) PILA allows challenging an #award if the #arbitral tribunal has decided beyond the #prayers for relief. #Awards which grant more, or something else than what has been asked for (*ultra* or *extra petita*) are within the scope of this provision, according to the #interpretation of the Federal Supreme Court which laid emphasis on the French version of the statute.

FSCD 120 II 172 [175], FSCD 4A_404/2017 c. 3.2.1, FSCD 4A_314/2017 c. 3.2.1, FSCD 4A_50/2017 c. 3.1, FSCD 4A_218/2015 c. 3.1, FSCD 4A_709/2014 c. 4.1, FSCD 4A_440/2010 c. 3.1 (not published in FSCD 137 III 85), FSCD 4A_464/2009 c. 4.1

Article 190(2)(c) PILA applies not only when the #arbitral tribunal does not rule on a claim, as the German and the Italian version of the provision appear to say, but, in accordance with the French version, also when the #arbitral tribunal grants more, or something different, than what has been requested (*ultra petita*).

FSCD 116 II 639 [641-642], FSCD 4A_678/2015 c. 3.2.1, FSCD 4A_684/2014 c. 3.2.1, FSCD 4A_552/2012 c. 3.3, FSCD 4A_654/2011 c. 5.2, FSCD 4P.146/2004 c. 6.2, FSCD 21.06.1995 [4P.267/1994] c. 4a, FSCD 07.12.1994 c. 3a, FSCD 18.08.1992 c. 4 (not published in FSCD 118 II 359)

The principle “*ne eat iudex ultra petita partium*” provides that in particular with respect to monetary #prayers for relief, the #tribunal may not grant more than the total amount claimed. The #tribunal is not bound by the different elements of the claimed amounts. Therefore, it does not violate this principle if within the limits of the total amount claimed, more than the different partial amounts are granted (FSCD 119 II 396 c. 2).

FSCD 4A_642/2017 c. 7.2.3, FSCD 4P.54/2006 c. 2.1

Having regard to the principle derived from the adage *a maiore minus*, it is evident that a #tribunal – State or arbitral – does not rule *ultra* or *extra petita* by giving less to a party than it requested.

FSCD 4A_404/2017 c. 3.2.1

An #arbitral tribunal can however decide #preliminary issues that are not within the scope of the #arbitration agreement.

FSCD 4A_482/2010 c. 4.3.1, FSCD 4A_428/2010 c. 2.2

Article 190(2)(c) PILA applies for instance if the #arbitrators called to decide on the #validity of a contract grant by their #award the payment of damages.

FSCD 4A_464/2009 c. 4.1, FSCD 20.10.1998 c. 2a/aa; FSCD 30.04.1992 c. 2b/c

By its #prayers for relief, the party to the proceedings requests what the tribunal shall order. There is #lis pendens for what is requested in the #prayers for relief, and the tribunal has to decide only on this. If a party reserves further #claims, this shows that it did not want to submit these #claims to the tribunal for decision.

FSCD 07.12.1994 c. 3b

With regard to the quantum, the object of the dispute [*Streitgegenstand*] submitted to the tribunal is fixed by the parties' #prayers for relief; with regard to the contents, it is fixed by the factual #claims. The principle "*ne eat judex ultra petita partium*" is not yet violated, if the judge who has to decide on different disputed issues, issues positive and negative orders in favour or to the detriment of one or the other party, which did not request this, provided the judge does not exceed the limit fixed by the #prayers for relief of the opposing party. If a negative declaratory #action is opposed to a counterclaim, the possibilities of drafting the #operative part are particularly numerous, as there are many disputed issues. If the #operative part has different sections and if their contents can be related to the #prayers for relief of one or the other party, there is not a decision "*ultra petita*". It has to be taken into account in this context that the #operative part must be interpreted according to its true meaning, and not only based on its wording, whereby the #reasons have to be considered.

FSCD 07.12.1994 c. 4a

2c.2.2 Guarantee of the Right to be Heard

The principle "*ne eat judex ultra petita partium*" guarantees a particular aspect of the #right to be heard, to the extent that it forbids an #arbitral tribunal from including in its #award claims (or part of them) on which the parties did not have the possibility to express themselves with respect to the #facts or the law.

FSCD 120 II 172 [175], FSCD 28.05.1998 c. 3b

The prohibition placed on the #arbitrator not to decide *ultra petita* aims at protecting a party from the risk that the decision covers an unexpected issue on which the party could not submit its point of view. The rule also aims at avoiding that the #arbitrator grants the #claimant more than what it requests, taking into account its liberty to dispose of its assets.

FSCD 4P.154/2005 c. 5, FSCD 4P.143/2001 c. 3c/bb

2c.3 Lack of Decision on Filed Prayers for Relief

2c.3.1 Incomplete Award

This provision envisages the incomplete #award, i.e. the case where the #arbitral tribunal did not decide on one of the #prayers for relief which the parties submitted to it.

FSCD 128 III 234 [242], FSCD 4A_424/2017 c. 4.1, FSCD 4A_384/2017 c. 3.1, FSCD 4A_173/2016 c. 3.2, FSCD 4A_218/2015 c. 2.1, FSCD 4A_246/2014 c. 5.1, FSCD 4A_378/2014 c. 3.1, FSCD 4A_253/2014 c. 4.2, FSCD 4A_635/2012 c. 4.2, FSCD 4A_314/2012 c. 5, FSCD 4A_524/2009 c. 3.1, FSCD 4P.206/2006 c. 6, FSCD 4P.96/2002 c. 4.2, FSCD 4P.269/2003 c. 2.1, FSCD 4P.198/2002 c. 3.2

If the #award dismisses all other or all further #prayers for relief, the #grievance of an incomplete #award is excluded.

FSCD 128 III 234 [242], FSCD 4A_173/2016 c. 3.2, FSCD 4A_218/2015 c. 2.1, FSCD 4A_378/2014 c. 3.1, FSCD 4A_635/2012 c. 4.2, FSCD 4A_314/2012 c. 5, FSCD 4A_652/2011 c. 3.2, FSCD 4A_524/2009 c. 3.1, FSCD 4P.206/2006 c. 6, FSCD 4P.96/2002 c. 4.2, FSCD 4P.269/2003 c. 2.1, FSCD 4P.71/2002 c. 2.1

The #grievance of an incomplete #award does not allow one to claim that the #arbitral tribunal has omitted to decide an issue which is important for the resolution of the dispute.

FSCD 128 III 234 [242], FSCD 4A_424/2017 c. 4.1, FSCD 4A_384/2017 c. 3.1, FSCD 4A_173/2016 c. 3.2, FSCD 4A_218/2015 c. 2.1, FSCD 4A_378/2014 c. 3.1, FSCD 4A_446/2013 c. 6.2.2.2, FSCD 4A_314/2012 c. 5, FSCD 4A_524/2009 c. 3.1

It is not admissible under Article 190(2)(c) PILA to call into question the #award as such, but only to complain about the fact that the #arbitral tribunal has omitted to decide on certain #prayers for relief.

FSCD 128 III 234 [242-243], FSCD 4A_62/2009 c. 3.2

Under Article 190(2)(c) PILA, it may be claimed that the #arbitral tribunal has not decided on formally valid #prayers for relief that were filed in time.

*FSCD 107 Ia 246 [250]

There is no incomplete #award in the case where the #arbitral tribunal grants in part the #appellant's #prayers for relief and thus implicitly rejects the remaining #prayers for relief which were moreover dealt with in the #award.

FSCD 4A_524/2009 c. 3.2

In principle, this #ground for setting aside does not apply to partial #awards which are by definition incomplete, unless the #arbitrators omitted to decide an issue which they were obliged to decide in this #award.

FSCD 4P.198/2002 c. 3.2

There is an omission to decide on a #prayer for relief, if the #arbitral tribunal omits to examine it. To the contrary, there is not an omission if the #arbitral tribunal dismisses a #prayer for relief, because it cannot be heard and therefore does not decide on it with respect to the #merits.

FSCD 21.06.1995 [4P.243/1994] c. 4a

Article 190(2)(c) PILA aims only at guaranteeing that the #arbitral tribunal treats the claims which are submitted to it from a procedural and substantive point of view. This does not prevent the #arbitral tribunal from not hearing #prayers for relief which are inadmissible pursuant to the applicable (procedural or substantive) law. Therefore, only the examination of all claims falling within the #jurisdiction of the #arbitral tribunal is guaranteed, not their substantive examination.

FSCD 21.06.1995 [4P.243/1994] c. 4a

2c.3.2 Procedural Denial of Justice

The #grievance of Article 190(2)(c) PILA, second hypothesis, is identical to a procedural #denial of justice pursuant to Article 8 FC. The PILA adopts here the second ground for setting aside of Article 36(c) fConcordat.

FSCD 128 III 234 [242], FSCD 115 II 288 [293], FSCD 4A_424/2017 c. 4.1, FSCD 4A_173/2016 c. 3.2, FSCD 4A_218/2015 c. 2.1, FSCD 4A_246/2014 c. 5.1, FSCD 4A_511/2013 c. 2.2.2, FSCD 4A_635/2012 c. 4.2, FSCD 4A_314/2012 c. 5, FSCD 4A_524/2009 c. 3.1, FSCD 4P.206/2006 c. 6, FSCD 4P.96/2002 c. 4.2, FSCD 4P.269/2003 c. 2.1, FSCD 4P.198/2002 c. 3.2, FSCD 19.11.1998 c. 7a

According to Article 393(c) CCP, a domestic #award may be challenged on the grounds that the #arbitral tribunal has ruled on issues which have not been submitted to it or that it has not decided on certain #prayers for relief. The failure to decide on a #prayer for relief mentioned in the second half sentence is a case of procedural #denial of justice. This plea relates to an arbitral #award which is incomplete because the #arbitral tribunal has not decided on certain #prayers for relief submitted by the parties. However, on the basis of Article 393(c) CCP, it cannot be argued that the #arbitral tribunal did not examine the dispute in all its legal aspects.

FSCD 4A_117/2014 c. 2.1

The authority which expressly refuses or tacitly omits to take a certain decision, irrespective of the fact that it is under a duty to take a decision, commits a procedural #denial of justice. A procedural #denial of justice may for instance result from the fact that the authority has ignored or misunderstood the parties' #claims and #prayers for relief. To the contrary, there is no procedural #denial of justice when the whole amount claimed by a party is not granted. The same holds true when the #tribunal does not explain in detail the #reasons for not granting entirely the claimed amount. The simple lack of #reasons does not lead to the setting aside of the #award.

FSCD 19.11.1998 c. 7a

2c.4 Prayers for Relief and their Interpretation

"*Chefs de la demande*", "*Rechtsbegehren*", "*determinate conclusioni*", "claims" means the parties' #prayers for relief.

FSCD 128 III 234 [242], FSCD 4A_424/2017 c. 4.1, FSCD 4A_384/2017 c. 3.1, FSCD 4A_218/2015 c. 2.1, FSCD 4A_246/2014 c. 5.1, FSCD 4A_314/2012 c. 5, FSCD 4A_524/2009 c. 3.1, FSCD 4P.206/2006 c. 6, FSCD 09.10.2007 c. 4.2, FSCD 4P.269/2003 c. 2.1, FSCD 4P.198/2002 c. 3.2

The ground of #appeal under Article 190(2)(c) PILA is not already fulfilled if the #arbitral tribunal deviates in its #award from the wording of the application or interprets a #prayer for relief taking into account the relevant written submission.

FSCD 4A_284/2018 c. 3.2.2

The meaning and the scope of the parties' #prayers for relief have to be interpreted, in #arbitral proceedings as well, according to the principles applicable to the #interpretation of #expressions of intent. If the real intent of the declaring party does not appear clearly, one has to carry out a normative #interpretation of the awareness of the addressee, be it the opposing party or the #arbitral tribunal. This means that not only the wording of the #expression, but also all circumstances in which it has been made, have to be taken into account.

FSCD 30.12.1994 [(1995) ASA p. 219]

2c.5 Different Legal Grounds

Based on the rule *jura novit curia*, the #arbitrator is in principle not bound by the legal arguments developed by the parties, provided the parties did not limit the #tribunal's task to the legal grounds submitted by the parties (with the possibility for a party contesting an #award which does not respect this limitation to challenge it based on a violation of the rule *ne eat iudex ultra petita partium* or to plead the lack of #jurisdiction of the #arbitral tribunal, i.e. the #grounds of Art. 190(2)(b) and (c) PILA).

FSCD 130 III 35 [39], FSCD 4A_634/2014 c. 4.1, FSCD 4A_554/2014 c. 2.2, FSCD 4A_214/2013 c. 4.1, FSCD 4A_400/2008 c. 3.1, FSCD 4P.4/2007 c. 4.1

As soon as a claim is sufficiently substantiated and in the absence of an agreement between the parties to the contrary, the #arbitral tribunal has, in line with the principle *jura novit curia*, to apply the law *ex officio*, without being bound by the #reasons brought forth by the parties. Therefore, the #arbitral tribunal does not decide *ultra* or *extra petita* if it bases its decisions on legal grounds which the parties did not plead, because it is merely giving a new legal #interpretation of the #facts underlying the dispute.

FSCD 122 III 492 [(2002) ASA p. 263-264], FSCD 120 II 172 [175], FSCD 4A_404/2017 c. 3.2.1, FSCD 4A_314/2017 c. 3.2.1, FSCD 4A_508/2017 c. 3.1, FSCD 4A_50/2017 c. 3.1, FSCD 4A_356/2015 c. 6.1, FSCD 4A_218/2015 c. 3.1, FSCD 4A_709/2014 c. 4.1, FSCD 4A_464/2009 c. 4.1, FSCD 4A_488/2009 c. 4.1, FSCD 4A_220/2007 c. 7.2, FSCD 4P.168/2006 c. 7.2, FSCD 4P.54/2006 c. 2.1, FSCD 4P.146/2004 c. 6.2, FSCD 4P.114/2001 c. 3a, FSCD 4P.260/2000 c. 5c, FSCD 06.05.1996 c. 2a & 3b, FSCD 30.04.1992 c. 2a

According to the Federal Supreme Court's #case law, there is no violation of the principle "*ne eat iudex ultra petita partium*" if the claim asserted is assessed from a legal point of view wholly or partially deviating from the reasons given by the parties, provided that it is covered by the #prayers for relief.

FSCD 120 II 172 [175], FSCD 4A_284/2018 c. 3.1, FSCD 4A_580/2017 c. 2.1.1, FSCD 4A_508/2017 c. 3.1, FSCD 4A_678/2015 c. 3.2.1, FSCD 4A_684/2014 c. 3.2.1, FSCD 4A_428/2010 c. 3.1

The #arbitral tribunal is however bound by the #subject matter and the amounts of the submitted #prayers for relief, in particular when a party qualifies or limits its claim in the #prayers for relief.

FSCD 4A_284/2018 c. 1, FSCD 4A_404/2017 c. 3.2.1, FSCD 4A_314/2017 c. 3.2.1, FSCD 4A_580/2017 c. 2.1.1, FSCD 4A_508/2017 c. 3.1, FSCD 4A_50/2017 c. 3.1, FSCD 4A_678/2015 c. 3.2.1, FSCD 4A_356/2015 c. 6.1, FSCD 4A_218/2015 c. 3.1, FSCD 4A_684/2014 c. 3.2.1, FSCD 4A_709/2014 c. 4.1, FSCD 4A_440/2010 c. 3.1 (not published in FSCD 137 III 85), FSCD 4A_464/2009 c. 4.1, FSCD 4A_488/2009 c. 4.1, FSCD 4A_220/2007 c. 7.2, FSCD 4P.168/2006 c. 7.2, FSCD 4P.114/2001 c. 3a, FSCD 01.11.1996 c. 2c/bb (not published in FSCD 122 III 492), FSCD 30.04.1992 c. 2a

There is no violation of the principle "*ne eat iudex ultra petita partium*" if a tribunal considers the claim from a legal point of view completely or partially in a different way from the parties' reasoning, provided that its conclusions are covered by the claim.

FSCD 120 II 172 [175], FSCD 4A_678/2015 c. 3.2.1, FSCD 4A_684/2014 c. 3.2.1, FSCD 4A_709/2014 c. 4.1, FSCD 4A_440/2010 c. 3.1 (not published in FSCD 137 III 85), FSCD 4A_428/2010 c. 3.1, FSCD 4A_488/2009 c. 4.1, FSCD 4A_220/2007 c. 7.2, FSCD 4P.134/2006 c. 4, FSCD 4P.260/2000 c. 5c, FSCD 06.05.1996 c. 3b, FSCD 07.12.1994 c. 3a

The State courts, as well as private #arbitral tribunals, are obliged to examine *ex officio* the legal consequences of the #facts which are validly submitted during the proceedings, or which are determined, without being bound by the parties' legal #interpretations of the #facts. This obligation is in particular based on the fact that the decision can only give clarity on the #matter in dispute if the tribunal examines an alleged legal consequence from all legal points of view.

FSCD 120 II 172 [175], FSCD 4A_440/2010 c. 3.1 (not published in FSCD 137 III 85), FSCD 4A_488/2009 c. 4.1, FSCD 4P.260/2000 c. 5b

If a party qualifies or limits its claims in its #prayers for relief, the indication of the legal ground or the limitation of the #prayers for relief to a determined #subject matter has to be interpreted in the sense that the party waives the right to claim the contentious performance on another ground. If the #arbitral tribunal were allowed to exceed the framework defined by the party in its #prayers for relief, this could amount to a violation of the #right to be heard of the opposing party.

FSCD 4A_488/2009 c. 4.1, FSCD 30.04.1992 c. 2a

There is an exception to this principle for #arbitral tribunals when their #jurisdiction to apply the law has been limited by the parties to a certain claim. However, such a limitation should not easily be assumed.

FSCD 4P.260/2000 c. 5b, FSCD 06.05.1995 c. 2a

2c.6 Modifications of the Reasons for the Claim

The question of #admissibility of modifications with regard to the #reasons for a claim in international #arbitral proceedings does not fall within the scope of application of Article 190(2)(c) PILA. The limits to such modifications result from the scope of application of the #arbitration agreement or depend on the

procedural rules chosen by the parties (Art. 182 PILA). In the first case (*extra potestatem*), the parties have to invoke exclusively Article 190(2)(b) PILA if they intend to contest the #arbitrators' #jurisdiction to decide the dispute (FSCD 116 II 639 [641-642]); in the second case, the violation of mandatory procedural principles pursuant to Article 182(3) PILA can be submitted to the Federal Supreme Court by a #motion to set aside based on Articles 190(2)(d) & (e) PILA.

FSCD 117 II 346 [347-348], FSCD 30.12.1994 [(1995) ASA p. 220-221]

2c.7 Relationship with Article 190(2)(b) PILA

- See Article 190(2)(b) PILA, section 2b.13

If the #arbitral tribunal decides an issue which is not contained in the #terms of reference, the #award can be set aside because of a violation of Article 190(2)(b) PILA. To the contrary, if the #arbitral tribunal examines a disputed issue, but the decision goes beyond the limits fixed by the parties' #prayers for relief, the #award may be set aside for a violation of Article 190(2)(c) PILA. Such is for instance the case when the #arbitrators, called to decide on the #validity of a contract, grant damages.

FSCD 19.11.1998 c. 6a

2c.8 Relationship with Article 190(2)(d) PILA

The rule "*ne eat judex ultra petita partium*" guarantees a particular aspect of the #right to be heard, to the extent that it prevents the #arbitral tribunal from including in its #award claims on which the parties did not have the possibility to take a position during the proceedings with regard to the #facts or the law.

FSCD 122 III 492 [(2002) ASA p. 264], FSCD 120 II 172 [175], FSCD 116 II 80 [85], FSCD 5P.390/2003 c. 3.3, FSCD 30.12.1994 [(1995) ASA p. 219], FSCD 07.12.1994 c. 3a, FSCD 11.05.1992 [(1992) ASA p. 395], FSCD 30.04.1992 c. 2a

2c.9 Relationship with Article 37(1) UNCITRAL Arbitration Rules

The Federal Supreme Court left open the question whether a #motion to set aside based on Article 190(2)(c) PILA presupposes a request for an additional #award pursuant to Article 37(1) UNCITRAL Arbitration Rules.

FSCD 01.03.1996 c. 2a

2c.10 Timeliness of the Plea of an Award *Ultra or Extra Petita*

- For the timeliness of other pleas of procedural flaws, see Article 177(1) PILA, section 1.15; Article 180(2) PILA; Article 186(2) PILA, section 2.5; Article 190(2)(a) PILA, section 2a.9; Article 190(2)(b) PILA, section 2b.2; Article 190(2)(d) PILA, section 2d.5; and Article 190(2)(e) PILA, section 2e.14.4

The party which considers that it is a victim of a procedural error must invoke it immediately, risking otherwise not to be heard any longer. To invoke such an error only in the #motion to set aside a decision – because it turns out to be negative –, when the error could have been pleaded during the proceedings, constitutes a violation of the principle of #good faith.

FSCD 119 II 386 [388], FSCD 4A_428/2015 c. 3.1, FSCD 4A_54/2015 c. 3.1, FSCD 4A_544/2014 c. 3.2.2, FSCD 4A_597/2013 c. 2.1, FSCD 4A_476/2012 c. 3.1, FSCD 4P.96/2002 c. 4.3.2

2c.11 Individual Cases

The #arbitral tribunal does **not** decide *ultra petita*:

- when it rejects a negative declaratory #action considered unfounded, by admitting the existence of the disputed debt in the #operative part of its #award, because the content of the declaratory #decision and the #*res judicata* effect are the same, whether the declaratory #action is dismissed or the existence of the debt is admitted.
FSCD 120 II 172 [175-176]
- when it imposes sanctions on a party which were more severe than the maximum sanction in its alternate submission but less severe than the ones issued at first instance.
FSCD 4A_682/2012 c. 5.1
- when it held that only one #respondent and not that both #respondents were liable when the #claimant sought that both #respondents be held jointly and severally liable as this request encompassed a request that one #respondent be held liable.
FSCD 4A_552/2012 c. 3.1-3.3
- when it awarded #interest which was not expressly included in the #prayer for relief section of the party's brief but which was implicitly included in the same when construed in light of the entire brief.
FSCD 4A_440/2010 c. 3.2.1 (not published in FSCD 137 III 85)
- when it is called upon to adjudicate claims between two members of a consortium and deals with possible claims by third parties against the consortium where the determination of those claims arises as a #preliminary question.
FSCD 4A_428/2010 c. 2.2

- when it interpreted the concept of material breach in a contract subject to Swiss law according to the CISG and the Unidroit Principles of International Commercial Contracts.
FSCD 4A_240/2009 c. 2.2
- when it based its calculation of #default interest by simplifying to an average date of payment, whereas the #claimant applies a prior term with regard to certain payments.
FSCD 19.02.1990 [(1990) ASA p. 182]
- when the #claimant claims from both #respondents payment of the agreed commissions and, after the exchange of the submissions, claims damages against one of the #respondents based on a contract with a third party, and the #arbitral tribunal admits the claim.
FSCD 30.12.1994 [(1995) ASA p. 220]

The #arbitral tribunal decides ***ultra petita***:

- when it did not limit itself to reject the #prayer for relief of the #claimant, asking for a declaration of the inexistence of the disputed debt, but furthermore orders this #claimant to pay its debt even though #respondent did not formulate any #prayer for relief in this sense.
FSCD 28.04.1992 c. 2b (not published in FSCD 118 II 193), reported in FSCD 120 II 172 [175]

2d *Violation of the Equal Treatment of the Parties or their Right to Be Heard in Adversarial Proceedings (d)*

2d.1 Principle

- See also Article 182(3) PILA

This #grievance sanctions only the mandatory procedural principles pursuant to Article 182(3) PILA, to the exclusion of procedural rules fixed by the parties in their contract.

FSCD 130 III 35 [37-38], FSCD 119 II 386 [388], FSCD 117 II 346 [347], FSCD 116 II 373 [375], FSCD 4A_308/2018 c. 3.1, FSCD 4A_284/2018 c. 4.1, FSCD 4A_404/2017 c. 3.1.1, FSCD 4A_505/2017 c. 3.1.1, FSCD 4A_580/2017 c. 2.1.2, FSCD 4A_430/2017 c. 2.1, FSCD 4A_236/2017 c. 4.1, FSCD 4A_277/2017 c. 3.1, FSCD 4A_80/2017 c. 3.1, FSCD 4A_532/2016 c. 4.1, FSCD 4A_470/2016 c. 3.1, FSCD 4A_490/2016 c. 3.1.1, FSCD 4A_405/2016 c. 3.2, FSCD 4A_478/2016 c. 3.1, FSCD 4A_322/2015 c. 5, FSCD 4A_173/2016 c. 4.1, FSCD 4A_678/2015 c. 4.1, FSCD 4A_568/2015 c. 3.1, FSCD 4A_172/2015 c. 4.1, FSCD 4A_54/2015 c. 4.1, FSCD 4A_684/2014 c. 4.1, FSCD 4A_623/2014 c. 3.1, FSCD 4A_636/2014 c. 3.2, FSCD 4A_486/2014 c. 4.1, FSCD 4A_544/2014 c. 3.2.1, FSCD 4A_324/2014 c. 3.2.1, FSCD 4A_74/2014 c. 3.2.1 (not published in FSCD 140 III 477), FSCD 4A_178/2014 c. 5.1, FSCD 4A_330/2013 c. 3.1, FSCD 4A_274/2013 c. 3.1, FSCD 4A_95/2013 c. 3.1, FSCD 4A_672/2012 c. 3.1.1, FSCD 4A_522/2012 c. 3.1, FSCD 4A_407/2012 c. 4.1, FSCD 4A_76/2012 c. 3.1, FSCD 4A_682/2012 c. 4.1, FSCD 4A_360/2011 c. 4.1, FSCD 4A_528/2011 c. 2.1, FSCD 4A_526/2011 c. 2.1, FSCD 4A_162/2011 c. 2.1.2, FSCD 4A_402/2010 c. 3.1, FSCD 4A_176/2008 c. 4, FSCD 4P.105/2006 c. 7.1, FSCD 4P.23/2006 c. 3.1, FSCD 4P.26/2004 c. 3.1, FSCD 4P.104/2004 c. 5.1, FSCD 4P.93/2004 c. 2.1, FSCD 4P.64/2004 c. 3.1, FSCD 4P.14/2004 c. 2.1, FSCD 4P.115/2003 c. 4.2, FSCD 4P.167/2002 c. 2.1, FSCD 4P.71/2002 c. 2.2, FSCD 4P.17/2002 c. 2b, FSCD 08.09.1999 c. 7a, FSCD 22.02.1999 [(1999) ASA p. 541], FSCD 20.10.1998 c. 3a, FSCD 17.07.1998 [4P.7/1998] c. 2a, FSCD 15.06.1998 c. 2a, FSCD 09.06.1998 [(1998) ASA p. 658], FSCD 28.05.1998 c. 2a, FSCD 08.05.1998 c. 1a, FSCD 16.02.1998 c. 4, FSCD 12.01.1998 c. 2a, FSCD 03.11.1997 c. 2a, FSCD 25.07.1997 [(2000) ASA p. 102], FSCD 06.09.1996 [(1997) ASA p. 306], FSCD 09.07.1996 [4P.114/1995] c. 1a, FSCD 10.06.1996 [(2000) ASA p. 769], FSCD 16.02.1996 c. 4a & 4c, FSCD 28.11.1995 c. 2, FSCD 21.06.1995 [4P.243/1994] c. 3a, FSCD 17.08.1994 [(1995) ASA p. 203], FSCD 19.04.1994 c. 5b (not published in FSCD 120 II 155), FSCD 21.12.1992 [(1993) ASA p. 264], FSCD 11.05.1992 [(1992) ASA p. 395-396], FSCD 06.02.1992 c. 4a, FSCD 23.10.1989 [(1990) ASA p. 52], ZH 30.06.2003 p. 5

Even in cases where the parties adopted a procedural rule which is binding upon the #arbitral tribunal, such a rule does not become a mandatory procedural principle within the meaning of Article 182(3) PILA.

FSCD 117 II 346 [348], FSCD 4A_405/2016 c. 3.3, FSCD 4A_554/2014 c. 2.2, FSCD 4P.23/2006 c. 4.2, FSCD 4P.14/2004 c. 2.2.5, FSCD 12.01.1998 c. 3a, FSCD 21.06.1995 [4P.243/1994] c. 3a

The mere fact that the parties adopted a procedural rule and that this rule is binding on the #arbitral tribunal does not make this rule a mandatory procedural principle within the meaning of Article 190(2)(d) PILA.

FSCD 117 II 346 [348], FSCD 4A_308/2018 c. 5.3.1, FSCD 4A_405/2016 c. 3.3, FSCD 4A_554/2014 c. 2.2

Article 393(d) CCP allows the arbitral *award* to be set aside if the principle of *equal treatment* of the parties or their *right to be heard* has been violated. This provision can also be found in the rules on international arbitration, which is why the *case law* developed pursuant to Article 190(2)(d) PILA can also be applied.

FSCD 142 III 284 [288], FSCD 5A_163/2018 c. 3.1, FSCD 4A_117/2018 c. 3.2, FSCD 4A_356/2018 c. 2.1, FSCD 4A_587/2015 c. 3.1, FSCD 5A_294/2016 c. 4.1, FSCD 4A_599/2014 c. 3.2, FSCD 4A_253/2014 c. 4.2, FSCD 5A_634/2011 c. 2.2.1

2d.2 Violation of the Equal Treatment of the Parties

➤ See also Article 182(3) PILA

The *equal treatment* of the parties expressly provided for in Article 182(3) PILA also falls within the scope of application of Article 190(2)(d) PILA.

FSCD 129 III 445 [(2003) ASA p. 625]

The *appellant* who submits that it was a victim of unequal treatment by contrast to the adverse party or who submits that the *arbitral tribunal* violated the principle of *adversarial proceedings* must, at least, attempt to show how the outcome of the proceedings could have been different if the alleged violations of its *right to be heard* had not been committed.

FSCD 4A_491/2017 c. 4.1.2, FSCD 4A_478/2017 c. 3.2.2, FSCD 4A_247/2017 c. 5.1.3, FSCD 4A_592/2017 c. 4.1.2

A breach of the duty of *confidentiality* imposed upon the *arbitrators* does not constitute, as a rule, a ground for *setting aside* an arbitral *award*. However, some authors reserve the possibility of an *appeal* with a view to invoking a violation of the principle of *equal treatment* of the parties within the meaning of Article 190(2)(d) PILA if, due to an *arbitrator's* unilateral indiscretion during the proceedings, a party obtains information to its advantage in the evidentiary phase of the arbitration.

FSCD 4A_510/2015 c. 4.2

2d.3 Violation of the Right to Be Heard

➤ See also Article 182(3) PILA

2d.3.1 Principle

2d.3.1.1 Minimal Duty to Examine and Treat Relevant Issues

The *right to be heard* includes a minimal duty for the authority to examine and to treat the relevant issues (FSCD 126 I 97 c. 2b). This duty has been extended to international arbitration. This duty is violated if, by oversight or misunderstanding, the *arbitral tribunal* does not take into consideration the *claims*, *arguments*, *evidence* and *offers of evidence* presented by one of the parties and which are important for the decision to be rendered.

FSCD 142 III 360 [361], FSCD 133 III 235 [248], FSCD 121 III 331 [333], FSCD 4A_550/2017 c. 3.1, FSCD 4A_578/2017 c. 3.1.1, FSCD 4A_502/2017 c. 3.1, FSCD 4A_491/2017 c. 4.1.1, FSCD 4A_170/2017 c. 4.1, FSCD 4A_478/2017 c. 3.2.1,

FSCD 4A_247/2017 c. 4.2.1, FSCD 4A_450/2017 c. 4.1, FSCD 4A_260/2017 c. 4.1, FSCD 4A_56/2017 c. 3.1, FSCD 4A_424/2017 c. 3.1, FSCD 4A_12/2017 c. 4.1 (not published in FSCD 143 III 578), FSCD 4A_318/2017 c. 3.1, FSCD 4A_316/2017 c. 3.1, FSCD 4A_80/2017 c. 3.1.1, FSCD 4A_34/2016 c. 4.1.1, FSCD 4A_692/2016 c. 5.1, FSCD 4A_40/2017 c. 4.1, FSCD 4A_490/2016 c. 3.1.1, FSCD 4A_704/2015 c. 5.1, FSCD 4A_202/2016 c. 4.1, FSCD 4A_173/2016 c. 4.1, FSCD 4A_259/2015 c. 3.2, FSCD 4A_678/2015 c. 4.1, FSCD 4A_572/2015 c. 4.1, FSCD 4A_520/2015 c. 3.3.1, FSCD 4A_568/2015 c. 3.1, FSCD 4A_69/2015 c. 3.1, FSCD 4A_34/2015 c. 4.1.2 (not published in FSCD 141 III 495), FSCD 4A_54/2015 c. 4.1, 4.3.2, FSCD 4A_246/2014 c. 6.1, FSCD 4A_684/2014 c. 4.1, FSCD 4A_124/2015 c. 4, FSCD 4A_709/2014 c. 5.1, FSCD 4A_426/2014 c. 3.1, FSCD 4A_636/2014 c. 3.2, FSCD 4A_486/2014 c. 4.1, FSCD 4A_324/2014 c. 5.1, FSCD 4A_199/2014 c. 5, FSCD 4A_606/2013 c. 4.1, FSCD 4A_74/2014 c. 3.2.1 (not published in FSCD 140 III 477), FSCD 4A_178/2014 c. 5.1, 5.3.5, FSCD 4A_450/2013 c. 3.1, 4.1, FSCD 4A_450/2013 c. 3.1, FSCD 4A_564/2013 c. 3.1, FSCD 4A_304/2013 c. 4.2, FSCD 4A_446/2013 c. 3, FSCD 4A_460/2013 c. 3.1, FSCD 4A_93/2013 c. 5.2, FSCD 4A_188/2013 c. 2, FSCD 4A_439/2012 & 4A_457/2012 c. 5.1, FSCD 4A_730/2012 c. 3.1, FSCD 4A_669/2012 c. 3.1, FSCD 4A_576/2012 c. 4.1, FSCD 4A_538/2012 c. 5.2, FSCD 4A_198/2012 c. 3.2.1, FSCD 4A_635/2012 c. 5.2, FSCD 4A_110/2012 c. 3.1.2, FSCD 4A_150/2012 c. 3.1, FSCD 4A_488/2011 c. 5.1, FSCD 4A_16/2012 c. 3.1, FSCD 31.01.2011 c. 5.1, FSCD 4A_46/2011 c. 4.3.1, FSCD 4A_482/2010 c. 3.2, FSCD 4A_386/2010 c. 7.2, FSCD 4A_10/2010 c. 2.1, FSCD 4A_43/2010 c. 5.4, FSCD 4A_433/2009 c. 2.1, FSCD 4A_620/2009 c. 3.1, FSCD 4A_584/2009 c. 3.1, FSCD 4A_524/2009 c. 4.1, FSCD 4A_550/2009 c. 5.1, FSCD 4A_539/2008 c. 5.1, FSCD 4A_220/2007 c. 10, FSCD 4A_18/2007 c. 5.1, FSCD 4P.71/2002 c. 2.2

There is a violation of the #right to be heard in the specific case where a manifest oversight leads the #arbitral tribunal not to take into consideration elements which one of the parties has submitted. In fact, there is a violation of this party's right that the #arbitrators examine its arguments. It is in the same situation as if it did not have the possibility to submit them. It is this party's duty to show in its #motion to set aside the #award how the manifest oversight prevented it from expressing itself on an important issue.

FSCD 133 III 235 [248], FSCD 127 III 576 [580], FSCD 121 III 331 [333-334], FSCD 4A_74/2014 c. 3.2.6 (not published in FSCD 140 III 477), FSCD 4A_672/2012 c. 3.1.2, FSCD 4A_522/2012 c. 3.2.2, FSCD 4A_16/2012 c. 3.1, FSCD 4A_360/2011 c. 5.1, FSCD 4A_433/2009 c. 2.1, FSCD 4A_550/2009 c. 5.1, FSCD 4A_612/2009 c. 6.4, FSCD 4A_240/2009 c. 5.1, FSCD 4A_294/2008 c. 3.2.3.2, FSCD 4P.134/2006 c. 7, FSCD 4P.105/2006 c. 7.4

The #right to be heard – even according to the widest meaning given to this notion by Swiss constitutional law – is only violated if the authority does not satisfy its minimal duty to examine the relevant problems.

FSCD 133 III 235 [249], FSCD 4A_433/2009 c. 2.1, FSCD 4A_620/2009 c. 3.1, FSCD 4A_624/2009 c. 4.1

The door opened by the #case law on the minimal duty of the #arbitral tribunal to examine and deal with relevant issues is narrow. It is only if a point of fact or law invoked by one of the parties appears necessary for the decision to be rendered and it remains purely and simply ignored in the #reasons for the #award, without it being possible to understand why, that it must be admitted that the #right to be heard has been deprived of its substance, in the sense that the #arbitral tribunal simply did not rule on the dispute as it was presented to it.

FSCD 4A_491/2017 c. 4.2.3

There has been no relaxation of the #case law in the sense of a willingness of the Federal Supreme Court to expand its control where there is a procedural #denial of justice linked to an omission to consider an argument in an #award. The widening of this control is not topical even less so given that the Federal Supreme Court is confronted with a growing tendency of #appellants to invoke this aspect of the #right to be heard in the hope of obtaining an indirect examination of the #merits of the challenged #award. The Federal Supreme Court is not an appeals instance and the legislator consciously and voluntarily restricted its power of review when it rules on #appeals in the area of international arbitration.

FSCD 4A_34/2016 c. 4.1.1, FSCD 4A_202/2016 c. 4.1, FSCD 4A_520/2015 c. 3.3.1

2d.3.1.2 Procedural Denial of Justice

There is a procedural #denial of justice in the sense of a violation of the #right to be heard, when a party could not bring its standpoint in the proceedings, so that the tribunal did not take it into account in its decision-making process and that the party has thus been disadvantaged in the proceedings.

FSCD 127 III 576 [579], FSCD 4A_244/2007 c. 6.2

In arbitration, there is a violation of the #right to be heard if the content of the #award is equivalent to a procedural #denial of justice which makes the #right to be heard empty of its substance. This hypothesis holds if the tribunal, by inadvertence or by a misunderstanding, does not take into account the #claims, arguments, #evidence and #offers of evidence presented by one of the parties and which are material for the decision to be rendered.

FSCD 127 III 576 [579-580], FSCD 121 III 331 [333-334], FSCD 4A_416/2008 c. 5.5, FSCD 4A_352/2007 c. 5.1, FSCD 4P.202/2003 c. 2.1, FSCD 4P.71/2002 c. 2.2

A procedural #denial of justice occurs when one of the parties could not present its point of view in the proceedings, with the result that the tribunal did not take it into account. It is therefore not important whether or not the #arbitral tribunal took into account or misunderstood a document. It is only decisive that a party has been disadvantaged in the proceedings and that its rights of participation have been made meaningless to the extent that it is not in a better position than if its #right to be heard had not been respected at all with regard to an issue which is material for the decision.

FSCD 127 III 576 [579-580], FSCD 4A_176/2008 c. 4.1.1, FSCD 4A_18/2007 c. 5.1, FSCD 4P.134/2006 c. 7, FSCD 4P.115/2004 c. 3.1, FSCD 4P.140/2004 c. 2

There is a procedural #denial of justice, in the sense of the violation of the #right to be heard, if a party could not submit in the proceedings its point of view and if the tribunal did not take into account these submissions when making its decision, so that the party has been disadvantaged in the proceedings. On the contrary, if it is established that the conditions of the proceedings allowed the party to bring forth its arguments and that the #tribunal has taken notice of the parties' arguments, the #right to be heard is not violated.

FSCD 127 III 576 [579-580], FSCD 4P.74/2006 c. 4, FSCD 4P.48/2005 c. 3.4.2.2, FSCD 4P.208/2004 c. 5.1, FSCD 4P.146/2004 c. 7.2, FSCD 4P.93/2004 c. 2, FSCD 4P.207/2002 c. 4, FSCD c. 2.1

There can in particular be a procedural #denial of justice in this sense if the parties' submissions have been overlooked inadvertently or have been misunderstood. But the #right to be heard, derived from the prohibition of procedural #denial of justice, does not cover the substantive assessment of the specific submissions.

FSCD 121 III 331 [333-334], FSCD 17.02.1999 [(2000) ASA p. 315]

2d.3.2 Proving the Violation

The party which submits that its #right to be heard has been violated must show, on the one hand, that the #arbitral tribunal did not examine certain elements of #facts, the #evidence of the law which it has correctly asserted in support of its #prayers for relief and, on the other hand, that these elements were proper to influence the outcome of the case. If this party succeeds in doing that, it will be the #arbitrators' and the opposing party's task to justify this omission, by showing that the omitted elements were not material for the decision or, if they were, that the #arbitral tribunal implicitly rejected them. However, the #arbitrators do not have a duty to discuss all arguments made by the parties. Therefore, they cannot be blamed, by the #right to be heard in #adversarial proceedings, not to have rejected, even implicitly, an argument objectively deprived of any relevance.

FSCD 142 III 360 [363], FSCD 133 III 235 [248], FSCD 4A_550/2017 c. 3.1, FSCD 4A_478/2017 c. 3.2.1, FSCD 4A_247/2017 c. 4.2.1, FSCD 4A_424/2017 c. 3.1, FSCD 4A_34/2016 c. 4.1.1, FSCD 4A_692/2016 c. 5.1, FSCD 4A_704/2015 c. 5.1, FSCD 4A_342/2015 c. 4.1.4 (not published in FSCD 142 III 360), FSCD 4A_572/2015 c. 4.1, FSCD 4A_520/2015 c. 3.3.1, FSCD 4A_69/2015 c. 3.1, FSCD 4A_34/2015 c. 4.1.2 (not published in FSCD 141 III 495), FSCD 4A_246/2014 c. 6.1, FSCD 4A_124/2015 c. 4, FSCD 4A_709/2014 c. 5.1, FSCD 4A_426/2014 c. 3.1, FSCD 4A_636/2014 c. 3.2, FSCD 4A_486/2014 c. 4.1, FSCD 4A_199/2014 c. 5, FSCD 4A_606/2013 c. 4.1, FSCD 4A_564/2013 c. 3.2.2, FSCD 4A_446/2013 c. 3, FSCD 4A_460/2013 c. 3.1, FSCD 4A_93/2013 c. 5.2, FSCD 4A_188/2013 c. 2, FSCD 4A_439/2012 & 4A_457/2012 c. 5.1, FSCD 4A_730/2012 c. 3.1, FSCD 4A_669/2012 c. 3.1, FSCD 4A_538/2012 c. 5.2, FSCD 4A_635/2012 c. 5.2, FSCD 4A_110/2012 c. 3.1.2, FSCD 4A_150/2012 c. 3.1, FSCD 4A_488/2011 c. 5.1, FSCD 4A_16/2012 c. 3.1, FSCD 4A_360/2011 c. 5.1, FSCD 4A_46/2011 c. 4.3.1, FSCD 4A_386/2010 c. 7.2, FSCD 4A_10/2010 c. 2.1, FSCD 4A_433/2009 c. 2.1, FSCD 4A_620/2009 c. 3.1, FSCD 4A_624/2009 c. 4.1, FSCD 4A_584/2009 c. 3.1, FSCD 4A_524/2009 c. 4.1, FSCD 4A_240/2009 c. 5.3, FSCD 4A_539/2008 c. 5.1, FSCD 4A_352/2007 c. 5.1, FSCD 4A_220/2007 c. 10, FSCD 4A_18/2007 c. 5.1, FSCD 4P.207/2002 c. 4.1

It goes without saying that, unless to require a *probatio diabolica*, this demonstration does not encompass a duty to include the reason why a relevant element has been omitted by the #arbitrators. If the #award does not say anything on the elements which apparently are material for the resolution of the dispute, it will be up to the #arbitrators or the opposing party to justify this omission in their comments on the #motion to set aside. They can do this by showing that, contrary to the #appellant's #claims, the omitted elements are not material for the outcome of the case at hand, or, if they were, that the #arbitral tribunal implicitly rejected them.

FSCD 133 III 235 [248-249], FSCD 4A_491/2017 c. 4.1.1, FSCD 4A_34/2016 c. 4.1.1, FSCD 4A_692/2016 c. 5.1, FSCD 4A_202/2016 c. 4.1, FSCD 4A_460/2013 c. 3.1, 3.3, FSCD 4A_150/2012 c. 3.1, FSCD 4A_488/2011 c. 5.1, FSCD 4A_360/2011 c. 5.1, FSCD 4A_46/2011 c. 4.3.1, FSCD 4A_433/2009 c. 2.1, FSCD 4A_620/2009 c. 3.1, FSCD 4A_624/2009 c. 4.1, FSCD 4A_18/2007 c. 5.1, FSCD 23.05.2005 c. 3.3

There is only a violation of the #right to be heard if the #reasons given show with sufficient clarity that the #arbitrator did not hear the #claims of a party. This cannot be the case if the #arbitrator examines all the circumstances of the case. In such a case, the #appellant must establish, based on concrete circumstances, that the #arbitrator has not taken into account its #claims, not only because it considered them as unfounded or immaterial with respect to the #merits, but because it did not hear them or because it failed to consider them. This cannot be established by an assessment of the #witness statements, which is different from the assessment made by the #arbitral tribunal.

FSCD 127 III 576 [579-580], FSCD 31.05.2002 c. 2.3

The mere fact that the #arbitral tribunal states that it has taken into account all the #facts, legal arguments and #evidence submitted by the parties does not rule out a violation of the #right to be heard if the #arbitral tribunal does not take into account some factual statements, arguments, #evidence or #offers of evidence presented by one of the parties and important for the decision to be issued.

FSCD 4A_668/2016 c. 3.2.2, FSCD 4A_730/2012 c. 3.3.2

The #appellant will establish the violation of its #right to be heard based on the #reasons stated in the challenged #award.

FSCD 4A_18/2007 c. 5.1, FSCD 4P.207/2002 c. 4.1

The fact that the #arbitral tribunal did not take into account a relevant #claim made by a party can in particular become apparent from the #reasons given in the #award.

FSCD 4P.74/2006 c. 4, FSCD 31.05.2002 c. 2.3

In order to succeed with a #grievance for a violation of the #right to be heard pursuant to Article 190(2)(d) PILA, the #appellant must establish that the #arbitrator simply did not hear its #claims, so that its point of view has not been heard any better than if it had not made any #claims at all. This is not the case if the #appellant merely opposes its own #interpretation of the #facts to a different #interpretation made by the #arbitral tribunal.

FSCD 31.05.2002 c. 2.3

2d.3.3 No Right to a Correct Award

The #right to be heard does not encompass a right to a correct #award on the #merits. Therefore, it is not the task of the Federal Supreme Court to examine whether the #arbitral tribunal has taken into account and correctly understood all documents in the file.

FSCD 142 III 360 [362], FSCD 127 III 576 [578], FSCD 4A_80/2017 c. 4, FSCD 4A_173/2016 c. 4.1, FSCD 4A_678/2015 c. 4.2, FSCD 4A_568/2015 c. 3.2, FSCD 4A_54/2015 c. 4.4, FSCD 4A_684/2014 c. 4.2, FSCD 4A_74/2014 c. 3.2.6 (not published in FSCD 140 III 477), FSCD 4A_178/2014 c. 5.5, FSCD 4A_672/2012 c. 3.1.2, FSCD 4A_522/2012 c. 3.2.2, FSCD 4A_76/2012 c. 3.4, FSCD 4A_402/2010 c. 3.2, FSCD 4A_612/2009 c. 6.3.1, FSCD 4A_550/2009 c. 5.1, FSCD 4A_240/2009 c. 5.1, FSCD 4A_176/2008 c. 4.1.1, FSCD 4P.134/2006 c. 7, FSCD 4P.105/2006 c. 7.4, FSCD 4P.74/2006 c. 4, FSCD 4P.48/2005 c. 3.4.2.2, FSCD 4P.115/2004 c. 3.1, FSCD 17.07.1998 [4P.7/1998] [(2002) ASA p. 667]

2d.3.4 Procedural Nature of the Right to be Heard

In international arbitration, the #right to be heard is a procedural guarantee. Its violation leads to the setting aside of the challenged decision, independently of the chances of success of the #motion to set aside with regard to the #merits. This sanction is all the more justified as, in this field, the possibilities of setting aside the #award on the #merits are considerably limited.

FSCD 142 III 360 [363], FSCD 142 III 284 [289], FSCD 133 III 235 [250], FSCD 121 III 331 [334], FSCD 120 Ib 379 [383], FSCD 4A_642/2017 c. 4.2.2.1, FSCD 4A_505/2017 c. 3.1.1, FSCD 4A_491/2017 c. 4.1.2, FSCD 4A_478/2017 c. 3.2.2, FSCD 4A_247/2017 c. 5.1.3, FSCD 4A_592/2017 c. 4.1.2, FSCD 4A_692/2016 c. 5.2, FSCD 4A_570/2016 c. 2.4, FSCD 4A_322/2016 c. 3.1, FSCD 4A_572/2015 c. 4.1, FSCD 4A_520/2015 c. 3.3.1, FSCD 4A_69/2015 c. 3.1, FSCD 4A_34/2015 c. 4.1.3 (not published in FSCD 141 III 495), FSCD 4A_460/2013 c. 3.1, FSCD 4A_730/2012 c. 3.1, FSCD 4A_669/2012 c. 3.1, FSCD 4A_110/2012 c. 3.1.2, FSCD 4A_150/2012 c. 3.1, FSCD 4A_360/2011 c. 5.1, FSCD 4A_46/2011 c. 4.3.2, FSCD 4A_600/2010 c. 3, FSCD 22.02.1999 [(1999) ASA p. 542], FSCD 17.07.1998 [4P.7/1998] [(2002) ASA p. 667], FSCD 06.09.1996 [(1997) ASA p. 309], FSCD 10.06.1996 [(2000) ASA p. 771], FSCD 07.04.1993 [(1993) ASA p. 526], SZ 06.12.2004 c. 3d, *GE 18.02.2011 c. 4.2

It is not possible to dismiss a claim involving a violation of the #right to be heard as a procedural #denial of justice, on the grounds that the violation is without importance as long as the challenged decision does not violate #public policy and that the reasons for the violation do not have to be considered. This principle, which has been developed in the context of the substantive #denial of justice, cannot be applied to the field of procedural guarantees because their importance is not to ensure a decision on the #merits which is, to the extent of the scope of review of the appeals instance, correct, but to guarantee the parties an independent review of the #prayers for relief and factual #claims which have been submitted in accordance with the procedural rules.

FSCD 121 III 331 [334-335]

The #right to be heard is a constitutional guarantee of a procedural nature.

FSCD 4A_578/2017 c. 3.1.2, FSCD 4A_491/2017 c. 4.1.2, FSCD 4A_478/2017 c. 3.2.2, FSCD 4A_247/2017 c. 5.1.3

It is not for the Federal Supreme Court to decide whether or not the #arbitrators should have upheld the argument they overlooked had they handled it.

FSCD 4A_572/2015 c. 4.1, FSCD 4A_69/2015 c. 3.1

The Federal Supreme Court does not have to examine whether the arbitral #award would actually have been different if the legally relevant #claim had been taken into account. Due to the procedural nature of the #right to be heard, a violation of this principle leads to the setting aside of the contested decision irrespective of the substantive #merits of the #claim.

FSCD 4A_532/2016 c. 4.1, FSCD 4A_460/2013 c. 3.1, FSCD 4A_669/2012 c. 3.1, FSCD 4A_360/2011 c. 5.1, FSCD 4A_46/2011 c. 4.3.2

Articles 182(3) and 190(2)(d) PILA protect the #right to be heard in its result and not the modalities by which it is granted. This right is of a procedural nature and its value has to be assessed independently of the chances of success of the #motion to set aside with respect to the #merits, its violation entailing the setting aside of the challenged #award. Such a violation may only be repaired before the appeal instance if it has the same #powers of review as the inferior instance (FSCD 116 Ia 94 [95-96]), which is not the case in international arbitration because of the restricted scope in which the #grounds for setting aside of Article 190(2) PILA may be examined.

FSCD 15.06.1998 c. 2a, FSCD 25.11.1997 c. 3a

In international arbitration, the #right to be heard is a procedural guarantee.

FSCD 06.09.1996 [(1997) ASA p. 309], FSCD 10.06.1996 [(2000) ASA p. 771], FSCD 07.04.1993 [(1993) ASA p. 526]

This is why this #ground for setting aside is in principle examined before the other #grounds, independently of the substantive #grounds for setting aside brought forward by the #appellant.

FSCD 07.04.1993 [(1993) ASA p. 526]

It follows that when there is a violation of the #right to be heard, the #arbitral award must be set aside, even if appears that the new decision after safeguarding the #right to be heard would not be different.

*GE 18.02.2011 c. 4.2

2d.3.5 Materiality of Violation

As the #right to be heard is not an end in itself, the allegedly aggrieved party must show, in addition to the alleged violation, that this prevented it from invoking its rights in the #arbitral proceedings to which the arbitral #award put an end.

FSCD 4A_404/2017 c. 3.1.1

The #right to be heard is not however an end in itself. It constitutes a way of avoiding that a judicial proceeding does not end up in a #judgment which is vitiated due to the violation of the parties' right to participate in the proceedings, notably the taking of #evidence. When one does not see the influence that the violation of the #right to be heard could have on the proceedings, there is no need to set aside the attacked decision.

FSCD 4A_578/2017 c. 3.1.2, FSCD 4A_505/2017 c. 3.1.1, FSCD 4A_491/2017 c. 4.1.2, FSCD 4A_478/2017 c. 3.2.2, FSCD 4A_247/2017 c. 5.1.3, FSCD 4A_592/2017 c. 4.1.2

This #case law also applies, *mutatis mutandis*, to international arbitration. Therefore, in addition to the alleged violation, the party that alleges that it has been prejudiced by the oversight of the #arbitrators must show, by reference to the grounds set out in the attacked #award, that the factual, evidential or legal elements that they had regularly put forward, but that the #arbitral tribunal omitted to take into consideration, were of a nature to influence the outcome of the dispute.

FSCD 4A_578/2017 c. 3.1.2, FSCD 4A_505/2017 c. 3.1.1, FSCD 4A_491/2017 c. 4.1.2, FSCD 4A_478/2017 c. 3.2.2, FSCD 4A_247/2017 c. 5.1.3, FSCD 4A_592/2017 c. 4.1.2

Similarly, the #appellant who submits that it was a victim of unequal treatment by contrast to the adverse party or who submits that the #arbitral tribunal violated the principle of #adversarial proceedings must, at least, attempt to show how the outcome of the proceedings could have been different if the alleged violations of its #right to be heard had not been committed.

FSCD 4A_491/2017 c. 4.1.2, FSCD 4A_478/2017 c. 3.2.2, FSCD 4A_247/2017 c. 5.1.3, FSCD 4A_592/2017 c. 4.1.2

This does not mean that the #right to be heard has an abstract character and exists by itself, without being linked in any way to the substantive #reasons. With regard to the parties' right to comment on the allegedly decisive determinations, Article 29(2) FC and Article 190(2)(d) PILA, which says the same as the constitutional provision on this issue, give such a right to the parties only if the said determinations are legally #relevant, i.e. such as to have an influence on the outcome of the decision.

FSCD 07.04.1993 [(1993) ASA p. 526-527]

This prerequisite is not fulfilled when the alleged violation of the #right to be heard concerns only one of the several #reasons given for the attacked decision and if the decision is based on one or several other alternative #reasons which have not been validly challenged. In such a case, the rule has to apply, even in the context of a procedural #denial of justice, that the [former] #motion for constitutional review does not give the possibility to claim #grounds for setting aside questioning the #reasons of a decision which, with respect to its result, remains compatible with the Constitution and the law.

FSCD 115 II 288 [293], FSCD 07.04.1993 [(1993) ASA p. 527]

2d.3.6 Right to Submit Evidence

- See also Article 182(3) PILA, section 3.3.5

The #right to be heard relates only to the parties' #claims and #evidence which are legally relevant.

FSCD 121 III 331 [333], FSCD 4P.88/2006 c. 3.1, FSCD 4P.172/1999 [(2001) ASA p. 795]

The fact that the parties have to bring and to indemnify themselves their #witnesses is part of the freedom reserved to the parties to #arbitral proceedings under Article 182(1) PILA and clearly does not violate the minimal guarantees required by Article 182(3) PILA, independently of the chosen procedure.

FSCD 119 II 271 [(1993) ASA p. 408]

An #appellant cannot argue a violation of its right to submit #evidence because #evidence proposed by the opponent was not administered.

FSCD 4A_386/2010 c. 7.2

In #arbitral proceedings, as in civil proceedings, the parties cannot submit new #claims and #evidence at any time and without restriction. This does not constitute a violation of the #right to be heard but is in line with generally recognised procedural principles.

FSCD 4A_612/2009 c. 5.2

According to Article 190(2)(e) PILA, the State court may review the assessment of #evidence, the application of the law and the resolution of the dispute by the #arbitrator only under the restricted angle of #public policy; therefore, it can in most cases only exercise a very limited control with respect to the right to submit #evidence, even though the statute recognizes it as a fully-fledged #ground for setting aside.

FSCD 17.07.1998 [4P.7/1998] [(2002) ASA p. 667], FSCD 15.06.1998 c. 2a, FSCD 06.09.1996 [(1997) ASA p. 308], FSCD 25.04.1995 c. 2b (not published in FSCD 121 III 331)

Simple irregularities in the taking of #evidence as such do not lead to a violation of the #right to be heard. The #appellant has further to show that these irregularities had in fact influenced the outcome of the proceedings, to its detriment.

FSCD 09.06.1998 [(1998) ASA p. 658]

The #right to be heard with respect to #evidence relates to its taking, provided it is proper to influence the decision, but does not relate to its substantive assessment. By the #grievance of Article 190(2)(d)PILA, one cannot reproach the #arbitral tribunal with the fact that it assessed the #evidence partially or otherwise erroneously, but only with the fact that it incorrectly refused to take #evidence which was submitted in accordance with the applicable procedural rules and which was related to relevant factual #claims. An indefensible assessment of the #evidence relates to the prohibition of the substantive and not the procedural #denial of justice and can therefore not be complained of by virtue of Article 190(2)(d) PILA.

FSCD 09.07.1996 [4P.114/1995] c. 1b

2d.3.7 Right to an Expert Opinion

- See also Article 182(3) PILA, section 3.3.9; and Article 191 PILA, section 34.13

The judge seized by a #motion to set aside because of the dismissal of an #expert opinion has to examine whether the taking of this #evidence could have led to a different #award, hence to examine at the same time issues of discretion and issues with respect to the #merits.

FSCD 4A_277/2017 c. 3.1, FSCD 06.09.1996 [(1997) ASA p. 308]

The Federal Supreme Court, when seized by a [former] #motion for constitutional review for a violation of the #right to be heard based on Article 8 FC, examines the anticipated assessment of the #evidence made by the authority only with regard to #arbitrariness, with respect to the question of dismissal of a request for an #expert opinion.

FSCD 06.09.1996 [(1997) ASA p. 308], FSCD 10.06.1996 [(2000) ASA p. 771]

2d.3.8 Anticipated Assessment of Evidence

- See also Article 182(3) PILA, section 3.3.7

The Federal Supreme Court may not review an anticipated assessment of #evidence, except under the extremely limited scope of #public policy.

FSCD 142 III 360 [361], FSCD 4A_65/2018 c. 3.2.1.2.5, FSCD 4A_550/2017 c. 4.1, FSCD 4A_505/2017 c. 3.1.2, FSCD 4A_277/2017 c. 3.1, FSCD 4A_80/2017 c. 3.1.1, FSCD 4A_246/2014 c. 6.1, FSCD 4A_486/2014 c. 5.1, FSCD 4A_544/2014 c. 3.2.1, FSCD 4A_312/2012 c. 4.1, FSCD 4A_274/2012 c. 3.1, FSCD 4A_150/2012 c. 4.1, FSCD 4A_528/2011 c. 2.1, FSCD 4A_526/2011 c. 2.1, FSCD 4A_600/2010 c. 4.1, FSCD 4P.117/2004 c. 2.1

The fact that #evidence which has already been admitted, is not taken does not, as such, violate the #right to be heard of a party and does not constitute a clear violation of the prohibition of contradictory conduct or of the principle of #good faith, if the #evidence is, after an anticipated assessment of #evidence, considered as being not relevant or appropriate.

FSCD 4P.48/2005 c. 3.4.2.1

The Federal Supreme Court, when seized by a [former] #motion for constitutional review based on a violation of the #right to be heard, reviews only with respect to #arbitrariness the anticipated assessment of the #evidence made by the authority in order to dismiss a request for an #expert opinion (*FSCD 119 Ib 492 [505]). It cannot widen its #powers of review if the same question is raised in a #motion to set aside an #award rendered in international arbitration. To the contrary, the notion of #public policy which represents the relevant criterion for the #award on the #merits and, in particular, of the assessment of the #evidence made by the #arbitrator, imposes even more restraint on the #appeals instance in the examination of this issue.

FSCD 4P.115/2003 c. 4.2

Article 190(2)(d) PILA does not provide grounds to complain about a false anticipated assessment of #evidence.

FSCD 4P.99/2000 c. 3c

The Federal Supreme Court, when seized by a [former] #motion for constitutional review for a violation of the #right to be heard based on Article 8 FC, examines the anticipated assessment of the #evidence made by the authority only with regard to #arbitrariness, with respect to the question of dismissal of a request for an #expert opinion.

FSCD 06.09.1996 [(1997) ASA p. 308], FSCD 10.06.1996 [(2000) ASA p. 771]

2d.3.9 Flawed Deliberations

The flaws affecting the #deliberations fall within the scope of application of Article 190(2)(a) PILA, which sanctions the incorrect #composition of the #arbitral tribunal, be it a structural flaw or an isolated problem. It is also possible to consider Article 190(2)(d) PILA (violation of the #equal treatment of the parties and their #right to be heard) or Article 190(2)(e) PILA (violation of procedural #public policy).

FSCD 4P.115/2003 c. 3.2

It is questionable whether the #appellant may ground its #motion to set aside at the same time on Article 190(2)(a) PILA and on the violation of the #equal treatment of the parties and the #right to be heard (Art. 190(2)(d) PILA).

FSCD 4P.115/2003 c. 3.4

2d.3.10 No Duty to Give Reasons

- See also Article 182(3) PILA, section 3.3.23; Article 189(2) PILA, section 2.5; and Article 190(2)(e) PILA, section 2e.14.23

The #right to be heard pursuant to Article 190(2)(d) PILA does not encompass the duty to give #reasons, which is not part of the principle of #adversarial proceedings.

FSCD 142 III 360 [360-361], FSCD 134 III 186 [187], FSCD 133 III 235 [248], FSCD 130 III 125 [130], FSCD 128 III 234 [243], FSCD 116 II 373 [375], FSCD 4A_550/2017 c. 3.1, FSCD 4A_404/2017 c. 3.1.1, FSCD 4A_578/2017 c. 3.1.1, FSCD 4A_505/2017 c. 3.1.1, FSCD 4A_491/2017 c. 4.1.1, FSCD 4A_170/2017 c. 4.1, FSCD 4A_478/2017 c. 3.2.1, FSCD 4A_247/2017 c. 4.2.1, FSCD 4A_260/2017

c. 4.1, FSCD 4A_56/2017 c. 3.1, FSCD 4A_220/2017 c. 3.1, FSCD 4A_236/2017 c. 4.1, FSCD 4A_424/2017 c. 3.1, FSCD 4A_12/2017 c. 4.1 (not published in FSCD 143 III 578), FSCD 4A_318/2017 c. 3.1, FSCD 4A_316/2017 c. 3.1, FSCD 4A_80/2017 c. 3.1.1, FSCD 4A_692/2016 c. 5.2, FSCD 4A_40/2017 c. 4.1, FSCD 4A_704/2015 c. 5.1, FSCD 4A_259/2015 c. 3.2, FSCD 4A_173/2016 c. 4.1, FSCD 4A_678/2015 c. 4.1, FSCD 4A_572/2015 c. 4.1, FSCD 4A_520/2015 c. 3.3.1, FSCD 4A_568/2015 c. 3.1, FSCD 4A_69/2015 c. 3.1, FSCD 4A_34/2015 c. 4.1.2 (not published in FSCD 141 III 495), FSCD 4A_54/2015 c. 4.1, 4.3.2, FSCD 4A_246/2014 c. 7.1, FSCD 4A_684/2014 c. 4.1, FSCD 4A_124/2015 c. 4, FSCD 4A_709/2014 c. 5.1, FSCD 4A_426/2014 c. 3.1, FSCD 4A_636/2014 c. 3.2, FSCD 4A_486/2014 c. 4.1, FSCD 4A_324/2014 c. 5.1, FSCD 4A_199/2014 c. 5, FSCD 4A_606/2013 c. 4.1, FSCD 4A_74/2014 c. 3.2.1 (not published in FSCD 140 III 477), FSCD 4A_178/2014 c. 5.1, FSCD 4A_450/2013 c. 4.1, FSCD 4A_564/2013 c. 3.1, FSCD 4A_304/2013 c. 4.2, FSCD 4A_446/2013 c. 3, FSCD 4A_93/2013 c. 5.2, FSCD 4A_330/2013 c. 3.1, 3.3, FSCD 4A_188/2013 c. 2, FSCD 4A_95/2013 c. 3.1, 3.3, FSCD 4A_439/2012 & 4A_457/2012 c. 5.1, FSCD 4A_730/2012 c. 3.1, FSCD 4A_672/2012 c. 3.1.1, FSCD 4A_669/2012 c. 3.1, FSCD 4A_538/2012 c. 5.2, FSCD 4A_635/2012 c. 4.2, 5.2, FSCD 4A_76/2012 c. 3.2, FSCD 4A_110/2012 c. 3.1.2, FSCD 4A_150/2012 c. 3.1, FSCD 4A_488/2011 c. 5.1, FSCD 4A_360/2011 c. 5.1, FSCD 4A_528/2011 c. 3.2, FSCD 4A_526/2011 c. 3.2, FSCD 4A_162/2011 c. 2.1.2, 2.2.2, FSCD 4A_404/2010 c. 5, FSCD 4A_402/2010 c. 2.1.2, FSCD 4A_440/2010 c. 4.3 (not published in FSCD 137 III 85), FSCD 4A_10/2010 c. 2.1, FSCD 4A_43/2010 c. 5.4, FSCD 4A_433/2009 c. 2.1, FSCD 4A_550/2009 c. 5.1, FSCD 4A_612/2009 c. 6.4, FSCD 4A_18/2008 c.4, FSCD 4P.105/2006 c. 7.3, FSCD 4P.146/2005 c. 11.2, FSCD 4P.26/2004 c. 3.3, FSCD 4P.114/2004 c. 4, FSCD 4P.172/1999 [(2001) ASA p. 791], FSCD 16.02.1998 c. 3, FSCD 22.01.1998 c. 4a, FSCD 16.02.1996 c. 4d, AR 05.08.1994 p. 7

Nothing changed in this respect with the entry into force of Article 77 FSCA, because according to this provision, the [#]Appeal in Civil Matters is admissible against decisions of [#]arbitral tribunals under the conditions of Articles 190-192 PILA. Whereas the conditions for cantonal decisions subject to the [#]Appeal in Civil Matters follow the regime of Article 122 FSCA, decisions of [#]arbitral tribunals in the sense of Article 190 PILA are governed by Article 189 PILA. Pursuant to this provision, they are rendered in conformity with the rules of procedure and in the form agreed upon by the parties (1), they shall possibly be in writing, supported by [#]reasons, dated and signed (2). From the possibility to waive the right to an [#]award supported by [#]reasons, [#]case law has deduced that this right is not part of the non-waivable principles of the [#]right to be heard within the meaning of Article 182(3) PILA and that its violation cannot be complained of pursuant to Article 190(2)(d) PILA.

FSCD 134 III 186 [187]

However, it may not be denied that the [#]reasons for an [#]award – if and in so far as they are given – may be important for other aspects of the [#]right to be heard guaranteed by Article 190(2)(d) PILA. The [#]reasons given can in particular lead with sufficient clarity to the conclusion that the [#]arbitral tribunal indeed did not take into account at all the parties' [#]claims. It is also based on the [#]reasons that one has to examine whether a factual [#]claim is at all material according to the legal opinion of the [#]arbitral tribunal.

FSCD 121 III 331 [333], FSCD 4P.207/2002 c. 4.1

Contrary to Article 36(h) fConcordat in connection with Article 33(1)(e) fConcordat, Article 190(2) PILA does not mention the #ground of lack of #reasons for the #award. This corresponds to the will of the legislator to limit the possibilities to set aside #awards when compared to the fConcordat and the [former] codes on civil procedure of the Cantons which did not accede to the fConcordat. It would be completely contrary to the legislator's will if the ground of lack of #reasons were to be included in the new regulation by equating the #right to be heard guaranteed by Article 190(2)(d) PILA to the #right to be heard derived from Article 8 FC which includes the duty to give #reasons.

FSCD 116 II 373 [375], ZH 30.06.2003 p. 5

The fact that the inclusion of the duty to give #reasons in the #right to be heard of Article 190(1)(d) PILA is not compatible with the PILA, is confirmed by the French version of this provision which limits the #right to be heard, contrary to the German and the Italian version, to the right of the parties "*d'être entendues en procédure contradictoire*" and which therefore does not include the #reasons, as these #reasons are given only once the #adversarial proceedings are terminated.

FSCD 116 II 373 [375], FSCD 4P.114/2004 c. 4

An analysis of the text of the PILA leads to the same result. Article 190(2)(d) PILA mentions only the mandatory procedural rules of Article 182(3) PILA as #grounds for setting aside, but not the duty to give #reasons for the #award pursuant to Article 189(2) PILA.

FSCD 116 II 373 [375]

This principle also applies, if not more so, to a procedural order whose aim is to note that the pending matter has ended *ipso jure* and that it must be crossed off the list. Undoubtedly, for this procedural decision, as for a decision on the #merits, it is necessary that the person who rendered it has treated all the pertinent arguments advanced by the parties. However, it is not necessary that it does so expressly or that lengthy texts are devoted to this point, at least when, as is the case here, the sanction for the non-respect of a procedural rule hardly leaves any margin of appreciation to the one who must rule on it.

FSCD 4A_692/2016 c. 5.2

There is no violation of the #right to be heard when the #arbitral tribunal has allegedly insufficiently justified its assessment of the value of the claim.

FSCD 4A_526/2011 c. 4.2, FSCD 4A_528/2011 c. 4.2

In #arbitral proceedings, the parties may agree that the #award contain no #reasons. Therefore, the mandatory #right to be heard within the meaning of Article 190(2)(d) PILA cannot apply to the #reasons of the #award as such.

FSCD 4P.207/2002 c. 4.1

In #arbitral proceedings, the party does not have a specific right to #reasons, which permits it to challenge the #award on that specific ground. One cannot follow the doctrine which holds that #reasons are also part of the basic requirements in arbitration, provided that the parties did not expressly waive them.

FSCD 4P.207/2002 c. 4.1

In general, no #reasons have to be given for the decision on the order for #costs.
FSCD 4P.99/2000 c. 5

The duty to give #reasons exists in international arbitration only to the extent that the silence of the #award could hide a decision on the #merits incompatible with #public policy or a major violation of the #right to be heard in #adversarial proceedings.

FSCD 15.06.1998 c. 2b/bb

2d.3.11 No Duty to Take Minutes of Oral Hearings

In FSCD 116 II 373 c. 7b, the Federal Supreme Court refused to qualify the lack of #reasons as a violation of the #right to be heard and therefore to recognize it as a #ground for setting aside. It is all the less justified to recognize the taking of #minutes of an oral #hearing, i.e. in the essence of the parties' arguments, as a constitutional procedural guarantee in international arbitrations pursuant to the PILA, which does not expressly provide for a duty to take #minutes. #Minutes may be helpful and advisable for #setting aside proceedings against the #award; however, they are not indispensable.

FSCD 4A_43/2010 c. 4.2, FSCD 28.05.1998 c. 2a

2d.3.12 Manifest Inadvertence

There is not necessarily a violation of the #right to be heard within the meaning of Article 190 PILA if a manifest inadvertence led to an incorrect #award. This would be a substantive #denial of justice. There is only a procedural #denial of justice if the parties were deprived of the possibility to take part in the proceedings, to exercise an influence on them and to bring forth their point of view, i.e. if their #right to be heard has in fact been made meaningless by the manifest inadvertence. Only this justifies setting aside the #award without taking into account the chances of success on the #merits of the #motion to set aside, because the #right to be heard does not guarantee the substantive correctness of the #award, but only the right of the parties to participate in the decision-making process. If the arbitral #award were set aside for every manifest inadvertence, without taking into account the chances of success on the #merits, the Federal Supreme Court would have #powers of review on #motions to set aside #arbitral awards which it does not have in other proceedings, even as an ordinary #appeals instance. This is contrary to the clear intention of the legislator.

FSCD 127 III 576 [579], FSCD 121 III 331 [333-334], FSCD 4A_672/2012 c. 3.1.2, FSCD 4A_76/2012 c. 3.4, FSCD 4P.74/2006 c. 4, FSCD 4P.48/2005 c. 3.4.2.2, FSCD 4P.168/2004 c. 2.1.2, FSCD 22.02.1999 [(1999) ASA p. 542]

Every manifest inadvertence does not constitute a violation of the #right to be heard.

FSCD 127 III 576 [577-579], FSCD 4A_578/2017 c. 3.1.1, FSCD 4A_76/2012 c. 3.4, FSCD 4P.202/2003 c. 2.2, FSCD 4P.71/2002 c. 2.2

The party wishing to derive from a manifest inadvertence a violation of its #right to be heard cannot limit itself to stating to what extent the alleged inadvertence has led to an erroneous assessment of #evidence because this, just like an arbitrary assessment of #evidence or an erroneous #assignment of the #burden of

claim or of proof, does not constitute a violation of the #right to be heard. This party has to show how the inadvertence of the judge had the effect that it could not bring forth and prove its points of view with regard to an issue which is material for the outcome of the case.

FSCD 127 III 576 [580], FSCD 4A_578/2017 c. 3.1.1, 3.3, FSCD 4A_80/2017 c. 4, FSCD 4A_672/2012 c. 3.1.2, FSCD 4A_612/2009 c. 6.4, FSCD 4P.74/2006 c. 4, FSCD 4P.48/2005 c. 3.4.2.2, FSCD 4P.115/2004 c. 3.1, FSCD 17.07.1998 [4P.7/1998] [(2002) ASA p. 667]

The parties may not invoke the #right to be heard in order to set aside an #award flawed even by a manifest error. However, an error in the #award amounts to a violation of the #right to be heard in the specific case where a manifest inadvertence leads the #arbitrators not to take into account elements which one of the parties has submitted to it. This party's right to have its arguments examined by the #arbitrators is thus violated; it is then in a similar position as if it would not have had the possibility to present these arguments to the #arbitrators.

FSCD 4P.115/2004 c. 3.1

Every manifest inadvertence does not constitute a violation of the #right to be heard; the manifest inadvertence must have prevented the party from pleading its case on a relevant issue and from submitting the #evidence on the basis of its #claims.

FSCD 4P.202/2003 c. 2.2

The mere inadvertence of the #arbitrator, or the fact that the #reasons contain a contradiction with the file, does not prove in and of itself that the alleged circumstance was material for the decision in the general context of the #reasons and that the #appellant's standpoint has not been heard, respectively that the #appellant has been disadvantaged in the proceedings.

FSCD 31.05.2002 c. 2.4

2d.3.13 No Right to a Stay of the Proceedings

Apart from cases of imperative reasons for the #stay, this measure depends on the discretionary power of the authority or the #arbitral tribunal. In ordinary proceedings, apart from cases of excess or abuse, the exercise of this power can in principle not be reviewed by the Federal Supreme Court (FSCD 120 Ib 156 [160]). The same must apply in the field of international arbitration where the #appeal to the Federal Supreme Court is admissible, with regard to procedural issues, only for the violation of fundamental principles. In general, the #stay of the proceedings, granted or dismissed by the #arbitral tribunal by taking into account the interests of the parties, does involve neither the #equality of the parties nor their #right to be heard in #adversarial proceedings pursuant to Articles 182(3) and 190(2)(d) PILA.

FSCD 133 III 139 [144]

2d.3.14 Violation of the ECHR

➤ See also Article 190(2) PILA, section 2.5

The provision of Article 6(1) ECHR does in any way not apply to proceedings of voluntary arbitration. However, this does not exclude that the principles flowing from Article 6(1) ECHR may be used when concretising the procedural guarantees which can be invoked based on Article 190(2) PILA.

FSCD 4A_124/2010 c. 6.3.3.2, FSCD 4A_43/2010 c. 3.6.1, FSCD 4A_320/2009 c. 2, FSCD 4P.105/2006 c. 7.3

Otherwise, the admissible #grounds for setting aside would be widened, as the content of the #right to be heard within the meaning of Article 190(2)(d) PILA does not correspond to the content of the procedural guarantees resulting from Article 6(1) ECHR.

FSCD 4A_43/2010 c. 3.6.1, FSCD 4A_320/2009 c. 2, FSCD 4A_612/2009 c. 2.4.1, FSCD 4P.105/2006 c. 7.3

A distinction must be made between voluntary and forced arbitration. In a forced arbitration, in the sense that the arbitration is imposed by law, the parties have no possibility of excluding their dispute from the decision of an #arbitral tribunal. The latter must offer the guarantees provided for in Article 6(1) ECHR. On the other hand, in the case of voluntary arbitration, there is little problem with Article 6 ECHR. Indeed, the parties to a dispute are free to exclude from the ordinary State courts certain disputes that may arise from the performance of a contract. By entering into an #arbitration agreement, the parties voluntarily waive certain rights guaranteed by the Convention. Such a #waiver does not conflict with the Convention as long as it is free, lawful and unequivocal.

ECHR 02.10.2018 §§ 95-96

2d.3.15 Right to a Public Hearing

No right to a public #hearing in #arbitral proceedings may be derived from Article 6(1) ECHR, Article 30(3) FC or Article 14(1) of the International Covenant on Civil and Political Rights as these provisions are not applicable to voluntary #arbitral proceedings.

FSCD 4A_320/2009 c. 2, FSCD 4A_612/2009 c. 4.1

It is not clear to what extent the #right to be heard and #public policy would require a public #hearing in international #arbitral proceedings which are not public as a rule. Nevertheless, given the outstanding significance of the #CAS in the field of sport, it would be desirable for a public #hearing to be held on request by the athlete concerned with a view to the trust in the #independence and fairness of the decision-making process.

FSCD 4A_612/2009 c. 4.1

There is a right to a public #hearing in a case where there is a forced arbitration, where the applicant expressly requested a public #hearing and it was refused without any of the conditions listed in Article 6(1) ECHR being met and where there was a controversy on the #facts and where the sanction imposed on the applicant was of an infamous nature, being likely to prejudice the applicant's professional integrity and recognition.

ECHR 02.10.2018 §§ 181-183

2d.3.16 No Review of the Merits

The #ground for setting aside based on the violation of the #right to be heard should not serve, for the party which complains about errors in the #reasons of the #award, to provoke by this means a review of the application of the law applicable to the #merits.

FSCD 142 III 360 [362], FSCD 4A_550/2017 c. 3.1, FSCD 4A_238/2018 c. 4.2, FSCD 4A_56/2017 c. 3.1, FSCD 4A_220/2017 c. 3.1, FSCD 4A_247/2017 c. 5.1.1, FSCD 4A_188/2013 c. 3.2.2, FSCD 4A_576/2012 c. 4.2.3, FSCD 4P.117/2004 c. 2.1, FSCD 4P.196/2003 c. 4.1, FSCD 4P.202/2003 c. 2.2

2d.3.17 Decision in Equity Instead of According to the Rules of Law

The #appellant cannot claim a violation of its #right to be heard alleging that the #arbitral tribunal has decided in #equity instead of applying a particular law. This is in fact a question related to the #merits and not to the proceedings. For the same reason, the #appellant cannot claim that the #arbitral tribunal has fixed the loss suffered arbitrarily and in contradiction with the file.

FSCD 4P.23/2006 c. 2, FSCD 15.11.1993 c. 5b

In FSCD 15.11.1993 c. 5b, the Federal Supreme Court did not in general exclude the #grievance pursuant to Article 190(2)(d) PILA with respect to arbitral #awards based on #equity.

FSCD 4P.23/2006 c. 2

2d.4 Violation of the Principle of Adversarial Proceedings

The #appellant which submits that it was a victim of unequal treatment by contrast to the adverse party or which submits that the #arbitral tribunal violated the principle of #adversarial proceedings must, at least, attempt to show how the outcome of the proceedings could have been different if the alleged violations of its #right to be heard had not been committed.

FSCD 4A_491/2017 c. 4.1.2, FSCD 4A_478/2017 c. 3.2.2, FSCD 4A_247/2017 c. 5.1.3, FSCD 4A_592/2017 c. 4.1.2

Article 190(2)(d) PILA does not only guarantee the #right to be heard but also the right to #adversarial proceedings.

FSCD 4P.117/2004 c. 2.1, FSCD 22.02.1999 [(1999) ASA p. 542]

2d.5 Timeliness of the Plea of Violation of the Equal Treatment and the Right to Be Heard in Adversarial Proceedings

- For the timeliness of other pleas of procedural flaws, see Article 177(1) PILA, section 1.15; Article 180(2) PILA; Article 186(2) PILA, section 2.5; Article 190(2)(a) PILA, section 2a.9; Article 190(2)(b) PILA, section 2b.2; Article 190(2)(c) PILA, section 2c.10; and Article 190(2)(e) PILA, section 2e.14.4

A party which considers that its #right to be heard is violated, or that another procedural error has been made, must complain about this immediately.

FSCD 127 III 576 [(2002) ASA p. 480], FSCD 119 II 386 [388], FSCD 116 II 639 [644], *FSCD 113 Ia 67 [67-68], FSCD 4A_668/2016 c. 3.1, FSCD 4A_690/2016 c. 3.1, FSCD 4A_616/2015 c. 4.2, FSCD 4A_392/2015 c. 4.2, FSCD 4A_378/2015 c. 3.3, FSCD 4A_54/2015 c. 3.1, FSCD 4A_426/2014 c. 4.2.2, FSCD 4A_620/2012 c. 4.2, FSCD 4A_198/2012 c. 3.2.1, FSCD 4A_312/2012 c. 4.1, FSCD 4A_440/2010 c. 4.1 (not published in FSCD 137 III 85), FSCD 4A_530/2011 c. 2.2, FSCD 4A_234/2010 c. 4.1 (not published in FSCD 136 III 605), FSCD 4P.129/2002 c. 7.1, FSCD 4P.212/1999 c. 3a, FSCD 25.11.1997 c. 3a, FSCD 25.07.1997 [(2000) ASA p. 103], FSCD 28.01.1997 [(1998) ASA p. 125], FSCD 21.06.1995 [4P.243/1994] c. 3a, FSCD 17.08.1994 [(1995) ASA p. 203], FSCD 15.12.1992 c. 3, *VS 02.12.2005 c. 3a

A party complaining of a violation of its #right to be heard, or of another procedural error, has to undertake all reasonable steps in order to be treated equally and to be heard, as soon as it knows of the procedural flaw or could have known, if it had taken reasonable care. It is contrary to the principle of #good faith to claim a procedural error only in the context of the setting aside proceedings, even though the party would have had the possibility during the #arbitral proceedings to give the #arbitral tribunal the possibility to cure the flaw by filing an appropriate #grievance.

FSCD 127 III 576 [(2002) ASA p. 480], FSCD 119 II 386 [388], FSCD 116 II 639 [644], *FSCD 113 Ia 67, FSCD 4A_247/2017 c. 5.1.2, FSCD 4A_668/2016 c. 3.1, FSCD 4A_690/2016 c. 3.1, FSCD 4A_173/2016 c. 2.1, FSCD 4A_428/2015 c. 3.1, FSCD 4A_392/2015 c. 4.2, FSCD 4A_54/2015 c. 3.1, FSCD 4A_374/2014 c. 4.2.2, FSCD 4A_544/2014 c. 3.2.2, FSCD 4A_324/2014 c. 3.2.2, FSCD 4A_597/2013 c. 2.1, FSCD 4A_178/2014 c. 5.7, FSCD 4A_620/2012 c. 4.2, FSCD 4A_476/2012 c. 3.1, FSCD 4A_312/2012 c. 4.1, FSCD 4A_682/2012 c. 3.1, FSCD 4A_16/2012 c. 3.3, FSCD 4A_530/2011 c. 2.2, FSCD 4A_617/2010 c. 3.1, FSCD 4A_44/2011 c. 3.1.2, FSCD 4A_440/2010 c. 4.1 (not published in FSCD 137 III 85), FSCD 4P.129/2002 c. 7.1, FSCD 4P.212/1999 c. 3a, FSCD 25.07.1997 [(2000) ASA p. 103], FSCD 10.06.1996 [(2000) ASA p. 769]

A violation of the #right to be heard generally may not be cured by a subsequent submission of #reasons during the setting aside proceedings, because the goals of the duty to give #reasons – and also of the obligation to examine the parties' submissions – are not achieved by such subsequent submissions. This applies in particular to setting aside proceedings in international arbitration, where the #fact-findings and the application of law are only examined within the narrow limits of the #grounds for setting aside pursuant to Article 190(2) PILA, and where, therefore, the Federal Supreme Court has almost no possibility to complete or to rectify by itself the #facts determined by the #arbitral tribunal in order to cure the violation of the #right to be heard.

FSCD 121 III 331 [334]

A violation of the #right to be heard can only be cured before the appeals instance if the appeals instance has the same #powers of review as the lower instance. This is not the case in international arbitration because of the limited #powers of review with regard to the #grounds for setting aside pursuant to Article 190(2) PILA.

FSCD 121 III 331 [334], FSCD 17.07.1998 [4P.7/1998] [(2002) ASA p. 667]

A party which considers that its #right to be heard has been violated, or that another procedural error has been made, must complain thereof at the outset of the #arbitral proceedings. If it complains only after the rendering of an #award which is not favourable to it, it violates the principle of #good faith.

FSCD 119 II 386 [388], *FSCD 113 Ia 67, FSCD 4A_668/2016 c. 3.1, FSCD 4A_690/2016 c. 3.1, FSCD 4A_616/2015 c. 3.1.1, FSCD 4A_202/2016 c. 3.2, FSCD 4A_173/2016 c. 2.1, FSCD 4A_428/2015 c. 3.1, FSCD 4A_392/2015 c. 4.2, FSCD 4A_378/2015 c. 3.3, FSCD 4A_54/2015 c. 3.1, FSCD 4A_597/2013 c. 2.1, FSCD 4A_620/2012 c. 4.2, FSCD 4A_476/2012 c. 3.1, FSCD 4A_198/2012 c. 3.2.1, FSCD 4A_682/2012 c. 3.1, FSCD 4A_16/2012 c. 3.3, FSCD 4A_530/2011 c. 2.2, FSCD 4A_617/2010 c. 3.1, FSCD 4A_44/2011 c. 3.1.2, FSCD 4A_440/2010 c. 4.1 (not published in FSCD 137 III 85), FSCD 4A_234/2010 c. 4.1 (not published in FSCD 136 III 605), FSCD 4P.17/2002 c. 2b, FSCD 4P.200/2001 c. 3a, FSCD 4P.114/2001 c. 3b, FSCD 17.07.1998 [4P.7/1998] [(2002) ASA p. 667], FSCD 28.05.1998 c. 2c, FSCD 25.11.1997 c. 3a, FSCD 25.07.1997 [(2000) ASA p. 103], FSCD 28.01.1997 [(1998) ASA p. 125], FSCD 10.06.1996 [(2000) ASA p. 769], FSCD 21.06.1995 [4P.243/1994] c. 3a, FSCD 17.08.1994 [(1995) ASA p. 203]), FSCD 15.12.1992 c. 3, *VD 25.03.2003 c. 2

It is not permissible to keep in reserve grievances concerning procedural defects which could have been rectified immediately and raise them only in the event of an unfavourable outcome of the #arbitral proceedings.

FSCD 4A_65/2018 c. 3.2.3.3.1, FSCD 4A_247/2017 c. 5.1.2, FSCD 4A_436/2017

A party which considers itself to be a victim of a procedural error must raise this error straightaway in the #arbitral proceedings under penalty of foreclosure. Indeed, it is contrary to #good faith to only invoke a procedural error in the framework of the #appeal against the #arbitral award, even though the error could have been invoked during the proceedings.

FSCD 4A_550/2017 c. 5.3.1, FSCD 4A_40/2018 c. 3.3.1, FSCD 4A_450/2017 c. 3.1, FSCD 4A_260/2017 c. 4.1, FSCD 4A_70/2015 c. 3.2.1, FSCD 4A_274/2012 c. 3.1, FSCD 4A_150/2012 c. 4.1, FSCD 4A_348/2009 c. 4

A party claiming to be harmed by a denial of the #right to be heard or any other procedural deficiency according to Article 190(2) PILA forfeits its right if it does not raise the issue in the #arbitral proceedings in a timely manner and does not take all appropriate steps to remedy the deficiency to the extent possible.

FSCD 4A_324/2014 c. 3.2.2

An #appellant must have raised the procedural violation in the #arbitral proceedings and thereby have given the #arbitral tribunal the opportunity to remedy the violation. To the extent that it failed to do so and waited to see if the #award would be in its favour, it waived the right to raise such a violation in #setting aside proceedings.

FSCD 4A_620/2012 c. 4.2, FSCD 4A_617/2010 c. 3.2

A party acts contrary to #good faith when it shows no interest in the appeal proceedings and thereafter raised an alleged procedural error with a view to obtaining the #setting aside of an #award which is not in its favour.

FSCD 4A_682/2012 c. 6.2

It is immaterial that there is no immediate #appeal against an interim #decision by the #CAS refusing to appoint an #expert. #Case law still requires that the party concerned should draw the panel's attention to the procedural error and clearly oppose the step taken with the hope that such an objection might lead the #arbitrators to change their opinion and to reconsider the contested decision.

FSCD 4A_274/2012 c. 3.2.2

A remark made during the pleadings does not fulfil the requirements of a #grievance, especially when a violation of the #right to be heard is at stake.

FSCD 28.01.1997 [(1998) ASA p. 126]

The duty to react in time presupposes however that the means be at the disposal of the complaining party. Otherwise, the reproach not to complain immediately about a violation of the #right to be heard and to adopt a contradictory behaviour is groundless. In fact, the aforementioned duty does not request one to derogate from the applicable procedural rules and to seize the deciding authority without observing the possibilities, #time limits and forms provided for by the procedural rules. The principle of #good faith may not make up for the absence of a means of #appeal, in particular an #appeal of which the prerequisites provided for by the statute are not fulfilled.

FSCD 15.12.1992 c. 3

2d.6 Cure of Violation of Right to be Heard

A violation of the #right to be heard generally cannot be cured by a subsequent submission of #reasons during the setting aside proceedings, because the goals of the duty to give #reasons – and also of the obligation to examine the parties' submissions – are not fulfilled by such subsequent submissions. This applies in particular to setting aside proceedings in international arbitration, where the determination of #facts and the application of law are only examined within the narrow limits of the #grounds for setting aside pursuant to Article 190(2) PILA, and where, therefore, the Federal Supreme Court has almost no possibility to complete or to rectify itself the #facts determined by the #arbitral tribunal in order to cure the violation of the #right to be heard.

FSCD 121 III 331 [334]

A violation of the #right to be heard can only be cured before the appeals instance if this instance has the same #powers of review as the lower instance. This is not the case in international arbitration because of the limited #powers of review with regard to the #grounds for setting aside pursuant to Article 190(2) PILA.

FSCD 121 III 331 [334], FSCD 4A_570/2016 c. 2.4, FSCD 17.07.1998 [4P.7/1998] [(2002) ASA p. 667]

2d.7 Modifications of the Reasons for the Claim

The question of #admissibility of modifications with regard to the #reasons for a claim in international #arbitral proceedings does not fall within the scope of application of Article 190(2)(c) PILA. The limits to such modifications result from the scope of application of the #arbitration agreement or depend on the procedural rules chosen by the parties (Art. 182 PILA). In the first case (*extra potestatem*), the parties have to invoke exclusively Article 190(2)(b) PILA if they intend to contest the #arbitrators' #jurisdiction to decide the dispute (FSCD 116 II 639 [641-642]); in the second case, the violation of mandatory procedural principles pursuant to Article 182(3) PILA can be submitted to the Federal Supreme Court by a #motion to set aside based on Article 190(2)(d) & (e) PILA.

FSCD 117 II 346 [347-348], FSCD 30.12.1994 [(1995) ASA p. 220-221]

2d.8 Relationship with Article 190(2)(c) PILA

- See Article 190(2)(c) PILA, section 2c.8

2d.9 Relationship with Article 190(2)(e) PILA

The incorrect or even arbitrary application of a procedural rule agreed upon by the parties and binding on the #arbitral tribunal does not violate procedural #public policy.

FSCD 129 III 445 [464], FSCD 126 III 249 [253], FSCD 4A_308/2018 c. 5.3.1

An #appellant should invoke Article 190(2)(d) PILA, and not Article 190(2)(e) PILA, when seeking a finding that the guarantees embodied at Article 182(3) PILA have been breached.

FSCD 4A_394/2010 c. 4.2

However, according to Article 190(2)(e) PILA, the State court may review the assessment of #evidence, the application of the law and the resolution of the dispute by the #arbitrator only under the limited angle of #public policy; therefore, it can only in most cases exercise a very limited control with respect to the right to submit #evidence, even though the statute recognizes it as a fully-fledged #ground for setting aside.

FSCD 17.07.1998 [4P.7/1998] [(2002) ASA p. 667], FSCD 15.06.1998 c. 2a, FSCD 06.09.1996 [(1997) ASA p. 308], FSCD 25.04.1995 c. 2b (not published in FSCD 121 III 331)

It is not sufficient for the #appellant to allege that, by not ordering an #expert opinion, the #arbitral tribunal has violated its #right to be heard or has made an arbitrary assessment of the #evidence. In international arbitration, these two #grievances by themselves, without alleging or demonstrating that they led to an #award contrary to #public policy, cannot be heard.

FSCD 06.09.1996 [(1997) ASA p. 310-311]

The State court may not widen its #powers of review if the same question arises in the context of a #motion to set aside against an #award rendered in international arbitration. On the contrary, the notion of #public policy which constitutes the decisive criterion with regard to the #award on the #merits, and, in particular, with regard to the assessment of #evidence made by the #arbitrators, imposes an even greater restraint on the appeals instance regarding the examination of this issue.

FSCD 06.09.1996 [(1997) ASA p. 308-309], FSCD 10.06.1996 [(2000) ASA p. 171]

2d.10 Individual Cases

The #right to be heard is **not violated**:

- when the #arbitral tribunal dismisses a request for a #stay of the #arbitral proceedings until the termination of criminal proceedings for suspicion of #bribery pending abroad, because, on the one hand, the #stay of the proceedings is in principle in the #arbitrator's discretion and cannot be imposed by the parties based on evidentiary difficulties and by invoking the #right to be heard, and, on the other hand, neither the #right to be heard nor #public policy impose the application of the principle according to which in the same matter, the criminal proceedings come before the civil proceedings ("*le pénal tient le civil en l'état*");
FSCD 119 II 386 [389-390]
- when the #arbitral tribunal renounces final oral pleadings despite the fact that the #terms of reference provide that "*les parties auront en tout état de cause encore la faculté de s'exprimer oralement avant que le Tribunal arbitral ne rende sa sentence*", because the parties have tacitly waived their right to final oral pleadings;
FSCD 117 II 346 [348], FSCD 4P.74/2006 c. 6.3
- when the #arbitral tribunal does not open the #evidentiary proceedings by an evidentiary order [*Beweisbeschluss*], similar to the provisions of the fCCP/ZH in order to ensure that the tribunal and the parties are informed with respect to the taking of #evidence;
FSCD 116 II 639 [644]
- when the #arbitral tribunal applied the principle of #equity in the form of a specific legal provision which allowed it to reduce the amount of compensation due to the contractor given that this principle formed part of the applicable Algerian law and that the parties mentioned this principle on multiple occasions in their submissions.
FSCD 4A_525/2017 c. 3.3.2
- when the #arbitral tribunal did not allow further analysis to be carried out by using other methods in addition to the testing procedures provided for by the applicable doping rules.
FSCD 4A_80/2017 c. 6.1, FSCD 4A_178/2014 c. 5.2
- when the #appellant expressly confirmed at the end of the #arbitral proceedings that it had had a reasonable opportunity to present its case and had no objection as to the conduct of the #arbitral proceedings.
FSCD 4A_378/2015 c. 3.3

- when a party protested against the questions a #witness was asked (“Object to this question”) and raised the following objections (“With all due respect, Mr [Arbitrator]” or “Mr [Arbitrator] I am really surprised”) as these were not sufficiently clear objections in the arbitration claiming that the arbitration suffered from a procedural violation within the meaning of Article 190(2)(a) & (d) PILA.
FSCD 4A_54/2015 c. 3.2.2
- when a party did not attend a #hearing due to mismanagement of its representative and the #arbitral tribunal thereafter refused to order a new #hearing.
FSCD 4A_70/2015 c. 3.2.2
- when the #arbitral tribunal decided for reasons of #procedural economy to limit its analysis to one decisive argument and not to rule on the other argument which had been raised by the #appellant in the #arbitral proceedings.
FSCD 4A_520/2015 c. 3.3.2
- when the #arbitral tribunal held that the #respondent was entitled to amend its submissions *pendente lite* but did not authorize the #appellant to introduce new #evidence purporting to establish some #facts which were devoid of any pertinence to decide the dispute.
FSCD 4A_486/2014 c. 6
- when the #arbitral tribunal did not mention a certain #witness statement in the pertinent #reasons of the #award and when it found generally that the other #evidence, including the #witness statement, could not change the factual conclusion it had reached as a result of the #evidence.
FSCD 4A_95/2013 c. 3.2
- when the #arbitral tribunal issued a decision on new #evidence and amended submissions filed by the #respondent without first giving the #appellant an opportunity to express its view in a case where the #appellant voluntarily decided not to appear at the #hearing. It was deemed to know that its absence at the #hearing would not prevent the #hearing from being held and that it was possible that its opponent would file some new exhibits.
FSCD 4A_682/2012 c. 6.2
- when the #appellant expressly confirmed at the end of the arbitral #hearing that with regard to its #right to be heard, it had no objections as to the way the proceedings had been conducted. The #arbitral tribunal was entitled to assume on the basis of this statement that the #appellant had no, or no longer had any objections.
FSCD 4A_620/2012 c. 4.3
- when the #arbitral proceedings were conducted with speed and there was only a short period of time between the evidentiary #hearing and the issuance of the #award in a case where the parties had agreed to conduct the #arbitral proceedings in an expedited manner.
FSCD 4A_730/2012 c. 3.2.2

- when the parties had confirmed that they had filed all the exhibits they wanted to submit and that they were given a full #hearing.
FSCD 4A_730/2012 c. 3.2.2
- when a party asked the #arbitral tribunal whether it was of the opinion that further efforts should be made to hear the #witnesses as the #arbitral tribunal could not conclude from this question that the party was of the view that there was a violation of a fundamental principle of procedure in the failure to hear a #witness.
FSCD 4A_407/2012 c. 3.2.2
- when a party stated that in its view #equal treatment was at stake and that it had a feeling of being at disadvantage as these were not sufficiently clear #grievances that the proceedings were affected by a procedural violation within the meaning of Article 190(2)(d) PILA.
FSCD 4A_407/2012 c. 3.4
- when an #arbitral tribunal refuses to consolidate proceedings in accordance with Article 52(4) #CAS Code and/or admit #witness statements and #evidence from one proceeding into another proceeding given that the appropriateness of such a measure in a given case goes beyond the scope of review in a setting aside procedure. The possibility that contradictory #awards may be issued in two cases does not imply by itself a violation of the #appellant's right to introduce #evidence.
FSCD 4A_312/2012 c. 4.3.1-4.3.2
- when the statements of a #witness were not reproduced in the minutes but merely tape-recorded.
FSCD 4A_43/2010 c. 4.2
- when an #arbitral tribunal renders an #award without waiting for the outcome of parallel proceedings brought by the athlete before the administrative courts of the athlete's country, having implicitly decided that the athlete was estopped from making the claim.
FSCD 4A_624/2009 c. 4.2
- when a sole #arbitrator speaks with counsel of a party on the phone about the request of this party to answer to new #facts asserted by the opposing party in the last memorandum. This would also be true if this oral communication violated procedural rules fixed by the #arbitrator (FSCD 117 II 346 c. 1b/aa).
FSCD 4A_294/2008 c. 3.2.2
- when an #arbitrator hears a party and takes into account the results of this #hearing as #evidence, provided the other party has a sufficient possibility to comment on the testimony taken.
FSCD 09.06.1998 [(1998) ASA p. 658]

- when an #arbitrator asks the parties *ex officio* for additional information after the exchange of the briefs, in particular if it has reserved this possibility.
FSCD 09.06.1998 [(1998) ASA p. 658]
- when the #arbitral tribunal renounces final oral pleadings, because the parties had the opportunity to plead orally before the #arbitral tribunal previously during a two-day #hearing.
FSCD 24.03.1997 [(1997) ASA p. 324-325]
- when an #arbitral tribunal renounces hearing a #witness after this #witness did not appear at the #hearing to which it had been invited, if this #hearing is not requested by the party which claims a violation of the #right to be heard.
FSCD 28.01.1997 [(1998) ASA p. 126]
- when the #arbitrator contents itself with a single #hearing, has omitted to take #evidence, does not give the parties the possibility of oral arguments or the opportunity to substantiate once again the arguments brought forth in the written submissions, provided that the #terms of reference signed by the parties state that the dispute has to be resolved as far as possible in one #hearing after the exchange of written briefs.
FSCD 22.12.1992 [(1996) ASA p. 649-650]
- when an #arbitral tribunal makes a wrong application of the rules regarding the #burden of claim and of proof.
FSCD 13.10.1992 [(1993) ASA p. 75]
- when an #arbitral tribunal excludes, on the basis of an anticipated assessment of the #evidence, a technical #expert opinion aiming at establishing the inner will of a party.
FSCD 11.05.1992 [(1992) ASA p. 398]
- when an #arbitral tribunal does not communicate to the parties the #dissenting opinion of an #arbitrator, unless a corresponding agreement had been reached in the #arbitration agreement or in the #terms of reference.
FSCD 11.05.1992 [(1992) ASA p. 387]
- when the #arbitral tribunal rejects a request for the appointment of an #expert, if this request does not fulfil the requirements of the #arbitration agreement [*in casu* the #arbitration agreement provided the following: "Suggestions that the Tribunal summon its own expert must be accompanied by a separate list of the questions that it is suggested the expert should answer"].
FSCD 21.08.1990 [(1991) ASA p. 31-32])

- when an #arbitral tribunal keeps in the file #evidence which is unilateral or unknown to one of the parties and in the preparation of which this party did not participate, provided the #arbitral tribunal had an open approach to the parties, had mentioned the existence of this #evidence and had given the parties the opportunity to take notice of it and to express themselves on it.
FSCD 19.02.1990 [(1990) ASA p. 181]

The #right to be heard is **violated** or may be violated:

- when an #arbitral tribunal ruled on the #costs and expenses without giving the parties the opportunity to put forward their arguments on this subject.
FSCD 142 III 284 [289-291]
- when the #fact-findings of the #arbitral tribunal are so obviously wrong, or contrary to the file, that it amounts to a procedural #denial of justice, e.g. with regard to the date by which a party had executed its obligations, when the parties agreed on this issue during the proceedings.
FSCD 121 III 331 [333-334]
- when an #arbitral tribunal omitted to take into account a party's amended #prayer for relief.
FSCD 4A_478/2017 c. 3.3.3
- when a party fails to comply with a #time limit for the submission on #costs and that its submission was disregarded for this reason as opposed to that of the other party.
FSCD 4A_636/2014 c. 4.2, FSCD 4A_468/2007 c. 7.1
- when an #arbitral tribunal merely mentions the issue of exclusion of liability, which was legally relevant for the adjudication of the claims for damages, in the summary of the parties' positions and did not analyse or implicitly reject this legal argument of the #appellant.
FSCD 4A_460/2013 c. 3.2.2
- when an #arbitral tribunal fails to explain why, when calculating damages, it did not take into account the deductions submitted by a financial expert and by the #respondent.
FSCD 4A_669/2012 c. 3.2.1
- when an #arbitral tribunal refuses to accept an #appellant's answer to the #request for arbitration.
FSCD 4A_198/2012 c. 3.2.2
- when an #arbitral tribunal rejects a timely request made in the proper format for the appointment of an #expert enabling it to prove a pertinent and disputed fact even if a discretionary power to appoint an #expert were to result from the correct #interpretation of Article R43.3 #CAS Code.
FSCD 4A_274/2012 c. 3.2.1
- when an #arbitral tribunal completely ignored the #appellant's second defence and failed to take into consideration four #witness statements which

would have modified its analysis as a consequence of an oversight as to the existence of the #appellant's post-hearing brief.

FSCD 4A_360/2011 c. 5.2.1.2, 5.2.3.2

- when an #arbitral tribunal rendered a final #award deciding on the issue of #costs without acting on the parties' previous requests to postpone the ruling on #costs and grant a #time limit to the parties to file their submissions on #costs.

FSCD 4A_600/2010 c. 4.2

- when an #arbitral tribunal did not take into account a party's claim concerning the withholding made by the opposing party which was an important element in the determination of damages.

FSCD 4A_433/2009 c. 2.4.2

- when the #arbitral tribunal takes into account "secret #evidence".

FSCD 19.02.1990 [(1990) ASA p. 176-177]

- when an #arbitral tribunal takes #evidence on #facts and afterwards informs the parties that these #facts have not been validly alleged. Once the authorisation to submit #evidence has been granted, the #arbitrators cannot modify their decision without violating the principle of #good faith in proceedings, which applies not only to the parties, but also to the judges, and which can be considered a consequence of the principle #*pacta sunt servanda* which is itself part of #public policy pursuant to Article 190(2)(e) PILA; alternatively, this can be seen as an instance of the principle of "fairness" or of #equal treatment of the parties as envisaged by Article 190(2)(d) PILA, which has the same scope as Article 8 FC.

NE 23.09.1999 [(1999) ASA p. 571-572]

2e Violation of Public Policy (e)

2e.1 Purpose of Article 190(2)(e) PILA

The review by the Federal Supreme Court of international arbitral [#]awards with respect to the [#]merits is limited to the issue of whether or not the arbitral [#]award is compatible with [#]public policy (Art. 190(2)(e) PILA).

FSCD 139 III 511 [514], FSCD 121 III 331 [333], FSCD 116 II 634 [636], FSCD 4A_525/2017 c. 3.3.4, FSCD 4A_470/2016 c. 4.1, FSCD 4A_132/2016 c. 3.2.1, FSCD 4A_568/2015 c. 4.1, FSCD 4A_54/2015 c. 4.4, FSCD 4A_684/2014 c. 4.2, FSCD 4A_597/2013 c. 4.1, FSCD 4A_304/2013 c. 2.2, FSCD 4A_330/2013 c. 3.3, FSCD 4A_524/2012 c. 2.2, FSCD 4A_522/2012 c. 4.2.2, FSCD 4A_276/2012 c. 3.1, FSCD 4A_76/2012 c. 4.1, FSCD 4A_150/2012 c. 5.1, FSCD 4A_654/2011 c. 4.1, FSCD 4A_16/2012 c. 4.1, FSCD 4A_326/2010 c. 3.1, FSCD 4A_402/2010 c. 2.1.2, FSCD 4A_394/2010 c. 5.1, FSCD 4A_414/2010 c. 2.1, FSCD 4A_320/2009 c. 4.1, FSCD 4A_624/2009 c. 3.1, FSCD 4A_4/2010 c. 3.1, FSCD 4A_488/2009 c. 3.1, FSCD 4A_444/2009 c. 4.2, FSCD 4A_612/2009 c. 6.1, FSCD 4A_550/2009 c. 6.1, FSCD 4A_256/2009 c. 4.1, FSCD 4A_258/2009 c. 4.1, FSCD 4A_260/2009 c. 3.1, FSCD 4A_240/2009 c. 4.1, FSCD 4A_194/2008 c. 5.1, FSCD 4A_17/2007 c. 4.1, FSCD 4P.304/2006 c. 3, FSCD 4P.114/2006 c. 6.5.3, FSCD 07.09.2007 [4P.134/2006] c. 5.1, FSCD 4P.88/2006 c. 4.1, FSCD 4P.146/2005 c. 3.1, FSCD 4P.260/2000 c. 3b, FSCD 09.07.1996 [4P.114/1995] c. 1a, FSCD 17.08.1994 [(1995) ASA p. 201]).

Accordingly, the possibilities for setting aside due to a substantive [#]denial of justice are narrowly confined.

FSCD 121 III 331 [333]

Determining whether the solution reached by the [#]arbitral tribunal was materially correct or not does not fall within the scope of Article 190(2)(d) PILA or 190(2)(e) PILA.

FSCD 4A_44/2011 c. 3.1.2

According to the legislator's intent, Article 190(2)(e) PILA limits the examination, in international arbitration, to the question of compatibility with [#]public policy.

FSCD 4A_42/2007 c. 6.1, FSCD 4P.222/2001 c. 2a

Article 190(2)(e) PILA also aims at guaranteeing a certain minimum quality of international arbitration in Switzerland. Therefore, an [#]award which suffers from an internal contradiction is also contrary to [#]public policy.

FSCD 4P.99/2000 c. 3b/aa, FSCD 17.02.1999 [(2000) ASA p. 318]

2e.2 Notion of Public Policy

An [#]award is incompatible with [#]public policy if it violates the largely recognised essential values which, according to the conception prevailing in Switzerland, should form the basis of every legal system.

FSCD 144 III 120 [129], FSCD 132 III 389 [395], FSCD 4A_170/2017 c. 6.1, FSCD 4A_508/2017 c. 4.3, FSCD 4A_157/2017 c. 3.1, FSCD 4A_312/2017 c. 3.1, FSCD 4A_384/2017 c. 4.1, FSCD 4A_125/2018 c. 3.2.1, FSCD 4A_668/2016 c. 4.1, FSCD 4A_532/2016 c. 3.1, FSCD 4A_692/2016 c. 6.1, FSCD 4A_470/2016 c. 4.1, FSCD

4A_690/2016 c. 4.1, FSCD 4A_478/2016 c. 4.1, FSCD 4A_32/2016 c. 4.1, FSCD 4A_116/2016 c. 4.1, FSCD 4A_136/2016 c. 4.2.2, FSCD 4A_132/2016 c. 3.2.1, FSCD 4A_342/2015 c. 5.1 (not published in FSCD 142 III 360), FSCD 4A_568/2015 c. 4.1, FSCD 4A_34/2015 c. 5.1 (not published in FSCD 141 III 495), FSCD 4A_172/2015 c. 5.1, FSCD 4A_709/2014 c. 6.1, FSCD 4A_70/2015 c. 4.2, FSCD 4A_597/2013 c. 4.1, FSCD 4A_530/2013 c. 4, FSCD 4A_448/2013 c. 3.1.1, FSCD 4A_362/2013 c. 3.1.1, FSCD 4A_304/2013 c. 5.1.1, FSCD 4A_524/2012 c. 3.2, FSCD 4A_522/2012 c. 4.2.2, FSCD 4A_576/2012 c. 3.2, FSCD 4A_550/2012 c. 4.1, FSCD 4A_276/2012 c. 3.1, FSCD 4A_76/2012 c. 4.1, FSCD 4A_150/2012 c. 5.1, FSCD 4A_654/2011 c. 3.4, 4.1, FSCD 4A_16/2012 c. 4.1, 6, FSCD 4A_414/2010 c. 2.1, FSCD 4A_458/2009 c. 4.1, FSCD 4A_320/2009 c. 4.1, FSCD 4A_433/2009 c. 3.2, FSCD 4A_620/2009 c. 4.1, FSCD 4A_624/2009 c. 3.1, FSCD 4A_4/2010 c. 3.1, FSCD 4A_524/2009 c. 5.1, FSCD 4A_488/2009 c. 3.1, FSCD 4A_444/2009 c. 4.2, FSCD 4A_612/2009 c. 6.1, FSCD 4A_550/2009 c. 6.1, FSCD 4A_258/2009 c. 4.1, FSCD 4A_256/2009 c. 4.1, FSCD 4A_260/2009 c. 3.1, FSCD 4A_539/2008 c. 6.2.1, FSCD 4A_258/2008 c. 4.1, FSCD 4A_176/2008 c. 5.1, FSCD 4A_506/2007 c. 4.1, FSCD 4A_370/2007 c. 5.1, FSCD 4A_42/2007 c. 6.1, FSCD 4A_17/2007 c. 4.1, FSCD 4P.240/2006 c. 4.1, FSCD 4P.154/2006 c. 3.1, FSCD 4P.134/2006 c. 5.1, FSCD 4P.105/2006 c. 8.1, FSCD 4P.88/2006 c. 4.1, FSCD 4P.146/2005 c. 3.1, FSCD 4P.253/2004 c. 3.1, FSCD 08.02.1994 c. 3, FSCD 28.08.1990 c. 2

#Public policy must not be identified with mere illegality.

FSCD 138 III 322 [329]

#Public policy is an #undefined legal notion which is difficult to grasp and to define once and for all. This statement made by the Federal Supreme Court more than ten years ago in its decision *Emirats Arabes Unis et consorts contre Westland Helicopters Limited* (FSCD 120 II 155 [168]) is still valid. The essence, the nature and the limits of the notion of #public policy remain evasive. Some have compared this notion to a chameleon because of its changing aspect. The evasive character of #public policy is perhaps inherent to this very notion, given its too vast generality; the large range of almost countless opinions uttered with respect to this notion illustrates this. All attempts to answer the numerous issues raised by the #interpretation of this notion only raised other difficult or even polemic questions.

FSCD 132 III 389 [391]

One could however raise the question what is at stake, at least on a practical level, in the debate among scholars with respect to the delimitation of #public policy pursuant to Article 190(2)(e) PILA, as the setting aside of an international arbitral #award on this ground is extremely rare.

FSCD 132 III 389 [391]

This rather pessimistic statement with respect to the possibility to define once and for all the notion of #public policy tends to reinforce the pragmatic approach of the Federal Supreme Court, which it already recommended in the *Westland* case and from which it has not departed since. Perhaps this approach does not sufficiently serve the foreseeability of the law. However, one should not exaggerate the importance of this inconvenience: on the one hand, even though the limits of #public policy in international arbitration remain relatively vague, they have nevertheless been traced, be it grossly, by rich #case law; on the other hand, it should from now on be clear for every person who enters into an #arbitration agreement leading to the application of Articles 176 et seq. PILA that

one has extremely little chances of success the day one wants to set aside an arbitral [#]award based on the ground of Article 190(2)(e) PILA.

FSCD 132 III 389 [391-392]

Even though the reservation of [#]public policy is widespread, it is nevertheless up to the Swiss judge who must decide on the [#]grievance provided for in Article 190(2)(e) PILA, to interpret this provision and to search what the Swiss legislator had in mind when it inserted this [#]undefined legal notion. It is not certain that the same principles are considered as being fundamental everywhere in the world, as the diversity of civilisations can sometimes justify different – or even contradictory – fundamental principles. Therefore, the Swiss legislator, when choosing the term [#]public policy, had inevitably in mind the system of values prevailing in the part of the world in which the country whose statutes this legislator has the task to enact, and the principles which constitute the foundation of the civilisation to which this country belongs. Therefore, the task of the Swiss judge deciding on a [#]motion to set aside an international arbitral [#]award, consists in searching the principles flowing from this system of values and to examine whether the challenged [#]award is compatible or not with them.

FSCD 132 III 389 [394]

The fact that the specificities of sport arbitration were taken into account by federal [#]case law with regard to specific procedural issues does not mean that the same should be done with regard to the general ground for [#]setting aside derived from the incompatibility of the [#]award with [#]public policy unless one wanted to create a *lex sportiva* through [#]case law which could raise issues with respect to the competences of the legislature and the judiciary of the Confederation.

FSCD 4A_312/2017 c. 3.3.2, FSCD 4A_116/2016 c. 4.2.3, FSCD 4A_488/2011 c. 6.2

It is not imaginable to leave to a subject of private law the right to determine the essential and broadly acknowledged values of Article 190(2)(e) PILA which according to the prevailing views in Switzerland should constitute the basis of any legal order.

FSCD 4A_136/2016 c. 4.2.2

The notion of incompatibility with [#]public policy within the meaning of Article 190(2)(e) PILA is not defined by statute. [#]Case law has not yet defined whether one should adopt the Swiss, foreign, international or transnational understanding of [#]public policy.

FSCD 06.02.1992 c. 5a

2e.3 Violation of Fundamental Principles

An [#]award is incompatible with [#]public policy if it violates the largely recognised essential values which, according to the conception prevailing in Switzerland, should form the basis of every legal system.

FSCD 144 III 120 [129], FSCD 138 III 322 [327], FSCD 132 III 389 [395], FSCD 4A_170/2017 c. 6.1, FSCD 4A_157/2017 c. 3.1, FSCD 4A_312/2017 c. 3.1, FSCD 4A_384/2017 c. 4.1, FSCD 4A_668/2016 c. 4.1, FSCD 4A_692/2016 c. 6.1, FSCD 4A_32/2016 c. 4.1, FSCD 4A_116/2016 c. 4.1, FSCD 4A_136/2016 c. 4.2.2, FSCD

4A_132/2016 c. 3.2.1, FSCD 4A_342/2015 c. 5.1 (not published in FSCD 142 III 360), FSCD 4A_568/2015 c. 4.1, FSCD 4A_34/2015 c. 5.1 (not published in FSCD 141 III 495), FSCD 4A_709/2014 c. 6.1, FSCD 4A_70/2015 c. 4.2, FSCD 4A_597/2013 c. 4.1, FSCD 4A_530/2013 c. 4, FSCD 4A_448/2013 c. 3.1.1, FSCD 4A_362/2013 c. 3.1.1, FSCD 4A_304/2013 c. 5.1.1, FSCD 4A_524/2012 c. 3.2, FSCD 4A_522/2012 c. 4.2.2, FSCD 4A_576/2012 c. 3.2, FSCD 4A_550/2012 c. 4.1, FSCD 4A_276/2012 c. 3.1, FSCD 4A_76/2012 c. 4.1, FSCD 4A_150/2012 c. 5.1, FSCD 4A_488/2011 c. 6.1, FSCD 4A_654/2011 c. 3.4 & 4.1, FSCD 4A_16/2012 c. 4.1 & 6, FSCD 4A_326/2010 c. 3.1, FSCD 4A_394/2010 c. 5.1, FSCD 4A_414/2010 c. 2.1, FSCD 4A_320/2009 c. 4.1, FSCD 4A_433/2009 c. 3.2, FSCD 4A_620/2009 c. 4.1, FSCD 4A_624/2009 c. 3.1, FSCD 4A_4/2010 c. 3.1, FSCD 4A_488/2009 c. 3.1, FSCD 4A_444/2009 c. 4.2, FSCD 4A_612/2009 c. 6.1, FSCD 4A_550/2009 c. 6.1, FSCD 4A_258/2009 c. 4.1, FSCD 4A_256/2009 c. 4.1, FSCD 4A_260/2009 c. 3.1, FSCD 4A_240/2009 c. 4.1, FSCD 4A_539/2008 c. 6.2.1, FSCD 4A_258/2008 c. 4.1, FSCD 4A_176/2008 c. 5.1, FSCD 4A_506/2007 c. 4.1, FSCD 4A_370/2007 c. 5.1, FSCD 4A_42/2007 c. 6.1, FSCD 4A_17/2007 c. 4.1, FSCD 4P.240/2006 c. 4.1, FSCD 4P.154/2006 c. 3.1, FSCD 4P.134/2006 c. 5.1, FSCD 4P.105/2006 c. 8.1, FSCD 4P.88/2006 c. 4.1, FSCD 4P.146/2005 c. 3.1, FSCD 4P.253/2004 c. 3.1, FSCD 08.02.1994 c. 3, FSCD 28.08.1990 c. 2

An #award is contrary to substantive #public policy if it violates fundamental legal principles to an extent that it is no longer compatible with the legal system and the system of values on which it is based.

FSCD 144 III 120 [130], FSCD 132 III 389 [392], FSCD 129 III 445 [464], FSCD 128 III 191 [198], FSCD 126 III 249 [253], FSCD 120 II 155 [166], FSCD 117 II 604 [606], FSCD 116 II 634 [636], FSCD 4A_474/2018 c. 3.1, FSCD 4A_404/2017 c. 4.1, FSCD 4A_502/2017 c. 4.1, FSCD 4A_491/2017 c. 5.1, FSCD 4A_450/2017 c. 5.1, FSCD 4A_56/2017 c. 4, FSCD 4A_312/2017 c. 3.1, FSCD 4A_157/2017 c. 3.1, FSCD 4A_384/2017 c. 4.1, FSCD 4A_668/2016 c. 4.1, FSCD 4A_50/2017 c. 4.1, FSCD 4A_690/2016 c. 4.1, FSCD 4A_32/2016 c. 4.1, FSCD 4A_116/2016 c. 4.1, FSCD 4A_522/2016 c. 3.2, FSCD 4A_497/2015 c. 5.2, FSCD 4A_136/2016 c. 4.1, FSCD 4A_536/2016 c. 4.3.1, FSCD 4A_342/2015 c. 5.1 (not published in 142 III 360), FSCD 4A_510/2015 c. 6.2.1, FSCD 4A_319/2015 c. 4.1, FSCD 4A_34/2015 c. 5.1 (not published in FSCD 141 III 495), FSCD 4A_634/2014 c. 5, FSCD 4A_709/2014 c. 6.1, FSCD 4A_426/2014 c. 5, FSCD 4A_70/2015 c. 4.2, FSCD 4A_448/2013 c. 3.1.2, FSCD 4A_362/2013 c. 3.1.2, FSCD 4A_304/2013 c. 5.1.1, FSCD 4A_93/2013 c. 4.2, FSCA 4A_232/2013 c. 5.1.2, FSCD 4A_550/2012 c. 4.1, FSCD 4A_276/2012 c. 3.1, FSCD 4A_312/2012 c. 6.1, FSCD 4A_150/2012 c. 5.1, FSCD 4A_488/2011 c. 6.1, FSCD 4A_14/2012 c. 5.2.1 (not published in FSCD 138 III 270), FSCD 4A_604/2010 c. 3.1, FSCD 4A_326/2010 c. 3.1, FSCD 4A_394/2010 c. 5.1, FSCD 4A_392/2010 c. 6.1, FSCD 4A_579/2010 c. 3.1, FSCD 4A_440/2010 c. 5.1.2 (not published in FSCD 137 III 85), FSCD 4A_458/2009 c. 4.1, FSCD 4A_4/2010 c. 3.1, FSCD 4A_524/2009 c. 5.1, FSCD 4A_488/2009 c. 3.1, FSCD 4A_260/2009 c. 3.1, FSCD 4A_506/2007 c. 4.1, FSCD 4P.48/2005 c. 3.4.2.1, FSCD 4P.146/2004 c. 8.2, FSCD 4P.207/2002 c. 2.1, FSCD 4P.129/2002 c. 8.2, FSCD 4P.167/2002 c. 3.2, FSCD 4P.71/2002 c. 3.2, FSCD 4P.200/2001 c. 2a, FSCD 4P.222/2001 c. 2a, FSCD 4P.143/2001 c. 3a/aa, FSCD 4P.124/2001 c. 3a, FSCD 4P.64/2001 c. 2d, FSCD 4P.99/2000 c. 3b/aa, FSCD 4P.12/2000 c. 4a/aa, FSCD 31.03.1999 [(1998-2000) Digest CAS p. 778], FSCD 22.02.1999 [(1999) ASA p. 539], FSCD 17.02.1999 [(2000) ASA p. 317-318], FSCD 13.11.1998 [(1999) ASA p. 533], FSCD 17.07.1998 [4P.7/1998] [(2002) ASA p. 671-672], FSCD 09.06.1998 [(1998) ASA p. 659], FSCD 09.02.1998 [(1998) ASA p. 644], FSCD 22.01.1998 c. 2b, FSCD 24.03.1997 [(1997) ASA p. 319-320], FSCD 28.01.1997 [(1998) ASA p. 129-130], FSCD 06.09.1996 [(1997) ASA p. 304], FSCD 09.07.1996 [4P.114/1995] c. 2a, FSCD 10.06.1996 [(2000) ASA p. 775], FSCD 01.03.1996 c. 2b/aa, FSCD 30.12.1994 [(1995) ASA p. 224], FSCD 17.08.1994 [(1995) ASA p. 202], FSCD

11.05.1992 [(1992) ASA p. 399-400], FSCD 13.03.1992 [(1992) ASA p. 366], FSCD 23.10.1989 [(1990) ASA p. 55]

In a general sense, the #public policy defence has to allow the setting aside of decisions which violate in a shocking way the most fundamental principles of the legal order as it stands in Switzerland.

FSCD 126 III 534 [538], FSCD 125 III 443 [447], FSCD 4P.154/2006 c. 3.1, FSCD 4P.253/2004 c. 3.1, FSCD 4P.167/2002 c. 3.2, FSCD 4P.71/2002 c. 3.2, FSCD 4P.143/2001 c. 3a/aa, FSCD 4P.124/2001, FSCD 4P.64/2001 c. 2d (not published in FSCD 127 III 429)

Such fundamental violations are so rare that they are almost never accepted in #case law.

FSCD 4P.54/2006 c. 3.1

2e.4 Supra-National System of Legal and Moral Values

Generally, #case law has aimed at separating the #public policy of Article 190(2)(e) PILA of any connection to a nation, be it the *lex fori*, the *lex causae* or the law of a third State. The reason lies in the fact that this #ground does not aim at protecting the Swiss legal order, or at sanctioning the lack of application or the erroneous application of the foreign – even mandatory – law applicable to the #merits, nor the lack of application of mandatory law of a third State.

FSCD 132 III 389 [394], FSCD 4A_319/2015 c. 4.2.2, FSCD 4A_654/2011 c. 4.2

Even though the reservation of #public policy is widespread, it is nevertheless up to the Swiss judge who must decide on the #ground provided for in Article 190(2)(e) PILA, to interpret this provision and to search what the Swiss legislator had in mind when it inserted this #undefined legal notion. It is not certain that the same principles are considered as being fundamental everywhere in the world, as the diversity of civilisations can sometimes justify different – or even contradictory – fundamental principles. Therefore, the Swiss legislator, when choosing the term #public policy, had inevitably in mind the system of values prevailing in the part of the world in which the country whose statutes this legislator has the task to enact, and the principles which constitute the foundation of the civilisation to which this country belongs. Therefore, the task of the Swiss judge deciding on a #motion to set aside an international arbitral #award, consists in searching the principles flowing from this system of values and to examine whether the challenged #award is compatible or not with them.

FSCD 132 III 389 [394]

This shows the ambivalent nature of #public policy pursuant to Article 190(2)(e) PILA. On the one hand, it is a pressure valve which allows the preservation of essential principles of which every State – in an ideal world – should ensure the respect of by sanctioning, if need be, an #award although it is in conformity with the applicable procedural and substantive rules; this is the supra-national function of the defensive #public policy. On the other hand, the Swiss judge who does not live in a no man's land but in a country being part of a given civilisation where certain values are favoured compared to others, has to identify these principles according to its own sensibility and to the essential values of which its civilisation is imbued; this is the Swiss aspect of the defensive #public policy.

FSCD 132 III 389 [395]

The #ground for challenge within the meaning of Article 190(2)(e) PILA has to be understood uniformly, in the sense of a universal #public policy which is independent from the law applicable to the #merits. It should allow the setting aside of decisions which are contrary, according to the Swiss conception, to the legal and moral values in civilised States, which values are therefore valid at a supra-national level.

FSCD 120 II 155 [166-167], FSCD 4P.240/2006 c. 4.1, FSCD 4P.172/1999 [(2001) ASA p. 792], FSCD 08.09.1999 c. 3a, FSCD 17.02.1999 [(2000) ASA p. 318], FSCD 14.12.1998 [(2000) Rivista dell'Arbitrato p. 142], FSCD 13.11.1998 [(1999) ASA p. 533], FSCD 17.07.1998 [4P.7/1998] [(2002) ASA p. 672], FSCD 15.06.1998 c. 3a, FSCD 25.11.1997 c. 1a, FSCD 24.03.1997 [(1997) ASA p. 320], FSCD 06.09.1996 [(1997) ASA p. 304], FSCD 01.03.1996 c. 2b/aa, FSCD 16.02.1996 c. 5a, FSCD 17.08.1994 [(1995) ASA p. 202]

#Public policy within the meaning of this provision cannot have any positive and regulatory effect on contentious legal relationships; it is uniform in the sense that it does not correspond to the applicable law. This is why it has to be distinguished from the #public policy that has to be taken into account in the application of the law by the #arbitral tribunal. If the #arbitral tribunal has to apply another substantive law than Swiss law, and therefore is not obliged to take into account Swiss #public policy, there is apparently no reason for setting aside the #award on a [former] #motion for constitutional review by a reference to Swiss #public policy. Therefore, the uniform application of Article 190(2)(e) PILA seems to require an extensive #interpretation of the notion of #public policy, i.e. the choice of a transnational or universal #public policy including the fundamental principles of law which are mandatory without regard to the links of the dispute with a certain country.

FSCD 120 II 155 [167-168], FSCD 09.02.1998 [(1998) ASA p. 644], FSCD 06.09.1996 [(1997) ASA p. 304], FSCD 30.12.1994 [(1995) ASA p. 224]

It is true however that in most cases, especially in the field of corporate and contract law, the choice of Swiss #public policy in international matters, as opposed to transnational #public policy, should not lead to a different result. Therefore, it is advisable to privilege a pragmatic approach to this controversy and not to look for a definitive solution in one sense or the other, all the more so because #public policy is an #undefined legal notion which is difficult to grasp and to define once and for all.

FSCD 120 II 155 [168], *FSCD 102 Ia 574 [583]

By its origin the #public policy referred to in Article 190(2)(e) PILA is Swiss, but it is international by its function.

FSCD 120 II 155 [167]

The Federal Supreme Court left open the question whether the value system prevailing in Switzerland, or instead the fundamental values of civilised States, which are therefore supra-nationally valid, are decisive.

FSCD 120 II 155 [166-167], FSCD 116 II 635 [637], FSCD 4P.146/2004 c. 8.2, FSCD 4P.207/2002 c. 2.1, FSCD 08.05.1998 c. 2a, FSCD 03.11.1997 c. 4a, FSCD 16.10.1997 c. 1c, FSCD 17.08.1994 [(1995) ASA p. 202], FSCD 25.07.1990 [(1991) SJ p. 12], FSCD 23.10.1989 [(1990) ASA p. 54-55]

#Case law did not decide whether #public policy has to be examined in general or as the case may be depending on the links of the matter with Switzerland with respect to the Swiss, a foreign, a supra-national or even a universal order of moral and legal values.

FSCD 117 II 604 [606-607], FSCD 116 II 634 [636-637], FSCD 09.06.1998 [(1998) ASA p. 659-660], FSCD 11.05.1992 [(1992) ASA p. 400]

The #arbitral tribunal must in particular take into account the international #public policy of the applicable law, i.e. all the fundamental legal rules which must, from the viewpoint of the State in question, be observed mandatorily in international legal relations.

FSCD 06.07.1990 c. 4a

2e.5 Substantive and Procedural Public Policy

- For substantive #public policy, see Article 190(2)(e) PILA, section 2e.13; for procedural #public policy, see Article 190(2)(e) PILA, section 2e.14

One generally distinguishes between substantive and procedural #public policy.

FSCD 144 III 120 [129], FSCD 141 III 229 [234], FSCD 140 III 278 [279], FSCD 132 III 389 [392], FSCD 129 III 445 [464], FSCD 128 III 191 [194], FSCD 126 III 249 [252], FSCD 4A_125/2018 c. 3.2.1, FSCD 4A_345/2017 c. 2.2, FSCD 4A_170/2017 c. 6.1, FSCD 4A_247/2017 c. 4.1.1, FSCD 4A_508/2017 c. 4.3, FSCD 4A_157/2017 c. 3.1, FSCD 4A_236/2017 c. 5.1, FSCD 4A_312/2017 c. 3.1, FSCD 4A_384/2017 c. 4.1, FSCD 4A_668/2016 c. 4.1, FSCD 4A_692/2016 c. 6.1, FSCD 4A_690/2016 c. 4.1, FSCD 4A_478/2016 c. 4.1, FSCD 4A_32/2016 c. 4.1, FSCD 4A_116/2016 c. 4.1, FSCD 4A_342/2015 c. 5.1 (not published in FSCD 142 III 360), FSCD 4A_34/2015 c. 5.1 (not published in FSCD 141 III 495), FSCD 4A_709/2014 c. 6.1, FSCD 4A_606/2013 c. 6.1, FSCD 4A_448/2013 c. 3.1.1, FSCD 4A_362/2013 c. 3.1.1, FSCD 4A_304/2013 c. 5.1.1, FSCD 4A_458/2009 c. 4.1, FSCD 4A_539/2008 c. 6.2.1, FSCD 4A_258/2008 c. 4.1, FSCD 4A_370/2007 c. 5.1, FSCD 4P.96/2002 c. 6.1, FSCD 4P.280/2005 c. 2.1, FSCD 4P.154/2005 c. 6.1, FSCD 4P.117/2004 c. 3.1, FSCD 4P.196/2003 c. 5.1, FSCD 4P.167/2002 c. 3.2, FSCD 4P.71/2002 c. 3.2, FSCD 4P.320/2001 c. 5b, FSCD 4P.143/2001 c. 3a/aa, FSCD 4P.124/2001 c. 3b, FSCD 4P.64/2001 c. 2d, FSCD 16.02.1996 c. 5a

According to the system of the #grounds for setting aside, the #ground for setting aside of Article 190(2)(e) PILA relates primarily to violations of the substantive law, as procedural flaws have to be complained of on the #grounds of Article 190(2)(a)-(d) PILA.

FSCD 06.07.1990 c. 4a

However, the #ground of Article 190(2)(e) PILA must also be available for violations of fundamental principles of procedural nature, provided that they do not already entail the invalidity of the #award according to the applicable procedural rules.

FSCD 06.07.1990 c. 4a

2e.6 Violation by the Result of the Award

The #award will only be set aside if its result is incompatible with #public policy. It is not sufficient if its #reasons are incompatible with #public policy. The same conclusion must be drawn with regard to its #operative part.

FSCD 144 III 120 [130], FSCD 138 III 322 [327], FSCD 120 II 155 [167], FSCD 117 II 604 [606], FSCD 116 II 634 [636-637], FSCD 4A_474/2018 c. 3.1, FSCD 4A_508/2017 c. 4.3, FSCD 4A_157/2017 c. 3.1, FSCD 4A_312/2017 c. 3.1, FSCD 4A_532/2016 c. 3.1, FSCD 4A_470/2016 c. 4.1, FSCD 4A_478/2016 c. 4.1, FSCD 4A_32/2016 c. 4.1, FSCD 4A_116/2016 c. 4.1, FSCD 4A_132/2016 c. 3.2.1, FSCD 4A_568/2015 c. 4.1, FSCD 4A_172/2015 c. 5.1, FSCD 4A_597/2013 c. 4.1, FSCD 4A_524/2012 c. 3.2, FSCD 4A_448/2013 c. 3.1.2, FSCD 4A_362/2013 c. 3.1.2, FSCD 4A_522/2012 c. 4.2.2, FSCD 4A_654/2011 c. 4.1, FSCD 4A_16/2012 c. 4.1, FSCD 4A_326/2010 c. 3.1, FSCD 4A_414/2010 c. 2.1, FSCD 4A_4/2010 c. 3.1, FSCD 4A_444/2009 c. 4.2, FSCD 4A_612/2009 c. 6.1, FSCD 4A_550/2009 c. 6.1, FSCD 4A_258/2009 c. 4.1, FSCD 4A_256/2009 c. 4.1, FSCD 4A_240/2009 c. 4.1, FSCD 4A_194/2008 c. 5.1, FSCD 4A_42/2007 c. 6.1, FSCD 4A_17/2007 c. 4.1, FSCD 4P.240/2006 c. 4.1, FSCD 4P.105/2006 c. 8.1, FSCD 4P.88/2006 c. 4.1, FSCD 4P.14/2004 c. 3.1, FSCD 4P.250/2002 c. 2.1, FSCD 4P.200/2001 c. 2b, FSCD 4P.222/2001 c. 2a, FSCD 4P.143/2001 c. 3a/aa, FSCD 4P.99/2000 c. 3b/bb, FSCD 4P.12/2000 c. 4a/aa, FSCD 26.05.1999 [(2000) ASA p. 334], FSCD 22.02.1999 [(1999) ASA p. 539], FSCD 09.06.1998 [(1998) ASA p. 659], FSCD 09.02.1998 [ASA p. 643], FSCD 03.11.1997 c. 4a, FSCD 16.10.1997 c. 1c, FSCD 28.01.1997 [(1998) ASA p. 130], FSCD 06.09.1996 [(1997) ASA p. 304], FSCD 10.06.1996 [(2000) ASA p. 775], FSCD 08.02.1994 c. 3, FSCD 11.05.1992 [(1992) ASA p. 400], SZ 10.10.2011 c. 5b

The examination of the #merits of a disputed claim violates #public policy if the result to which it leads violates fundamental legal principles which makes the decision appear to be completely incompatible with the relevant legal system or the values underlying that system, but not merely if the #reasons given by the #arbitral tribunal are arbitrary.

FSCD 120 II 155 [167], FSCD 4P.240/2006 c. 4.1, FSCD 4P.88/2006 c. 4.1, FSCD 4P.242/2004 c. 7.1, FSCD 4P.26/2004 c. 4.1, FSCD 4P.104/2004 c. 6.1, FSCD 4P.222/2001 c. 2a, FSCD 4P.99/2000 c. 3b/aa, FSCD 4P.172/1999 [(2001) ASA p. 792], FSCD 31.03.1999 [(1998-2000) Digest CAS p. 779], FSCD 17.02.1999 [(2000) ASA p. 318-319], FSCD 19.11.1998 c. 5a, FSCD 13.11.1998 [(1999) ASA p. 533], FSCD 20.10.1998 c. 2b/aa, FSCD 17.07.1998 [4P.7/1998] [(2002) ASA p. 671-672], FSCD 15.06.1998 c. 3a, FSCD 09.06.1998 [(1998) ASA p. 659], FSCD 08.05.1998 c. 2a, FSCD 09.02.1998 [(1998) ASA p. 643], FSCD 22.01.1998 c. 2b, FSCD 25.11.1997 c. 1a, FSCD 16.10.1997 c. 1c, FSCD 24.03.1997 [(1997) ASA p. 319-320], FSCD 28.01.1997 [(1998) ASA p. 129-130], FSCD 06.09.1996 [(1997) ASA p. 304], FSCD 09.07.1996 [4P.114/1995] c. 2b, FSCD 10.06.1996 [(2000) ASA p. 775], FSCD 30.12.1994 [(1995) ASA p. 222]

As the new #ground for setting aside for a violation of #public policy is narrower than the #ground for setting aside of #arbitrariness under the fConcordat, the challenged #award will only be set aside, by analogy to #case law with regard to Article 29(2) FC, if its result is incompatible with #public policy.

FSCD 120 II 155 [167], FSCD 117 II 604 [606], FSCD 116 II 634 [636-637], FSCD 4P.12/2000 c. 4a/aa, FSCD 11.05.1992 [(1992) ASA p. 400]

With respect to the assessment of #evidence, it is not sufficient to claim that the assessment is indefensible, but the legal consequences drawn by the #arbitral tribunal from the assessment of #evidence must violate fundamental legal principles.

FSCD 09.07.1996 [4P.114/1995] c. 2b

2e.7 Protective Function

#Public policy within the meaning of Article 190(2)(e) PILA constitutes a simple exception or incompatibility clause, which means that #public policy has only a protective function (negative #public policy) of the fundamental and largely recognized values and that it has no normative effect (positive or regulatory #public policy) on the disputed legal relationships.

FSCD 132 III 389 [393], FSCD 126 III 249 [253], FSCD 120 II 155 [166-167], FSCD 4P.200/2001 c. 2b, FSCD 4P.222/2001 c. 2a, FSCD 4P.99/2000 c. 3b/bb, FSCD 4P.12/2000 c. 4a/aa, FSCD 08.09.1999 c. 3a, FSCD 26.05.1999 [(2000) ASA p. 334], FSCD 31.03.1999 [(1998-2000) Digest CAS p. 779], FSCD 22.02.1999 [(1999) ASA p. 539], FSCD 17.02.1999 [(2000) ASA p. 318], FSCD 14.12.1998 [(2000) Rivista dell'Arbitrato p. 142], FSCD 19.11.1998 c. 5b, FSCD 13.11.1998 [(1999) ASA p. 533], FSCD 20.10.1998 c. 2b/aa, FSCD 17.07.1998 [4P.7/1998] [(2002) ASA p. 672], FSCD 15.06.1998 c. 3a, FSCD 09.06.1998 [(1998) ASA p. 659], FSCD 08.05.1998 c. 2a, FSCD 09.02.1998 [(1998) ASA p. 644], FSCD 25.11.1997 c. 1a, FSCD 03.11.1997 c. 4a, FSCD 16.10.1997 c. 1c, FSCD 24.03.1997 [(1997) ASA p. 320], FSCD 06.09.1996 [(1997) ASA p. 304], FSCD 09.07.1996 [4P.114/1995] c. 2a, FSCD 10.06.1996 [(2000) ASA p. 775], FSCD 01.03.1996 c. 2b/aa, FSCD 16.02.1996 c. 5a, FSCD 30.12.1994 [(1995) ASA p. 224], FSCD 08.02.1994 c. 3

2e.8 Status of the Award Contrary to Public Policy

The #award which violates #public policy is in principle not null and void, but only voidable, unless it violates prevailing public interests.

FSCD 120 II 155 [168], ZH 30.06.2003 p. 7

2e.9 Public Policy and Arbitrariness

The notion of #public policy is narrower than that of #arbitrariness within the meaning of Article 8 FC or Article 36(f) fConcordat.

FSCD 138 III 322 [329], FSCD 132 III 389 [393], FSCD 121 III 331 [333], FSCD 120 II 155 [166], FSCD 119 II 271 [(1993) ASA p. 409], FSCD 117 II 604 [606], FSCD 116 II 634 [636-637], FSCD 115 II 288 [292], FSCD 4A_116/2016 c. 4.1, FSCD 4A_143/2015 c. 1.2, FSCD 4A_654/2011 c. 4.2, FSCD 4A_4/2010 c. 3.1, FSCD 4A_612/2009 c. 6.3.1, FSCD 4A_260/2009 c. 3.1 FSCD 4P.304/2006 c. 3,

FSCD 4P.154/2006 c. 3.1, FSCD 4P.105/2006 c. 9, FSCD 4P.146/2005 c. 3.1 & 7.2.1, FSCD 4P.270/2003 c. 3.4, FSCD 4P.157/2000 c. 2, FSCD 22.09.1998 c. 2, FSCD 01.03.1996 c. 2b/aa, FSCD 17.08.1994 [(1995) ASA p. 201-202], FSCD 11.05.1992 [(1992) ASA p. 399], FSCD 13.03.1992 [(1992) ASA p. 365-366], FSCD 08.07.1992 c. 3a, FSCD 30.09.1991 c. 1a, FSCD 28.08.1990 c. 2, FSCD 25.07.1990 [(1991) SJ p. 13], FSCD 23.10.1989 [(1990) ASA p. 55]

As the notion of #public policy is narrower than the notion of #arbitrariness, even clear violations of law and manifestly false #fact-findings, or #fact-findings which are contrary to the file, are not in and of themselves sufficient to constitute a violation of #public policy in international #arbitral proceedings.

FSCD 127 III 576 [578], FSCD 121 III 331 [333], FSCD 116 II 634 [636-637], FSCD 4A_206/2016 c. 5, FSCD 4A_70/2015 c. 4.2, FSCD 4A_530/2013 c. 4, FSCD 4A_4/2010 c. 3.1, FSCD 4A_444/2009 c. 4.2.1, FSCD 4P.154/2006 c. 3.1, 4P.105/2006 c. 7.4, FSCD 4P.48/2005 c. 3.4.2.2, FSCD 4P.253/2004 c. 3.1, FSCD 4P.99/2000 c. 3b/bb, FSCD 4P.12/2000 c. 4a/bb, FSCD 31.03.1999 [(1998-2000) Digest CAS p. 779], FSCD 17.02.1999 [(2000) ASA p. 318], FSCD 13.11.1998 [(1999) ASA p. 533], FSCD 11.05.1992 [(1992) ASA p. 400]

The notion of substantive #public policy is not defined in the PILA. By introducing this notion during the parliamentary debates, the legislator has replaced the notion of #arbitrariness.

FSCD 115 II 288 [292], FSCD 11.05.1992 [(1992) ASA p. 399], FSCD 13.03.1992 [(1992) ASA p. 365], FSCD 23.10.1989 [(1990) ASA p. 54]

Article 393(e) CCP which allows an #award which is arbitrary in its result to be challenged has no counterpart in international arbitration because the ground of incompatibility of the #award with #public policy as contemplated by Article 190(2)(e) PILA is a more restrictive concept than the one of #arbitrariness.

FSCD 4A_600/2016 c. 1.1.4, FSCD 4A_150/2012 c. 5.1

#Public policy should not be confused with mandatory law and its violation is examined much more strictly than #arbitrariness in the sense of Article 36(f) fConcordat.

FSCD 4P.12/2000 c. 5b/aa

2e.10 Relationship with Article 190(2)(b) PILA

- See Article 190(2)(b) PILA, section 2b.14

2e.11 Relationship with Article 190(2)(d) PILA

- See Article 190(2)(d) PILA, section 2d.9

2e.12 Relationship with Article 19 PILA

Article 19 PILA authorises the State court, under certain circumstances, to take directly into account mandatory foreign provisions with respect to a contract, if the pleaded foreign law provides for its mandatory application to the relevant #facts at hand. According to the prevailing doctrine, an international #arbitral tribunal is not obliged to apply foreign law to the contract, in particular in

presence of a #choice of law. The non-application of mandatory provisions of a third country does not, following unanimous doctrine, amount to a violation of #public policy within the meaning of Article 190(2)(e) PILA.

FSCD 30.12.1994 [(1995) ASA p. 225]

A contract which violates a #mandatory norm of a foreign law may be considered contrary to Swiss #public policy only if the foreign law's purpose is to protect individual interests, and interests of the human community which are of fundamental importance.

FSCD 17.04.1990 [(1993) ASA p. 253], GE 17.11.1989 [(1993) ASA p. 252]

2e.13 Substantive Public Policy

2e.13.1 Principle

An #award is contrary to substantive #public policy if it violates the fundamental principles of the substantive law to a point that it is no longer compatible with the legal order and the decisive system of values.

FSCD 144 III 120 [130], FSCD 132 III 389 [392], FSCD 129 III 445 [464], FSCD 128 III 191 [198], FSCD 126 III 249 [253], FSCD 120 II 155 [166], FSCD 117 II 604 [606], FSCD 116 II 634 [636], FSCD 4A_474/2018 c. 3.1, FSCD 4A_404/2017 c. 4.1, FSCD 4A_345/2017 c. 2.2.1, FSCD 4A_502/2017 c. 4.1, FSCD 4A_491/2017 c. 5.1, FSCD 4A_450/2017 c. 5.1, FSCD 4A_56/2017 c. 4, FSCD 4A_312/2017 c. 3.1, FSCD 4A_157/2017 c. 3.1, FSCD 4A_384/2017 c. 4.1, FSCD 4A_668/2016 c. 4.1, FSCD 4A_50/2017 c. 4.1, FSCD 4A_690/2016 c. 4.1, FSCD 4A_32/2016 c. 4.1, FSCD 4A_116/2016 c. 4.1, FSCD 4A_522/2016 c. 3.2, FSCD 4A_497/2015 c. 5.2, FSCD 4A_136/2016 c. 4.1, FSCD 4A_536/2016 c. 4.3.1, FSCD 4A_342/2015 c. 5.1 (not published in FSCD 142 III 360), FSCD 4A_510/2015 c. 6.2.1, FSCD 4A_319/2015 c. 4.1, FSCD 4A_34/2015 c. 5.1 (not published in FSCD 141 III 495), FSCD 4A_634/2014 c. 5, FSCD 4A_709/2014 c. 6.1, FSCD 4A_426/2014 c. 5, FSCD 4A_70/2015 c. 4.2, FSCD 4A_448/2013 c. 3.1.2, FSCD 4A_362/2013 c. 3.1.2, FSCD 4A_304/2013 c. 5.1.1, FSCD 4A_93/2013 c. 4.2, FSCA 4A_232/2013 c. 5.1.2, FSCD 4A_550/2012 c. 4.1, FSCD 4A_276/2012 c. 3.1, FSCD 4A_312/2012 c. 6.1, FSCD 4A_150/2012 c. 5.1, FSCD 4A_488/2011 c. 6.1, FSCD 4A_14/2012 c. 5.2.1 (not published in FSCD 138 III 270), FSCD 4A_604/2010 c. 3.1, FSCD 4A_326/2010 c. 3.1, FSCD 4A_394/2010 c. 5.1, FSCD 4A_392/2010 c. 6.1, FSCD 4A_579/2010 c. 3.1, FSCD 4A_440/2010 c. 5.1.2 (not published in FSCD 137 III 85), FSCD 4A_458/2009 c. 4.1, FSCD 4A_4/2010 c. 3.1, FSCD 4A_524/2009 c. 5.1, FSCD 4A_488/2009 c. 3.1, FSCD 4A_260/2009 c. 3.1, FSCD 4A_600/2008 c. 4.1, FSCD 4A_539/2008 c. 6.2.1, FSCD 4A_258/2008 c. 4.1, FSCD 4A_194/2008 c. 5.1, FSCD 4A_370/2007 c. 5.1, FSCD 4P.304/2006 c. 3, FSCD 4P.96/2002 c. 6.1, FSCD 4P.298/2005 c. 3.1, FSCD 4P.280/2005 c. 2.1, FSCD 4P.98/2005 c. 5.2.1, FSCD 4P.146/2005 c. 7.2.1, FSCD 4P.242/2004 c. 7.1, FSCD 4P.253/2004 c. 3.1, FSCD 4P.26/2004 c. 4.1, FSCD 4P.208/2004 c. 6.1, FSCD 4P.115/2004 c. 4, FSCD 4P.104/2004 c. 6.1, FSCD 4P.117/2004 c. 3.1, FSCD 4P.14/2004 c. 3.1, FSCD 4P.196/2003 c. 5.1, FSCD 4P.250/2002 c. 2.1, FSCD 4P.320/2001 c. 5b, FSCD 08.09.1999 c. 3a, FSCD 19.11.1998 c. 5a, FSCD 20.10.1998 c. 2b/aa, FSCD 15.06.1998 c. 3a, FSCD 08.05.1998 c. 2a, FSCD 16.02.1998 c. 4 and 5b, FSCD 22.01.1998 c. 2b, FSCD 25.11.1997 c. 1a, FSCD 03.11.1997 c. 4a, FSCD 16.10.1997 c. 1c, FSCD 09.07.1996 [4P.114/1995] c. 2a, FSCD 01.03.1996 c. 2b/aa, FSCD 16.02.1996 c. 5a, FSCD 08.02.1994 c. 3, FSCD 08.07.1992 c. 3a, FSCD 28.08.1990 c. 2, SZ 10.10.2011 c. 5b

The notion of *#public policy* includes only the fundamental principles of the legal system in question, that is the fundamental values to be observed in the context of every decision, such as the principle that agreements must be kept (*#pacta sunt servanda*), the principle of *#good faith*, the prohibition of *#abuse of right* and of discriminatory and confiscatory measures, the protection of persons who lack the *#capacity to act*, the prohibition of *#expropriation without compensation* and the prohibition of excessive undertakings (cf. Art. 27(2) CC) if this constitutes an obvious and serious violation of *#personal rights*.

FSCD 144 III 120 [130], FSCD 138 III 322 [327], FSCD 132 III 389 [392], FSCD 128 III 191 [198], FSCD 120 II 155 [166], FSCD 117 II 604 [606], FSCD 116 II 634 [636], FSCD 4A_474/2018 c. 3.1, FSCD 4A_125/2018 c. 3.2.1, FSCD 4A_345/2017 c. 2.2.1, FSCD 4A_491/2017 c. 5.1, FSCD 4A_450/2017 c. 5.1, FSCD 4A_508/2017 c. 4.3, FSCD 4A_56/2017 c. 4, FSCD 4A_157/2017 c. 3.1, FSCD 4A_312/2017 c. 3.1, FSCD 4A_668/2016 c. 4.1, FSCD 4A_50/2017 c. 4.1, FSCD 4A_532/2016 c. 3.1, FSCD 4A_470/2016 c. 4.1, FSCD 4A_690/2016 c. 4.1, FSCD 4A_478/2016 c. 4.1, FSCD 4A_32/2016 c. 4.1, FSCD 4A_116/2016 c. 4.1, FSCD 4A_522/2016 c. 3.2, FSCD 4A_497/2015 c. 5.2, FSCD 4A_136/2016 c. 4.1, FSCD 4A_536/2016 c. 4.3.1, FSCD 4A_132/2016 c. 3.2.1, FSCD 4A_342/2015 c. 5.1 (not published in FSCD 142 III 360), FSCD 4A_510/2015 c. 6.2.1, FSCD 4A_319/2015 c. 4.1, FSCD 4A_568/2015 c. 4.1, FSCD 4A_34/2015 c. 5.1 (not published in FSCD 141 III 495), FSCD 4A_172/2015 c. 5.1, FSCD 4A_634/2014 c. 5, FSCD 4A_709/2014 c. 6.1, FSCD 4A_426/2014 c. 5, FSCD 4A_597/2013 c. 4.1, FSCD 4A_448/2013 c. 3.1.2, FSCD 4A_362/2013 c. 3.1.2, FSCD 4A_304/2013 c. 5.1.1, FSCD 4A_93/2013 c. 4.2, FSCD 4A_232/2013 c. 5.1.2, FSCD 4A_524/2012 c. 3.2, FSCD 4A_522/2012 c. 4.2.2, FSCD 4A_550/2012 c. 4.1, FSCD 4A_276/2012 c. 3.1, FSCD 4A_76/2012 c. 4.1, FSCD 4A_488/2011 c. 6.1, FSCD 4A_654/2011 c. 4.1, FSCD 4A_16/2012 c. 4.1, FSCD 4A_14/2012 c. 5.2.1 (not published in FSCD 138 III 270), FSCD 4A_604/2010 c. 3.1, FSCD 4A_326/2010 c. 3.1, FSCD 4A_394/2010 c. 5.1, FSCD 4A_392/2010 c. 6.1, FSCD 4A_579/2010 c. 3.1, FSCD 4A_440/2010 c. 5.1.1 (not published in FSCD 137 III 85), FSCD 4A_414/2010 c. 2.1, FSCD 4A_458/2009 c. 4.1, FSCD 4A_320/2009 c. 4.1, FSCD 4A_433/2009 c. 3.2, FSCD 4A_4/2010 c. 3.1, FSCD 4A_524/2009 c. 5.1, FSCD 4A_488/2009 c. 3.1, FSCD 4A_444/2009 c. 4.2, FSCD 4A_612/2009 c. 6.1, FSCD 4A_550/2009 c. 6.1, FSCD 4A_258/2009 c. 4.1, FSCD 4A_256/2009 c. 4.1, FSCD 4A_260/2009 c. 3.1, FSCD 4A_240/2009 c. 4.1, FSCD 4A_600/2008 c. 4.1, FSCD 4A_539/2008 c. 6.2.1, FSCD 4A_258/2008 c. 4.1, FSCD 4A_176/2008 c. 5.1, FSCD 4A_194/2008 c. 5.1, FSCD 4A_18/2008 c. 2.2, FSCD 4A_370/2007 c. 5.1 and 5.5, FSCD 4A_268/2007 c. 3.1, FSCD 4A_220/2007 c. 12.2.1, FSCD 4A_42/2007 c. 6.1, FSCD 4A_17/2007 c. 4.1, FSCD 4P.96/2002 c. 6.1, FSCD 4P.240/2006 c. 4.1, FSCD 4P.134/2006 c. 5.1, FSCD 4P.105/2006 c. 8.1, FSCD 4P.88/2006 c. 4.1, FSCD 4P.54/2006 c. 3.1, FSCD 4P.314/2005 c. 3.1, FSCD 4P.298/2005 c. 3.1, FSCD 4P.280/2005 c. 2.1, FSCD 4P.98/2005 c. 5.2.1, FSCD 4P.146/2005 c. 7.2.1, FSCD 4P.242/2004 c. 7.1, FSCD 4P.253/2004 c. 3.1, FSCD 4P.26/2004 c. 4.1, FSCD 4P.208/2004 c. 6.1, FSCD 4P.115/2004 c. 4, FSCD 4P.140/2004 c. 3.1, FSCD 4P.104/2004 c. 6.1 & 6.3, FSCD 4P.117/2004 c. 3.1, FSCD 4P.146/2004 c. 8.2, FSCD 4P.14/2004 c. 3.1, FSCD 4P.196/2003 c. 5.1, FSCD 4P.250/2002 c. 2.1, FSCD 4P.207/2002 c. 2.1, FSCD 4P.129/2002 c. 8.2, FSCD 4P.71/2002 c. 3.2, FSCD 4P.320/2001 c. 5b, FSCD 4P.200/2001 c. 2a, FSCD 4P.222/2001 c. 2a, FSCD 4P.143/2001 c. 3a/aa, FSCD 4P.124/2001 c. 3b, FSCD 4P.64/2001 c. 2d, FSCD 4P.99/2000 c. 3b/aa, FSCD 4P.12/2000 c. 4a/aa, FSCD 08.09.1999 c. 3a, FSCD 26.05.1999 [(2000) ASA p. 334], FSCD 31.03.1999 [(1998-2000) Digest CAS p. 778], FSCD 22.02.1999 [(1999) ASA p. 539], FSCD 17.02.1999 [(2000) ASA p. 318], FSCD 14.12.1998 [(2000) Rivista dell'Arbitrato p. 142], FSCD 19.11.1998 c. 5b, FSCD 13.11.1998 [(1999) ASA p. 533], FSCD 20.10.1998 c. 2b/aa, FSCD 17.07.1998 [4P.7/1998] [(2002) ASA p. 672], FSCD 15.06.1998 c. 3a, FSCD 09.06.1998 [(1998) ASA p. 659], FSCD 08.05.1998 c. 2a, FSCD 16.02.1998 c. 5b, FSCD 09.02.1998 [(1998)

ASA p. 644], FSCD 22.01.1998 c. 2b, FSCD 25.11.1997 c. 1a, FSCD 03.11.1997 c. 4a, FSCD 16.10.1997 c. 1c, FSCD 24.03.1997 [(1997) ASA p. 320], FSCD 28.01.1997 [(1998) ASA p. 130], FSCD 06.09.1996 [(1997) ASA p. 304], FSCD 09.07.1996 [4P.114/1995] c. 2a, FSCD 10.06.1996 [(2000) ASA p. 775], FSCD 01.03.1996 c. 2b/aa, FSCD 16.02.1996 c. 5a, FSCD 30.12.1994 [(1995) ASA p. 224], FSCD 17.08.1994 [(1995) ASA p. 202], FSCD 08.02.1994 c. 3, FSCD 08.02.1993 c. 3, FSCD 08.07.1992 c. 3a, FSCD 11.05.1992 [(1992) ASA p. 400], FSCD 13.03.1992 [(1992) ASA p. 366], FSCD 30.09.1991 c. 1a, FSCD 28.08.1990 c. 2, FSCD 25.07.1990 [(1991) SJ p. 13], FSCD 23.10.1989 [(1990) ASA p. 56]

The list of examples set forth by the Federal Supreme Court to describe the contents of substantive #public policy is not exhaustive. It would be tricky and even dangerous to try to exhaustively list all the fundamental principles. It is therefore preferable to leave the list open.

FSCD 144 III 120 [130], FSCD 138 III 322 [327], FSCD 4A_508/2017 c. 4.3, FSCD 4A_157/2017 c. 3.1, FSCD 4A_312/2017 c. 3.1, FSCD 4A_478/2016 c. 4.1, FSCD 4A_32/2016 c. 4.1, FSCD 4A_116/2016 c. 4.1, FSCD 4A_448/2013 c. 3.1.2, FSCD 4A_362/2013 c. 3.1.2, FSCD 4A_304/2013 c. 5.1.1, FSCD 4A_458/2009 c. 4.1

It is not easy to define substantive #public policy positively or to determine its scope precisely. It is easier to exclude some elements from it.

FSCD 144 III 120 [130], FSCD 4A_474/2018 c. 3.1, FSCD 4A_157/2017 c. 3.1, FSCD 4A_312/2017 c. 3.1

The review by the Federal Supreme Court of international arbitral #awards with regard to the #merits is limited to the issue of whether the arbitral #award is compatible with #public policy (Art. 190(2)(e) PILA).

FSCD 139 III 511 [514], FSCD 127 III 576 [578], FSCD 121 III 331 [333], FSCD 116 II 634 [636], FSCD 4A_525/2017 c. 3.3.4, FSCD 4A_580/2017 c. 3.2, FSCD 4A_532/2016 c. 3.1, FSCD 4A_132/2016 c. 3.2.1, FSCD 4A_568/2015 c. 4.1, FSCD 4A_172/2015 c. 5.1, FSCD 4A_54/2015 c. 4.4, FSCD 4A_684/2014 c. 4.2, FSCD 4A_524/2012 c. 3.2, FSCD 4A_522/2012 c. 4.2.2, FSCD 4A_276/2012 c. 3.1, FSCD 4A_654/2011 c. 4.1, FSCD 4A_16/2012 c. 4.1, FSCD 4A_394/2010 c. 5.1, FSCD 4A_414/2010 c. 2.1, FSCD 4A_320/2009 c. 4.1, FSCD 4A_624/2009 c. 3.1, FSCD 4A_472/2010 c. 3.1, FSCD 4A_488/2009 c. 3.1, FSCD 4A_444/2009 c. 4.2, FSCD 4A_550/2009 c. 6.1, FSCD 4A_258/2009 c. 4.1, FSCD 4A_260/2009 c. 3.1, FSCD 4A_240/2009 c. 4.1, FSCD 4A_194/2008 c. 5.1, FSCD 4A_17/2007 c. 4.1, FSCD 4P.304/2006 c. 3, FSCD 4P.114/2006 c. 6.5.3, FSCD 07.09.2007 [4P.134/2006] c. 5.1, FSCD 4P.88/2006 c. 4.1, FSCD 4P.146/2005 c. 3.1, FSCD 4P.260/2000 c. 3b, FSCD 09.07.1996 [4P.114/1995] c. 1a, FSCD 17.08.1994 [(1995) ASA p. 201])

2e.13.2 *Pacta Sunt Servanda*

The process of #interpretation of the legal relationship in dispute as such, and the legal conclusions logically drawn from it, are not subject to the principle of #*pacta sunt servanda* (principle that agreements must be kept), so that the #grievance of a violation of #public policy is not admissible in this respect.

FSCD 144 III 120 [130], FSCD 4A_404/2017 c. 4.1, FSCD 4A_502/2017 c. 4.1, FSCD 4A_491/2017 c. 5.1, FSCD 4A_450/2017 c. 5.1, FSCD 4A_56/2017 c. 4.1, FSCD 4A_157/2017 c. 3.1, FSCD 4A_312/2017 c. 3.1, FSCD 4A_318/2017 c. 4.2, FSCD 4A_50/2017 c. 4.1, FSCD 4A_532/2016 c. 3.2.2, FSCD 4A_32/2016 c. 4.1, FSCD 4A_116/2016 c. 4.1, FSCD 4A_522/2016 c. 3.2.2, FSCD 4A_319/2015 c. 4.1, FSCD 4A_634/2014 c. 5.1.1, FSCD 4A_426/2014 c. 5.1.1, FSCD 4A_70/2015 c. 4.2, FSCD 4A_304/2013 c. 5.1.1, FSCD 4A_93/2013 c. 4.2, FSCD 4A_232/2013 c.

5.1.2, FSCD 4A_550/2012 c. 4.1, FSCD 4A_276/2012 c. 3.1, FSCD 4A_76/2012 [4A_76/2012] c. 4.2, FSCD 4A_312/2012 c. 6.1, FSCD 4A_150/2012 c. 5.1, FSCD 4A_14/2012 c. 5.2.1 (not published in FSCD 138 III 270), FSCD 4A_46/2011 c. 4.2.1, FSCD 4A_481/2010 c. 3.1, FSCD 4A_394/2010 c. 5.1, FSCD 4A_440/2010 c. 5.1.2 (not published in FSCD 137 III 85), FSCD 4A_458/2009 c. 4.1, FSCD 4A_4/2010 c. 3.1, FSCD 4A_488/2009 c. 3.1, FSCD 4A_260/2009 c. 3.1, FSCD 4A_194/2008 c. 5.2, FSCD 4A_506/2007 c. 4.1, FSCD 4A_370/2007 c. 5.5, FSCD 14.11 2007 c. 3.1, FSCD 14.11 2007 c. 3.1, FSCD 4A_220/2007 c. 12.2.1, FSCD 4P.206/2006 c. 4.1, FSCD 4P.154/2006 c. 3.2, FSCD 4P.314/2005 c. 3.1, FSCD 4P.98/2005 c. 5.2.1, FSCD 4P.12/2000 c. 4a/cc, FSCD 26.05.1999 [(2000) ASA p. 335], FSCD 19.11.1998 c. 5b, FSCD 20.10.1998 c. 2b/aa, FSCD 15.06.1998 c. 3b, FSCD 08.05.1998 c. 2c, FSCD 16.10.1997 c. 2b/aa, FSCD 06.09.1996 [(1997) ASA p. 305], FSCD 10.06.1996 [(2000) ASA p. 776], FSCD 16.02.1996 c. 5b, FSCD 21.06.1995 [4P.267/1994] c. 6b

There can only be a violation of the principle of *#pacta sunt servanda* if the tribunal accepts that a contractual provision is binding but refuses to apply it, based on irrelevant *#reasons* or inapplicable legal provisions; or, on the contrary, considers that a contractual provision is not binding but nevertheless holds that the provision must be respected.

FSCD 116 II 634 [638], FSCD 4A_404/2017 c. 4.1, FSCD 4A_502/2017 c. 4.1, FSCD 4A_491/2017 c. 5.1, FSCD 4A_450/2017 c. 5.1, FSCD 4A_56/2017 c. 4.1, FSCD 4A_318/2017 c. 4.2, FSCD 4A_50/2017 c. 4.1, FSCD 4A_532/2016 c. 3.2.2, FSCD 4A_522/2016 c. 3.2.2, FSCD 4A_497/2015 c. 5.2, FSCD 4A_319/2015 c. 4.1, FSCD 4A_634/2014 c. 5.1.1, FSCD 4A_426/2014 c. 5.1.1, FSCD 4A_597/2013 c. 4.3, FSCD 4A_93/2013 c. 4.2, FSCA 4A_232/2013 c. 5.1.2, FSCD 4A_550/2012 c. 4.1, FSCD 4A_276/2012 c. 3.1, FSCD 4A_76/2012 c. 4.2, FSCD 4A_312/2012 c. 6.1, FSCD 4A_150/2012 c. 5.1, FSCD 4A_46/2011 c. 4.2.1, FSCD 4A_481/2010 c. 3.1, FSCD 4A_394/2010 c. 5.1, FSCD 4A_440/2010 c. 5.1.2 (not published in FSCD 137 III 85), FSCD 4A_43/2010 c. 5.2, FSCD 4A_433/2009 c. 3.2, FSCD 4A_4/2010 c. 3.1, FSCD 4A_488/2009 c. 3.1, FSCD 4A_258/2009 c. 4.2.2, FSCD 4A_256/2009 c. 4.2.2, FSCD 4A_260/2009 c. 3.1, FSCD 4A_176/2008 c. 5.2, FSCD 4A_194/2008 c. 5.2, FSCD 4A_370/2007 c. 5.5, FSCD 4A_268/2007 c. 3.1, FSCD 4P.4/2007 c. 5.2, FSCD 4A_220/2007 c. 12.2.1, FSCD 4A_42/2007 c. 6.2, FSCD 4P.206/2006 c. 4.1, FSCD 4P.154/2006 c. 3.2, FSCD 4P.134/2006 c. 5.2, FSCD 4P.314/2005 c. 3.1, FSCD 4P.298/2005 c. 3.1, FSCD 4P.98/2005 c. 5.2.1, FSCD 4P.146/2005 c. 7.2.1, FSCD 4P.242/2004 c. 7.1, FSCD 4P.253/2004 c. 3.1, FSCD 4P.115/2004 c. 4, FSCD 4P.140/2004 c. 3.1, FSCD 4P.104/2004 c. 6.3, FSCD 4P.117/2004 c. 3.1, FSCD 4P.146/2004 c. 8.2, FSCD 4P.196/2003 c. 5.1, FSCD 4P.202/2003 c. 5, FSCD 4P.71/2002 c. 3.2, FSCD 4P.114/2001 c. 4, FSCD 4P.143/2001 c. 3a/bb, FSCD 4P.12/2000 c. 4b, FSCD 4P.12/2000 c. 4a/cc, FSCD 26.05.1999 [(2000) ASA p. 335], FSCD 19.11.1998 c. 5b, FSCD 20.10.1998 c. 2b/bb, FSCD 15.06.1998 c. 3b, FSCD 08.05.1998 c. 2c, FSCD 16.10.1997 c. 2b/aa, FSCD 06.09.1996 [(1997) ASA p. 305], FSCD 10.06.1996 [(2000) ASA p. 776], FSCD 16.02.1996 c. 5b, FSCD 21.06.1995 [4P.267/1994] c. 6b, FSCD 08.07.1992 c. 3b, FSCD 11.05.1992 [(1992) ASA p. 400-401], FSCD 30.09.1991 c. 1b/aa, SZ 10.10.2011 c. 5b

In order to claim a violation of the principle of *#pacta sunt servanda*, the *#arbitral* tribunal must have ordered compliance with contractual duties in contradiction with its plain *#interpretation* of these duties.

FSCD 116 II 634 [638], FSCD 4P.114/2001 c. 4

In other words, the [#]tribunal must have applied or refused to apply a contractual provision in contradiction with the result of its own [#]interpretation concerning the existence or the content of the invoked legal act.

FSCD 4A_404/2017 c. 4.1, FSCD 4A_502/2017 c. 4.1, FSCD 4A_491/2017 c. 5.1, FSCD 4A_450/2017 c. 5.1, FSCD 4A_56/2017 c. 4.1, FSCD 4A_318/2017 c. 4.2, FSCD 4A_50/2017 c. 4.1, FSCD 4A_532/2016 c. 3.2.2, FSCD 4A_522/2016 c. 3.2.2, FSCD 4A_319/2015 c. 4.1, FSCD 4A_634/2014 c. 5.1.1, FSCD 4A_426/2014 c. 5.1.1, FSCA 4A_232/2013 c. 5.1.2, FSCD 4A_550/2012 c. 4.1, FSCD 4A_276/2012 c. 3.1, FSCD 4A_312/2012 c. 6.1, FSCD 4A_150/2012 c. 5.1, FSCD 4A_46/2011 c. 4.2.1, FSCD 4A_481/2010 c. 3.1, FSCD 4A_394/2010 c. 5.1, FSCD 4A_440/2010 c. 5.1.2 (not published in FSCD 137 III 85), FSCD 4A_4/2010 c. 3.1, FSCD 4A_488/2009 c. 3.1, FSCD 4A_260/2009 c. 3.1, FSCD 4A_370/2007 c. 5.5, FSCD 4A_268/2007 c. 3.1, FSCD 4A_220/2007 c. 12.2.1, FSCD 4P.206/2006 c. 4.1, FSCD 4P.154/2006 c. 3.2, FSCD 4P.314/2005 c. 3.1, FSCD 4P.98/2005 c. 5.2.1, FSCD 4P.117/2004 c. 3.1, FSCD 4P.196/2003 c. 5.1, FSCD 4P.202/2003 c. 5, FSCD 4P.143/2001 c. 3a/bb, FSCD 19.11.1998 c. 5b, FSCD 20.10.1998 c. 2b/bb, FSCD 15.06.1998 c. 3b, FSCD 08.05.1998 c. 2c, FSCD 16.10.1997 c. 2b/aa, FSCD 16.02.1996 c. 5b, FSCD 21.06.1995 [4P.267/1994] c. 6b

Therefore, almost all disputes resulting from the violation of a contract are excluded from the scope of application of the principle of *pacta sunt servanda* (principle that agreements must be kept), as envisaged under the [#]public policy of Article 190(2)(e) PILA.

FSCD 4A_404/2017 c. 4.1, FSCD 4A_491/2017 c. 5.1, FSCD 4A_450/2017 c. 5.1, FSCD 4A_56/2017 c. 4.1, FSCD 4A_318/2017 c. 4.2, FSCD 4A_50/2017 c. 4.1, FSCD 4A_522/2016 c. 3.2.2, FSCD 4A_319/2015 c. 4.1, FSCD 4A_634/2014 c. 5.1.1, FSCD 4A_426/2014 c. 5.1.1, FSCD 4A_93/2013 c. 4.2, FSCA 4A_232/2013 c. 5.1.2, FSCD 4A_550/2012 c. 4.1, FSCD 4A_276/2012 c. 3.1, FSCD 4A_312/2012 c. 6.1, FSCD 4A_150/2012 c. 5.1, FSCD 4A_14/2012 c. 5.2.1 (not published in FSCD 138 III 270), FSCD 4A_46/2011 c. 4.2.1, FSCD 4A_481/2010 c. 3.1, FSCD 4A_394/2010 c. 5.1, FSCD 4A_440/2010 c. 5.1.2 (not published in FSCD 137 III 85), FSCD 4A_43/2010 c. 5.2, FSCD 4A_458/2009 c. 4.4.4, FSCD 4A_4/2010 c. 3.1, FSCD 4A_488/2009 c. 3.1, FSCD 4A_260/2009 c. 3.1, FSCD 4A_506/2007 c. 4.1, FSCD 4A_370/2007 c. 5.5, FSCD 4A_220/2007 c. 12.2.1, FSCD 4P.206/2006 c. 4.1, FSCD 4P.314/2005 c. 3.1, FSCD 4P.98/2005 c. 5.2.1, FSCD 4P.143/2001 c. 3a/bb, FSCD 4P.12/2000 c. 4a/cc, FSCD 26.05.1999 [(2000) ASA p. 335]

The process of [#]interpretation and the logical consequences thereof are not governed by this principle, and the Federal Supreme Court has on numerous occasions pointed out that almost all disputes arising from the - alleged - violation of contracts are excluded from the scope of protection of the principle of *pacta sunt servanda*.

FSCD 4A_532/2016 c. 3.2.2, FSCD 4A_522/2016 c. 3.2.2, FSCD 4A_497/2015 c. 5.1, FSCD 4A_319/2015 c. 4.1, FSCD 4A_634/2014 c. 5.1.1, FSCD 4A_14/2012 c. 5.2.1 (not published in FSCD 138 III 270)

The notion of substantive [#]public policy and the principle of *pacta sunt servanda* do not include the principle of autonomy of an [#]association.

FSCD 4A_682/2012 c. 7

Distortion is tantamount to arbitrarily interpreting or applying the law or the contract and has nothing to do with the notion of [#]public policy. Even though the [#]arbitral tribunal may have interpreted or applied the pertinent legal provisions in an untenable manner or the specific clauses of the contract, in particular by

failing to rely on the rules of law governing the issue in dispute or by confusing the meanings of some distinct provisions in a contractual clause, it would have not breached substantive #public policy.

FSCD 4A_14/2012 c. 5.2.1 (not published in FSCD 138 III 270)

The principle of *#pacta sunt servanda* does not oblige the judge or the #arbitrator to grant a party's #prayer for relief based on #facts which it has not proven, or based on an assessment of #evidence which has not been made in violation of the procedural guarantees (Art. 190(2)(d) PILA in relation with Art. 182(3) PILA) or in violation of procedural #public policy.

FSCD 15.06.1998 c. 3c

The principle of *#pacta sunt servanda* (principle that agreements must be kept) does not oblige the judge or the #arbitrator to admit the party's #prayer for relief based on #facts which this party did not prove, even though it had previously granted the existence of the #claim on which the #prayer for relief is based. The question whether the #arbitrators have rightly proceeded in the absence of #evidence regarding the specific #claim can only be criticised before the Federal Supreme Court on the grounds that the findings of the relevant #facts have been made in violation of procedural guarantees (Art. 190(2)(d) PILA in connection with Art. 182(3) PILA) or that the findings of #facts are incompatible with procedural #public policy.

FSCD 10.06.1996 [(2000) ASA p. 776-777]

The principle of *#pacta sunt servanda* is not violated when the tribunal accepts, rightly or wrongly, the existence of a contract or the fulfilment of a condition for the performance and orders its performance.

FSCD 08.07.1992 c. 3b, FSCD 30.09.1991 c. 1b/aa

There may also be a violation of the principle of *#pacta sunt servanda* if the #tribunal admits the fulfilment of a condition for the performance of an obligation, but refuses to order its performance, or, on the contrary, denies the fulfilment of such a condition and nevertheless orders the performance of the obligation.

FSCD 30.09.1991 c. 1b/aa

2e.13.3 Good Faith and the Prohibition of Abuse of Right

It is inferred from the principle of #good faith that the parties must not suffer any loss because of an inaccurate indication of the legal remedies. However, a party may only avail itself of this protection if it relies in #good faith on this indication. This is not the case for the person who noticed the error or should have noticed it if it had paid the attention required by the circumstances. Only gross procedural negligence can defeat the protection of #good faith. This ceases only if a party or its lawyer could have become aware of the inaccuracy of the indication of legal remedies by simply reading the applicable legislation. However, they are not expected to consult the relevant #case law or doctrine in addition to the legal texts. Determining whether the negligence committed is gross is based on the concrete circumstances and legal knowledge of the person involved. The requirements for lawyers are naturally higher: in all cases, lawyers are expected to carry out a brief review of the indication of the legal remedies.

FSCD 4A_170/2017 c. 6.2.1.1

The rules of #good faith and the prohibition of an #abuse of right have to be interpreted in the light of the #case law concerning Article 2 CC.

FSCD 4A_426/2014 c. 5.1.3, FSCD 4A_150/2012 c. 5.1, FSCD 4A_579/2010 c. 3.1, FSCD 4A_458/2009 c. 4.4.9, FSCD 4A_4/2010 c. 3.1, FSCD 4A_488/2009 c. 3.1, FSCD 4A_260/2009 c. 3.1, FSCD 4A_600/2008 c. 4.2.1.1, FSCD 4A_220/2007 c. 12.2.2, FSCD 4P.206/2006 c. 5, FSCD 4P.253/2004 c. 3.1, FSCD 4P.117/2004 c. 3.1, FSCD 4P.167/2002 c. 3.2, FSCD 4P.71/2002 c. 3.2

There may be a violation of the principle of #good faith, respectively a so-called *culpa in contrahendo*, if a party fails to disclose to the other party, during contractual negotiations, #facts which are obviously relevant for its decision-making and which this other party did not and could not know about.

FSCD 4P.88/2006 c. 4.2, FSCD 4P.172/1999 [(2001) ASA p. 792]

The fact that #evidence which has already been admitted, is not taken does, not, as such, violate the #right to be heard of a party and does not constitute a clear violation of the prohibition of contradictory conduct or of the principle of #good faith, if the #evidence is, after an anticipated assessment of #evidence, considered as being not relevant or appropriate.

FSCD 4P.48/2005 c. 3.4.2.1

The prohibition of an #abuse of right is part of substantive #public policy.

FSCD 4P.167/2002 c. 3.2

The principle of #good faith is part of the fundamental legal principles pertaining to #public policy.

FSCD 4P.172/1999 [(2001) ASA p. 792]

The principle according to which #contracts for the performance of continuing obligations may be terminated in advance for #good cause if one of the parties reasonably cannot continue any longer to perform them, corresponds to the principle of #good faith, respectively the prohibition of an #abuse of right, and is therefore part of #public policy.

FSCD 4P.172/1999 [(2001) ASA p. 793-794]

The protection of a manifest #abuse of right may violate #public policy, but the intervention in the statute or the legal transaction requires a special justification, which in general only follows from the fact that the purpose has been abused or that there is no interest in a behaviour compatible with the legal provisions. Therefore, lawful conduct constitutes in principle only an #abuse of right if it is useless, ignores clearly preponderant interests of the aggrieved party, appears to be contradictory or is based on the fact that the right has been wrongly obtained. Only the blatantly unbearable may be deprived of the protection of the law by a decision correcting the provisions.

FSCD 08.09.1999 c. 4d, FSCD 01.03.1996 c. 2b/cc

It follows from the principle of #good faith that a long-term bilateral contract can be terminated in case of a fundamental economic change pursuant to the principle of *clausula rebus sic stantibus*. However, there must be an extraordinary and unforeseeable change of circumstances, which entails such an imbalance between performance and consideration that the granting of the creditor's claims would lead to a severe exploitation of the imbalance and therefore would constitute an #abuse of right.

FSCD 22.02.1999 [(1999) ASA p. 540]

In a #motion for setting aside pursuant to Article 190(2)(e) PILA, the parties cannot criticise the #fact-findings and discuss the requirements of the *clausula rebus sic stantibus*, as this would have the effect that the Federal Supreme Court reviews the #facts and the law as if it were an appeals instance.

FSCD 22.02.1999 [(1999) ASA p. 541]

2e.13.4 Prohibition of Discriminatory and Confiscatory Measures

It is not for the Federal Supreme Court to review the arbitral #award as a court of appeal would do, but only to sanction discriminatory and confiscatory measures which are ordered or upheld by the #arbitral tribunal.

FSCD 4A_510/2015 c. 6.2.2, FSCD 4A_634/2014 c. 5.2.2, FSCD 4P.12/2000 c. 5b/cc

An action, a measure or a decision is discriminatory if it illicitly violates the #personal rights of the addressee because it is only taken based on his gender, its race, its state of health, its sexual preferences, its religion, its nationality or its political opinions. German legislation distinguishing according to race between "Jews" and "Aryans" has thus been recognized as being contrary to #public policy.

FSCD 4A_370/2007 c. 5.4, FSCD 4P.12/2000 c. 5a/aa

2e.13.5 Prohibition of Expropriation Without Compensation

Appropriations, #expropriations and nationalisations without compensation are considered as confiscatory measures contrary to #public policy.

*FSCD 102 Ia 574 [581], FSCD 4P.280/2005 c. 2.2.2, FSCD 4P.12/2000 c. 5a/aa

It goes without saying that this definition cannot apply to an #award concerning the amount of the #fees to be reimbursed to the winning party in a civil dispute.

FSCD 4P.280/2005 c. 2.2.2

In the field of #expropriation without compensation, it has for instance been considered contrary to #public policy that a State appropriates the assets of a company without taking into account the liabilities (FSCD 53 III 54 [58], FSCD 51 II 259 [264]). Limitations of rights to assets located in the territory of another State in principle violate #public policy if the State measures are contrary to fundamental principles such as the prohibition of discrimination guaranteed by public international law.

FSCD 4P.200/2001 c. c. 2b

According to principles of public international law, there is no absolute right to be awarded full compensation.

FSCD 4P.200/2001 c. 2c

2e.13.6 Prohibition of Forced Labour

An #award which would violate, even indirectly, a principle as fundamental as the one of the prohibition of forced labour (Art. 4(2) ECHR) would be contrary to the Swiss notion of #public policy.

FSCD 144 III 120 [130], FSCD 138 III 322 [327], FSCD 4A_157/2017 c. 3.1, FSCD 4A_312/2017 c. 3.1, FSCD 4A_32/2016 c. 4.1, FSCD 4A_116/2016 c. 4.1, FSCD 4A_304/2013 c. 5.1.1, FSCD 4A_458/2009 c. 4.1 & 4.4.3.3, FSCD 4A_370/2007 c. 5.3.2

2e.13.7 Principle of Respect for Human Dignity

The Federal Supreme Court would not hesitate to sanction as a violation of substantive #public policy an #award that would disregard the fundamental principle of the respect for human dignity.

FSCD 144 III 120 [130], FSCD 4A_157/2017 c. 3.1, FSCD 4A_312/2017 c. 3.1, FSCD 4A_32/2016 c. 4.1, FSCD 4A_116/2016 c. 4.1, FSCD 4A_304/2013 c. 5.1.1, FSCD 4A_458/2009 c. 4.1 & 4.4.3.3

2e.13.8 Delivery of Weapons

The delivery of arms or weapons in regions in which an armed conflict exists or threatens to break out, is in principle a violation of universal #public policy.

FSCD 4C.172/2000 c. 5f

It is doubtful whether a general prohibition of delivery of weapons to a crisis region merely based on the general Swiss perception of #*bonos mores* and sense of decency of all fair and reasonable thinking persons, exists and has to be considered to fall within the catalogue of values of the Swiss #*bonos mores*. This field of #*bonos mores* relates much more to a concrete behaviour when human beings live together within a society. The use of arms to defend one's own country (self-defence) or to help an attacked country (self-defence assistance) can, in certain circumstances, undoubtedly represent a moral duty of all fair and reasonable thinking persons.

FSCD 4C.172/2000 c. 5

2e.13.9 Privity of Contractual Rights

The principle of *#privity* of contractual rights [*res inter alios acta aliis neque prodesse neque nocere potest*] is the negative counterpart of the principle of *#pacta sunt servanda* (principle that agreements must be kept) and its violation may be claimed by a *#motion* to set aside according to Article 85(c) fSOFJ and Article 190(2)(e) PILA.

FSCD 120 II 155 [169], FSCD 09.02.1998 [(1998) ASA p. 651]

2e.13.10 Principle of *ne bis in idem*

The principle of *ne bis in idem* must be included in the concept of *#public policy* within the meaning of Article 190(2)(e) PILA.

FSCD 4A_324/2014 c. 6.2.1, FSCD 4A_386/2010 c. 9.3.1

The Federal Supreme Court left open the extent to which this principle of criminal law would also have to be taken into account in disciplinary sport law.

FSCD 4A_324/2014 c. 6.2.1, FSCD 4A_386/2010 c. 9.3.1

The question of whether this principle belongs to procedural or substantive *#public policy* is left open.

FSCD 4A_386/2010 c. 9.3.1

2e.13.11 Corruption and Bribery

According to Swiss law, *#promises* to pay *#bribes* are illegal, and therefore null and void pursuant to Articles 19 et seq. CO. They are also contrary to international *#public policy*.

FSCD 138 III 322 [327], FSCD 119 II 380 [384-385], FSCD 4A_50/2017 c. 4.1, FSCD 4A_136/2016 c. 4.3.2, FSCD 4A_532/2014 & 4A_534/2014 c. 5.1, FSCD 4A_231/2014 c. 5.1, FSCD 4A_448/2013 c. 3.1.2, FSCD 4A_362/2013 c. 3.1.2, FSCD 4A_538/2012 c. 6.1, FSCD 4P.208/2004 c. 6.1, FSCD 16.10.1997 c. 3a, FSCD 30.12.1994 [(1995) ASA p. 226]

In order for an arbitral *#award* to be set aside on the grounds of *#public policy*, the corruption must be established and the *#arbitral tribunal* must have refused to take it into account.

FSCD 4A_65/2018 c. 4.4.3, FSCD 4A_50/2017 c. 4.3.2, FSCD 4A_136/2016 c. 4.1, FSCD 4A_532/2014 & 4A_534/2014 c. 5.1, FSCD 4A_231/2014 c. 5.1, FSCD 4A_538/2012 c. 6.1, FSCD 4P.208/2004 c. 6.1, FSCD 30.12.1994 [(1995) ASA p. 226]

An *#award* which does not determine the *#invalidity* of an agreement regarding an “offer to cover” because there are no indications that *#bribery* was involved, because it does not constitute a prohibited “*pactum de licitando*” and because it does not aim either at influencing the prices or at influencing in a decisive way the outcome of the adjudicating proceedings, is not contrary to *#public policy*, and not even arbitrary within the meaning of Article 8 FC.

FSCD 13.11.1998 [(1999) ASA p. 534]

2e.13.12 Violation of Article 27 CC

The notion of #public policy includes only the fundamental principles of the legal system in question, namely the fundamental values to be observed in the context of every decision, such as [...] the prohibition of excessive undertakings (cf. Art. 27(2) CC) if this constitutes an obvious and serious violation of #personal rights.

FSCD 138 III 322 [327, 329], FSCD 4A_172/2015 c. 5.1

For certain legal scholars, the violation of Article 27 CC could, under certain circumstances, constitute a violation of #public policy. However, this can only be the case concerning serious and clear violations of fundamental rights.

FSCD 144 III 120 [134], FSCD 138 III 322 [327, 329], FSCD 4A_312/2017 c. 3.1, FSCD 4A_668/2016 c. 4.2, FSCD 4A_32/2016 c. 4.1, FSCD 4A_116/2016 c. 4.2.3, FSCD 4A_132/2016 c. 3.2.1 & 3.2.3, FSCD 4A_568/2015 c. 4.1 & 4.2, FSCD 4A_448/2013 c. 3.1.2, 3.4, FSCD 4A_362/2013 c. 3.1.2 & 3.4, FSCD 4A_304/2013 c. 5.2.2, FSCD 4A_524/2012 c. 3.2, FSCD 4A_458/2009 c. 4.4.3.2, FSCD 4A_320/2009 c. 4.4, FSCD 4P.12/2000 c. 5b/aa, FSCD 25.11.1997 c. 2

A contractual limitation of economic freedom [Art. 27 CC] is only considered excessive pursuant to Article 27(2) CC if the obliged party is at the mercy of the other party's #arbitrariness, its economic freedom is totally negated or limited to an extent that the bases of its economic existence are in danger. Article 27(2) CC also applies to undertakings which are excessive with regard to their subject, that is those concerning certain #personal rights which are so important that a person cannot be bound in this respect for the future.

FSCD 144 III 120 [134], FSCD 138 III 322 [329], FSCD 4A_312/2017 c. 3.1, FSCD 4A_668/2016 c. 4.2, FSCD 4A_32/2016 c. 4.1, FSCD 4A_116/2016 c. 4.2.3, FSCD 4A_458/2009 c. 4.4.3.2, FSCD 4A_320/2009 c. 4.4, FSCD 4P.12/2000 c. 5b/bb, FSCD 25.11.1997 c. 2

The principle enshrined at Article 27(2) CC is one of the largely recognised essential values which, according to the majority opinion in Switzerland, should form the basis of every legal system.

FSCD 138 III 322 [329]

The limits on contractual restrictions on the grounds of protection of #personal rights also apply to #statutes and decisions of #legal persons including sports #federations. Measures taken by sports #federations which seriously harm the development of individuals who practice the sport as a profession are licit only when the interests of the #federations justify the infringement of the individual's #personal rights.

FSCD 138 III 322 [329-330], FSCD 4A_362/2013 c. 3.4

The threat of an unlimited occupational ban by a sports #federation for failure to pay an #award of damages, constituted a clear and serious encroachment on the #appellant's #personal rights and disregarded the principles embodied in Article 27(2) CC. The ban would deprive the #appellant of earning income which would enable it to pay the debt although the sanction was not necessary to enforce the damages awarded as the #award could have been enforced through the NYC. The abstract goal of enforcing compliance by football players with their duties to their employers is clearly of less weight than a worldwide occupational ban. The

#award constituted a clear and serious violation of the #appellant's #personal rights and was contrary to #public policy.

FSCD 138 III 322 [331-332], FSCD 4A_448/2013 c. 3.4, FSCD 4A_362/2013 c. 3.4

Finding in principle that substantive #public policy within the meaning of Article 190(2)(e) PILA prohibits all excessive commissions in the field of recruitment, while stating that a commission is excessive if it exceeds a certain percentage of the worker's salary is not necessary or even desirable.

FSCD 4A_312/2017 c. 3.3.3

Article 17(2) FIFA rules on the status and transfer of players which establishes a joint liability, with respect to the payment of an indemnity for breach of contract without #just cause between the professional player and its new club is not contrary to substantive #public policy.

FSCD 4A_32/2016 c. 4.3

The same reasoning applies concerning Article 20(1) CC.

FSCD 4A_116/2016 c. 4.2.3, FSCD 4A_458/2009 c. 4.4.3.2

It is possible to take into account the pertinent provisions and general principles of Swiss law concerning excessive undertakings entered into by one of the contracting parties as long as they constitute the expression of essential and widely recognized values which according to the conceptions prevailing in Switzerland should constitute the foundation of every legal order.

FSCD 4A_116/2016 c. 4.2.3

It has already been held that a #contractual penalty of 10% of a sales price was not considered excessive according to Swiss law. Furthermore, a penalty interest of 12% is not contrary in itself to the opportunity given by Article 104(2) CO to the parties to agree upon an annual interest rate of above 5%. That a failure to pay the #contractual penalty within the #time limit foreseen leads to late payment interest of 5% per annum does not appear disputable either as this is a consequence foreseen by the law when the debtor is in default (Art. 104(1) CO). One does not see how combining these three obligations leads to the #appellant's freedom being excessively infringed pursuant to Article 27(2) CC such that it would be subject to the other contracting party's #arbitrariness, would suppress its economic freedom or limit it to such an extent that the very basis of its economic existence would be jeopardized.

FSCD 4A_536/2016 c. 4.3.2

One cannot deduce from Article 27 CC an entitlement to terminate at any time a contract limited in time.

FSCD 4A_568/2015 c. 4.2

Contrary to [FSCD 138 III 322], the ban against the #appellant is limited in time and does not remain in force merely due to the failure of making a payment and rather is the consequence of a violation of the applicable provisions covering sanctions against manipulations of games or #bribery in sport.

FSCD 4A_362/2013 c. 3.4, FSCD 4A_448/2013 c. 3.4

The disputed proportionality of a sanction could lead to a violation of #public policy by the #award under #appeal only if it constitutes a blatant and grievous infringement of privacy.

FSCD 4A_522/2012 c. 4.2.2, FSCD 31.03.1999 [(1998-2000) Digest CAS p.780]

A blanket reference to an alleged violation of #personal rights does not constitute a violation of #public policy.

FSCD 4A_43/2010 c. 3.6.2, FSCD 4A_458/2009 c. 4.4.3.2,

2e.13.13 *Force majeure*

The question of whether *force majeure* belongs to substantive #public policy is left open.

FSCD 4A_502/2017 c. 4.2.1

2e.13.14 *Estoppel (venire contra factum proprium)*

The question has been left open whether the principle of #good faith, in the sense of the prohibition of contradictory conduct [*estoppel, venire contra factum proprium*] has universal validity in international trade.

FSCD 01.09.1993 [(1996) ASA p. 627]

The fact that #evidence which has already been admitted, is not taken does not, as such, violate the #right to be heard of a party and does not constitute a clear violation of the prohibition of contradictory conduct or of the principle of #good faith, if the #evidence is, after an anticipated assessment of #evidence, considered as being not relevant or appropriate.

FSCD 4P.48/2005 c. 3.4.2.1

2e.13.15 *Prohibition of Reformatio in Peius*

The Federal Supreme Court left open the question whether the prohibition of *reformatio in peius* is part of #public policy.

FSCD 4A_624/2009 c. 3.2.1, FSCD 4A_17/2007 c. 4.2

The principle of the prohibition of *reformatio in peius* is not violated when the #arbitral tribunal imposes a sanction on an athlete which is more severe than that issued by a first instance tribunal provided that the sanction is requested by the opposing party in accordance with the applicable procedural rules.

FSCD 4A_624/2009 c. 3.2.1

2e.13.16 *Principles of lex mitior and non-retroactivity*

The Federal Supreme Court left open the question whether the principles of *lex mitior* and non-#retroactivity form part of #public policy and whether they are an integral part of substantive or procedural #public policy.

FSCD 4A_620/2009 c. 4.2

As a rule, the principles of *lex mitior* and non-[#]retroactivity do not apply to procedural law.

FSCD 4A_620/2009 c. 4.3.2

2e.13.17 Primacy of International Law over Domestic Law

The primacy of international law over domestic law is undoubtedly a generally admitted principle including in Switzerland. This does not necessarily mean that an [#]award ordering a party to compensate its opponent fairly would be incompatible with the restrictive definition of substantive [#]public policy even though it would contradict a standard of supranational law.

FSCD 144 III 120 [131], FSCD 4A_568/2015 c. 5.3.1 (not published in FSCD 141 III 495)

2e.13.18 Partner's Right to an Equal Share on Profits and Losses

One could ask oneself whether Article 533(1) CO [*providing that unless otherwise agreed, each [#]partner of a simple partnership has an equal share in profits and losses regardless of the nature and amount of his contribution*] is part of [#]public policy within the meaning of Article 190(2)(e) PILA.

FSCD 08.05.1998 c. 2b

2e.13.19 Prohibition of Selling a Shell Company

The prohibition of [#]selling a shell company [*Mantelhandel*] is not part of the fundamental legal principles.

FSCD 16.02.1998 c. 5b

2e.13.20 Monopoly of State in Field of Compulsory Enforcement

The Federal Supreme Court left open the question whether the monopoly of the State in the field of [#]compulsory enforcement is part of [#]public policy. The decision of a FIFA disciplinary commission to fine a member of its [#]association for a violation of its rules, does not amount to the [#]compulsory enforcement of a monetary claim.

FSCD 4P.240/2006 c. 4.2

2e.13.21 Principle of *dolus semper praestatur*

The Federal Supreme Court left open the question of whether the principle of *dolus semper praestatur* is part of [#]public policy.

FSCD 4P.104/2004 c. 6.2

2e.13.22 Reduction of Excessive Liquidated Damages

Article 163(3) CO which obliges a court to reduce excessive penalties, is a [#]public policy provision, namely a [#]mandatory norm which the court must apply even if the debtor of the [#]contractual penalty did not expressly seek a reduction of its

amount (FSCD 143 III 1 [2]). This concept of #public policy has nothing to do with #public policy within the meaning of Article 190(2)(e) PILA.

FSCD 4A_508/2017 c. 4.4, FSCD 4A_312/2017 c. 3.3.3, FSCD 4A_536/2016 & 4A_540/2016 c. 4.3.2, FSCD 4A_510/2015 c. 6.2.2, FSCD 4A_634/2014 c. 5.2.2

The Federal Supreme Court has repeatedly held that it does not review arbitral #awards in relation to Article 163(3) CO as if it were an appeals instance with unfettered #powers of review.

FSCD 4A_508/2017 c. 4.4, FSCD 4A_510/2015 c. 6.2.2, FSCD 4A_634/2014 c. 5.2.2

This observation also applies to Article 417 CO, as well as Article 9(4) LSE [*Federal Law of 6 October 1989 on employment services and the rental of services*], Article 20(1) OSE [*Ordinance of 16 January 1991 on employment services and the rental of services*] and Article 3(1) OEmol-LSE [*Ordinance of 16 January 1991 on Fees, Commissions and Securities provided for in the Employment Services Act*].

FSCD 4A_312/2017 c. 3.3.3

The Federal Supreme Court left open the question whether or not the reduction of excessive #liquidated damages is part of #public policy.

FSCD 4P.88/2006 c. 5

2e.13.23 Punitive Damages

The question of whether the prohibition of #punitive damages belongs to #public policy within the meaning of Article 190(2)(e) PILA is left open.

FSCD 4A_536/2016 c. 4.3.2, FSCD 4A_16/2012 c. 4.3

The majority of legal writers would reject the notion that an #award is contrary to substantive #public policy simply because it orders a party to pay #punitive damages.

FSCD 4A_536/2016 c. 4.3.2

Foreign judgments awarding so-called #punitive damages can only be refused in Switzerland on the basis of Swiss #public policy if the penalty component clearly outweighs the obligation to pay and not if the aggrieved party makes a profit in excess of the damage incurred. To a certain extent, however, payments with a penalty character must be accepted. It should be remembered that Article 336a CO (*penalty payment in the event of abusive termination of the employment contract*) also provides for #punitive damages to a certain extent. The same applies to a #contractual penalty.

ZH 05.11.2018 c. 6.2

2e.13.24 Prohibition of Unjust Enrichment

The question has been left open whether or not the prohibition of #unjust enrichment with regard to damages is part of international #public policy.

FSCD 17.07.1998 [4P.7/1998] [(2002) ASA p. 674]

2e.13.25 Competition Law

- See also Article 177(1) PILA, section 1.10; and Article 190(2)(b) PILA, section 2b.14.2

There can be no doubt any longer: the provisions of any competition law whatsoever are not part of the essential and largely recognized values, which, according to the conception prevailing in Switzerland, should form the basis of every legal system. Therefore, the violation of such a provision does not trigger the application of Article 190(2)(e) PILA. The situation where such a violation could be incompatible with one of the principles which #case law derived from the notion of substantive #public policy must be examined separately.

FSCD 144 III 120 [130-131], FSCD 132 III 389 [398], FSCD 4A_43/2010 c. 3.6.1, FSCD 4A_320/2009 c. 4.2

It is doubtful whether the national or European provisions of competition law are part of the fundamental judicial and moral principles recognized by all #civilised States to a point that their violation has to be considered as contrary to #public policy.

FSCD 128 III 234 [243], FSCD 13.11.1998 [(1999) ASA p. 534]

2e.13.26 Violation of Mandatory Legal Provision

The fact that a legal provision is mandatory and that the parties cannot waive it by agreement does not mean that it belongs to #public policy within the meaning of Article 190(2)(e) PILA and that its violation can be examined by the Federal Supreme Court with full #powers of review.

FSCD 4A_132/2016 c. 3.2.2

2e.13.27 Decision in Equity Instead of According to the Rules of Law

A decision rendered in #equity, instead of according to the rules of law agreed upon by the parties, does not violate #public policy if the application of the agreed rule of law would not have led to a fundamentally different result, which would also have been compatible with #public policy.

FSCD 116 II 634 [637], *FSCD 110 Ia 56 [57-58], FSCD 4P.26/2004 c. 4.2, FSCD 16.10.1997 c. 2c, FSCD 16.02.1996 c. 2, FSCD 15.11.1993 c. 5b

If the #arbitrators are authorised to decide in #equity [as *gütliche Schlichter*, *amiables compositeurs*, *amichevoli compositori*], they are empowered to depart from the application of mandatory law, including procedural rules, with the exception however of #public policy provisions, and they are allowed to be guided by #equity.

*FSCD 107 Ib 63 [65], FSCD 4P.114/2001 c. 2c/bb/aaa

If an #arbitrator is mandated to decide as an *amiable compositeur* and therefore decides, with the exception of the #public policy provisions, *ex aequo et bono*, this does not prevent it from deciding on the basis of a certain law, if it considers that this is in conformity with an *ex aequo et bono* decision.

*FSCD 110 Ia 56 [58], VD 19.05.1999 p. 13

Even though the opinions on the notion of #equity may diverge, it is certain that *amiables compositeurs* have much larger freedom of judgment – called for by the parties within the limits of their autonomy – than an #arbitrator called to decide in accordance with the law, who can only found its decision in #equity if the law itself refers to this notion.

*FSCD 107 Ib 63 [65]

It is not certain whether the usurpation of the powers to decide in #equity is contrary to #public policy, at least when the #award does not come to a conclusion which is incompatible with #public policy (FSCD 116 II 634 [637]).

FSCD 4A_370/2007 c. 5.6

If the #arbitral tribunal is empowered to decide in #equity, this faculty does not, in advance, exclude a violation of #public policy.

FSCD 08.02.1994 c. 3

If the parties empower the #arbitrators to decide in #equity, the #powers of review of the Federal Supreme Court are limited.

FSCD 08.02.1993 c. 3

The #arbitral tribunal which is empowered to decide in #equity does not violate #public policy if it disregards a contractual clause when the #arbitrators would have had this possibility even without the powers of *amiables compositeurs*.

FSCD 19.02.1990 [(1990) ASA p. 178-179]

2e.13.28 Contradictory Award

The #grievance related to an internal contradiction in an #award is not covered by the definition of substantive #public policy.

FSCD 128 III 191 [198], FSCD 4A_522/2016 c. 3.2.2, FSCD 4A_322/2015 c. 4.3, FSCD 4A_678/2015 c. 3.2.2, FSCD 4A_426/2014 c. 5.1.2, FSCD 4A_448/2013 c. 3.1.2, FSCD 4A_362/2013 c. 3.2.2, FSCD 4A_188/2013 c. 3.2.2, FSCD 4A_276/2012 c. 3.2, FSCD 4A_150/2012 c. 5.2.1, FSCD 4A_654/2011 c. 4.2, FSCD 4A_481/2010 c. 4, FSCD 4A_440/2010 c. 5.2.4 (not published in FSCD 137 III 85), FSCD 4A_386/2010 c. 8.3.1, FSCD 4A_320/2009 c. 4.3, FSCD 4A_464/2009 c. 5.1, FSCD 4A_612/2009 c. 6.2.2

This includes an internal contradiction between the #award and the #reasons justifying it as well as between the various #reasons contained within the #award.

FSCD 4A_386/2010 c. 8.3.1,

Article 190(2)(e) PILA also aims at guaranteeing a certain minimum quality of international arbitration in Switzerland. Therefore, an #award which suffers from an internal contradiction is also contrary to #public policy.

FSCD 4P.99/2000 c. 33b/aa, FSCD 17.02.1999 [(2000) ASA p. 318]

Some doctrine considers that an arbitral #award is null and void if there is a fundamental internal contradiction, i.e. if the #award is absurd to the extent that it adds confusion and is contradictory to #public policy. This doctrine can be followed to the extent that an arbitral #award cannot have effects which are internally contradictory, or which cannot at all be reconciled with the #reasons given. However, incomprehensible #awards are not necessarily absurd; they

have to be explained and clarified as much as possible. This opinion is confirmed if one considers that an internal contradiction in the #award does not lead to its absolute nullity but permits at the outmost to set it aside for a violation of #public policy. Therefore an #award can only be considered null and void with respect to its content in exceptional cases.

FSCD 16.10.1997 c. 2a/aa, FSCD 21.06.1995 [4P.267/1994] c. 3a

An internally contradictory #award may violate #public policy. However, this presupposes that the directions of the arbitral #award are contradictory in themselves or are in contradiction with the respective #reasons.

FSCD 09.07.1996 [4P.114/1995] c. 2b/cc

The decision on the #merits of a disputed claim violates #public policy if it contradicts itself.

FSCD 30.12.1994 [(1995) ASA p. 224]

2e.13.29 Burden of Proof

Rules on the #burden of proof do not form part of #public policy.

FSCD 4A_497/2015 c. 5.2 & 5.3, FSCD 4A_616/2015 c. 4.3.1

2e.13.30 Principle of Liability Based on Fault

The principle of liability based on fault is not a fundamental principle forming part of #public policy, which should be observed in doping proceedings and which the principle of strict liability would violate.

FSCD 4A_522/2012 c. 4.2.2, FSCD 4P.105/2006 c. 8.2

2e.13.31 Endorsement of Subsidiary Liability by Member States

There is no violation of #public policy when member States of an international organisation are ordered, in accordance with the principles of public international law, to endorse the subsidiary liability of the member States.

FSCD 120 II 155 [169-171]

2e.13.32 Compound Interest

Compound interest does not violate #public policy within the meaning of Article 190(2)(e) PILA.

FSCD 4A_634/2014 c. 5.2.2

2e.13.33 Obligation to Pay Interest

The obligation to pay #default interest and compensatory interest does not derive from a principle that is part of #public policy.

FSCD 17.07.1998 [4P.7/1998] [(2002) ASA p. 675]

#Public policy does not require at all that every claim necessarily bears interest.

FSCD 03.11.1997 c. 4b/aa

2e.13.34 Costs of the Arbitration and Legal Fees

An arbitral #award which apportions the #costs of the proceedings “in view of the circumstances” is not contrary to #public policy, as it is clear that the #costs are apportioned between the parties according to the extent to which the parties have been successful or unsuccessful.

FSCD 116 II 373 [375]

It does not matter that the #appellant paid a part of the #advance on costs within the imparted #time limit. That the #appellant was willing to pay the remaining sum later is also not decisive. Indeed, the obligation to pay an #advance on costs within a certain #time limit would become meaningless if one accepted such an argument based on the sole intention, non-proven, alleged by the debtor of the #advance on costs.

FSCD 4A_692/2016 c. 6.3

Article 190(2) PILA does not contain a #ground for setting aside which could be used to challenge an obviously excessive #arbitrator’s #fee before the Federal Supreme Court.

FSCD 4A_254/2013 c. 2.2

Substantive #public policy cannot be violated for the mere reason that the decision on #costs is based on a tariff which, according to the applicant, is not applicable.

FSCD 4P.304/2006 c. 5.1

The question has been left open whether procedural #public policy requires that it be possible to #appeal with #suspensive effect an immediately enforceable decision on #costs in an interim #award.

FSCD 4P.196/2002 c. 4.4

There is no violation of #public policy if the #arbitral tribunal adopts other criteria for the apportionment of #costs, such as the importance of the amount allocated, independently of the initial #prayers for relief.

FSCD 09.06.1998 [(1998) ASA p. 660]

A procedural rule which limits the amount of the legal #fees reimbursed to the winning party to a part of its attorney’s #fees does not manifestly violate procedural #public policy.

FSCD 4P.280/2005 c. 2.2.1

It goes without saying that this definition cannot apply to an #award concerning the amount of the #fees to be reimbursed to the winning party in a civil dispute.

FSCD 4P.280/2005 c. 2.2.2

In theory, it is not inconceivable that the decision of an #arbitral tribunal with regard to the amount of #fees to be reimbursed violates substantive #public policy. However, besides the fact that it is difficult to see to which element of this notion the #grievance could be connected to, this #ground for setting aside cannot be made available more liberally to the #appellant who criticises the amount to be reimbursed to the other party than to the #appellant who criticises the #award on the #merits. Therefore, it would not be sufficient that the amount

of #fees to be reimbursed fixed by the #arbitral tribunal could be considered as being excessive, in order for the State judge, seized by a #motion to set aside filed by the debtor of this amount, to intervene based on a violation of substantive #public policy. On the contrary, in order to justify such an intervention, the amount of #fees to be reimbursed fixed by the #arbitral tribunal must be far out of proportion compared to the necessary #costs incurred by this party for the defence of its rights, taking into account all the circumstances of the case at hand, so as to violate in a shocking way the most essential principles of the decisive legal order.

FSCD 4A_524/2009 c. 5.2.6.1, FSCD 4P.280/2005 c. 2.2.2

The Federal Supreme Court only intervenes with the greatest restraint when #arbitrariness is argued in the area of #fees. This is even more so in matters of international arbitration especially when the #arbitrators rule on the basis of equitable principles.

FSCD 4A_524/2009 c. 5.2.6.1

The fact that a party mandates an attorney-at-law applying a high hourly #fee rate, whereas the opposing party instructed an attorney-at-law with a more attractive hourly rate does not entail that the #fees to be reimbursed to the first party are *ipso facto* excessive.

FSCD 4P.280/2005 c. 2.2.2

The rule “costs follow the event” is regarded as a classical principle of the law of civil procedure. However, the extent to which it can also be classified as #public policy may remain open in the present case (and in any case cannot be inferred from the literature cited by the #respondent).

SZ 10.10.2011 c. 5b

2e.13.35 Success Fees

Neither the disproportion between the performance-related and the non-performance-related part of the remuneration nor the lack of parallel interests caused by the remuneration mechanism amount to a violation of #public policy.

FSCD 4A_125/2018 c. 3.3

In FSCD 5A_409/2014 of 15.09.2014, an arbitral #award in exequatur proceedings for a performance-related #fee of USD 1,837,500 (corresponding to approx. 2% of the total settlement amount) was considered as compatible with #public policy.

FSCD 4A_125/2018 c. 3.2.3

In another judgment, the Federal Supreme Court did not consider a foreign arbitral #award on an agreement according to which the #fee owed amounted to 30% of the outcome to be a violation of the substantive #public policy (FSCD 5P.201/1994 of 09.01.1995 c. 7).

FSCD 4A_125/2018 c. 3.2.3

Even with a contingency #fee of over CHF 6,500,500, corresponding to approximately 6.5% of the financial interest, a breach of #public policy was denied

(FSCD 5P.128/2005 of 11.07.2005 c. 2.3), even though the fee agreement in question was a *pactum de quota litis*, which is inadmissible in Switzerland.

FSCD 4A_125/2018 c. 3.2.3

The agreement according to which the remuneration of counsel is based exclusively on a share of the proceeds of the proceedings, i.e. a *pactum de quota litis*, is prohibited under Swiss law.

GE 11.04.2014 c. 4.5.1

The principle of an agreement fixing #fees based on criteria unrelated to the lawyer's actual activity is not, however, in itself contrary to #public policy. A remuneration equivalent to 6.5% of the amount involved in a criminal trial, or a remuneration of 8% of the amount recovered, in addition to a fixed #fee bringing it to a total of 30% of the gain of the trial, was not considered by the Federal Supreme Court to be contrary to #public policy.

GE 11.04.2014 c. 4.5.1

2e.13.36 No Violation Because of Manifestly Wrong Findings of Facts, Violations of the Applicable Law, Wrong Interpretations of Contracts and Arbitrary Assessment of Evidence

The process of #interpretation of the statutory provisions of a private law body by an #arbitral tribunal cannot be the subject of a #grievance of a violation of #public policy.

FSCD 144 III 120 [130], FSCD 4A_474/2018 c. 3.1, FSCD 4A_157/2017 c. 3.1, FSCD 4A_312/2017 c. 3.1, FSCD 4A_32/2016 c. 4.1, FSCD 4A_116/2016 c. 4.1, FSCD 4A_70/2015 c. 4.2

There is no violation of #public policy merely because #evidence has been assessed arbitrarily, the #facts have been manifestly wrongly established, a contractual clause has not been correctly interpreted or applied, or applicable legal rules have been clearly violated.

FSCD 127 III 576 [577-578], FSCD 121 III 331 [333], FSCD 117 II 604 [606], FSCD 116 II 634 [636-637], FSCD 115 II 102 [105], FSCD 4A_345/2017 c. 3.3, FSCD 4A_157/2017 c. 3.1, FSCD 4A_312/2017 c. 3.1, FSCD 4A_32/2016 c. 4.1, FSCD 4A_70/2015 c. 4.2, FSCD 4A_304/2013 c. 5.1.1, FSCD 4A_150/2012 c. 5.1, FSCD 4A_394/2010 c. 4.2, FSCD 4A_414/2010 c. 2.2, FSCD 4A_458/2009 c. 4.1, FSCD 4A_524/2009 c. 5.1, FSCD 4A_488/2009 c. 3.1, FSCD 4A_444/2009 c. 4.2, FSCD 4A_612/2009 c. 6.3.1, FSCD 4A_258/2009 c. 4.2.2, FSCD 4A_256/2009 c. 4.2.2, FSCD 4P.154/2006 c. 3.1, FSCD 4P.54/2006 c. 3.1, FSCD 4P.48/2005 c. 3.4.2.1 & 3.4.2.2, FSCD 4P.242/2004 c. 7.1, FSCD 4P.253/2004 c. 3.1, FSCD 4P.26/2004 c. 4.2, FSCD 4P.115/2004 c. 4, FSCD *FSCD 5P.232/2004 c. 3.7, FSCD 4P.104/2004 c. 6.3, FSCD 4P.270/2003 c. 3.4, FSCD 4P.250/2002 c. 2.1, FSCD 4P.207/2002 c. 2.1, FSCD 4P.167/2002 c. 3.2, FSCD 4P.71/2002 c. 3.2, FSCD 4P.320/2001 c. 5c/aa, FSCD 4P.143/2001 c. 3a/aa, FSCD 4P.64/2001 c. 2d, FSCD 26.05.1999 [(2000) ASA p. 334-335], FSCD 22.02.1999 c. 2b, FSCD 22.01.1998 c. 4a, FSCD 25.11.1997 c. 1a, FSCD 16.10.1997 c. 1c, FSCD 24.03.1997 [(1997) ASA p. 329], FSCD 01.03.1996 c. 2b/cc

As the notion of #public policy is narrower than the notion of #arbitrariness, even clear violations of law and manifestly false #fact-findings, or #fact-findings which are contrary to the file, are not in and of themselves sufficient to constitute a violation of #public policy in international #arbitral proceedings.

FSCD 127 III 576 [578], FSCD 121 III 331 [333], FSCD 116 II 634 [636-637], FSCD 4A_32/2016 c. 4.1, FSCD 4A_70/2015 c. 4.2, FSCD 4A_304/2013 c. 5.1.1, FSCD 4A_524/2009 c. 5.1, FSCD 4A_444/2009 c. 4.2.1, FSCD 4P.154/2006 c. 3.1, 4P.105/2006 c. 7.4, FSCD 4P.48/2005 c. 3.4.2.2, FSCD 4P.253/2004 c. 3.1, FSCD 4P.99/2000 c. 3b/bb, FSCD 4P.12/2000 c. 4a/bb, FSCD 31.03.1999 [(1998-2000) Digest CAS p. 779], FSCD 17.02.1999 [(2000) ASA p. 318], FSCD 13.11.1998 [(1999) ASA p. 533], FSCD 11.05.1992 [(1992) ASA p. 400]

A wrong #interpretation of a contract does not constitute as such a violation of #public policy. The Federal Supreme Court cannot examine whether the result of the #interpretation made by the #arbitral tribunal is compatible with the statute and constitutional law (that is, it cannot review the prohibition of #arbitrariness). Therefore, it can only examine whether the result of the #interpretation, that is the content of the contract as determined by the #arbitral tribunal, is compatible with substantive #public policy.

FSCD 117 II 604 [607], FSCD 4P.99/2000 c. 3b/cc, FSCD 4P.172/1999 [(2001) ASA p. 793]

There is no violation of #public policy if an #arbitral tribunal interprets a contract in a certain way and if this contract would have been considered valid by the State courts, in particular if the content of the contract determined by #interpretation is only subject to non-mandatory law, as for instance an agreement on #maturity or the #waiver to plead #set-off or the rule of *exceptio non adimpleti contractus* of Article 82 CO.

FSCD 117 II 604 [607]

If the Federal Supreme Court is invited to verify the compatibility of the attacked #award with substantive #public policy, it will not sanction on this basis, an erroneous #interpretation, even arbitrary, of a clause in a bilateral #investment treaty or a finding which is not supported by the relevant #facts.

FSCD 4A_157/2017 c. 3.3.4

An argument based on the incompatibility with substantive #public policy within the meaning of Article 190(2)(e) PILA and the related #case law is not admissible to the extent that it solely attempts to establish the contradiction between the attacked #award and the different norms of Swiss law invoked, notwithstanding the degree of this contradiction supposing that it has been established.

FSCD 4A_32/2016 c. 4.3

The Federal Supreme Court does not review in what way the #arbitral tribunal applied the concept of damages in the case at hand as it flows from the rules of the law or from the principles to be taken into consideration. The Federal Supreme Court cannot set aside an arbitral #award for violating #public policy simply because it disregarded this concept. The same applies to the field of international sports arbitration.

FSCD 4A_458/2009 c. 4.4.4

The Federal Supreme Court will not review, under the guise of an alleged violation of #public policy, whether the determination of the applicable law was correct or whether the applicable law was correctly applied.

FSCD 4A_624/2009 c. 3.2.2, FSCD 4A_260/2009 c. 3.2.2

The rules concerning the conditions under which a party may request a tribunal to determine the existence or non-existence of claims under federal law and the question of which rules apply for a prayer for a finding in proceedings before an international #arbitral tribunal do not fall within the domain of #public policy.

FSCD 4A_444/2009 c. 4.2.1

The issue of the applicable law as well as the question of whether the parties' #choice of law validly covers the infringement of the trademark rights does not concern any fundamental principle connected to the notion of #public policy.

FSCD 4A_444/2009 c. 5.1

There was no violation of #public policy when an #arbitral tribunal interpreted the concept of material breach in a contract subject to Swiss law according to the CISG and the Unidroit Principles of International Commercial Contracts.

FSCD 4A_240/2009 c. 2.2

Following the example of the process of #interpretation of a contract and the consequences which follow logically from it, the #interpretation made by an #arbitral tribunal of the provisions of #statutes of a private organism is also excluded from the scope of application of #public policy and cannot be reviewed by the Federal Supreme Court in the context of a #motion to set aside based on Article 190(2)(e) PILA.

FSCD 4A_258/2008 c. 4.2

In the context of the review of a violation of #public policy within the meaning of Article 190(2)(e) PILA, the Federal Supreme Court does not have to examine whether the #arbitrator has correctly interpreted a contractual clause.

FSCD 4A_370/2007 c. 5.5, FSCD 4A_268/2007 c. 3.1

In the context of the examination of a violation of #public policy within the meaning of Article 190(2)(e) PILA, the Federal Supreme Court does not have to review whether the #arbitrator has correctly interpreted a contractual clause, be it by determining the real or the hypothetical intent of the parties.

FSCD 4A_220/2007 c. 12.2.1, FSCD 4P.206/2006 c. 4.1, FSCD 4P.314/2005 c. 3.1, FSCD 4P.98/2005 c. 5.2.1

The #grievance based on Article 190(2)(e) PILA does not entitle a party to claim that the #arbitral tribunal did not apply the correct contractual provision, or that it interpreted or applied it wrongly.

FSCD 4A_42/2007 c. 6.3, FSCD 4P.134/2006 c. 5.2, FSCD 26.05.1999 c. 1a/bb

Substantive #public policy concerns only the application of the law; it does not comprise the #fact-findings on the basis of the #award.

FSCD 4P.250/2002 c. 2.1

A miscalculation must be corrected by a request for #revision to the Federal Supreme Court.

FSCD 4P.320/2001 c. 5c/aa

Another question is whether the result of such an #interpretation – i.e. the content of the contract as established by the #arbitrators – violates #public policy.

FSCD 19.11.1998 c. 5b, FSCD 20.10.1998 c. 2b/bb

2e.14 Procedural Public Policy

2e.14.1 Principle

There is a violation of procedural #public policy if fundamental and generally recognized principles have been violated, which leads to an unbearable contradiction with the #sense of justice, so that the decision appears incompatible with the values recognized in a State based on the rule of law.

FSCD 141 III 229 [234], FSCD 140 III 278 [279], FSCD 136 III 345 [347], FSCD 132 III 389 [392], FSCD 129 III 445 [464], FSCD 128 III 191 [194], FSCD 126 III 249 [253], FSCD 4A_550/2017 c. 7.2, FSCD 4A_170/2017 c. 6.1, FSCD 4A_247/2017 c. 4.1.1, FSCD 4A_236/2017 c. 5.1, FSCD 4A_384/2017 c. 4.1, FSCD 4A_668/2016 c. 4.1, FSCD 4A_80/2017 c. 3.2, FSCD 4A_692/2016 c. 6.1, FSCD 4A_405/2016 c. 3.2, FSCD 4A_690/2016 c. 4.1, FSCD 4A_342/2015 c. 5.1 (not published in FSCD 142 III 360), FSCD 4A_246/2014 c. 7.1, FSCD 4A_709/2014 c. 6.1, FSCD 4A_324/2014 c. 6.2.1, FSCD 4A_606/2013 c. 6.1, FSCD 4A_530/2013 c. 4, FSCD 4A_448/2013 c. 3.1.3, FSCD 4A_362/2013 c. 3.1.3, FSCD 4A_304/2013 c. 5.1.2, FSCA 4A_232/2013 c. 5.1.1, FSCD 4A_576/2012 c. 5.1, FSCD 4A_276/2012 c. 4.1, FSCD 4A_488/2011 c. 6.1, FSCD 4A_392/2010 c. 6.1, FSCD 4A_440/2010 c. 5.1.1 (not published in FSCD 137 III 85), FSCD 4A_600/2008 c. 5.1, FSCD 4A_539/2008 c. 6.2.1, FSCD 4A_258/2008 c. 4.1, FSCD 4A_370/2007 c. 5.1, FSCD 4P.96/2002 c. 6.1, FSCD 4P.280/2005 c. 2.1, FSCD 4P.154/2005 c. 6.1, FSCD 4P.146/2005 c. 5.2, FSCD 4P.196/2003 c. 5.1, FSCD 4P.320/2001 c. 5b

Procedural #public policy guarantees to the parties the right to an independent #award on the #prayers for relief and the #facts submitted to the #arbitral tribunal, in a way compatible with the applicable procedural rules.

FSCD 140 III 278 [279], FSCD 132 III 389 [392], FSCD 126 III 249 [253], FSCD 4A_345/2017 c. 2.2.2, FSCD 4A_170/2017 c. 6.1, FSCD 4A_247/2017 c. 4.1.1, FSCD 4A_384/2017 c. 4.1, FSCD 4A_668/2016 c. 4.1, FSCD 4A_692/2016 c. 6.1, FSCD 4A_690/2016 c. 4.1, FSCD 4A_342/2015 c. 5.1 (not published in FSCD 142 III 360), FSCD 4A_246/2014 c. 7.1, FSCD 4A_709/2014 c. 6.1, FSCD 4A_606/2013 c. 6.1, FSCD 4A_304/2013 c. 5.1.2, FSCA 4A_232/2013 c. 5.1.1, FSCD 4A_576/2012 c. 5.1, FSCD 4A_276/2012 c. 4.1, FSCD 4A_488/2011 c. 6.1, FSCD 4A_392/2010 c. 6.1, FSCD 4A_440/2010 c. 5.1.1 (not published in FSCD 137 III 85), FSCD 4A_600/2008 c. 5.1, FSCD 4A_539/2008 c. 6.2.1, FSCD 4A_258/2008 c. 4.1, FSCD 4A_370/2007 c. 5.1, FSCD 4P.96/2002 c. 6.1, FSCD 4P.280/2005 c. 2.1, FSCD 4P.154/2005 c. 6.1, FSCD 4P.146/2005 c. 5.2, FSCD 4P.196/2003 c. 5.1, FSCD 4P.263/2002 c. 7.2, FSCD 4P.320/2001 c. 5b

There is a violation of procedural #public policy if fundamental and generally recognized principles have been violated, which leads to an unbearable contradiction with the #sense of justice, so that the decision appears blatantly

incompatible with the legal order and the system of values of a civilised State. The right to a fair trial is among these guarantees.

FSCD 132 III 389 [392], FSCD 129 III 445 [464], FSCD 128 III 191 [194], FSCD 126 III 249 [253], FSCD 4A_345/2017 c. 2.2.1, FSCD 4P.23/2006 c. 4.2, FSCD 4P.146/2005 c. 5.2, FSCD 4P.263/2002 c. 7.2, FSCD 4P.196/2002 c. 4.2, FSCD 4P.207/2002 c. 2.2, FSCD 4P.320/2001 c. 5b, FSCD 4P.143/2001 c. 3a/aa, FSCD 4P.124/2001 c. 3b, FSCD 4P.64/2001 c. 2d, FSCD 30.12.1994 [(1995) ASA p. 222]

However, every violation, even arbitrary, of a procedural rule does not amount to a violation of procedural #public policy. Only the violation of a rule which is essential to ensure the fairness of the proceedings may be taken into account.

FSCD 129 III 445 [464], FSCD 126 III 249 [253], FSCD 121 III 331 [333], FSCD 4A_505/2017 c. 3.1.2, FSCD 4A_490/2016 c. 3.2.2, FSCD 4A_392/2015 c. 4.2, FSCD 4A_636/2014 c. 4.2, FSCD 4A_448/2013 c. 3.2.2, FSCD 4A_362/2013 c. 3.2.2, FSCD 4A_232/2013 c. 5.1.1, FSCD 4A_440/2010 c. 5.1.1 (not published in FSCD 137 III 85) c. 5.1.1, FSCD 4A_612/2009 c. 6.3.1, FSCD 4A_600/2008 c. 4.2.1.3, FSCD 4A_210/2008 c. 3.3.1.6, FSCD 4P.23/2006 c. 4.2, FSCD 4P.280/2005 c. 2.1, FSCD 4P.154/2005 c. 6.1, FSCD 4P.196/2003 c. 5.

Procedural #public policy requires compliance with the fundamental rules deduced from Articles 29 and 30 FC and Article 6 ECHR, in particular, the #right to be heard and to a fair trial.

FSCD 4A_530/2013 c. 4

2e.14.2 Relationship with Article 190(2)(a)-(d) PILA

According to well established #case law, procedural #public policy within the meaning of Article 190(2)(e) PILA is merely a subsidiary guarantee which can only be invoked if none of the #grounds set out in Article 190 (2)(a)-(d) PILA apply.

FSCD 138 III 270 [276], FSCD 4A_550/2017 c. 7.2, FSCD 4A_170/2017 c. 6.1, FSCD 4A_668/2016 c. 4.1, FSCD 4A_690/2016 c. 4.1, FSCD 4A_342/2015 c. 5.1 (not published in FSCD 142 III 360)

The procedural #public policy guarantee is a precautionary norm for procedural breaches which the legislature did not consider when adopting the other sections of Article 190(2) PILA. It does not enable a party to raise an argument falling within Article 190(2)(a)-(d) PILA which is inadmissible for another reason.

FSCD 138 III 270 [276], FSCD 4A_550/2017 c. 7.2, FSCD 4A_510/2015 c. 5, FSCD 4A_246/2014 c. 7.1, FSCD 4A_304/2013 c. 5.1.2, FSCA 4A_232/2013 c. 5.1.1, FSCD 4A_576/2012 c. 5.1, FSCD 4A_276/2012 c. 4.1, FSCD 4A_312/2012 c. 5, FSCD 4A_488/2011 c. 4.5

The procedural guarantees which are expressed in the #grounds for setting aside pursuant to Article 190(2)(a)-(d) PILA and the procedural aspect of #public policy according to Article 190(2)(e) PILA ensure the respect of the parties' right to an independent judgment on the #prayers for relief and the #facts submitted to the #arbitral tribunal, in accordance with the applicable procedural rules.

FSCD 129 III 445 [464], FSCD 128 III 191 [194], FSCD 126 III 249 [253], FSCD 4A_384/2017 c. 4.1, FSCD 4A_246/2014 c. 7.1, FSCD 4A_448/2013 c. 3.1.3, FSCD 4A_362/2013 c. 3.1.3, FSCD 4P.196/2002 c. 4.2, FSCD 4P.124/2001 c. 3b, FSCD 24.03.1997 [(1997) ASA p. 320]

If procedural rules outside of the framework of Article 190(2)(a)–(d) PILA are violated, the *#award* can be set aside if the violation of these provisions has the effect of violating *#public policy*.

FSCD 117 II 346 [347], FSCD 116 II 373 [375], FSCD 4P.74/2006 c. 6.3, FSCD 30.12.1994 [(1995) ASA p. 221]

Compared to the guarantees specifically mentioned in Article 190(2)(a)–(d) PILA, procedural *#public policy* has a general and subsidiary nature.

FSCD 4A_384/2017 c. 4.1, FSCD 4A_668/2016 c. 4.1, FSCD 4A_692/2016 c. 6.1, FSCD 4A_690/2016 c. 4.1, FSCD 4A_510/2015 c. 5, FSCD 4A_392/2015 c. 4.2, FSCD 4A_246/2014 c. 7.1, FSCD 4A_448/2013 c. 3.1.3, FSCD 4A_362/2013 c. 3.1.3, FSCD 4A_576/2012 c. 5.1, FSCD 4P.146/2005 c. 5.2, FSCD 09.07.1996 [4P.114/1995] c. 2a, FSCD 16.02.1996 c. 5a

The specific *#grounds* for setting aside contained in Article 190(2)(a)–(d) PILA prevail over the ground of Article 190(2)(e) PILA.

FSCD 4A_510/2015 c. 5, FSCD 4A_392/2015 c. 4.2, FSCD 4A_709/2014 c. 6.1, FSCD 4A_426/2014 c. 4.2.1, FSCD 4A_486/2014 c. 8, FSCD 4A_304/2013 c. 5.1.2, FSCD 4A_312/2012 c. 5, FSCD 4A_488/2011 c. 4.5, FSCD 4A_682/2012 c. 4.3, FSCD 4A_530/2011 c. 3.2, FSCD 4A_604/2010 c. 2.2.2, FSCD 4A_600/2010 c. 4.3, FSCD 4P.105/2006 c. 5.3

Procedural *#public policy* protects against the violation of fundamental procedural principles which are not included in the *#grounds* for setting aside of Article 190(2)(a)–(d) PILA.

FSCD 4A_448/2013 c. 3.1.3, FSCD 4A_362/2013 c. 3.1.3, FSCD 4A_576/2012 c. 5.1, FSCD 4P.196/2002 c. 4.2, FSCD 24.03.1997 [(1997) ASA p. 320]

The Federal Supreme Court examines first the formal *#grievances* because their admission leads to the setting aside of the *#arbitral award*, without it being necessary to examine the *#merits*.

FSCD 03.11.1997 c. 1

2e.14.3 Protective Function

Procedural *#public policy* within the meaning of Article 190(2)(e) PILA represents, like substantive *#public policy*, a mere incompatibility clause which only has a protective function. In particular, one should not, by a broad interpretation, derive from procedural *#public policy* a real “code on arbitral procedure”, to which the proceedings chosen by the parties have to conform.

FSCD 126 III 249 [253], FSCD 4A_345/2017 c. 4.3, FSCD 16.02.1996 c. 5a, FSCD 30.12.1994 [(1995) ASA p. 221]

2e.14.4 Timeliness of the Plea of Violation of Procedural Public Policy

- For the timeliness of other pleas of procedural flaws, see Article 177(1) PILA, section 1.15; Article 180(2) PILA; Article 186(2) PILA, section 2.5; Article 190(2)(a) PILA, section 2a.9; Article 190(2)(b) PILA, section 2b.2; Article 190(2)(c) PILA, section 2c.10; and Article 190(2)(d) PILA, section 2d.5

This procedural issue has to be claimed immediately. However, there is an exception for especially serious flaws, which have to be corrected *ex officio* and in any phase of the proceedings. The lack of #legal personality and of the #capacity to be a party to judicial proceedings figure among these flaws, because otherwise, one would be in a situation of recognizing the position of a party to an entity without legal existence.

FSCD 4P.146/2005 c. 5.2.1, FSCD 4P.235/2001 c. 8 (not published in FSCD 128 III 191)

An #appellant must have raised the procedural violation in the #arbitral proceedings and thereby have given the #arbitral tribunal the opportunity to remedy the violation. To the extent that it failed to do so and waited to see if the #award would be in its favour, it waived the right to raise such a violation in setting aside proceedings.

FSCD 4A_617/2010 c. 3.2

2e.14.5 Lack of Arbitrability

The #grievance based on a lack of #arbitrability falls under Article 190(2)(b) PILA and not under Article 190(2)(e) PILA (incompatibility with #public policy).

FSCD 4A_370/2007 c. 5.2.2

2e.14.6 Violation of *res judicata*

The #arbitral tribunal violates procedural #public policy if it renders a decision without taking into account the #*res judicata* effect of a previous decision or if it departs, in its final #award, from the opinion it expressed in a preliminary #award deciding a #preliminary issue on the #merits.

FSCD 141 III 229 [234], FSCD 140 III 278 [279], FSCD 136 III 345 [347], FSCD 128 III 191 [194], FSCD 4A_345/2017 c. 2.2.2, FSCD 4A_247/2017 c. 4.1.1, FSCD 4A_374/2014 c. 4.2.1, FSCD 4A_324/2014 c. 6.2.1, FSCD 4A_606/2013 c. 3, 6.3.1, FSCD 4A_392/2010 c. 6.2.1, FSCD 4P.4/2007 c. 5.1, FSCD 4P.98/2005 c. 5.1, FSCD 19.02.1990 [(1990) ASA p. 174-175]

#Res judicata also applies at the international level and in particular to the relationship between an *#arbitral tribunal* seated in Switzerland and a foreign State court. Therefore, if a party seizes an *#arbitral tribunal* sitting in Switzerland of a request identical to that which was the object of an enforceable judgment issued between the same parties in a territory other than Switzerland, the *#arbitral tribunal* must rule that the claim is inadmissible to the extent that the foreign judgment is capable of being recognized in Switzerland pursuant to Article 25(a) PILA, subject to the specific provisions contained in Article 1(2) PILA.

FSCD 141 III 229 [234], FSCD 140 III 278 [279], FSCD 4A_247/2017 c. 4.1.1, FSCD 4A_374/2014 c. 4.2.1, FSCD 4A_606/2013 c. 6.3.1

#Res judicata also applies to the relationship between an *#arbitral tribunal* seated in Switzerland and a foreign *#award*. The scope of the *#res judicata* effect of a foreign *#award* is determined according to the same principles as for a foreign court judgment.

FSCD 141 III 229 [234], FSCD 4A_374/2014 c. 4.2.1, 4.2.2

If a party to a procedure before an *#arbitral tribunal* sitting in Switzerland objects that an issue has already been adjudicated in a foreign *#award* in force, the former must examine, as a *#preliminary issue*, whether or not the conditions for *#recognition* of the foreign *#award* are met; an independent *#recognition procedure* is not necessary.

FSCD 141 III 229 [235], FSCD 4A_374/2014 c. 4.2.2

Unless an international treaty states otherwise, the *lex fori* determines whether the claim raised before a foreign State court and the claim submitted to a Swiss State court are identical. Hence the principles established by the *#case law* of the Federal Supreme Court in this respect are applicable. *#Res judicata* depends on the law of the State of origin, so it is up to this law to specify the conditions and limits of its effect.

FSCD 141 III 229 [235], FSCD 140 III 278 [280]

The Federal Supreme Court has emphasized that the *#res judicata* effect of a foreign *#award* is limited to the *#operative part* of the *#award* and that the *#reasons* are not included.

FSCD 141 III 229 [236], FSCD 128 III 191 [195]

The Federal Supreme Court applies to the *#res judicata* effect of a foreign *#award* the same principles as with regard to the foreign judgment of a State court.

FSCD 141 III 229 [236]

The *#res judicata* effect applies only insofar as the specific *#claim* was decided. To what extent this is the case is determined by the *#interpretation* of the judgment on the basis of its entire contents. While the *#res judicata* effect is limited to the *#operative part* of the *#award*, its scope frequently results from the *#reasons* of the decision, particularly when a *#claim* is rejected. The meaning of the specific *#operative part* of the *#award* is therefore to be assessed in each case on the basis of the entire *#reasons* of the decision.

FSCD 141 III 229 [238]

A foreign decision is recognized in Switzerland if, among other conditions, the judicial or administrative bodies of the State in which it was issued had #jurisdiction (Art. 25(a) PILA). This requirement is not met as to a decision which a State court issues without taking into account an #arbitration defence validly raised by the #respondent (FSCD 124 III 83 [87]). In the last cited decision, the Federal Supreme Court indicated that the examination of the indirect #jurisdiction of the foreign State court under Article 25(a) PILA must be examined with reference to Article II(3) NYC. Berger/Kellerhals submit that it would be more appropriate to treat this problem in light of Article 7 PILA and Chapter 12 of the same law relating to international arbitration. They approve an author for whom the NYC is not applicable to this matter, given that it does not treat the #recognition of foreign State judgments, the decisive issue not being whether the foreign State court had #jurisdiction according to its *lex fori* or not, which might facilitate dilatory manoeuvres but whether, from the point of view of Swiss law, there was a valid #arbitration agreement (Art. 178 PILA) as to an arbitrable dispute (Art. 177 PILA) which could form the foundation of the #jurisdiction of an #arbitral tribunal sitting in Switzerland. However, there is no need to examine any further this critique of the published federal #case law.

FSCD 140 III 278 [279-280], FSCD 4A_247/2017 c. 4.1.1

There is #*res judicata* when the claim in dispute is identical to that which was already the subject of an enforceable judgment. This is the case when in both proceedings the same parties submitted the same claim to the court on the basis of the same #facts. It is not necessary to include the legal basis in the definition of the object of the dispute and the identity of claims submitted is determined by the submissions of the claim and the #facts on which the submissions rely (FSCD 139 III 126 c. 3.2.2 & 3.2.3). The identity must be understood from a substantive and not a literal point of view, so that a new claim, no matter how it is formulated, will have the same object as the claim already adjudicated even if it appears to be its opposite or if it was already contained in the preceding action (FSCD 139 III 126 c. 3.2.3) such as a claim decided on the #merits in the first litigation and presented as a #preliminary issue in the second (FSCD 123 III 15 [19]).

FSCD 140 III 278 [281]

The #*res judicata* effect extends to all the #facts existing at the time of the first judgment, whether or not they were known to the parties, invoked by them, or considered by the first court (FSCD 139 III 126 [129]). However, it does not stand in the way of a claim based on a change in circumstances since the first judgment (FSCD 139 III 126 [130]) or since the time at which, according to the governing law, the #facts on which the judgment was based were finally determined (FSCD 116 II 738 [743]). Therefore, the #*res judicata* effect does not extend to the #facts after the time until which the object of the dispute could be modified, namely to those which took place beyond the last time when the parties could supplement their statements of #facts and evidentiary submissions. Such circumstances are new #facts as opposed to the #facts already in existence at the decisive time, which could not have been invoked in the previous proceedings (FSCD 22.11.2011 c. 3.1).

FSCD 140 III 278 [281-282]

The absence of *#res judicata* is an *#admissibility* requirement of the claim. If this requirement is not met, the *#claimant* is barred from acting pursuant to the rule *ne bis in idem*. *#Case law* recognizes the importance of this rule, sanctioning its violation under a violation of procedural *#public policy* (Art. 190(2)(e) PILA). Therefore, there is no reason to limit the scope of review of the Federal Supreme Court when it is called upon to verify compliance with this essential rule or to discharge the *#arbitral tribunal* sitting in Switzerland because it engaged in a thorough analysis of the *#res judicata* effect of the foreign judgment.

FSCD 140 III 278 [282-283]

The Federal Supreme Court will exercise unlimited judicial review as to the legal issues, including the *#preliminary* issues, which may arise as to whether or not the *#arbitrators* disregarded the *#res judicata* effect of a foreign judgment.

FSCD 140 III 278 [283], FSCD 4A_374/2014 c. 4.2.3

According to the principle of the subjective relativity of *#res judicata*, the *#res judicata* effect of a judgment may be invoked in a new litigation only if it involves the same parties or their legal successors (FSCD 28.11.2013 c. 3.2.1). The *res judicata* effect *inter partes* does not depend on the respective positions that the parties had in the two litigations (FSCD 105 II 229 [232]). Whether or not there were any other parties in the previous litigation does not, in principle, prevent a finding that the parties are identical in the second litigation as long as these parties also participated in the previous litigation (FSCD 127 III 279 [285]; 105 II 29 [232]).

FSCD 140 III 278 [283-284]

It is contrary to *#public policy* if there are, in a certain legal system, two contradictory judicial decisions on the same claim and between the same parties, which are equally and simultaneously enforceable.

FSCD 136 III 345 [347], FSCD 127 III 279 [283]

A judicial decision has *#res judicata* effect when it is binding, i.e. when it cannot be questioned anymore by the parties or the tribunal. The effect of *#res judicata* relates only to the *#operative* part of the judgment, but not to the *#reasons*. The *#reasons* can only serve for the *#interpretation* of the *#operative* part, in order to understand its nature and its exact scope of application.

FSCD 136 III 345 [347], FSCD 4P.98/2005 c. 5.1

The *#arbitral tribunal* violates procedural *#public policy* if it renders a decision without taking into account the *#res judicata* effect of a judgment made in proceedings instituted pursuant to Article 75 CC in order for the court to set aside a *#decision* made by an *#association*.

FSCD 136 III 345 [348-349], FSCD 4A_386/2010 c. 9.3

There is no reason to treat the issuance of the *#operative* part of the *#award* and the subsequent issuance of the reasoned *#award* as two successive and distinct decisions. In reality, there is only one *#award* and thus no issue of *#res judicata* can arise.

FSCD 4A_730/2012 c. 5

The fact that the *#res judicata* defence is granted does not entail that the *#jurisdiction* of the *#arbitral tribunal* has to be denied. In such a case, the

#arbitral tribunal should render a decision not to hear the case based on #*res judicata* and not on lack of #jurisdiction. Therefore, even in the case of #*res judicata*, the #ground for setting aside of Article 190(2)(b) PILA is not available. In such a case, only a violation of #public policy, that is the #ground for setting aside of Article 190(2)(e) PILA, could be envisaged.

FSCD 1P.113/2000 c. 3b

It is true that a decision has binding force only in the form it is expressed in the #operative part, but the scope of the #operative part often only becomes clear when reading the #reasons. This is particularly true with respect to filed #claims that are dismissed.

FSCD 22.09.1998 c. 3

2e.14.7 Principle of *ne bis in idem*

The principle of *ne bis in idem* must be included in the concept of #public policy within the meaning of Article 190(2)(e) PILA.

FSCD 4A_324/2014 c. 6.2.1, FSCD 4A_386/2010 c. 9.3.1

The Federal Supreme Court left open the extent to which this principle of criminal law would also have to be taken into account in disciplinary sports law.

FSCD 4A_324/2014 c. 6.2.1, FSCD 4A_386/2010 c. 9.3.1

The question of whether this principle belongs to procedural or substantive #public policy is left open.

FSCD 4A_386/2010 c. 9.3.1

2e.14.8 Violation of Procedural Rules

Every violation, even arbitrary, of a procedural rule does not amount to a violation of procedural #public policy, but only the violation of a rule which is essential to ensure the fairness of the proceedings.

FSCD 129 III 445 [464], FSCD 126 III 249 [253], FSCD 121 III 331 [333], FSCD 4A_394/2017 c. 4.3.4.2, FSCD 4A_505/2017 c. 3.1.2, FSCD 4A_490/2016 c. 3.2.2, FSCD 4A_405/2016 c. 3.3, FSCD 4A_392/2015 c. 4.2, FSCD 4A_636/2014 c. 4.2, FSCD 4A_448/2013 c. 3.2.2, FSCD 4A_362/2013 c. 3.2.2, FSCA 4A_232/2013 c. 5.1.1, FSCD 4A_440/2010 c. 5.1.1 (not published in FSCD 137 III 85), FSCD 4A_612/2009 c. 6.3.1, FSCD 4A_600/2008 c. 4.2.1.3, FSCD 4A_210/2008 c. 3.3.1.6, FSCD 4P.23/2006 c. 4.2, FSCD 4P.280/2005 c. 2.1, FSCD 4P.154/2005 c. 6.1, FSCD 4P.196/2003 c. 5.1

The refusal to apply a procedural rule, like an arbitrary violation of such a rule, does not constitute, as such, a violation of procedural #public policy, in the restrictive meaning of this notion given by #case law. Such a rule must also be a rule which is essential to ensure the fairness of the proceedings.

FSCD 4P.280/2005 c. 2.2.1

A procedural rule which limits the amount of the legal #fees reimbursed to the winning party to a part of its attorney's #fees does not manifestly violate procedural #public policy.

FSCD 4P.280/2005 c. 2.2.1

Like the arbitrary application of a procedural rule, the refusal to apply such a rule does not violate procedural #public policy, in the restrictive sense of this notion applied by #case law.

FSCD 4P.280/2005 c. 2.2.1

There is no violation of #public policy if the presiding #arbitrator grants an extension of the #time limit for the filing of the statement of claim without prior consultation with the #co-arbitrators, even though the #terms of reference provide that the presiding #arbitrator will give a ruling on applications of extensions of #time limits “after consulting with the co-arbitrators”.

FSCD 24.03.1997 [(1997) ASA p. 319-320]

2e.14.9 Excessive Formalism

According to the #case law grounded on Article 29(1) FC, there is #excessive formalism when the procedural rules are conceived or applied with a rigour that is not justified by any interest worthy of protection, to the point that the proceedings become an end in themselves and prevent or complicate in an unbearable manner the application of the law.

FSCD 4A_238/2018 c. 5.3

Formal requirements are necessary for the implementation of legal remedies, in order to ensure that the proceedings are carried out in accordance with the principle of #equal treatment and to guarantee the application of the substantive law. Strict respect of the rules concerning the #time limits for filing an #appeal apply for reasons of #equal treatment and #legal certainty.

FSCD 4A_238/2018 c. 5.3

Procedural rules are necessary in order to implement legal remedies that guarantee that proceedings can take place in accordance with the principle of #equal treatment. With respect to this principle and #legal certainty, strict adherence to the provisions governing the #time limit for filing an #appeal is thus obvious, without this requirement being contrary to the prohibition of #excessive formalism.

FSCD 4A_238/2018 c. 5.5, FSCD 4A_384/2017 c. 4.2.3, FSCD 4A_692/2016 c. 6.2, FSCD 4A_690/2016 c. 4.2

Formal requirements are necessary for the implementation of the legal means, if only to ensure that the proceedings are carried out in conformity with the principle of #equal treatment. To decide otherwise in the case of arbitration would lead one to forget that in an #arbitral proceeding, as in a proceeding before a State court, the #respondent is entitled to expect that the #arbitral tribunal will apply and respect the provisions of its own procedural rules.

FSCD 4A_692/2016 c. 6.2

The Swiss #case law sees in #excessive formalism a specific aspect of the #denial of justice prohibited by Article 29(1) FC, a constitutional norm by virtue of which every person has the right in a judicial proceeding that its cause be treated equitably. If one recalls that a guarantee as important as the prohibition of #arbitrariness with respect to the application of procedural rules cannot be invoked in support of an #appeal based on Article 190(2)(e) PILA, it does not go

without saying that one must necessarily assimilate the violation of the prohibition of #excessive formalism with a violation of #public policy within the meaning of the aforesaid provision, and particularly, of procedural #public policy. The doctrine has apparently not taken position on this issue except to warn against the risk of an abusive recourse to the prohibition of #excessive formalism in circumstances where nothing justifies it. Perhaps it would be appropriate to only take into consideration, under the angle of a violation of procedural #public policy, a blatant violation of the prohibition of #excessive formalism in order to prevent an abuse of this prohibition.

FSCD 4A_692/2016 c. 6.1

The #formalism is excessive when the strict application of procedural rules is not justified by any interest worthy of protection, becomes an end in itself, complicates in an unbearable way the enforcement of substantive law or hinders in an inadmissible manner access to the courts. According to well established #case law there is no excessive rigour not to hear an #appeal if, in accordance with the applicable procedure, the case can only be heard provided that an #advance on costs is paid within a certain #time limit; however, the #appellant must have been informed in an appropriate way about the amount to pay, the #time limit for the payment and the consequences in case the #time limit is not respected.

FSCD 4A_692/2016 c. 6.2, FSCD 4A_600/2008 c. 5.2.2

2e.14.10 Independence of Experts

As long as an #expert does not have a direct personal interest in the outcome of the proceedings, which would change the #ground for challenge [*Ablehnungsgrund*] into a ground for #exclusion [*Ausschlussgrund*], there is no violation of procedural #public policy if #grounds for challenge are not taken into account *ex officio*. This would change the #ground for challenge into the ground for #exclusion, and the sanction of #waiver of a challenge because of acts against #good faith would become irrelevant, because every forfeited #ground for challenge would become a ground for #exclusion to be taken into account *ex officio*. The distinction between #grounds for challenge and grounds for #exclusion would thus become meaningless.

FSCD 126 III 249 [255-256]

The right to an independent and impartial #expert cannot be inferred from Article 190(2)(a) PILA because the #expert is not an #arbitrator. Accordingly, the Federal Supreme Court reviews the argument according to which an #expert should have been removed from the point of view of a violation of procedural #public policy, understood as a rule providing a subsidiary guarantee.

FSCD 4A_606/2013 c. 6.2.1

2e.14.11 Flawed Deliberations

The flaws affecting the #deliberations fall within the scope of application of Article 190(2)(a) PILA, which sanctions the incorrect #composition of the #arbitral tribunal, be it a structural flaw or an isolated problem. It is also possible to consider Article 190(2)(d) PILA (violation of the #equal treatment of the parties and their #right to be heard) or Article 190(2)(e) PILA (violation of procedural #public policy).

FSCD 4P.115/2003 c. 3.2

2e.14.12 *Jura novit curia*

There is no need to review the issue as to whether the adage *jura novit curia* is part of procedural #public policy within the meaning of Article 190(2)(e) PILA and related #case law.

FSCD 4A_446/2013 c. 6.2.2.3

2e.14.13 Illegally Acquired Evidence

The principle that illegally acquired #evidence should not be used is recognized in Swiss legal doctrine, by constant #case law and is found in Article 140f CCrimP and Article 152(2) CCP. However, illegally obtained #evidence is not always inadmissible, there is a balancing of interests in which the interest in discovering the truth is balanced against that of protecting the legal interest harmed by the acquisition of the #evidence.

FSCD 4A_448/2013 c. 3.2.1 & 3.2.2; FSCD 4A_362/2013 c. 3.2.1 & 3.2.2

2e.14.14 Priority of Criminal Proceedings over Civil Proceedings

Neither the #public policy exception nor the #right to be heard impose the application of the principle "*le pénal tient le civil en l'état*" according to which criminal proceedings have priority in time with respect to civil proceedings in the same matter.

FSCD 119 II 386 [389-390], FSCD 4A_532/2014 & 4A_534/2014 c. 5.2, FSCD 4A_231/2014 c. 5.2.1, FSCD 4A_604/2010 c. 2.2.2

2e.14.15 No Right to Legal Aid

There is no reason why #legal aid should be allowed in international arbitration given that it is excluded by Article 380 CCP for domestic arbitration.

FSCD 4A_690/2016 c. 5.1, FSCD 4A_178/2014 c. 4

2e.14.16 Statute of Limitations

#Statute of limitations is not a fundamental principle of the Swiss legal system.

FSCD 4P.146/2005 c. 7.2.1, FSCD 13.03.1992 [(1992) ASA p. 366]

2e.14.17 Modifications of the Prayers for Relief

The #admissibility of modifications of the #prayers for relief depends on the applicable procedural law, in particular on the #*lis pendens* of the #arbitral proceedings created by the filing of the statement of claim and the #adversarial maxim, as well as on the strictness of its possible application. In most of the [former] procedural codes in force in Switzerland, these formal principles are not stated in a uniform way but are regulated differently. As most of the [former] codes on civil procedure in Switzerland allow for amendments to the #prayers for relief requested by a party, provided that the #facts initially asserted are not changed, a modification of the #prayers for relief does not violate procedural #public policy. Procedural #public policy is in any case not violated if the solution adopted by the #award is compatible with some procedural rule in force in Switzerland.

FSCD 30.12.1994 [(1995) ASA p. 221-222]

2e.14.18 Modifications of the Reasons for the Claim

The question of the #admissibility of modifications with regard to the #reasons for a claim in international #arbitral proceedings does not fall within the scope of application of Article 190(2)(c) PILA. The limits to such modifications result from the scope of application of the #arbitration agreement or depend on the procedural rules chosen by the parties (Art. 182 PILA). In the first case (*extra potestatem*), the parties have to exclusively invoke Article 190(2)(b) PILA if they intend to contest the #arbitrators' #jurisdiction to decide the dispute (FSCD 116 II 639 [641-642]); in the second case, the violation of mandatory procedural principles pursuant to Article 182(3) PILA can be submitted to the Federal Supreme Court by a #motion to set aside based on Article 190(2)(d) & (e) PILA.

FSCD 117 II 346 [347-348], FSCD 30.12.1994 [(1995) ASA p. 220-221]

2e.14.19 Presence of Witnesses at the Entire Hearing

If the #witnesses are authorised to be present at the #hearing before being examined, and if they are thereby unavoidably influenced by the previous #witnesses, the statements of the parties and the course of the #pleadings, this does not constitute a procedural flaw of an essential nature such as to affect the fairness of the proceedings.

FSCD 4P.267/2002 c. 5.2.3 (not published in FSCD 129 III 445)

2e.14.20 *Negativa non sunt probanda*

#Case law does not recognize the principle of *negativa non sunt probanda*. At most, it imposes a duty to collaborate on a party which is in a position to provide positive proof of the contrary fact.

FSCD 4A_530/2013 c. 6.1

2e.14.21 Burden of Proof

The #CAS opinion, according to which it is sufficient that the analyses undertaken show the presence of a banned substance in order for there to be a presumption

of doping and, consequently, a reversal of the #burden of proof, does not relate to #public policy but to the #burden of proof and the assessment of #evidence, problems which cannot be regulated, in private law cases, on the basis of the principle of *in dubio pro reo* and the corresponding safeguards contained in the ECHR.

FSCD 119 II 271 [(1993) ASA p. 409], FSCD 4A_80/2017 c. 2.2, FSCD 4A_178/2014 c. 5.2, FSCD 4A_448/2013 c. 3.3, FSCD 4A_362/2013 c. 3.3, FSCD 4A_576/2012 c. 3.2.1, FSCD 4A_488/2011 c. 6.2, FSCD 4A_612/2009 c. 6.3.2, FSCD 5P.427/2000 c. 2a, FSCD 31.03.1999 [(1998-2000) Digest CAS p. 781]

An erroneous allocation of the #burden of proof does not fall within the scope of Article 190(2)(e) PILA.

FSCD 4A_668/2016 c. 4.3.2, FSCD 4A_522/2016 c. 3.2.1, FSCD 4A_616/2015 c. 4.3.1, FSCD 4A_34/2015 c. 4.3.2 (not published in FSCD 141 III 495), FSCD 4A_606/2013 c. 5.3, FSCD 4A_304/2013 c. 5.2.3, FSCD 4A_458/2009 c. 4.4.10, FSCD 4A_524/2009 c. 5.2.3

The doping proceedings rule according to which a case of doping may be presumed automatically in the presence of positive findings of a banned substance does not violate #public policy. This also applies when such substance or quantities of substance are prohibited which are not able to influence the performance of the horse.

FSCD 4P.105/2006 c. 8.2, FSCD 31.03.1999 c. 3d, FSCD 15.03.1993 c. 8 (not published in FSCD 119 II 271) [(1993) ASA p. 409]

According to Article 16(1) PILA, the content of the foreign law shall be determined *ex officio*. To this end, the assistance of the parties may be requested. In cases of monetary claims, the #burden of proof may be imposed upon the parties. Insofar as the #arbitrator uses this possibility, it does not violate #public policy.

FSCD 4P.242/2004 c. 7.3

#Public policy is not violated by the presumption, according to which the simple presence of a forbidden substance in the urine of an athlete constitutes a legal doping, presumption which can only be reversed by proving a malevolent act by a third party or by proving that the result of the analyses was erroneous.

FSCD 5P.427/2000 c. 2a

2e.14.22 No Obligation to Address Case with Full Power of Review

The concept of procedural #public policy referred to by Article 190(2)(e) PILA does not encompass an obligation for the #arbitral tribunal to address any case submitted to arbitration with full #powers of review. Once the State proceedings have been regularly waived, it is perfectly conceivable and admissible that the parties would agree directly or through their submissions to a set of arbitration rules and limit the power of review of the #arbitral tribunal as to the subject of its review and/or its depth.

FSCD 4A_246/2014 c. 7.2.2

2e.14.23 No Violation Because of Insufficient or No Reasons in the Award

- See also Article 182(3) PILA, section 3.3.23; Article 189(2) PILA, section 2.5; and Article 190(2)(d) PILA, section 2d.3.10

The fact that an #award lacks #reasons is not contrary to #public policy.

FSCD 130 III 125 [130], FSCD 101 Ia 521 [525-530], FSCD 4A_550/2017 c. 7.2, FSCD 5A_68/2013 c. 4.2.2, FSCD 4P.96/2002 c. 6.1, FSCD 4P.114/2004 c. 4, FSCD 16.02.1998 c. 3

Insufficient #reasons for an #award do not constitute a violation of #public policy, as according to the Federal Supreme Court's #case law, even the absence of any #reasons may not be claimed under this #ground for setting aside.

FSCD 4P.298/2005 c. 3.3

Article 190(2) PILA which lists the #grounds for setting aside does not mention the lack of #reasons given in the #award.

FSCD 4P.114/2004 c. 4

An #award which does not state sufficient #reasons, or which is based on #equity instead of applying a particular law, is compatible with #public policy, provided the #operative part of the #award does not lead to a result contrary to the fundamental principles of the legal order and the system of values.

FSCD 15.11.1993 c. 5b

2e.14.24 No Requirement of a Double Degree of Jurisdiction

The requirement of two instances or of a double degree of jurisdiction does not fall within procedural #public policy within the meaning of Article 190(2)(e) PILA.

FSCD 4A_384/2017 c. 4.2.3, FSCD 4A_90/2014 c. 3.3.2, FSCD 4A_558/2011 c. 3 (not published in FSCD 138 III 322), FSCD 4A_530/2011 c. 3.3.1, FSCD 4A_386/2010 c. 6.2

2e.14.25 Individual Cases

There could be a violation of procedural #public policy when an #arbitral tribunal takes #evidence on #facts and afterwards informs the parties that these #facts have not been sufficiently alleged. Once the right to submit #evidence has been granted, the #arbitrators cannot modify their decision without violating the principle of #good faith in proceedings, which applies not only to the parties, but also to the judges, and which can be considered a consequence of the principle #*pacta sunt servanda* which is itself part of #public policy pursuant to Article 190(2)(e) PILA; alternatively, this can be seen as an instance of the principle of "fairness" or of #equal treatment of the parties as envisaged by Article 190(2)(d) PILA, which has the same scope as Article 8 FC.

NE 23.09.1999 [(1999) ASA p. 571-572]

3 *Motion to Set Aside Preliminary Decisions (3)*

- See also Article 188 PILA

3.1 Interpretation of Article 190(3) PILA

3.1.1 Purpose: Procedural Economy

Undoubtedly the duty imposed on the #respondent to attack as soon as possible the #decision by which the #arbitral tribunal, ruling on its own #jurisdiction in conformity with Article 186(1) PILA, rejects the #jurisdictional objection raised by it, corresponds to reasons of #procedural economy, concerning a question which must be decided on, as far as possible, without waiting for the outcome on the #merits.

FSCD 143 III 462 [467-468], FSCD 4A_136/2018

The Federal Supreme Court should in principle only review a case once, at the end of the proceedings, unless one is concerned with a case where the law exceptionally authorizes, precisely for reasons of #procedural economy, an immediate #appeal against such #decisions.

FSCD 143 III 462 [468]

That there may be a certain antagonism, in spite of this identity of reasons, between on the one hand, the interest of the parties and/or the #arbitral tribunal to not continue a case of which the appeal authority could seal the fate by admitting the #appeal against an interim #decision, even if the attacked #decision does not rule definitively on the issue of the #jurisdiction of the #arbitral tribunal, and on the other hand, the interest of the appeal authority to not have to review a case multiple times, by reason of the numerous questions concerning #jurisdiction which could be submitted successively to the examination of the #arbitral tribunal, is uncontested.

FSCD 143 III 462 [468]

In order to decide on this #conflict of interest, one would highlight, first of all, from a purely factual point of view, the risk of abuse that would be caused by the review of interim #decisions which do not rule definitively on the issue of #jurisdiction, as it is true that, in international arbitrations with considerable financial stakes, like the one in question here, the temptation would be great for #respondents to resort systematically to so-called salami tactics (*Salamitaktik*), in order to block the normal progress of the #arbitral proceeding by successively invoking multiple grounds of lack of #jurisdiction prior to any defence on the #merits, attempting to obtain separate decisions on them and then challenging each decision before the Federal Supreme Court.

FSCD 143 III 462 [468]

One should also note that reasons of #procedural economy will often be largely tempered by the delays linked to possible immediate #appeals, even more so in this field where the federal appeal procedure will often have to be suspended due to the filing by the opposing party of an application for the provision of #security for costs, in particular when the #appellant has no permanent residence in

Switzerland and it will not be able to avail itself of the provisions of a bilateral or multilateral treaty prohibiting its opponent from asking for such a guarantee (Art. 62(2) FSCA). Moreover, in setting aside proceedings against international arbitral awards, a double exchange of briefs (see Art. 102(3) FSCA), which is often interrupted by judicial holidays (Art. 46 FSCA), is the rule in practice, if not in law. It thus appears from these remarks that the benefit expected by the parties and/or the arbitral tribunal of a relaxation of the case law in the matter of referral to the Federal Supreme Court with regard to decisions on jurisdiction which do not settle this question once and for all, remains to be seen.

FSCD 143 III 462 [468-469]

The legislator wanted, in the interest of procedural economy, to admit the direct challenge of preliminary, respectively interim decisions of the arbitral tribunal as to its constitution or jurisdiction, in order to prevent having to continue proceedings which are already flawed at an initial stage. This corresponds to the general procedural principle that issues concerning judiciary organisation have, by their nature, to be decided definitively before the continuation of the proceedings.

FSCD 140 III 477 [478], FSCD 130 III 66 [75], FSCD 128 III 50 [53], FSCD 4P.40/2002 c. 1a, FSCD 4P.168/1999 [(2001) ASA p. 784]

3.1.2 Plain meaning

The actual version of Article 190(3) PILA goes back to the drafting commission and is grammatically wider than the one decided by the Parliament. It is however not possible to conclude from this that the real meaning of the provision goes, according to the legislator's intention in the historical context, beyond its plain meaning.

FSCD 130 III 76 [83-84]

The sense and the purpose (*ratio legis*) of Article 190 PILA do not justify an interpretation of Article 190(3) PILA which goes beyond the plain meaning.

FSCD 130 III 76 [85]

As the different methods of interpretation do not provide any important reasons to depart from the plain meaning of Article 190(3) PILA, the plain meaning remains authoritative for the courts, which means excluding setting aside proceedings against arbitral interim decisions, except for those related to jurisdiction and constitution. To the extent that previous case law has admitted other possibilities of setting aside, or has left open the question of their existence, such previous case law cannot be maintained.

FSCD 130 III 76 [86]

3.2 Notion of Interim Decision

- For the preliminary #award on #jurisdiction, see Article 186(3) PILA
- For the notion of partial #award, see Article 188 PILA, section 1
- For the notion of #award, see Article 189(1) PILA, section 1.1
- For the finality of the #award, see Article 190(1) PILA

The decision, rendered during the course of the proceedings, by which the #arbitral tribunal expressly declares that it has #jurisdiction, which means that the arbitration will continue, is an interim #decision, within the meaning of Article 190(3) PILA, against which an #appeal should be filed immediately.

FSCD 143 III 462 [466-467], FSCD 4A_30/2018, FSCD 4A_150/2017 c. 2.2

It is not possible to appeal before the Federal Supreme Court a decision which only provisionally rules on the issue of #jurisdiction of an international #arbitral tribunal.

FSCD 143 III 462 [467], FSCD 4A_222/2015 c. 3.2

First and foremost, the text of the relevant provision, i.e. Art. 190(2)(b) PILA, constitutes an inescapable argument insofar as it subordinates the right to bring an #Appeal in Civil Matters to the Federal Supreme Court to the existence of a decision (express or implied) by which the #arbitral tribunal has not only settled one or more questions relating to its #jurisdiction, but has “accepted or denied jurisdiction”. However, the #arbitral tribunal which takes a position on one or the other of the various pleas relied on by the #respondent in support of its objection to #jurisdiction, by referring the examination of the residual pleas to a later stage of the #arbitral proceedings, does not make any decision - positive or negative - on its #jurisdiction to rule on the #merits of the claims made by the #claimant. That it discards all the pleas examined by it on a preliminary basis does not change anything, since it is not possible to say, at this stage of the procedure, whether it will finally rule on the #merits or if a future analysis of one or other of the pleas not yet treated will convince it to declare that it does not have #jurisdiction.

FSCD 143 III 462 [469]

If one wanted to attempt a comparison, such a decision would be more like a preliminary #decision, within the meaning of Article 93(1)(b) FSCA, than a decision concerning #jurisdiction, referred to in Article 92(1) FSCA, because, if the decision does not directly note the #jurisdiction of the #arbitral tribunal, the admission of an #appeal against it could lead immediately to a final decision of lack of #jurisdiction, provided that each of the alternative grounds underlying the defence of lack of #jurisdiction which have been rejected by the #arbitral tribunal lead to this result, and to avoid, if need be, a long and expensive evidentiary procedure. However, the possibility of bringing an #appeal against an interim or preliminary #award does not depend on the conditions of Article 93(1) FSCA since both the text of Article 77(2) FSCA, amended at the entry into force of the CCP, on 1 January 2011, excludes, in #appeals in the field of arbitration (international or domestic), the application of Articles 90 to 98 FSCA.

FSCD 143 III 462 [469-470]

Interim #decisions do not terminate the proceedings with regard to all or specific claims, but clarify a #preliminary issue which concerns either a procedural matter (e.g. the #arbitral tribunal's #jurisdiction) or a substantive matter (e.g. #waiver or the principle of liability); the clarification rendered by the interim #decision does not put an end to the proceedings. Interim #decisions relate to a qualitative aspect of the #matter in dispute.

FSCD 136 III 597 [599], FSCD 130 III 76 [79], FSCD 128 III 191 [194-195], FSCD 4A_633/2014 c. 2.4.1 (not published in FSCD 141 III 229), FSCD 4A_596/2012 c. 3.2, FSCD 4A_584/2009 c. 2.2, FSCD 4A_210/2008 c. 2.1, FSCD 4A_370/2007 c. 2.3.1, FSCD 4P.237/2005 c. 3.1, ZH 11.02.2005 c. III.1

The distinction made only in German between preliminary and interim #decisions (*Vor- und Zwischenentscheide*), in the sense that the preliminary #decision concerns a substantive #preliminary issue, and the interim #decision on the contrary concerns a procedural #preliminary issue, is of no legal importance in this context. It only has importance in theory and for classification purposes, but it is of no interest for the issue of whether an arbitral #award can be appealed. This is why this distinction is not made in the French and Italian legal languages where the two types are uniformly designated as *décisions incidentes* and *decisioni pregiudiziali*. In English, the expressions “*preliminary decisions*” or “*interim awards*” are also uniformly used for the two types of decisions. Therefore, if the German version of Article 190(3) PILA only mentions preliminary #decisions (*Vorentscheide*), it encompasses also interim #decisions (*Zwischenentscheide*). This clearly follows from the French and Italian texts (*décisions incidentes*, *decisioni pregiudiziali*).

FSCD 130 III 76 [79]

The final #award is a decision which puts an end to the proceedings, be it by a decision on the #merits, be it for procedural reasons. On the contrary, an interim #decision is a decision rendered during the proceedings and which only represents a step on the way to the final #award. Its subject can be a procedural issue, but also – in an anticipatory way – a question on the #merits.

FSCD 116 II 80 [82], FSCD 115 II 288 [292], FSCD 115 II 102 [104], FSCD 30.09.1993 [(1994) ASA p. 51], FSCD 15.12.1992 c. 2, ZH 11.02.2005 c. III.1

Despite its name (partial #award), the contested #award does not concern a quantitatively limited part of a disputed claim or one of the various claims in question, nor does it terminate the #proceedings against any of the parties. This is an interim #decision which, without closing the pending #arbitral proceedings, settles preliminary procedural questions, such as the #jurisdiction of the #arbitral tribunal to rule on the #claimant's withdrawal or the #validity of this unilateral procedural act taken by the interested party.

FSCD 4A_394/2017 c. 2.1

An #award by which the #arbitral tribunal declines its #jurisdiction is a final #award. An #award by which the #arbitral tribunal admits its #jurisdiction is an interim #decision. According to Article 190(3) PILA, an interim #decision admitting #jurisdiction can only be set aside based on the grounds of Articles 190(2)(a) and (b) PILA. This limitation does not apply to a final #award declining #jurisdiction.

FSCD 4A_426/2017 c. 2, FSCD 4A_452/2007 c. 1.2 and 3.2

If an #arbitral tribunal decides on one of many #prayers for relief concerning the same monetary claim without rendering a decision subject to #enforcement, the #arbitral tribunal does not decide on a specific part of the claim but recognizes only the existence of an element of this claim (*in casu*, that the disputed orders have been passed during the period fixed in the commission contract). By rendering this decision, the #arbitral tribunal rendered an interim #decision and not a partial #award against which the #grievance of a violation of the #right to be heard would have been admissible.

FSCD 4A_438/2008 c. 2.3

When an #arbitral tribunal admits its #jurisdiction in a separate #award (and the proceedings continue), it renders a preliminary #award (Art. 186(3) PILA), which can only be challenged before the Federal Supreme Court for the #grounds set out in Article 190(3) PILA. If the #arbitral tribunal denies its #jurisdiction in its #award and thus terminates the proceedings, it renders a final #award, which can be challenged before the Federal Supreme Court for all #grounds listed in Article 190(2) PILA.

FSCD 4A_128/2008 c. 2.1, FSCD 4P.48/2005 c. 2.1

A decision by which an arbitral appeals instance overturns a decision of an #arbitral tribunal is, according to the #case law of the Federal Supreme Court (FSCD 128 I 3 [7], FSCD 122 I 39 [41-42]), an interim #decision.

FSCD 4P.298/2006 c. 4

3.3 Grounds for Setting Aside Preliminary Awards

On the other hand, it should not be possible to directly challenge before the Federal Supreme Court a preliminary #award concerning the #constitution or the #jurisdiction of the #arbitral tribunal on the ground that the expenses and #fees of the #arbitrators fixed by the #arbitral tribunal – provided that a decision on this subject has not been handed down at the time of the issuance of the final #award, which is generally the case – are manifestly excessive, once one does not see how the fixing of the expenses and the #fees of the #arbitrator would be susceptible of influencing the decision concerning the #constitution or the #jurisdiction of the #arbitral tribunal.

FSCD 4A_407/2017 c. 1.1

A preliminary #award cannot be challenged directly on the ground of a violation of the #right to be heard. However, the #appellant can invoke this grievance in setting aside proceedings against the final #award.

FSCD 4A_254/2010 c 2.3.1

Interim #decisions can be independently challenged only for the #grounds mentioned in Article 190(3) PILA. The #grievance of a violation of the #right to be heard within the meaning of Article 190(2)(d) PILA is not included in these #grounds for setting aside. This #grievance can be raised only against the final #award.

FSCD 17.08.1995 [(1996) ASA p. 678]

3.4 Principle: No Setting Aside of Partial Awards *Lato Sensu*

In principle, a [former] #motion for constitutional review within the meaning of Article 85(c) fSOFJ cannot be filed against a partial #award *lato sensu*, i.e. a partial #award which decides a preliminary procedural issue.

FSCD 118 II 353 [355], FSCD 116 II 80 [85]

In the context of a #motion to set aside a partial #award – or a final #award – previous interim #decisions, which are the basis for the partial #award and which could not be set aside independently pursuant to Article 190(3) PILA, can also be set aside.

FSCD 4P.74/2006 c. 2.1, FSCD 4P.318/2001 c. 1.3, FSCD 4P.212/1999 c. 1a

The question has been left open whether a #motion for setting aside can be heard against a partial #award which decides part of the contentious claims (genuine partial #award), which prepares decisions on other claims (interim #award) and which orders the parties to negotiate an agreement on the remaining claims.

FSCD 4P.114/2001 c. 1b

3.5 Exceptions

3.5.1 Incorrect Constitution of the Arbitral Tribunal (Art. 190(2)(a) PILA)

It is also possible to challenge, by the #grievances mentioned in Article 190(3) PILA, interim #decisions which do not expressly concern the #constitution and #jurisdiction of the tribunal, but another procedural (e.g. #stay of the proceedings) or substantive #preliminary issue, if the tribunal acknowledges implicitly its lawful #constitution or #jurisdiction by rendering the interim #decision. It follows from the aforementioned duty to challenge that the first independent #interim decision of the #arbitral tribunal must be challenged.

FSCD 143 III 462 [467], FSCD 136 III 597 [600], FSCD 130 III 76 [80], FSCD 4A_596/2012 c. 3.2, FSCD 4A_210/2008 c. 2.1, FSCD 4A_370/2007 c. 2.3.1, FSCD 4P.168/1999 [(2001) ASA p. 784]

It follows from the purpose of Article 190(3) PILA that the #grievance regarding the incorrect #constitution of the tribunal has to be raised against the (first) interim #decision of the #arbitral tribunal with which it decides explicitly or by #implied actions on its #constitution. If this decision is not challenged, the #grievances are waived (Art. 87(1) fSOFJ).

FSCD 130 III 76 [80], FSCD 116 II 80 [84], FSCD 4A_282/2013 c. 5.3.2 (not published in FSCD 139 III 511), FSCD 4P.168/1999 [(2001) ASA p. 784]

Interim #decisions of the #arbitral tribunal, by which it acknowledges its orderly #constitution and #composition or its #jurisdiction, can be challenged without further substantive prerequisites in accordance with Article 190(2)(a) & (b) PILA. This corresponds to the plain text of the statute and to the general principle according to which organisational issues related to the tribunal have to be decided definitively before the continuation of the proceedings.

FSCD 130 III 76 [80], FSCD 4A_562/2015 c. 1.2, FSCD 4A_74/2014 c. 2.2 (not published in FSCD 140 III 477)

The restrictions of Article 87 fSOFJ do not apply to the #grounds for setting aside of Article 190(2)(a) & (b) PILA. In fact, decisions concerning the #constitution and #jurisdiction of judicial authorities can be challenged separately, for reasons of #procedural economy, by a [former] #motion for constitutional review, whether an #irreparable harm results or not. The same reasons explain why the parties have to immediately challenge an interim #decision by which the #arbitral tribunal decides on these two issues.

FSCD 118 II 353 [355], FSCD 116 II 80 [84]

3.5.2 Wrongful Acceptance or Declination of Jurisdiction (Art. 190 (2)(b) PILA)

Interim #decisions of the #arbitral tribunal, by which it acknowledges its orderly #constitution and #composition or its #jurisdiction, can be challenged without further substantive prerequisites in accordance with Article 190(2)(a) & (b) PILA. This corresponds to the plain meaning of the statute and to the general principle according to which organisational issues related to the tribunal have to be decided definitively before the continuation of the proceedings.

FSCD 130 III 76 [80]

The decision of an #arbitral tribunal on its #jurisdiction (Art. 190(2)(a) & (b) PILA) can be set aside as of its notification by a [former] #motion for constitutional review. The #appellant does not have to establish that it suffered #irreparable harm.

FSCD 118 II 353 [355], FSCD 116 II 80 [84]

The restrictions of Article 87 fSOFJ do not apply to the #grounds for setting aside of Article 190(2)(a) & (b) PILA. In fact, decisions concerning the #constitution and #jurisdiction of judicial authorities can be challenged separately, for reasons of #procedural economy, by a [former] #motion for constitutional review, whether an #irreparable harm results or not. The same reasons explain why the parties have to challenge immediately an interim #decision by which the #arbitral tribunal decides on these two issues.

FSCD 118 II 353 [355], FSCD 116 II 80 [84]

3.5.3 No Possibility to File an Appeal at an Earlier Stage

The interim #decision of the #arbitral tribunal with respect to its #constitution and #jurisdiction can not only be challenged independently, but it must be challenged independently; otherwise the #grievances directed against the interim #decision are waived based on the #facts known at the time of the interim #decision.

FSCD 143 III 462 [465], FSCD 140 III 477 [478], FSCD 130 III 66 [75], FSCD 121 III 495 [502], FSCD 118 II 353 [355], FSCD 4A_600/2016 c. 1.1.2, FSCD 4A_698/2014, FSCD 4A_178/2014 c. 3.1, FSCD 4A_282/2013 c. 5.3.2 (not published in FSCD 139 III 511), FSCD 4A_46/2011 c. 3.3.1, FSCD 4A_370/2007 c. 2.3.1, FSCD 4P.298/2005 c. 2.3

The interim #decision by which an #arbitral tribunal decides on its #jurisdiction can be immediately subject to a #motion to set aside. The party which does not challenge such an #award in the #time limit provided for, waives the right to later raise the plea of a lack of #jurisdiction of the #arbitral tribunal and it cannot challenge the interim #decision by a #motion to set aside the final #award.

FSCD 127 III 279 [282], FSCD 121 III 495 [502], FSCD 120 II 155 [158-159], FSCD 118 II 508 [512], FSCD 118 II 353 [355], FSCD 4A_46/2011 c. 3.3.1, FSCD 4P.230/2000 c. 1, *FSCD 26.11.1980 [(1982) SJ p. 617-618]

However, when the reasons for the dismissal of the jurisdictional objections are only spelled out in the final #award, the 30-day #time limit only starts to run from the notification of the final #award and not the interim #decision.

FSCD 4A_46/2011 c. 3.3.1

3.5.4 Plurality of Claimants and/or Respondents

A general exception to this rule must be made when there are several #claimants and #respondents. In such a case, the party against whom the #arbitrators have rendered a definitive #decision can seize the Federal Supreme Court without waiting for the end of the proceedings between the other parties which do not directly concern it, since the other parties may prolong or even choose to never terminate those proceedings.

FSCD 116 II 80 [83]

3.6 Continuation of the Proceedings after the Motion for Setting Aside

If a party files a #motion for setting aside against an interim #award on the #jurisdiction of the #arbitral tribunal, the #arbitrators can in principle continue with the proceedings on the #merits, notwithstanding the pending #motion for setting aside filed against the positive interim #decision on #jurisdiction. However, when deciding on the #stay of the proceedings, the #arbitral tribunal must take into account considerations of #procedural economy, i.e. considerations of practicability.

*FSCD 109 Ia 81 [84-85]

3.7 Powers of Review of the Federal Supreme Court

The Federal Supreme Court examines arbitral interim #decisions with great self-restraint.

FSCD 115 II 288 [291-292], FSCD 14.06.1990 [(1994) ASA p. 226]

Article 191

**IX. Finality,
Motion to Set
Aside
2. Judicial
Authority to
Set Aside**

Setting aside proceedings may only be heard by the Swiss Federal Supreme Court. The procedure is governed by Article 77 of the Swiss Federal Statute on the Swiss Federal Supreme Court of 17 June 2005.

IX.
Endgültig-
keit,
Anfechtung
2.
Beschwerde-
instanz

Einzige Beschwerdeinstanz ist das schweizerische Bundesgericht. Das Verfahren richtet sich nach Artikel 77 des Bundesgerichtsgesetzes vom 17. Juni 2005.

IX. Caractère
définitif.
Recours
2. Autorité de
recours

Le recours n'est ouvert que devant le Tribunal fédéral. La procédure est régie par l'art. 77 de la loi du 17 juin 2005 sur le Tribunal fédéral.

IX. Carattere
definitivo.
Impugnazione
2. Autorità di
ricorso

L'unica autorità di ricorso è il Tribunale federale. La procedura è retta dall'articolo 77 della legge del 17 giugno 2005 sul Tribunale federale.

1 *Application of the FSCA*

The provisions of the FSCA of 17 June 2005 (SR 173.110) apply to the #motions for setting aside against #awards rendered after the entry into force of the FSCA, on 1 January 2007 (Art. 132(1) FSCA) (RO/AS 2006 1205, 1242/1243).

FSCD 4A_370/2007 c. 1, FSCD 4A_352/2007 c. 1, FSCD 4A_268/2007 c. 1, FSCD 4P.4/2007 c. 1, FSCD 4A_220/2007 c. 1, FSCD 4A_160/2007 c. 1, FSCD 4A_42/2007 c. 1, FSCD 4A_17/2007 c. 1, FSCD 4A_18/2007 c. 1, FSCD 4P.32/2007 c. 1, FSCD 4P.206/2006 c. 1, FSCD 4P.172/2006 c. 1, FSCD 4P.304/2006 c. 1, FSCD 4P.168/2006 c. 1, FSCD 4P.298/2006 c. 1, FSCD 4P.148/2006 c. 1, FSCD 4P.96/2002 c. 1, FSCD 4P.240/2006 c. 1

The FSCA entered into force on 1 January 2007. According to Article 132 FSCA, this act applies to the proceedings pending before the Federal Supreme Court after its entry into force; however, it applies to appeal proceedings only if the appealed decision has been rendered after its entry into force. As the #revision is not an #appeal within the meaning of Article 132(1) FSCA, the exception provided for in this provision does not apply to #revision proceedings.

FSCD 4A_596/2008 c. 1

2 *Appeal in Civil Matters*

An #Appeal in Civil Matters is admissible against #awards concerning international arbitration under the conditions set forth in Articles 190-192 PILA (Art. 77(1)(a) FSCA)

FSCD 4A_394/2017 c. 2, FSCD 4A_65/2018 c. 2, FSCD 4A_474/2018 c. 2, FSCD 4A_308/2018 c. 2, FSCD 4A_284/2018 c. 2, FSCD 4A_398/2017 c. 3 (not published in FSCD 144 III 559), FSCD 4A_438/2017 c. 1.1, FSCD 4A_550/2017 c. 2, FSCD 4A_238/2018 c. 2, FSCD 4A_114/2018 c. 2.1, FSCD 4A_525/2017 c. 1, FSCD 4A_404/2017 c. 2, FSCD 4A_125/2018 c. 2.1, FSCD 4A_578/2017 c. 2, FSCD 4A_505/2017 c. 2, FSCD 4A_345/2017 c. 1.1, FSCD 4A_502/2017 c. 2, FSCD 4A_314/2017 c. 1, FSCD 4A_170/2017 c. 3.1, FSCD 4A_478/2017 c. 2.1, FSCD 4A_583/2017 c. 1, FSCD 4A_247/2017 c. 2.1, FSCD 4A_580/2017 c. 1, FSCD 4A_450/2017 c. 2.1, FSCD 4A_260/2017 c. 1, FSCD 4A_490/2017 c. 2, FSCD 4A_508/2017 c. 2, FSCD 4A_432/2017 c. 2, FSCD 4A_56/2017 c. 2, FSCD 4A_220/2017 c. 2, FSCD 4A_157/2017 c. 2.1, FSCD 4A_592/2017 c. 2, FSCD 4A_430/2017 c. 1., FSCD 4A_312/2017 c. 2, FSCD 4A_236/2017 c. 2, FSCD 4A_424/2017 c. 2, FSCD 4A_384/2017 c. 1, FSCD 4A_150/2017 c. 2, FSCD 4A_12/2017 c. 2 (not published in FSCD 143 III 578), FSCD 4A_318/2017 c. 2, FSCD 4A_277/2017 c. 2, FSCD 4A_316/2017 c. 2, FSCD 4A_80/2017 c. 1, FSCD 4A_668/2016 c. 2, FSCD 4A_50/2017 c. 2.1, FSCD 4A_532/2016 c. 2, FSCD 4A_34/2016 c. 2, FSCD 4A_692/2016 c. 2.1, FSCD 4A_470/2016 c. 2, FSCD 4A_40/2017 c. 2, FSCD 4A_490/2016 c. 2, FSCD 4A_405/2016 c. 2.1, FSCD 4A_704/2015 c. 1, FSCD 4A_473/2016 c. 1, FSCD 4A_690/2016 c. 2, FSCD 4A_478/2016 c. 2.1, FSCD 4A_492/2016 c. 2, FSCD 4A_716/2016 c. 2, FSCD 4A_672/2016 c. 2, FSCD 4A_188/2016 c. 2, FSCD 4A_32/2016 c. 2, FSCD 4A_116/2016 c. 2, FSCD 4A_522/2016 c. 2, FSCD 4A_497/2015 c. 1.2, FSCD 4A_136/2016 c. 2, FSCD 4A_310/2016 c. 2, FSCD 4A_536/2016 c. 3, FSCD 4A_616/2015 c. 2, FSCD 4A_202/2016 c. 2.1, FSCD 4A_259/2015 c. 1.2, FSCD 4A_132/2016 c. 2, FSCD 4A_322/2015 c. 2, FSCD 4A_173/2016 c. 1, FSCD 4A_214/2016 c. 3.1, FSCD 4A_42/2016 c. 2, FSCD 4A_342/2015 c. 2 (not published in FSCD 142 III 360), FSCD 4A_678/2015 c. 2, FSCD 4A_628/2015 c. 1.1 (not published in FSCD 142 III 296), FSCD 4A_510/2015 c. 2, FSCD 08.02.2016 c. 2 (not published in FSCD 142 III 239), FSCD 4A_428/2015 c. 2, FSCD 4A_222/2015 c. 2, FSCD 4A_572/2015 c. 2, FSCD 4A_319/2015 c. 2, FSCD 4A_520/2015 c. 2, FSCD 4A_392/2015 c. 1, FSCD 4A_568/2015 c. 2, FSCD 4A_562/2015 c. 1.1, FSCD 4A_176/2015 c. 2, FSCD 4A_218/2015 c. 1, FSCD 4A_69/2015 c. 2, FSCD 4A_34/2015 c. 2.1 (not published in FSCD 141 III 495), FSCD 4A_172/2015 c. 2, FSCD 4A_136/2015 c. 1, FSCD 4A_54/2015 c. 2, FSCD 4A_246/2014 c. 2, FSCD 4A_684/2014 c. 2, FSCD 4A_124/2015 c. 2, FSCD 4A_676/2014 c. 2, FSCD 4A_633/2014 c. 2 (not published in FSCD 141 III 229), FSCD 4A_634/2014 c. 2, FSCD 4A_709/2014 c. 1, FSCD 4A_426/2014 c. 2, FSCD 4A_623/2014 c. 2, FSCD 4A_70/2015 c. 2, FSCD 4A_554/2014 c. 1, FSCD 4A_636/2014 c. 2, FSCD 4A_374/2014 c. 2, FSCD 4A_486/2014 c. 2, FSCD 4A_544/2014 c. 2, FSCD 4A_532/2014 & 4A_534/2014 c. 3, FSCD 4A_662/2014 c. 1.1, FSCD 4A_446/2014 c. 2, FSCD 4A_324/2014 c. 2, FSCD 4A_199/2014 c. 2, FSCD 4A_231/2014 c. 3, FSCD 4A_606/2013 c. 1.1, FSCD 4A_6/2014 c. 2.1 (not published in FSCD 140 III 520), FSCD 4A_74/2014 c. 2 (not published in FSCD 140 III 477), FSCD 4A_118/2014 c. 2, FSCD 4A_90/2014 c. 2, FSCD 4A_124/2014 c. 2.1, FSCD 4A_597/2013 c. 1, FSCD 4A_178/2014 c. 2, FSCD 4A_508/2013 c. 2 (not published in FSCD 140 III 278), FSCD 4A_544/2013 c. 2, FSCD 4A_530/2013 c. 2, FSCD 4A_112/2014 c. 1.1, FSCD 4A_43/2014 c. 1.1 FSCD 4A_450/2013 c. 2.1, FSCD 4A_564/2013 c. 2, FSCD 4A_577/2013 c. 2, FSCD 4A_448/2013 c. 2, FSCD 4A_362/2013 c. 2, FSCD 4A_304/2013 c. 2.1, FSCD 4A_438/2013 c. 2 (not published in FSCD 140 III 134), FSCD 4A_446/2013 c. 2, FSCD 4A_460/2013 c. 2, FSCD 4A_490/2013 c. 1, FSCD 4A_509/2013 c. 2, FSCD 4A_282/2013 c. 2 (not

published in FSCD 139 III 511), FSCD 4A_93/2013 c. 2.1, FSCD 4A_305/2013 c. 2, FSCD 4A_232/2013 c. 2, FSCD 4A_330/2013 c. 2, FSCD 4A_274/2013 c. 2, FSCD 4A_188/2013 c. 1, FSCD 4A_67/2013 c. 1.2, FSCD 4A_95/2013 c. 2, FSCD 4A_682/2012 c. 2, FSCD 4A_205/2013 c. 2.1, FSCD 4A_476/2012 c. 2, FSCD 4A_439/2012 & 4A_457/2012 c. 3.1, FSCD 4A_41/2013, FSCD 4A_730/2012 c. 2, FSCD 4A_672/2012 c. 2, FSCD 4A_524/2012 c. 2, FSCD 4A_669/2012 c. 2, FSCD 4A_596/2012 c. 2, FSCD 4A_522/2012 c. 2, FSCD 4A_388/2012 c. 2, FSCD 4A_576/2012 c. 2, FSCD 4A_552/2012 c. 2, FSCD 4A_407/2012 c. 2, FSCD 4A_550/2012 c. 3, FSCD 4A_335/2012 c. 1.1, FSCD 4A_538/2012 c. 2, FSCD 4A_244/2012 c. 2, FSCD 4A_146/2012 c. 2, FSCD 4A_537/2012 c. 2.1, FSCD 4A_198/2012 c. 2.1, FSCD 4A_414/2012 c. 1.1, FSCD 4A_635/2012 c. 2, FSCD 4A_276/2012 c. 2, FSCD 4A_50/2012 c. 2 (not published in FSCD 138 III 714), FSCD 4A_76/2012 c. 2, FSCD 4A_312/2012 c. 2, FSCD 4A_274/2012 c. 2, FSCD 4A_240/2012 c. 2.1, FSCD 4A_150/2012 c. 2, FSCD 4A_54/2012 c. 1, FSCD 4A_636/2011 c. 2, FSCD 4A_488/2011 c. 2, FSCD 4A_682/2012 c. 2, FSCD 4A_654/2011 c. 2, FSCD 4A_16/2012 c. 2, FSCD 4A_14/2012 c. 1.1 (not published in FSCD 138 III 270), FSCD 4A_558/2011 c. 2 (not published in FSCD 138 III 322), FSCD 4A_652/2011 c. 3.1, FSCD 4A_428/2011 c. 1.1, FSCD 4A_360/2011 c. 2, FSCD 4A_528/2011 c. 1, FSCD 4A_526/2011 c. 1, FSCD 4A_602/2011 c. 2, FSCD 4A_246/2011 c. 1 (not published in FSCD 138 III 29), FSCD 4A_454/2011 c. 1, FSCD 4A_214/2011 c. 1.1, FSCD 4A_530/2011 c. 1, FSCD 4A_103/2011 c. 1, FSCD 4A_162/2011 c. 1, FSCD 4A_254/2011 c. 5.1, FSCD 4A_617/2010 c. 2, FSCD 4A_46/2011 c. 1, FSCD 4A_44/2011 c. 1, FSCD 4A_404/2010 c. 3, FSCD 4A_640/2010 c. 2, FSCD 4A_604/2010 c. 1, FSCD 4A_614/2010 c. 1, FSCD 4A_600/2010 c. 2, FSCD 4A_481/2010 c. 2, FSCD 4A_514/2010 c. 3.2, FSCD 4A_326/2010 c. 1, FSCD 4A_482/2010 c. 2, FSCD 4A_394/2010 c. 2, FSCD 4A_392/2010 c. 2.1, FSCD 4A_579/2010 c. 1, FSCD 4A_440/2010 c. 1.1 (not published in FSCD 137 III 85), FSCD 4A_386/2010 c. 2, FSCD 4A_10/2010 c. 1, FSCD 4A_391/2010 & 4A_399/2010 c. 3 (not published in FSCD 136 III 597), FSCD 4A_428/2010 c. 1, FSCD 4A_234/2010 c. 1.2 (not published in FSCD 136 III 605), FSCD 4A_414/2010 c. 1, FSCD 4A_254/2010 c. 2, FSCD 4A_43/2010 c. 2, FSCD 4A_458/2009 c. 2, FSCD 4A_320/2009 c. 1, FSCD 25.05.2010 c. 1, FSCD 4A_620/2009 c. 2, FSCD 4A_456/2009 c. 2, FSCD 4A_582/2009 c. 1 (not published in FSCD 136 III 200), FSCD 4A_490/2009 c. 1 (not published in FSCD 136 III 200), FSCD 4A_644/2009 c. 1, FSCD 4A_624/2009 c. 2, FSCD 4A_566/2009 c. 1, FSCD 4A_584/2009 c. 2, FSCD 4A_4/2010 c. 2, FSCD 4A_524/2009 c. 1, FSCD 4A_488/2009 c. 2, FSCD 4A_464/2009 c. 2, FSCD 4A_444/2009 c. 2, FSCD 4A_612/2009 c. 1, FSCD 4A_574/2009, FSCD 4A_550/2009 c. 2, FSCD 4A_548/2009 c. 2.1, FSCD 4A_256/2009 c. 2, FSCD 4A_260/2009 c. 2, FSCD 4A_348/2009 c. 2, FSCD 4A_240/2009 c. 1, FSCD 4A_428/2009 c. 2.1, FSCD 4A_352/2009 c. 2, FSCD 4A_62/2009 c. 2, FSCD 4A_96/2009 & 4A_94/2009 c. 2, FSCD 4A_428/2008 c. 2.1, FSCD 4A_416/2008 c. 4, FSCD 4A_600/2008 c. 2.1, FSCD 4A_539/2008 c. 2.1, FSCD 4A_400/2008 c. 2.1, FSCD 4A_424/2008 c. 2, FSCD 4A_460/2008 c. 3, FSCD 4A_392/2008 c. 2.1, FSCD 4A_376/2008 c. 2, FSCD 4A_438/2008 c. 2.1, FSCD 4A_210/2008 c. 2.1, FSCD 4A_294/2008 c. 2.1, FSCD 4A_258/2008 c. 3.1, FSCD 4A_128/2008 c. 2.1, FSCD 4A_506/2007 c. 2, FSCD 4A_452/2007 c. 1.1, FSCD 4A_370/2007 c. 2, FSCD 4A_244/2007 c. 4, FSCD 4A_450/2007 c. 2.1, FSCD 4A_352/2007 c. 3, FSCD 4A_268/2007 c. 2.1, FSCD 4A_220/2007 c. 3.1, FSCD 4A_160/2007 c. 2, FSCD 4A_42/2007 c. 4, FSCD 4A_17/2007 c. 3, FSCD 4A_18/2007 c. 2, FSCD 4A_2/2007 c. 2

The proceedings before the Federal Supreme Court are governed by Article 77 FSCA. Article 77(2) FSCA expressly excludes the application of Articles 48(3), 93(1)(b), 95-98, 103(2), 105(2), 106(1) and 107(2) FSCA.

FSCD 4A_642/2017 c. 1, FSCD 4A_662/2014 c. 1.1, FSCD 4A_378/2014 c. 1.2, FSCD 4A_112/2014 c. 1.1, FSCD 4A_43/2014 c. 1.1, FSCD 4A_428/2011 c. 2.2, FSCD 4A_376/2008 c. 2.2

3 *Appeal to the Federal Supreme Court*

The Federal Supreme Court examines its own #jurisdiction *ex officio* with unfettered #powers of review and without being bound by the parties' submissions (Art. 29(1)FSCA).

FSCD 133 III 462 [465], FSCD 4A_620/2015 c. 1, FSCD 4A_126/2015 c. 4, FSCD 4A_134/2012 c. 2, FSCD 4A_636/2011 c. 2.3.1, FSCD 4A_528/2011 c. 1.2, FSCD 4A_214/2011 c. 1, FSCD 4A_514/2010 c. 3.1, FSCD 4A_456/2009 c. 2.2, FSCD 4A_566/2009 c. 1.2, FSCD 4A_376/2008 c. 1, FSCD 4P.54/2002 c. 1, FSCD 4P.172/1999 [(2001) ASA p. 790]

The #Appeal in Civil Matters can only be addressed to the Federal Supreme Court and the parties may no longer agree that the sole cantonal authority at the seat of the #arbitral tribunal, designated by the Canton, decides in a final decision (see Art. 191 PILA in its new wording – RO 2006, 1249 -, which abolishes the possibility given to the parties by Art. 191(2) fPILA to exclude the #jurisdiction of the Federal Supreme Court).

FSCD 4A_220/2007 c. 3.1, FSCD 4A_160/2007 c. 2, FSCD 4A_18/2007 c. 2

Proceedings before the Federal Supreme Court can only be suspended) in exceptional circumstances in order to avoid that a file remains open before the Federal Supreme Court for too long a period.

FSCD 143 III 462 [471]

The power of the Federal Supreme Court to decide a #preliminary issue is derived from Article 31 FSCA according to which the Federal Supreme Court decides #preliminary issues when it has #jurisdiction in the main matter. However, when #preliminary issues occur in a foreign legal order, the Court only has #jurisdiction to decide them insofar as the bodies or courts which have #jurisdiction have not issued an enforceable judgment. If there is no enforceable judgment but the corresponding proceedings are pending before the courts that have #jurisdiction, the Federal Supreme Court may #stay the proceedings pursuant to Article 6(1) CCP and wait until the court which has #jurisdiction, has decided the #preliminary issue in its own pending proceedings. This avoids the risk of contradictory judgments.

FSCD 4A_118/2014 c. 3.4.2

4 *Standing of the Appellant*

Pursuant to Article 76(1) FSCA, which is applicable in domestic as well as international arbitration by virtue of Article 77(2) FSCA *a contrario*, is entitled to bring an #Appeal in Civil Matters anyone who took part in the proceedings before the previous authority or was deprived of the possibility of doing so (letter a), provided that it is particularly affected by the contested #decision and has a legal interest worthy of protection in its setting aside or modification (letter b). If its #standing to #appeal is not obvious, the onus is on the #appellant to demonstrate that the conditions are met and, to do so, to provide all the necessary data. The #standing to bring proceedings is determined exclusively by Article 76 FSCA.

FSCD 4A_560/2018 c. 2.1

The filing of an #appeal by a #branch company instead of the #mother company against whom the #award was issued must be considered as a mere mistaken designation of a party which does not prejudice its procedural #standing.

FSCD 4A_41/2013

A professional football club has standing to bring setting aside proceedings on the basis of an alleged violation of the player's #personal rights as Article 17(2) FIFA 2010 Regulations and Status Transfer creates joint liability between a professional player terminating his employment contract and his new club as to the payment of compensation for breach of contract without cause and Article 145 CO allows a joint debtor to raise the defences arising from the cause of the joint obligation against a creditor.

FSCD 4A_304/2013 c. 3

5 Interest of the Appellant

5.1 Principle

The #appellant must be particularly affected by the decision under #appeal and must have a legal interest worthy of protection in the setting aside or modification of the decision under #appeal (Art. 76(1)(b) FSCA).

FSCD 143 III 578 [587], FSCD 4A_560/2018 c. 2.1, FSCD 4A_550/2017 c. 6.1, FSCD 4A_50/2017 c. 3.3, FSCD 4A_22/2017, FSCD 4A_426/2017 c. 3.1, FSCD 4A_532/2016 c. 2.3, FSCD 4A_470/2016 c. 2.2, FSCD 4A_620/2015 c. 1.1, FSCD 4A_172/2015 c. 2.2, FSCD 4A_126/2015 c. 4.1, FSCD 4A_515/2012 c. 2.2, FSCD 4A_134/2012 c. 2.1, FSCD 4A_528/2011 c. 1.2

The #appellant must have a personal, direct and legal interest worthy of protection that the #award not be rendered in violation of the guarantees stemming from Article 190(2) PILA, which entitles it to file an #appeal (Art. 76(1) FSCA).

FSCD 4A_170/2017 c. 7.2.1, FSCD 4A_260/2017 c. 1.3, FSCD 4A_384/2017 c. 1.3, FSCD 4A_692/2016 c. 2.4, FSCD 4A_524/2016 c. 3.1, FSCD 4A_222/2015 c. 2, FSCD 4A_446/2014 c. 2, FSCD 4A_6/2014 c. 2.1 (not published in FSCD 140 III 520), FSCD 4A_530/2013 c. 2, FSCD 4A_304/2013 c. 2.1, FSCD 4A_232/2013 c. 2, FSCD 4A_414/2012 c. 1.1, FSCD 4A_635/2012 c. 2, FSCD 4A_312/2012 c. 2, FSCD 4A_240/2012 c. 2.1, FSCD 4A_54/2012 c. 1.2, FSCD 4A_636/2011 c. 2.3.1, FSCD 4A_428/2011 c. 1.1, FSCD 4A_44/2011 c. 2.3, FSCD 4A_614/2010 c. 1, FSCD 4A_514/2010 c. 3.2, FSCD 4A_392/2010 c. 2.2, FSCD 4A_440/2010 c. 1.1 (not published in FSCD 137 III 85), FSCD 4A_420/2010 c. 3, FSCD 4A_386/2010 c. 2, FSCD 4A_234/2010 c. 1.2 (not published in FSCD 136 III 605), FSCD 4A_254/2010 c. 2.2, FSCD 4A_458/2009 c. 2.2, FSCD 4A_456/2009 c. 2.2, FSCD 4A_582/2009 c. 1 (not published in FSCD 136 III 200), FSCD 4A_566/2009 c. 1.2, FSCD 4A_464/2009 c. 2, FSCD 4A_548/2009 c. 2.1, FSCD 4A_428/2009 c. 2.1, FSCD 4A_352/2009 c. 2, FSCD 4A_539/2008 c. 2.1, FSCD 4A_400/2008 c. 2.3, FSCD 4A_438/2008 c. 2.4, FSCD 4A_210/2008 c. 2.1, FSCD 4A_294/2008 c. 2.3, FSCD 4A_258/2008 c. 3.3, FSCD 4A_215/2008 c. 1.2, FSCD 4A_128/2008 c. 2.1, FSCD 4A_506/2007 c. 2.2, FSCD 4A_370/2007 c. 2.2, FSCD 4A_450/2007 c. 2.1, FSCD 4A_352/2007 c. 3, FSCD 4A_268/2007 c. 2.1, FSCD 4A_220/2007 c. 3.2, FSCD 4A_160/2007 c. 2.1, FSCD 4A_18/2007 c. 2.1

This implies that the #appellant's submissions with respect to its rights were rejected and that it should still have an interest in the modification of the decision.

FSCD 4A_44/2011 c. 2.3

5.2 Definition of Legal Interest Worthy of Protection

A legal interest worthy of protection consists in the practical use that admitting the #appeal would have for the #appellant, by preventing it from incurring loss of an economic, ideal, material or other nature which would be caused by the decision under #appeal.

FSCD 143 III 578 [587], FSCD 4A_560/2018 c. 2.1, FSCD 4A_550/2017 c. 6.1, FSCD 4A_170/2017 c. 7.2.1, FSCD 4A_426/2017 c. 3.1, FSCD 4A_50/2017 c. 3.3, FSCD 4A_524/2016 c. 3.1, FSCD 4A_620/2015 c. 1.1, FSCD 4A_126/2015 c. 4.1, FSCD 4A_146/2012 c. 3.3.1, FSCD 4A_134/2012 c. 2.1

As a general rule, there is no legal interest worthy of protection when the #appellant disputes the grounds of the attacked decision without however requesting any substantial modification to the #operative part of the #award.

FSCD 4A_22/2017

5.3 Present Interest

The interest must be present. It must exist not only at the time the #appeal is made but also when the #decision is rendered.

FSCD 143 III 578 [587], FSCD 4A_560/2018 c. 2.1, FSCD 4A_426/2017 c. 3.1, FSCD 4A_50/2017 c. 3.3, FSCD 4A_524/2016 c. 3.1, FSCD 4A_620/2015 c. 1.1, FSCD 4A_126/2015 c. 4.1, FSCD 4A_110/2012 c. 3.3.1, FSCD 4A_134/2012 c. 2.1,

If there is no legal interest worthy of protection when the #appeal is filed, the #appeal will be considered as inadmissible.

FSCD 4A_426/2017 c. 3.1, FSCD 4A_524/2016 c. 3.1, FSCD 4A_620/2015 c. 1.1, FSCD 4A_126/2015 c. 4.1

If there is a legal interest worthy of protection at the time the #appeal is filed which subsequently disappears, the case is to be considered as moot.

FSCD 4A_426/2017 c. 3.1, FSCD 4A_524/2016 c. 3.1, FSCD 4A_620/2015 c. 1.1, FSCD 4A_126/2015 c. 4.1, FSCD 4A_110/2012 c. 3.3.1, FSCD 4A_134/2012 c. 2.1, FSCD 4A_636/2011 c. 2.3.1

5.4 Personal Interest

Moreover, the #appellant must have a personal interest in bringing the #Appeal in Civil Matters. According to the adage “no one pleads by prosecutor”, it is not in principle admitted to bring legal proceedings invoking not one’s own interest but the interest of another.

FSCD 4A_560/2018 c. 2.1

5.5 Burden of Proof

The #appellant has to establish that the legal requirements set out in Article 76(1) FSCA are met.

FSCD 4A_636/2011 c. 2.3.1, FSCD 4A_456/2009 c. 2.2, FSCD 4A_566/2009 c. 1.2

It is not for the Federal Supreme Court to examine whether and to what extent the application to set aside is admissible, based on the file or other documents yet to be consulted.

FSCD 4A_636/2011 c. 2.3.1, FSCD 4A_566/2009 c. 1.2

5.6 Exception

The Federal Supreme Court may exceptionally not require a legal interest worthy of protection when the issue at hand may arise again in similar circumstances and when there is sufficient public interest in the issue being addressed due to its

fundamental nature and when it would be possible to adjudicate it timely in the case at hand.

FSCD 4A_426/2017 c. 3.1, FSCD 4A_134/2012 c. 2.1, FSCD 4A_636/2011 c. 2.3.1

5.7 Individual Cases

An #appellant is **directly affected** by:

- the contested decision as it confirmed the disciplinary sanctions imposed by the FIFA Appeal Committee as the final instance.
FSCD 4A_260/2017 c. 1.3
- the decision under #appeal which rejected its submissions that the #arbitral proceedings should be closed or in the alternative stayed.
FSCD 4A_446/2014 c. 2
- the arbitral #award in which its jurisdictional defence was rejected.
FSCD 4A_124/2014 c. 2.1, FSCD 4A_428/2011 c. 1.2
- the arbitral #award pursuant to which the #arbitrator ordered it to pay a sum of money to the #respondent.
FSCD 4A_669/2012 c. 2.2, FSCD 4A_312/2012 c. 2, FSCD 4A_54/2012 c. 1.2
- the arbitral #award pursuant to which the #arbitrator ordered it to pay a sum of money to the #respondent and upheld only a very small part of its counterclaim.
FSCD 4A_150/2012 c. 2, FSCD 4A_360/2011 c. 2.2

An #appellant has a **legal interest worthy of protection** in seeking the setting aside of an #award in which the #arbitral tribunal:

- rejected its submissions on the lack of #jurisdiction.
FSCD 4A_407/2017 c. 1.2, FSCD 4A_628/2015 c. 1.1 (not published in FSCD 142 III 296), FSCD 4A_515/2012 c. 2.2, FSCD 4A_146/2012 c. 2.2, FSCD 4A_414/2012 c. 1.1, FSCD 4A_240/2012 c. 2.1
- declared its #appeal inadmissible due to a failure to submit its #appeal within the relevant #time limit.
FSCD 4A_384/2017 c. 1.3
- refused to hear its #claim due to a lack of #jurisdiction.
FSCD 4A_692/2016 c. 2.4
- rejected its #claims.
FSCD 4A_530/2013 c. 2
- upheld one of the objections against #jurisdiction raised by the #respondent and rejected one of its substantive #claims.
FSCD 4A_450/2013 c. 2.1

- ordered it to pay an amount of money to the #respondent and prohibited it from registering any more players.
FSCD 4A_304/2013 c. 2.1
- ordered it to pay an amount of money to the #respondent and rejected its counterclaims.
FSCD 4A_232/2013 c. 2
- imposed upon it an illegibility period of two years even though this sanction expired two days after the #appeal was filed. Its interest is the risk that it may be punished more severely as a repeat offender if the #award enters into force and becomes #res *judicata* should it commit another violation in the future.
FSCD 4A_576/2012 c. 2
- imposed upon it an illegibility period of two years.
FSCD 4A_576/2012 c. 2
- rejected its submissions that an amount due to its opponent should be set off against its claim for damages.
FSCD 4A_635/2012 c. 2

Even though an #appellant may no longer have a legal interest worthy of protection in the setting aside of the main holding of the decision under #appeal, it may nonetheless appeal the #costs as they affect its personal and direct interests.

FSCD 4A_126/2015 c. 4.2, FSCD 4A_134/2012 c. 3, FSCD 4A_636/2011 c. 3

An #appellant has a personal and present interest worthy of protection to ensure that the #award was not issued in violation of the guarantees arising from Article 190(2) PILA as it was a party to the #CAS proceedings and is particularly affected by the #award under appeal as it set aside a decision ordering the #respondent and the player jointly to pay a significant amount of money to it.

FSCD 4A_6/2014 c. 2.1 (not published in FSCD 140 III 520)

An #appellant has a legal interest worthy of protection to ensure that the #CAS did not issue an #award falling within Article 190(2) PILA when it ordered the #appellant to pay part of the #costs of the arbitration and to compensate the two clubs implicated in the #arbitral proceedings.

FSCD 4A_314/2012 c. 2

An #appellant has a legal interest in setting aside the preliminary #award even if it did not comply with it. It may be important for the #appellant to obtain a declaration that the preliminary #award was not made in accordance with the law. In addition, a #decision by the Federal Supreme Court setting aside the #award may have consequences with respect to the allocation of #costs in the final #award.

FSCD 4A_582/2009 c. 2.2.2 (not published in FSCD 136 III 200)

However, the #appellant still has a legal interest worthy of protection in the setting aside of a ban from a race in which it won second place.

FSCD 4A_636/2011 c. 2.3.3

An #appellant does **not have a legal interest worthy of protection**:

- in the setting aside of an #award, the effect of which was to add a jointly and severally liable debtor to it.
FSCD 4A_550/2017 c. 6.3
- in the setting aside – even partial – of an #award for the sole reason that its #operative part contains superfluous findings without any effect of their own.
FSCD 4A_50/2017 c. 3.3
- in seeking the replacement of the ground of #inadmissibility relied on by the #arbitral tribunal, namely the failure of the notice of #appeal to comply with formal requirements, by another ground of #inadmissibility, namely the lack of #jurisdiction of the #arbitral tribunal.
FSCD 4A_22/2017
- in challenging a court decision which rejects its request to ensure that the #CAS tribunal was composed of #arbitrators not included on the official list when the #CAS tribunal had in the meantime issued an #award denying #jurisdiction.
FSCD 4A_126/2015 c. 4.2
- in challenging a #correction made by the #arbitral tribunal in the #operative part of the #award as the #correction was in the #appellant's favour.
FSCD 4A_730/2012 c. 4
- in the setting aside of an #award holding that it did not have the right to be reinstated into a competition which is over and terminating #provisional measures ordering that it should be able to participate. The #appellant's intention to seek compensation for the loss caused by the allegedly illicit exclusion from the competition does not create an interest worthy of protection. The decision under #appeal could not be invoked against the #appellant in a subsequent claim for damages.
FSCD 4A_134/2012 c. 2.2
- in the setting aside of the #award to the extent that the #arbitrator upheld the #appellant's main submission.
FSCD 4A_528/2011 c. 1.2
- to obtain the setting aside of a decision refusing to address the #merits of a request for #interpretation of an #award when the Federal Supreme Court decided in relation to the #appeal against the #award that the #award itself did not contradict the #reasons of the #award.
FSCD 4A_420/2010 c. 3

- in the setting aside of a ban imposed by an #award which has expired in the meantime.

FSCD 4A_636/2011 c. 2.3.2

The possibility of subsequently requesting compensation for the loss incurred due to a temporary allegedly illegal exclusion from a certain number of official meetings is not sufficient in itself to constitute an interest worthy of protection.

FSCD 4A_620/2015 c. 1.2

The imposition of #costs does not make it possible to obtain indirect judicial review of the #merits. The #appellant may only claim that the apportionment of the #costs was contrary to the law for another reason than because it lost on the #merits.

FSCD 4A_620/2015 c. 1.2, FSCD 4A_134/2012 c. 3, FSCD 4A_636/2011 c. 3

In principle, an #appellant who has settled its debt, no longer has a present interest in obtaining the setting aside of an #award which granted it a grace period to settle its debt under penalty of suspension. However, there is a remaining interest in the event that the #appellant may have suffered financial damages while it was suspended between the issuance of the #award and the payment of the debt and the #appellant could still argue a violation of its rights as to the issue of #costs.

FSCD 4A_604/2010 c. 1.2

A national sports #federation does not show a legal interest worthy of protection to have an #award set aside in a monetary dispute arising out of an employment contract between a football player and a club when it does not contend that the #award affects its member's rights and that it is representing the interest of its members.

FSCD 4A_566/2009 c. 1.2.2

6 *Formal Requirements*

According to Article 42(1) FSCA in connection with Article 54(1) FSCA, the #appeal must be written in an official language of Switzerland.

FSCD 4A_510/2017, FSCD 4A_596/2015

According to Article 42(6) FSCA, among other things, legal documents not written in an official language of Switzerland may be rejected and a request to remedy the irregularity may be made pursuant to Article 42(5) FSCA.

FSCD 4A_510/2017

Where a submission is made within the #time limit but not in the language of the proceedings, an additional #time limit for translation should generally be granted in order to avoid #excessive formalism. However, abusive procedural conduct is reserved.

FSCD 4A_510/2017

International #arbitral proceedings are regularly conducted in a language other than one of the official Swiss languages, which must be taken into consideration when reviewing the formal validity (Art. 42(1) FSCA) of the #appeal of the #award before the Federal Supreme Court pursuant to Article 77 FSCA within the 30-day #appeal period (Art. 100(1) FSCA).

FSCD 4A_510/2017

According to Article 42(1) FSCA, written submissions to the Federal Supreme Court must contain the signature of the party or its representative.

FSCD 4A_596/2015

Appeals to the Federal Supreme Court can only be filed in the legally prescribed form, i.e. by handing them over to the Federal Supreme Court or the Swiss Post Office (Art. 48(1) FSCA) or by electronic submission with a certified electronic signature (Art. 42(4) in conjunction with Art. 48(2) FSCA).

FSCD 4A_596/2015

Other electronic filings are invalid as they cannot contain an original signature. Therefore, they are not filed within the applicable #time limit. It is not possible to remedy an irregularity which consists in the filing of an electronic submission that does not have a certified electronic signature after the #time limit for the filing of the submission has expired.

FSCD 4A_596/2015

Filed within 30 days from the notification of the challenged #award (Art. 100(1) FSCA), the #motion for setting aside which fulfils the formal requirements provided for by Article 42(1) FSCA must be heard.

FSCD 4A_238/2018 c. 3.1, FSCD 5A_507/2016 c. 5, FSCD 4A_392/2015 c. 2.1, FSCD 4A_609/2014 c. 2, FSCD 4A_446/2014 c. 2, FSCD 4A_124/2014 c. 2.1, FSCD 4A_304/2013 c. 2.1, FSCD 4A_476/2013 c. 2.1, FSCD 4A_468/2013 c. 3.1, FSCD 4A_576/2012 c. 2, FSCD 4A_312/2012 c. 2, FSCD 4A_636/2011 c. 2.2.1, FSCD 4A_392/2010 c. 2.3.1, FSCD 4A_604/2010 c. 1.3, FSCD 4A_392/2010 c. 2.3.1, FSCD 4A_582/2009 c. 2.1.2 (not published in FSCD 136 III 200), FSCD 4A_438/2008 c. 2.4, FSCD 4A_210/2008 c. 2.1, FSCD 4A_294/2008 c. 2.3, FSCD 4A_215/2008 c. 1.2, FSCD 4A_128/2008 c. 2.1, FSCD 4A_506/2007 c. 2.2, FSCD

4A_370/2007 c. 2.2, FSCD 4A_450/2007 c. 2.1, FSCD 4A_352/2007 c. 3, FSCD 4A_268/2007 c. 2.1, FSCD 4A_220/2007 c. 3.2, FSCD 4A_160/2007 c. 2.1, FSCD 4A_18/2007 c. 2.1

7 Time Limit for the Filing of the Appeal

7.1 Principle

Filed within 30 days from the notification of the challenged #award (Art. 100(1) FSCA), the #motion for setting aside which fulfils the formal requirements provided for by Article 42(1) FSCA must be heard.

FSCD 4A_238/2018 c. 3.1, FSCD 5A_507/2016 c. 5, FSCD 4A_392/2015 c. 2.1, FSCD 4A_609/2014 c. 2, FSCD 4A_446/2014 c. 2, FSCD 4A_124/2014 c. 2.1, FSCD 4A_304/2013 c. 2.1, FSCD 4A_476/2013 c. 2.1, FSCD 4A_468/2013 c. 3.1, FSCD 4A_576/2012 c. 2, FSCD 4A_312/2012 c. 2, FSCD 4A_318/2012 [4A_318/2012], FSCD 4A_636/2011 c. 2.2.1, FSCD 4A_392/2010 c. 2.3.1, FSCD 4A_604/2010 c. 1.3, FSCD 4A_392/2010 c. 2.3.1, FSCD 4A_582/2009 c. 2.1.2 (not published in FSCD 136 III 200), FSCD 4A_438/2008 c. 2.4, FSCD 4A_210/2008 c. 2.1, FSCD 4A_294/2008 c. 2.3, FSCD 4A_215/2008 c. 1.2, FSCD 4A_128/2008 c. 2.1, FSCD 4A_506/2007 c. 2.2, FSCD 4A_370/2007 c. 2.2, FSCD 4A_450/2007 c. 2.1, FSCD 4A_352/2007 c. 3, FSCD 4A_268/2007 c. 2.1, FSCD 4A_220/2007 c. 3.2, FSCD 4A_160/2007 c. 2.1, FSCD 4A_18/2007 c. 2.1

The #motion for setting aside must be filed within 30 days after the complete #award was notified.

FSCD 4A_238/2018 c. 3.1, FSCD 4A_444/2016; FSCD 5A_507/2016 c. 5, FSCD 4A_392/2015 c. 2.1, FSCD 4A_576/2012 c. 2, FSCD 9.10.2012 c. 1; FSCD 4A_392/2010 c. 2.3.1

The #motion for setting aside must be filed with complete and legally sufficient reasons within the #time limit to appeal (Art. 42(1) FSCA).

FSCD 4A_544/2014 c. 2.4, FSCD 4A_244/2012 c. 2.5, FSCD 4A_602/2011 c. 2.2

A #time limit to supplement an insufficiently reasoned appeal is not included in Article 42(5) & (6) FSCA.

FSCD 4A_244/2012 c. 2.5

The #motion for setting aside an arbitral #award must be lodged with the Federal Supreme Court within 30 days of the notification of the complete copy (Art. 191 PILA in conjunction with Art. 100(1) FSCA), and this #time limit cannot be extended (Art. 47(1) FSCA).

FSCD 4A_318/2012

7.2 Start Date of the Time Limit

7.2.1 Date of Notification

The #time limit for filing a [former] #motion for constitutional review with the Federal Supreme Court within the meaning of Articles 190(2)(b) and 191(1) PILA starts to run as of the notification of the arbitral #award.

FSCD 116 II 721 [731], GE 12.05.1989 [(1989) ASA p. 191]

It is the date of notification of the decision under #appeal which is relevant and not the time at which it was read by the addressee.

FSCD 4A_609/2014 c. 2.3.3

7.2.2 Notification of Full Reasons Required

The 30-day #time limit within which a #motion to set aside must be filed starts to run only when the full #reasons of the decision are received. Accordingly, when the #reasons for the rejection of jurisdictional objections are only spelled out in the final #award, the #time limit only starts to run from the notification of the final #award and not the interim #decision.

FSCD 4A_46/2011 c. 3.3.1

7.2.3 Manner of Notification

The manner in which the #award is notified depends upon the agreement of the parties or the rules chosen by the parties.

FSCD 4A_609/2014 c. 2.3.1, FSCD 4A_582/2009 c. 2.1.2 (not published in FSCD 136 III 200)

7.2.4 Notification by Fax or Email

The notification by fax of an arbitral #award is not foreseen by [Art. 100(1) FSCA] and does not therefore cause the #time limit to start running when the arbitral rules foresee the notification of an original of the #award.

FSCD 4A_40/2018 c. 2.2, FSCD 4A_238/2018 c. 3.1

The same rule can be applied *mutatis mutandis*, due to the identity of reasons, concerning the notification of a copy of the original of the #award by email.

FSCD 4A_40/2018 c. 2.2, FSCD 4A_238/2018 c. 3.1

However, the case in which the applicable rules do not prescribe the sending of an original #award to the parties is reserved.

FSCD 4A_40/2018 c. 2.2

The legal doctrine however, by reference to Article 34(1) ICC Rules [2012 version], confirms that the fact that the notification of the original of the #award is imposed implies a communication by post or by courier.

FSCD 4A_40/2018 c. 2.2

The notification by fax or email of a #CAS #award does not extend the #time limit of Article 100(1) FSCA.

FSCD 4A_600/2016 c. 1.3, FSCD 4A_110/2012 c. 1

Article R31(2) of the #CAS Code provides that the #CAS #awards are notified “by any means permitting proof of receipt”. Article R59(1) of the #CAS Code requires the #award to be signed at least by the Presiding arbitrator of the Panel. Notifying a #CAS international arbitral #award by fax does not cause the #time limit of Article 100(1) FSCA to start running. On the one hand, a signature by hand cannot be substituted by the signature of the original with a copy faxed to

the addressees of the #award. On the other hand, a fax is generally not a means permitting proof of notification.

FSCD 4A_312/2012 c. 2, FSCD 4A_636/2011 c. 2.2.1, FSCD 4A_428/2011 c. 1.3, FSCD 4A_392/2010 c. 2.3.2, FSCD 4A_604/2010 c. 1.3

The 30-day #time limit within which a #motion to set aside must be filed starts to run from the notification of the #award. A notification of the #award by fax is sufficient to start the running of the #time limit.

FSCD 4A_628/2009 c. 2.

7.2.5 Notification by Registered Mail

The #time limit starts to run as from the day after the receipt of the registered mail containing the arbitral #award (Art. 44(1) FSCA).

FSCD 4A_609/2014 c. 2, FSCD 4A_476/2013 c. 2.1

A registered mail is deemed to be notified on the date that the recipient effectively received it. When the latter cannot be reached and an invitation to come and withdraw the mail is placed in its letter box or post office box, the date of withdrawal of the mail is the date retained. If the mail is not withdrawn within the seven day retention period, it is deemed to be communicated on the last day of this period.

FSCD 4A_392/2015 c. 2.1

In the event of the retention of mail, such as in the case of postal shipping to a letter box or a post office box, a registered mail is deemed to be communicated on the last day of a seven day #time limit starting from the receipt of the mail by the post office at the home of the recipient, in the case that the latter was waiting with a real likelihood to receive such a communication. This last condition is, in principle, satisfied during the whole of the duration of the proceedings.

FSCD 4A_476/2013 c. 2.1

7.3 Suspension of Time Limit

When a #final award is notified during the judicial holidays, the #time limit starts to run the first day following the holidays.

FSCD 143 III 589 [597]

The #time limit does not run during the judicial holidays, in particular from 15 July to 15 August inclusive (Art. 46(1)(b) FSCA)

FSCD 4A_392/2015 c. 2.1, FSCD 4A_304/2013 c. 2.1, FSCD 4A_476/2013 c. 2.2, FSCD 4A_468/2013 c. 3.1

7.4 Manner and Proof of Submission of Written Brief

The submission of a written brief by fax does not allow the #time limit to be respected.

FSCD 4A_214/2016 c. 1.2, FSCD 4A_392/2010 c. 2.3.1, FSCD 4A_258/2008 c. 2

The #appellant who chooses to submit its brief by foreign post must ensure that it is received within the #time limit by posting it sufficiently early.

FSCD 4A_468/2013 c. 3.1

According to Article 48(1) FSCA, the written briefs have to be submitted at the latest the last day of the #time limit, be it to the Federal Supreme Court, be it to the Swiss Post or a Swiss diplomatic or consular representation, to the attention of the Federal Supreme Court. Apart from the one of Liechtenstein, foreign post offices are not equated with a Swiss post office. Therefore, the handing over of a written brief to such an office does not equate with the handing over to a Swiss post office. In order to respect the #time limit in such a case, the letter containing the written brief must arrive at the last day of the #time limit to the office of the Federal Supreme Court or the Swiss Post must take possession of it before the expiry of the #time limit.

FSCD 4A_374/2014 c. 3.2, FSCD 4A_609/2014 c. 2, FSCD 4A_468/2013 c. 3.1, FSCD 4A_258/2008 c. 2

The party must prove that the written brief was submitted at the latest on the last day of the #time limit be it to the Federal Supreme Court, be it to the Swiss Post or a Swiss diplomatic or consular representation, to the attention of the Federal Supreme Court. Strict proof is required, and highest probability does not suffice.

FSCD 4A_374/2014 c. 3.2

7.5 Effects of Failure to Comply with Time Limits

When the Federal Supreme Court receives a #motion to set aside by fax, it declares the latter inadmissible without giving to the relevant party the opportunity to remedy this defect.

FSCD 4A_214/2016 c. 1.2

If the #time limit for filing an answer is not complied with, the Federal Supreme Court will exclude the answer from the file. The arguments developed by the #appellant in the #reply to refute arguments raised in the answer will also be disregarded.

FSCD 4A_374/2014 c. 3.2

7.6 No Extension of the Time Limit

The #time limit cannot be extended (Art. 47(1) FSCA).

FSCD 4A_444/2016; FSCD 4A_214/2016 c. 2.2, FSCD 4A_476/2013 c. 2.1, FSCD 4A_468/2013 c. 3.1, FSCD 4A_636/2011 c. 2.2.1, FSCD 4A_428/2011 c. 2.2, FSCD 4A_604/2010 c. 1.3, FSCD 4A_392/2010 c. 2.3.1

7.7 Re-Establishment of the Time Limit

If a party or its representative is prevented, for a ground other than an irregular notification and without any fault of its own, from acting within the specific #time limit, the #time limit is #re-established. The request for #re-establishment must

state the impediment and it must be filed within 30 days from the day on which the impediment ceases, and the omitted action must also be taken within this #time limit (Art. 50(1) FSCA).

FSCD 5A_507/2016 c. 6, FSCD 4A_215/2008 c. 7.1

Illness can constitute a legitimate reason for re-establishing the #time limit, as long as the illness prevented the party from filing the appeal brief within the #time limit or from entrusting this task to a third party.

FSCD 5A_507/2016 c. 6

The impediment which is not due to the fault of a party stops when the party is able to perform the procedural act itself or to entrust it to a third party.

FSCD 5A_507/2016 c. 6

Apart from the fact that Article 50(1) FSCA extends from 10 to 30 days the #time limit in which the request for #re-establishment must be filed and the omitted action must be taken, this provision does not change the substantive prerequisites established by Article 35 fSOFJ for the #re-establishment of the #time limit. This is why #case law regarding the abrogated provision also keeps all its value under the new law.

FSCD 4A_215/2008 c. 7.1, FSCD 30.08.1996 [(1997) ASA p. 114], FSCD 17.08.1994 [(1995) ASA p. 201]

The #re-establishment of the #time limit is conditioned by the fact that the party or its representative, who has been prevented from acting within the #time limit, did not have a faulty behaviour. According to #case law, the non-faulty impediment of the party or its representative includes not only objective impossibility, such as *force majeure*, but also subjective impossibility due to personal circumstances or to an excusable error (FSCD 96 II 262 [265]). The practice which strictly appreciates the fulfilment of this condition requires that the non-faulty nature of the asserted impediment clearly appears.

FSCD 4A_215/2008 c. 7.1

The need to translate the #award from English to Russian and the time necessary for this translation, and the absence of a representative or of a chosen domicile in Switzerland are not adequate grounds for a request for a #re-establishment of a #time limit, in particular when the #arbitral tribunal suggested several times to the party that it be represented.

FSCD 30.08.1996 [(1997) ASA p. 114]

7.8 Additional and Supplementary Appeal Briefs

An additional appeal brief is admissible if it was filed before the expiry of the #time limit running from the notification of the full #award with the signature of the presiding #arbitrator.

FSCD 4A_510/2015 c. 2

If two consecutive appeal briefs are filed within the #time limit, as they both correspond to the same #appeal, all arguments contained therein shall be examined together.

FSCD 4A_304/2013 c. 2.1

Supplementary appeal briefs are only possible under the restrictive conditions of Article 43 FSCA.

FSCD 4A_244/2012 c. 2.5

A second brief which rectifies formal errors contained in the first brief is not an additional #appeal which would be inadmissible due to late filing.

FSCA 4A_146/2012 c. 2.3

An #appellant must show that the opportunity to supplement the #appeal after the #time limit has expired is necessary to guarantee its #right to be heard.

FSCD 4A_244/2012 c. 2.5

The #time limit applies to the filing of one or several additional briefs.

FSCD 4A_636/2011 c. 2.2.1, FSCD 4A_392/2010 c. 2.3.1

7.9 Premature Appeal

An #appeal filed before the formal notification of the complete #award, when only the #operative part of the #award had been provided to the parties is premature, but nonetheless admissible.

FSCD 4A_444/2016

That the main #appeal was filed before the formal notification, when the #award had only been provided to the parties by fax is of no consequence. Although premature, the #appeal was nonetheless admissible.

FSCD 4A_510/2015 c. 2

7.10 Individual Cases

The UCI Cycling Regulations do not embody a requirement that the parties should be notified with an original of the #award signed by the #arbitrators.

FSCD 4A_609/2014 c. 2.3.1

The fact that the #appellant withdrew its participation from the #arbitral proceedings and did not respond to the procedural orders of the #arbitral tribunal does not permit it to disregard the #time limit to file a reasoned #appeal.

FSCD 4A_244/2012 c. 2.5

The date when the #award was formally communicated to the #appellant in accordance with Article 55(f) of the WIPO Expedited Arbitration Rules was relevant to determine when the #time limit had started to run. It was irrelevant that a copy of the #award had been sent as an attachment to an email at an earlier date.

FSCD 4A_582/2009 c. 2.1.2 (not published in FSCD 136 III 200)

The #time limit to file an #appeal does not expire 30 days after the parties have been informed by the #CAS about the #composition of the #arbitral tribunal. Such information does not constitute a decision which can be challenged before the Federal Supreme Court by an #Appeal in Civil Matters, but at the most, a

circumstance which could be important for the calculation of the #time limit to challenge the #arbitrators pursuant to Article R34 of the #CAS Code.

FSCD 4A_506/2007 c. 2.2

The fact that the legal representative of the #appellant did not have the whole file at its disposal does not constitute an impediment which is not a fault. The #appellants, as well as their representatives, have to organise themselves so that they can take the necessary measures within the statutory #time limit.

FSCD 17.08.1994 [(1995) ASA p. 201]

8 *Minimal Amount in Dispute*

It is disputed whether the #Appeal in Civil Matters is subject to the requirement of a minimal #amount in dispute if its object is an international arbitral #award.

FSCD 4A_61/2018 c. 4, FSCD 4A_570/2016 c. 1.2, FSCD 5A_294/2016 c. 1.2, FSCD 4A_322/2016 c. 1, FSCD 4A_422/2015 c. 1.2 (not published in FSCD 142 III 284), FSCD 4A_662/2014 c. 1.1, FSCD 4A_530/2013 c. 2, FSCD 4A_112/2014 c. 1.1, FSCD 4A_43/2014 c. 1.2, FSCD 4A_214/2013 c. 3, FSCD 4A_576/2012 c. 2, FSCD 4A_395/2012 c. 1, FSCD 4A_392/2010 c. 2.2, FSCD 4A_440/2010 c. 1.1 (not published in FSCD 137 III 85), FSCD 4A_386/2010 c. 2, FSCD 4A_234/2010 c. 1.2 (not published in FSCD 136 III 605), FSCD 4A_524/2009 c. 1, FSCD 4A_392/2008 c. 2.3

The Federal Supreme Court has left open the question of whether the #non-contentious nature of such proceedings has the effect that the prerequisite of a minimal #amount in dispute (Art. 74(1)(b) FSCA) does not apply to the #Appeal in Civil Matters and whether, in general, this requirement also applies in international arbitration.

FSCD 4A_43/2010 c. 3.2, FSCD 4A_215/2008 c. 1.1

Even if this was the case, such a requirement could not go beyond what applies to the #Appeal in Civil Matters against a decision rendered by a cantonal authority of last instance.

FSCD 4A_392/2008 c. 2.3

The dispute concerning the membership in an #association is not a financial matter within the meaning of Article 74 FSCA and is not subject to the prerequisite of a minimal #amount in dispute.

FSCD 4A_392/2008 c. 2.3, FSCD 4A_258/2008 c. 3.3, *FSCD 5A_260/2007 c. 1

9 *Principle of Exhaustion of Remedies*

The principle of the exhaustion of remedies, which requires that all useful remedies must be exhausted before an #appeal can be lodged, also applies to the #motion to set aside an #award.

FSCD 4A_490/2017 c. 3.3.4

10 *Object of the Appeal*

Article 191(1) PILA clearly shows the legislator's intention to open, in a direct way, against international arbitral #awards, the same #appeal, from a procedural point of view, as the #appeal which is open against the decisions of last cantonal instance in arbitration governed by the fConcordat or by a cantonal law; only the grounds for #appeal differ (Art. 190(2) PILA).

FSCD 115 II 288 [291]

Only an #award rendered in Switzerland in an arbitral matter with an international character to which the provisions of Chapter 12 of the PILA are applicable can be the object of a [*former*] #motion for constitutional review.

FSCD 4P.54/2002 c. 1

11 Substantiation of the Appeal

11.1 Only Raised and Reasoned Grievances

The Federal Supreme Court examines only the #grievances which have been raised and reasoned by the #appellant (Art. 77(3) FSCA). Therefore, the #appellant has to claim and argue its #grievances in accordance with Article 42(2) FSCA. This regime corresponds to the #duty of substantiation of Article 106(2) FSCA for the violation of #fundamental rights and of cantonal and inter-cantonal law.

FSCD 134 III 186 [187], FSCD 4A_394/2017 c. 2.3, FSCD 4A_338/2018 c. 1.2, FSCD 4A_65/2018 c. 2.2, FSCD 4A_308/2018 c. 2.3, FSCD 4A_301/2018 c. 3.1, FSCD 4A_642/2017 c. 1, FSCD 4A_284/2018 c. 2.3, FSCD 4A_398/2017 c. 3.2 (not published in FSCD 144 III 559), FSCD 4A_438/2017 c. 1.2, FSCD 4A_114/2018 c. 2.2, FSCD 4A_125/2018 c. 2.4, FSCD 4A_345/2017 c. 1.2, FSCD 4A_117/2018 c. 1, FSCD 4A_583/2017 c. 1.3, FSCD 4A_136/2018, FSCD 4A_426/2017 c. 2, FSCD 4A_580/2017 c. 1.2, FSCD 4A_490/2017 c. 2.3, FSCD 4A_508/2017 c. 2.2, FSCD 4A_432/2017 c. 2.3, FSCD 4A_430/2017 c. 1.3, FSCD 4A_236/2017 c. 2.2, FSCD 4A_150/2017 c. 2.2, FSCD 4A_318/2017 c. 2, FSCD 4A_80/2017 c. 2.2, FSCD 4A_600/2016 c. 1.2, FSCD 4A_532/2016 c. 2.5, FSCD 4A_470/2016 c. 2.3, FSCD 4A_621/2015 c. 3.3.1, FSCD 4A_490/2016 c. 2.2, FSCD 4A_405/2016 c. 2.2, FSCD 4A_478/2016 c. 2.2, FSCD 4A_672/2016 c. 2.2, FSCD 4A_497/2016 c. 1.4, FSCD 4A_310/2016 c. 2.2, FSCD 4A_355/2016 c. 2.1, FSCD 4A_259/2015 c. 1.4, FSCD 4A_132/2016 c. 2.2, FSCD 4A_173/2016 c. 1.2, FSCD 4A_206/2016 c. 5, FSCD 4A_214/2016 c. 3.1, FSCD 4A_678/2015 c. 2.2, FSCD 4A_422/2015 c. 2 (not published in FSCD 142 III 284), FSCD 4A_428/2015 c. 2.2, FSCD 4A_568/2015 c. 2.2, FSCD 4A_562/2015 c. 1.2, FSCD 4A_34/2015 c. 2.2 (not published in FSCD 141 III 495), FSCD 4A_172/2015 c. 2.3, FSCD 4A_378/2015 c. 3.1, FSCD 4A_54/2015 c. 2.2, FSCD 4A_143/2015 c. 1.2, FSCD 4A_684/2014 c. 2.2, FSCD 4A_709/2014 c. 2.1, FSCD 4A_623/2014 c. 2.4.1, FSCD 4A_554/2014 c. 1, FSCD 4A_599/2014 c. 2, FSCD 4A_636/2014 c. 2.2, FSCD 4A_698/2014, FSCD 4A_544/2014 c. 2.2, FSCD 4A_36/2015 c. 2, FSCD 4A_598/2014 c. 2.2.2, FSCD 4A_335/2014 c. 3.2.1, FSCD 4A_662/2014 c. 1.1, 1.2, FSCD 4A_378/2014 c. 1.3, FSCD 4A_324/2014 c. 2.2, FSCD 4A_199/2014 c. 3.1, FSCD 4A_274/2014 c. 1.2, FSCD 4A_74/2014 c. 2.5 (not published in FSCD 140 III 477), FSCD 4A_597/2013 c. 1.3, FSCD 4A_178/2014 c. 2.2, FSCD 4A_544/2013 c. 2.2, FSCD 4A_530/2013 c. 3, FSCD 4A_112/2014 c. 1.1, 1.2, FSCD 4A_43/2014 c. 1.1, 1.2, FSCD 4A_448/2013 c. 2.2, FSCD 4A_362/2013 c. 2.2, FSCD 4A_304/2013 c. 2.2, FSCD 4A_438/2013 c. 2.4 (not published in FSCD 140 III 134), FSCD 4A_451/2013 c. 2.2, FSCD 4A_540/2013 c. 3.1, FSCD 4A_93/2013 c. 2.3, FSCD 4A_333/2013 c. 2, FSCD 4A_305/2013 c. 2.2, FSCD 4A_330/2013 c. 2.2, FSCD 4A_274/2013 c. 2.2, FSCD 4A_67/2013 c. 1.3, FSCD 4A_95/2013 c. 2.2, FSCD 4A_205/2013 c. 2.1, FSCD 4A_476/2012 c. 2.3, FSCD 4A_439/2012 & 4A_457/2012 c. 3.1, FSCD 4A_41/2013, FSCD 4A_672/2012 c. 2.2, FSCD 4A_524/2012 c. 2.3, FSCD 4A_522/2012 c. 2.2, FSCD 4A_552/2012 c. 2.2, FSCD 4A_407/2012 c. 2.3, FSCD 4A_335/2012 c. 1.3, FSCD 4A_538/2012 c. 3.1, FSCD 4A_244/2012 c. 2.3, FSCD 4A_146/2012 c. 2.5, FSCD 4A_537/2012 c. 2.1, FSCD 4A_635/2012 c. 3, FSCD 4A_50/2012 c. 2.4 (not published in FSCD 138 III 714), FSCD 4A_299/2012 c. 1.4, FSCD 4A_395/2012 c. 1, FSCD 4A_314/2012 c. 6, FSCD 4A_76/2012 c. 2.2, FSCD 4A_54/2012 c. 1.6, FSCD 4A_636/2011 c. 2.4, FSCD 4A_682/2012 c. 2.3, FSCD 4A_232/2012 c. 2.2, FSCD 4A_654/2011 c. 2.2, FSCD 4A_16/2012 c. 2.2, FSCA 4A_14/2012 c. 4 (not published in FSCD 138 III 270), FSCD 4A_558/2011 c. 2.3 (not published in FSCD 138 III 322), FSCD 4A_627/2011 c. 2.4, FSCD 4A_652/2011 c. 3.1, FSCD 4A_360/2011 c. 3, FSCD 4A_528/2011 c. 1.3, FSCD 4A_526/2011 c. 1.2, FSCD

4A_634/2011 c. 1.4, FSCD 4A_602/2011 c. 2.2, FSCD 4A_454/2011 c. 2.1, FSCD 4A_214/2011 c. 1.3, FSCD 4A_426/2011 c. 2.2, FSCD 4A_162/2011 c. 1.2, FSCD 4A_254/2011 c. 5.1, FSCD 4A_617/2010 c. 2.3, FSCD 4A_404/2010 c. 3.3 & 3.5.3, FSCD 4A_604/2010 c. 2.2.2, FSCD 4A_326/2010 c. 1.2, FSCD 4A_402/2010 c. 1.2, FSCD 4A_428/2010 c. 1.2, FSCD 4A_414/2010 c. 1.2, FSCD 4A_43/2010 c. 3.4, FSCD 4A_338/2010, FSCD 4A_458/2009 c. 2.3.1, FSCD 4A_320/2009 c. 1.3, FSCD 4A_433/2009 c. 1.5, FSCD 4A_456/2009 c. 2.5.1, FSCD 4A_490/2009 c. 1.2 (not published in FSCD 136 III 200), FSCD 4A_624/2009 c. 3, FSCD 4A_524/2009 c. 4.2.1.2, FSCD 4A_444/2009 c. 2, FSCD 4A_574/2009, FSCD 4A_612/2009 c. 2.2, FSCD 4A_550/2009 c. 2, FSCD 4A_258/2009 c. 2.3, FSCD 4A_256/2009 c. 2.3, FSCD 4A_240/2009 c. 1.3, FSCD 4A_428/2009 c. 2.4, FSCD 4A_62/2009 c. 2.2, FSCD 4A_96/2009 & 4A_94/2009 c. 2.2, FSCD 4A_416/2008 c. 4, FSCD 4A_424/2008 c. 2.2, FSCD 4A_460/2008 c. 3, FSCD 4A_392/2008 c. 2.5.1, FSCD 4A_376/2008 c. 3.2, FSCD 4A_438/2008 c. 2.7, FSCD 4A_294/2008 c. 2.4, FSCD 4A_258/2008 c. 3.4, FSCD 4A_176/2008 c. 2.1, FSCD 4A_194/2008 c. 3, FSCD 4A_128/2008 c. 2.2, FSCD 4A_18/2008 c. 2, FSCD 4A_506/2007 c. 2.3, FSCD 4A_452/2007 c. 1.1, FSCD 4A_370/2007 c. 2.4, FSCD 4A_244/2007 c. 4.2, FSCD 4A_450/2007 c. 2.2, FSCD 4A_352/2007 c. 4, FSCD 4A_220/2007 c. 5.1, FSCD 4A_160/2007 c. 2.2, FSCD 4A_42/2007 c. 4.2, FSCD 4A_17/2007 c. 3.2, FSCD 4A_18/2007 c. 2.2, FSCD 4A_2/2007 c. 2.2

The strict requirements for substantiation established by the Federal Supreme Court under Article 90(1)(b) fSOFJ (FSCD 128 III 50 [53]) are still applicable, as the FSCA did not wish to change anything in this respect.

FSCD 134 III 186 [187], FSCD 4A_422/2015 c. 2 (not published in FSCD 142 III 284), FSCD 4A_206/2016 c. 5, FSCD 4A_562/2015 c. 1.2, FSCD 4A_335/2014 c. 3.2.1, FSCD 4A_662/2014 c. 1.2, FSCD 4A_378/2014 c. 1.3, FSCD 4A_274/2014 c. 1.2, FSCD 4A_112/2014 c. 1.2, FSCD 4A_451/2013 c. 2.2, FSCD 4A_67/2013 c. 1.3, FSCD 4A_333/2013 c. 2, FSCD 4A_93/2013 c. 2.3, FSCD 4A_627/2011 c. 2.4, FSCD 4A_454/2011 c. 2.1, FSCD 4A_214/2011 c. 1.3, FSCD 4A_254/2011 c. 5.1, FSCD 4A_458/2009 c. 2.3.1, FSCD 4A_416/2008 c. 4, FSCD 4A_460/2008 c. 3, FSCD 4A_392/2008 c. 2.5.1, FSCD 4A_376/2008 c. 3.2, FSCD 4A_438/2008 c. 2.7, FSCD 4A_294/2008 c. 2.4, FSCD 4A_258/2008 c. 3.4, FSCD 4A_194/2008 c. 3, FSCD 4A_128/2008 c. 2.2, FSCD 4A_506/2007 c. 2.3, FSCD 4A_452/2007 c. 1.1, FSCD 4A_370/2007 c. 2.4, FSCD 4A_244/2007 c. 4.2, FSCD 4A_450/2007 c. 2.2, FSCD 4A_352/2007 c. 4, FSCD 4A_220/2007 c. 5.1, FSCD 4A_160/2007 c. 2.2, FSCD 4A_42/2007 c. 4.2, FSCD 4A_17/2007 c. 3.2, FSCD 4A_18/2007 c. 2.2, FSCD 4A_2/2007 c. 2.2

Article 191 PILA refers in particular to Articles 88 to 96 fSOFJ. According to Article 90(1)(b) fSOFJ, the #motion to set aside has to contain the important #facts and a brief summary regarding the legal rules violated by the attacked decision and the extent to which they are violated. In the proceedings concerning a [former] #motion for constitutional review, the Federal Supreme Court examines only #grievances formulated in a clear and detailed manner and which are, as far as possible, proven (#adversarial maxim). The #appellant must explain in detail when discussing the #reasons of the challenged decision, to what extent a #ground for setting aside pursuant to Article 190(2) PILA is fulfilled (#Rügeprinzip). The Federal Supreme Court does not hear #grievances which are not sufficiently substantiated, and which are merely appellatory criticism of the attacked decision.

FSCD 129 III 445 [(2003) ASA p. 625-626], FSCD 128 III 191 [(2002) ASA p. 364], FSCD 128 III 50 [53], FSCD 127 III 279 [282], FSCD 126 III 524 [526], FSCD 117 II 604 [606], FSCD 4P.263/2002 c. 3.3, FSCD 4P.129/2002 c. 2.2, FSCD 4P.198/2002 c. 1.3, FSCD 4P.40/2002 c. 1b, FSCD 4P.38/2002c. 1b, FSCD

4P.320/2001 c. 5a, FSCD 4P.235/2001 c. 1b, FSCD 4P.200/2001 c. 1b, FSCD 4P.222/2001 c. 1c, FSCD 4P.114/2001 c. 1c, FSCD 4P.126/2001 c. 1c, FSCD 4P.188/2001 c. 1e, FSCD 4P.143/2001 c. 2c, FSCD 4P.124/2001 c. 1b, FSCD 4P.64/2001 c. 2b, FSCD 4P.290/2000 c. 3b, FSCD 4P.99/2000 c. 3b/bb, FSCD 1P.113/2000 c. 4b/aa, FSCD 17.02.1999 [(2000) ASA p. 318], FSCD 14.12.1998 [(2000) Rivista dell'Arbitrato p. 141-142], FSCD 16.10.1997 c. 1d, FSCD 06.09.1996 [(1997) ASA p. 309, 310-311], FSCD 30.12.1994 [(1995) ASA p. 221], FSCD 25.11.1993 [(1994) ASA p. 252], FSCD 22.12.1992 [(1996) ASA p. 649], FSCD 13.10.1992 [(1993) ASA p. 74], FSCD 11.05.1992 [(1992) ASA p. 382], FSCD 23.10.1989 [(1990) ASA p. 53]

A failure to ask for the #reasons of an arbitral #award does not prevent an #appeal being made against the arbitral #award, even though it significantly reduces the chances of success of the party intending to appeal the unreasoned #award.

FSCD 4A_298/2018 c. 3, FSCD 4A_300/2018 c. 3, FSCD 4A_198/2012 c. 2.2

A motion seeking the setting aside of an arbitral #award must satisfy the #duty of substantiation which flows from Article 77(3) FSCA in connection with Article 42(2) FSCA and the #case law relating to this latter provision.

FSCD 4A_314/2017 c. 2.4.2.2, FSCD 4A_491/2017 c. 3.1, FSCD 4A_170/2017 c. 3.2, FSCD 4A_478/2017 c. 2.2, FSCD 4A_247/2017 c. 2.2, FSCD 4A_450/2017 c. 2.2, FSCD 4A_260/2017 c. 2.1, FSCD 4A_157/2017 c. 2.2, FSCD 4A_592/2017 c. 3, FSCD 4A_50/2017 c. 2.2, FSCD 4A_34/2016 c. 2.2, FSCD 4A_444/2016, FSCD 4A_704/2015 c. 2, FSCD 4A_188/2016 c. 3, FSCD 4A_522/2016 c. 3.1, FSCD 4A_536/2016 c. 4.2

The relevant requirements are similar to those for grievances concerning infringements of fundamental rights.

FSCD 4A_600/2016 c. 1.2

The Federal Supreme Court is bound by the formal submissions made by the #appellant. It does not have to decide implicit submissions.

FSCD 4A_606/2013 c. 1.2

11.2 Duty to Indicate Legal Provisions and State Violation

The #appellant must clearly indicate the legal provisions that it considers violated and state precisely what the violation consists of.

FSCD 128 III 50 [53], FSCD 4A_80/2017 c. 2.2, FSCD 4A_206/2016 c. 5, FSCD 4A_562/2015 c. 1.2, FSCD 4A_93/2013 c. 2.3, FSCD 4A_335/2012 c. 1.3, FSCD 4A_214/2011 c. 1.3

It is therefore not sufficient to oppose to the opinion of the #arbitral tribunal one's own different point of view and to claim that the former is contrary to #public policy; it rather must be shown in detail to what extent this is the case and what fundamental legal principles are violated.

FSCD 119 II 380 [383], FSCD 116 II 636 [637], FSCD 4P.290/2000 c. 3b, FSCD 4P.99/2000 c. 3b/bb, FSCD 17.02.1999 [(2000) ASA p. 318], FSCD 08.02.1993 c. 3

It is not sufficient, in order to establish a violation of #public policy, to allege that the #award does not follow the applicable substantive law but is instead based on

considerations of #equity. On the contrary, one must establish in the #motion to set aside to what extent #public policy is violated.

FSCD 116 II 634 [637], FSCD 4P.129/2002 c. 8.2

The #appellant must address the #reasons of the decision under appeal and set out in detail why it considers that the authors of this decision violated the law.

FSCD 4A_314/2017 c. 2.4.2.2, FSCD 4A_491/2017 c. 3.1, FSCD 4A_170/2017 c. 3.2, FSCD 4A_478/2017 c. 2.2, FSCD 4A_247/2017 c. 2.2, FSCD 4A_450/2017 c. 2.2, FSCD 4A_260/2017 c. 2.1, FSCD 4A_157/2017 c. 2.2, FSCD 4A_592/2017 c. 3, FSCD 4A_312/2017 c. 3.3.1, FSCD 4A_50/2017 c. 2.2, FSCD 4A_600/2016 c. 1.2, FSCD 4A_34/2016 c. 2.2, FSCD 4A_444/2016, FSCD 4A_704/2015 c. 2, FSCD 4A_188/2016 c. 3, FSCD 4A_522/2016 c. 3.1, FSCD 4A_536/2016 c. 4.2, FSCD 4A_599/2014 c. 2

It can only do this by reference to the admissible #grounds set out in Article 190(2) PILA when the arbitration is of an international character.

FSCD 4A_491/2017 c. 3.1, FSCD 4A_170/2017 c. 3.2, FSCD 4A_478/2017 c. 2.2, FSCD 4A_247/2017 c. 2.2, FSCD 4A_450/2017 c. 2.2, FSCD 4A_260/2017 c. 2.1, FSCD 4A_157/2017 c. 2.2, FSCD 4A_592/2017 c. 3, FSCD 4A_50/2017 c. 2.2, FSCD 4A_34/2016 c. 2.2, FSCD 4A_444/2016, FSCD 4A_704/2015 c. 2, FSCD 4A_188/2016 c. 3, FSCD 4A_522/2016 c. 3.1

The appeal briefs do not satisfy this requirement of substantiation when the grievances are not based on the arguments underlying the attacked #award.

FSCD 4A_444/2016

The #appellant must specify which grounds of Article 190(2) PILA are met, and by reference to the #award being challenged, show in detail, what constitutes a violation of the invoked principle. It is only if these conditions are fulfilled that it will be possible for the #appeal to be examined.

FSCD 4A_214/2016 c. 3.1, FSCD 4A_378/2015 c. 3.1

11.3 Insufficiency of Mere References to Prior Arguments and Evidence

References to arguments, #evidence and #offers of evidence contained in briefs submitted in the #arbitral proceedings disregards that reasons must be contained in the appeal brief under penalty of #inadmissibility of the argument.

FSCD 4A_491/2017 c. 3.1, FSCD 4A_170/2017 c. 3.2, FSCD 4A_478/2017 c. 2.2, FSCD 4A_247/2017 c. 2.2, FSCD 4A_450/2017 c. 2.2, FSCD 4A_260/2017 c. 2.1, FSCD 4A_157/2017 c. 2.2, FSCD 4A_50/2017 c. 2.2, FSCD 4A_34/2016 c. 2.2, FSCD 4A_704/2015 c. 2, FSCD 4A_355/2016 c. 2.1, FSCD 4A_572/2015 c. 4.2.2, FSCD 4A_143/2015 c. 1.2, FSCD 4A_599/2014 c. 2, FSCD 4A_199/2014 c. 3.1, FSCD 4A_606/2013 c. 1.1, FSCD 4A_414/2012 c. 3.2, FSCD 4A_481/2010 c. 5, FSCD 4A_620/2009 c. 3.4.2, FSCD 4A_524/2009 c. 4.2.1.2

It is particularly important to address the #reasons of the decision under #appeal in the appeal brief and to set out in detail where there is a violation of the law. The #appellant should not merely repeat the legal arguments made in the #arbitral proceedings. It must point to the #reasons of the decision which it alleges are erroneous in its appeal brief.

FSCD 4A_600/2016 c. 1.2, FSCD 4A_355/2016 c. 2.1, FSCD 4A_143/2015 c. 1.2, FSCD 4A_599/2014 c. 2, FSCD 4A_50/2012 c. 2.4 (not published in FSCD 138 III 714)

Mere references to the file are inadmissible.

FSCD 4A_600/2016 c. 1.2, FSCD 4A_54/2015 c. 4.5, FSCD 4A_16/2012 c. 3.2, FSCD 4A_627/2011 c. 2.4

A party can substantiate its #grievances by a legal opinion filed as an exhibit to the #motion to set aside. This is admissible provided the #appellant does not violate the prohibition of new #claims. This is not the case if a legal opinion only confirms or supplements a legal view which the #appellant already presented during the #arbitral proceedings and if the purpose of the legal opinion is only to reinforce this point of view. In particular, the filing of such a legal opinion does not violate the principle that the arguments of the [former] #motion for constitutional review have to be stated in the #motion to set aside itself and cannot consist in a reference to submissions in other documents. This prohibition of references applies to submissions in the previous proceedings or in other documents of the file. It would be #excessive formalism to declare a legal opinion inadmissible only because it has been filed as an exhibit to the #motion to set aside but has not been literally integrated into the motion.

FSCD 4P.137/2002 c. 5.2, FSCD 08.09.1999 c. 3c

The #motion to set aside has to contain all arguments; they cannot be given by a reference to prior submissions.

FSCD 4P.235/2001 c. 1b

A second exchange of written briefs does not have any effect on the principle developed by #case law with regard to Article 90(1)(b) fSOFJ, according to which the arguments must be completely stated in the #motion to set aside, the simple reference to other briefs not being sufficient.

FSCD 11.05.1992 [(1992) ASA p. 383]

11.4 No Appellatory Criticism

Merely appellatory criticism is not admissible.

FSCD 134 III 565 [567], FSCD 119 II 380 [382], FSCD 4A_308/2018 c. 2.3, FSCD 4A_284/2018 c. 2.3, FSCD 4A_398/2017 c. 3.2 (not published in FSCD 144 III 559), FSCD 4A_114/2018 c. 2.2, FSCD 4A_125/2018 c. 2.4, FSCD 4A_345/2017 c. 1.2, FSCD 4A_117/2018 c. 1, FSCD 4A_583/2017 c. 1.3, FSCD 4A_136/2018, FSCD 4A_580/2017 c. 1.2, FSCD 4A_490/2017 c. 2.3, FSCD 4A_508/2017 c. 2.2, FSCD 4A_432/2017 c. 2.3, FSCD 4A_430/2017 c. 1.3, FSCD 4A_236/2017 c. 2.2, FSCD 4A_150/2017 c. 2.2, FSCD 4A_80/2017 c. 2.2, FSCD 4A_532/2016 c. 2.5, FSCD 4A_470/2016 c. 2.3, FSCD 4A_621/2015 c. 3.3.1, FSCD 4A_490/2016 c. 2.2, FSCD 4A_405/2016 c. 2.2, FSCD 4A_478/2016 c. 2.2, FSCD 4A_672/2016 c. 2.2, FSCD 4A_310/2016 c. 2.2, FSCD 4A_355/2016 c. 2.1, FSCD 4A_132/2016 c. 2.2, FSCD

4A_173/2016 c. 1.2, FSCD 4A_678/2015 c. 2.2, FSCD 4A_428/2015 c. 2.2, FSCD 4A_568/2015 c. 2.2, FSCD 4A_172/2015 c. 2.3, FSCD 4A_54/2015 c. 2.2, FSCD 4A_684/2014 c. 2.2, FSCD 4A_623/2014 c. 2.4.1, FSCD 4A_636/2014 c. 2.2, FSCD 4A_698/2014, FSCD 4A_544/2014 c. 2.2, FSCD 4A_324/2014 c. 2.2, FSCD 4A_199/2014 c. 3.1, FSCD 4A_74/2014 c. 2.5 (not published in FSCD 140 III 477), FSCD 4A_597/2013 c. 1.3, FSCD 4A_178/2014 c. 2.2, FSCD 4A_544/2013 c. 2.2, FSCD 4A_448/2013 c. 2.2, FSCD 4A_362/2013 c. 2.2, FSCD 4A_438/2013 c. 2.4 (not published in FSCD 140 III 134), FSCD 4A_305/2013 c. 2.3, FSCD 4A_330/2013 c. 2.2, FSCD 4A_274/2013 c. 2.2, FSCD 4A_95/2013 c. 2.2, FSCD 4A_476/2012 c. 2.3, FSCD 4A_672/2012 c. 2.2, FSCD 4A_524/2012 c. 2.3, FSCD 4A_522/2012 c. 2.2, FSCD 4A_552/2012 c. 2.2, FSCD 4A_407/2012 c. 2.3, FSCD 4A_244/2012 c. 2.3, FSCD 4A_50/2012 c. 2.4 (not published in FSCD 138 III 714), FSCD 4A_76/2012 c. 2.2, FSCD 4A_636/2011 c. 2.4, FSCD 4A_682/2012 c. 2.3, FSCD 4A_654/2011 c. 2.2, FSCD 4A_16/2012 c. 2.2, FSCD 4A_528/2011 c. 1.3, FSCD 4A_526/2011 c. 1.2, FSCD 4A_162/2011 c. 1.2, FSCD 4A_617/2010 c. 2.3, FSCD 4A_404/2010 c. 3.3, FSCD 4A_326/2010 c. 1.2, FSCD 4A_402/2010 c. 1.2, FSCD 4A_490/2009 c. 1.2 (not published in FSCD 136 III 200), FSCD 4A_258/2009 c. 2.3, FSCD 4A_256/2009 c. 2.3, FSCD 4A_62/2009 c. 2.2, FSCD 4A_96/2009 & 4A_94/2009 c. 2.2, FSCD 22.01.1998 c. 2c, FSCD 16.10.1997 c. 1d, FSCD 16.05.1995 c. 2b

This codifies the principle that grievances must be spelled out [*#duty of substantiation, Rügeprinzip, principe d'allégation, principio dell'allegazione*] and consequently excludes the *#admissibility* of criticism of an appellate nature.

FSCD 4A_394/2017 c. 2.3, FSCD 4A_65/2018 c. 2.2, FSCD 4A_497/2015 c. 1.4, FSCD 4A_259/2015 c. 1.4, FSCD 4A_34/2015 c. 2.2 (not published in FSCD 141 III 495), FSCD 4A_709/2014 c. 2.1

For *#grievances* based on Article 190(2)(e) PILA, the incompatibility of *#public policy* has to be established in detail. Appellatory criticism is not admissible.

FSCD 4A_428/2010 c. 1.2, FSCD 4A_414/2010 c. 1.2, FSCD 4A_43/2010 c. 3.4, FSCD 4A_320/2009 c. 1.3 & 4.2, FSCD 4A_444/2009 c. 2, FSCD 4A_612/2009 c. 6.2, FSCD 4A_612/2009 c. 2.2, FSCD 4A_550/2009 c. 2, FSCD 4A_62/2009 c. 2.2, FSCD 4A_424/2008 c. 2.2, FSCD 4A_176/2008 c. 2.1, FSCD 4A_194/2008 c. 5.2, FSCD 4A_42/2007 c. 4.2, FSCD 4A_17/2007 c. 3.2, FSCD 4A_2/2007 c. 2.2; see, under the fSOFJ, FSCD 119 II 380 [382], FSCD 117 II 604 [606], FSCD 12.01.1998 c. 1, FSCD 01.03.1996 c. 2b/bb, FSCD 28.11.1995 c. 1

11.5 No Duty for Federal Supreme Court to Seek Legal Grounds Justifying the Grievance

The Federal Supreme Court is not an *#appeal* court. Therefore, it is not the Federal Supreme Court's task to research itself, in the challenged *#award*, the legal arguments which could justify the *#grievance* based on Article 190(2)(e) PILA and which the *#appellant* did not submit as this would be contrary to Article 77(3) FSCA.

FSCD 140 III 278 [283]

It is not for the Federal Supreme Court to seek *sua sponte* the legal grounds of each solution to measure them against the arguments contained in the appeal brief. The Federal Supreme Court is not a court of appeal and this is even more true when its judicial review is limited to the grievance raised and reasoned by the #appellant (Art. 77(3) FSCA).

FSCD 4A_522/2016 c. 3.1

It is not for the Federal Supreme Court to sort through mixed factual and legal arguments made by the #appellant, contrary to the requirements of Article 77(3) FSCA.

FSCD 4A_136/2015 c. 2.2.3.1

It is not for the Federal Supreme Court to seek in the #award under #appeal which legal arguments could justify upholding the #grievance based on Article 190(2)(e) PILA which the #appellant has not invoked, contrary to the requirements of Article 77(3) FSCA.

FSCD 4A_374/2014 c. 4.2.3

Given the specific nature of an #Appeal in Civil Matters against an #award issued in international arbitration, it is not for the Federal Supreme Court to supplement insufficient arguments on its own initiative.

FSCD 4A_199/2014 c. 3.2

The #appellant must specify which of the various grounds for #appeal are met. It is not for the Federal Supreme Court to research which #ground for appeal should be invoked with respect to the various arguments raised. The #appellant must show in detail why the requirements of the #grounds for appeal are met and point out which of the #reasons of the lower court are legally inaccurate.

FSCD 4A_627/2011 c. 2.4

It is not for the Federal Supreme Court, in light of Article 77(3) FSCA, to sort out itself the arguments invoked under one or other of the six #grounds that are enumerated [in Art. 393 CCP].

FSCD 4A_254/2011 c. 5.2

The Federal Supreme Court, even examining with unfettered #powers of review legal questions relating to the #jurisdiction of the #arbitrators, is not an appeal court. Therefore, it is not the Federal Supreme Court's task to research itself, in the challenged #award, the legal arguments which could justify the #grievance based on Article 190(2)(b) PILA. On the contrary, it is rather up to the #appellant to draw the attention of the Federal Supreme Court to these arguments, in order to satisfy the requirements of Article 42(2) FSCA.

FSCD 4A_160/2007 c. 3.1

11.6 Effect of Insufficient Substantiation

Due to a lack of sufficient substantiation, the #appeal is inadmissible. In this case, the simplified procedure pursuant to Article 108(1) FSCA applies.

FSCD 4A_592/2017 c. 4.2.2, FSCD 4A_338/2010

The #appellant merely complains in general terms of the infringement of its “right to defence”, without showing to what extent the previous instance would thereby have violated the law within the meaning of the #grounds for setting aside provided for in Article 190(2) PILA. Accordingly, the #appeal is manifestly inadmissible within the meaning of Article 108(1)(a) FSCA due to the lack of a legally sufficient statement of the reasons for setting aside.

FSCD 4A_574/2009, FSCD 4A_338/2010

12 Award Based on Several Reasons

If the contested decision is based on several independent #reasons, each of which individually seals the outcome of the dispute, the #appellant must show that each of them infringes the law; otherwise the decision cannot be appealed.

FSCD 4A_125/2018 c. 4.1

If a decision or an #award that is the object of a [former] #motion for constitutional review is based on several #reasons, it is enough to dismiss the motion that one of the #reasons survives the #grievances brought against it, i.e. without a review of the other #reasons founding the appealed decision. Therefore, the Federal Supreme Court examines the matter only if the #appellant challenges, in the proper form, all independent #reasons given by the authority as justification for its decision.

FSCD 115 II 288 [293], FSCD 4A_428/2011 c. 5.2.1, FSCD 4A_458/2009 c. 4.2.2, FSCD 4P.62/2004 c. 2.1, FSCD 4P.168/2004 c. 2.1.1, FSCD 12.09.1997 p. 2, FSCD 28.01.1997 [(1998) ASA p. 127], FSCD 10.06.1996 [(2000) ASA p. 773], FSCD 07.04.1993 [(1993) ASA p. 526], FSCD 22.12.1992 [(1996) ASA p. 649], FSCD 13.10.1992 [(1993) ASA p. 76]

If the challenged decision is based on several independent, alternative or subsidiary #reasons, all of them sufficient, every #reason must be challenged by the appropriate #ground for appeal. This principle also applies to the #appeals against international arbitral #awards.

FSCD 4A_491/2017 c.4.2.4, FSCD 4A_355/2016 c. 2.1, FSCD 4A_342/2015 c. 2.2.1 (not published in FSCD 142 III 360), FSCD 4A_84/2015 c. 4.2 (not published in FSCD 142 III 239), FSCD 4A_90/2014 c. 3.2.3.3, FSCD 4A_392/2008 c. 2.5.2, FSCD 4P.278/2005 c. 1.2.2

This does not mean that every #appellant must refute all arguments that the opposing party has exposed alternatively and subsidiarily before the #arbitrators in order to explain the point of view which they finally adopted by basing themselves on one of the different arguments. In fact, Article 77(3) FSCA which mentions the #grounds for setting aside means only the #grounds directed against the decision which is the object of the #appeal, i.e. the arbitral #award, to the exclusion of all other written briefs.

FSCD 4A_392/2008 c. 2.5.2

However, nothing prevents the #appellant from attempting to refute all of the different elements of the multiple reasons stated in the briefs of the opposing party for the case that the appeals instance, assuming that it has such powers, examines the possibility to maintain the solution decided in the appealed #award by substituting other #reasons.

FSCD 4A_392/2008 c. 2.5.2

13 *No New Facts or Legal Arguments*

The question of what arguments have been pleaded in the #arbitral proceedings is a matter of fact which is not reviewed by the Federal Supreme Court. On the contrary, the legal consequences of the pleaded arguments are a matter of law which the Federal Supreme Court reviews with unfettered #powers of review.

FSCD 128 III 50 [60]

In proceedings on a [*former*] #motion for constitutional review, new factual or legal #claims are in principle prohibited.

FSCD 124 I 208 [212], FSCD 4P.129/2002 c. 6.1

Even if the #grievances based on Article 190(2) PILA are not already covered by the procedural guarantees derived from Article 8 FC, they should be treated, from a procedural point of view, in the same way as them, pursuant to the reference made in Article 191(1) PILA. Hence, the exclusion of new #facts in the proceedings on a [*former*] #motion for constitutional review also applies to these #grievances.

FSCD 124 I 208 [212], FSCD 119 II 271 [(1993) ASA p. 406], FSCD 118 Ia 20 [26], FSCD 1P.113/2000 c. 4b/bb

New #facts do not represent a ground for a #motion to set aside except for #revision.

FSCD 4P.4/2007 c. 3.2; see under the fSOFJ, FSCD 119 II 271 [(1993) ASA p. 406], FSCD 118 II 199 [203], FSCD 4P.104/2004 c. 3.3

14 *Answer to the Appeal*

The #time limit for the filing of the #answer to the appeal is a #time limit fixed by a judge (Art. 102(1) FSCA), whereas the #time limit for the filing of the #appeal is determined by statute (30 days; Art. 100(1) FSCA). Judicially determined #time limits may be extended upon a timely application for sufficient reasons (Art. 47(2) FSCA), whereas legally determined #time limits may not be extended (Art. 47(1) FSCA).

FSCD 4A_532/2016 c. 2.2

If the #time limit for filing an answer is not complied with, the Federal Supreme Court will exclude the answer from the file. The arguments developed by the #appellant in the #reply to refute arguments raised in the answer will also be disregarded.

FSCD 4A_374/2014 c. 3.2

15 Scope of Review with Regard to Facts

- For the Federal Supreme Court's scope of review with respect to a #motion to set aside based on a wrongful acceptance or declination of #jurisdiction, see Article 190(2)(b) PILA, section 2b.12

15.1 Principle

The mission of the Federal Supreme Court seized of an #Appeal in Civil Matters against an international arbitral #award is not to exercise full judicial review as an appeal court would but only to examine whether the admissible #grievances raised against the #award are well-founded or not.

FSCD 4A_394/2017 c. 2.4, FSCD 4A_65/2018 c. 2.3, FSCD 4A_525/2017 c. 2.1, FSCD 4A_491/2017 c. 3.1, FSCD 4A_170/2017 c. 3.3, FSCD 4A_478/2017 c. 2.2, FSCD 4A_247/2017 c. 2.2, FSCD 4A_260/2017 c. 2.2, FSCD 4A_157/2017 c. 2.2, FSCD 4A_384/2017 c. 2, FSCD 4A_668/2016 c. 2.2, FSCD 4A_50/2017 c. 2.2, FSCD 4A_34/2016 c. 2.2, FSCD 4A_704/2015 c. 2, FSCD 4A_500/2015 c. 2.1 (not published in FSCD 143 III 55) c. 2.1, FSCD 4A_188/2016 c. 3, FSCD 4A_32/2016 c. 3, FSCD 4A_116/2016 c. 3, FSCD 4A_136/2016 c. 3.1, FSCD 4A_709/2014 c. 2.2, FSCD 4A_532/2014 & 4A_534/2014 c. 4.1, FSCD 4A_199/2014 c. 4, FSCD 4A_231/2014 c. 4.1, FSCD 4A_606/2013 c. 2

To allow the parties to state #facts other than those found by the #arbitral tribunal - other than the exceptional cases reserved by #case law - would no longer be compatible with this mission, even if the #facts were established by #evidence in the arbitration file.

FSCD 4A_394/2017 c. 2.4, FSCD 4A_65/2018 c. 2.3, FSCD 4A_525/2017 c. 2.1, FSCD 4A_491/2017 c. 3.1, FSCD 4A_170/2017 c. 3.3, FSCD 4A_478/2017 c. 2.2, FSCD 4A_247/2017 c. 2.2, FSCD 4A_260/2017 c. 2.2, FSCD 4A_157/2017 c. 2.2, FSCD 4A_384/2017 c. 2, FSCD 4A_668/2016 c. 2.2, FSCD 4A_50/2017 c. 2.2, FSCD 4A_34/2016 c. 2.2, FSCD 4A_704/2015 c. 2, FSCD 4A_500/2015 c. 2.1 (not published in FSCD 143 III 55), FSCD 4A_188/2016 c. 3, FSCD 4A_32/2016 c. 3, FSCD 4A_116/2016 c. 3, FSCD 4A_136/2016 c. 3.1, FSCD 4A_532/2014 & 4A_534/2014 c. 4.1, FSCD 4A_231/2014 c. 4.1, FSCD 4A_606/2013 c. 2

The Federal Supreme Court, when it is ruling on an #Appeal in Civil Matters, the object of which is an #award rendered in the framework of an international arbitration, decides on the basis of the #facts established in the challenged #award (cf. Art. 105(1) FSCA which does not fall within the scope of the exclusion in Art. 77(2) FSCA) even when it examines a #grievance, within the meaning of Article 190(2) PILA, with respect to which it has unfettered #powers of review.

FSCD 4A_578/2017 c. 3.3.1.1, FSCD 4A_172/2015 c. 2.4

Save for the exceptional cases reserved by #case law, parties are not allowed to claim #facts other than those which were found by the #arbitral tribunal, including those #facts established by some #evidence on the file of the arbitration.

FSCD 4A_578/2017 c. 3.3.1.1, FSCD 4A_682/2012 c. 3.1, FSCD 4A_386/2010 c. 3.2, FSCD 4A_234/2010 c. 2.2

As Article 77(2) FSCA does not exclude the application of Article 99(1) FSCA, new #facts and arguments are normally not admissible.

FSCD 4A_491/2017 c. 3.1, FSCD 4A_478/2017 c. 2.2, FSCD 4A_247/2017 c. 2.2, FSCD 4A_157/2017 c. 3.3.1, FSCD 4A_662/2014 c. 1.1, FSCD 4A_378/2014 c. 1.2, FSCD 4A_112/2014 c. 1.1, FSCD 4A_43/2014 c. 1.1, FSCD 4A_67/2013 c. 1.2, FSCD 4A_205/2013 c. 2.1, FSCD 4A_439/2012 & 4A_457/2012 c. 3.1, FSCD 4A_537/2012 c. 2.1, FSCD 4A_454/2011 c. 2.1, FSCD 4A_464/2009 c. 3.3.2, FSCD 4A_428/2009 c. 2.3

These principles can be applied by analogy to decisions that can be appealed to the Federal Supreme Court that were rendered in the framework of an international arbitration but are not #awards within the strict meaning of the term, such as the decision that was taken by the President of the Appeals Arbitration Division of the #CAS.

FSCD 4A_384/2017 c. 2

This also means that new exhibits are inadmissible before the Federal Supreme Court.

FSCD 4A_530/2013 c. 3

15.2 Relevant Facts

The Federal Supreme Court decides on the basis of the #facts established by the #arbitral tribunal (Art. 105(1) FSCA). This includes the findings on the #facts that form the basis of the dispute as well as those concerning the arbitral proceedings, in particular the findings as to the object of the dispute, the submissions of the parties, their submissions on the #facts, law, statements in the proceedings and submissions of #evidence, the contents of a #witness statement, an #expert opinion, or the factual findings based on a #site visit.

FSCD 143 III 578 [585-586], FSCD 4A_338/2018 c. 1.3, FSCD 4A_301/2018 c. 3.2, FSCD 4A_284/2018 c. 2.4, FSCD 4A_398/2017 c. 3.3 (not published in FSCD 144 III 559), FSCD 4A_438/2017 c. 1.2, FSCD 4A_525/2017 c. 2.1, FSCD 4A_578/2017 c. 3.3.1.1, FSCD 4A_60/2018 c. 1.3, FSCD 4A_170/2017 c. 3.3, FSCD 4A_583/2017 c. 1.5, FSCD 4A_580/2017 c. 1.5, FSCD 4A_260/2017 c. 2.2, FSCD 4A_490/2017 c. 2.4, FSCD 4A_356/2018 c. 1.3, FSCD 4A_430/2017 c. 1.4, FSCD 4A_236/2017 c. 2.5, FSCD 4A_424/2017 c. 3.2.2, FSCD 4A_384/2017 c. 2, FSCD 4A_150/2017 c. 2.4, FSCD 4A_316/2017 c. 3.2.2, FSCD 4A_80/2017 c. 2.3, FSCD 4A_668/2016 c. 2.2, FSCD 4A_50/2017 c. 2.2, FSCD 4A_600/2016 c. 2, FSCD 4A_532/2016 c. 2.6, FSCD 4A_34/2016 c. 2.2, FSCD 4A_470/2016 c. 2.4, FSCD 4A_490/2016 c. 2.5, FSCD 4A_492/2016 c. 2.5, FSCD 4A_672/2016 c. 2.3, FSCD 4A_188/2016 c. 4.2.1, FSCD 4A_497/2015 c. 1.5, FSCD 4A_310/2016 c. 2.3, FSCD 4A_616/2015 c. 3.1.2, FSCD 4A_202/2016 c. 2.2, FSCD 4A_110/2016 c. 1.3, FSCD 4A_259/2015 c. 1.5, FSCD 4A_132/2016 c. 2.3, FSCD 4A_322/2015 c. 3, FSCD 4A_173/2016 c. 1.3, FSCD 4A_42/2016 c. 3, FSCD 4A_342/2015 c. 3 (not published in FSCD 142 III 360), FSCD 4A_678/2015 c. 2.3, FSCD 4A_356/2015 c. 1.4, FSCD 4A_568/2015 c. 2.3, FSCD 4A_172/2015 c. 2.4, FSCD 4A_54/2015 c. 2.3, FSCD 4A_684/2014 c. 2.3, FSCD 4A_623/2014 c. 2.3.1, FSCD 4A_636/2014 c. 2.3, FSCD 4A_544/2014 c. 2.3, FSCD 4A_324/2014 c. 2.3, FSCD 4A_178/2014 c. 2.3

It does not matter that the relevant factual finding appears in the legal reasoning of the #award and not its factual summary. It is still a finding of fact that binds the #arbitral tribunal.

FSCD 4A_312/2017 c. 3.3.4.1

#Facts concerning the #arbitral proceedings between the time the #arbitrator commenced the drafting of the #award and the receipt of the #award by the parties must be taken into account because they constitute the very basis of its main argument, according to which the #arbitrator resigned before issuing the #award.

FSCD 4A_490/2013 c. 2.2 (not published in FSCD 140 III 75)

The Federal Supreme Court decides on the basis of the #facts established by the #arbitral tribunal (Art. 105(1) FSCA). This includes the findings on the essential #facts that form the basis of the dispute as well as those concerning the #arbitral proceedings, in particular the submissions of the parties.

FSCD 4A_407/2012 c. 2.4.1, FSCD 4A_276/2012 c. 4.2.2, FSCD 4A_682/2012 c. 2.4

15.3 No Correction or Supplementation *Sua Sponte*

The Federal Supreme Court cannot correct or supplement *sua sponte* the #arbitrators' #fact-findings, notwithstanding that the #facts have manifestly been established in an erroneous way or in violation of the law within the meaning of Article 95 FSCA (Art. 77(2) FSCA, which excludes the application of Art. 105(2) FSCA as well as Art. 97 FSCA).

FSCD 140 III 278 [283], FSCD 4A_394/2017 c. 2.4, FSCD 4A_65/2018 c. 2.3, FSCD 4A_338/2018 c. 1.3, FSCD 4A_301/2018 c. 3.2, FSCD 4A_284/2018 c. 2.4, FSCD 4A_398/2017 c. 3.3 (not published in FSCD 144 III 559), FSCD 4A_438/2017 c. 1.2, FSCD 4A_525/2017 c. 2.1, FSCD 4A_578/2017 c. 3.3.1.1, FSCD 4A_345/2017 c. 1.2, FSCD 4A_60/2018 c. 1.3, FSCD 4A_491/2017 c. 3.1, FSCD 4A_170/2017 c. 3.3, FSCD 4A_478/2017 c. 2.2, FSCD 4A_583/2017 c. 1.5, FSCD 4A_247/2017 c. 2.2, FSCD 4A_580/2017 c. 1.5, FSCD 4A_260/2017 c. 2.2, FSCD 4A_490/2017 c. 2.4, FSCD 4A_356/2018 c. 1.3, FSCD 4A_157/2017 c. 2.2, FSCD 4A_430/2017 c. 1.4, FSCD 4A_312/2017 c. 3.3.4.1, FSCD 4A_236/2017 c. 2.5, FSCD 4A_407/2017 c. 1.5, FSCD 4A_384/2017 c. 2, FSCD 4A_150/2017 c. 2.4, FSCD 4A_80/2017 c. 2.3, FSCD 4A_668/2016 c. 2.2, FSCD 4A_50/2017 c. 2.2, FSCD 4A_600/2016 c. 2, FSCD 4A_532/2016 c. 2.6, FSCD 4A_34/2016 c. 2.2, FSCD 4A_692/2016 c. 3, FSCD 4A_470/2016 c. 2.4, FSCD 4A_490/2016 c. 2.5, FSCD 4A_704/2015 c. 2, FSCD 4A_492/2016 c. 2.5, FSCD 4A_672/2016 c. 2.2, FSCD 4A_500/2015 c. 2.1 (not published in FSCD 143 III 55), FSCD 4A_188/2016 c. 3, FSCD 4A_32/2016 c. 3, FSCD 4A_116/2016 c. 3, FSCD 4A_497/2015 c. 1.5, FSCD 4A_136/2016 c. 3.1, FSCD 4A_310/2016 c. 2.3, FSCD 4A_616/2015 c. 3.1.2, FSCD 4A_156/2016 c. 1.3, FSCD 4A_110/2016 c. 1.3, FSCD 4A_74/2014 c. 2.5 (not published in FSCD 140 III 477), FSCD 4A_355/2016 c. 2.2, FSCD 4A_202/2016 c. 2.2, FSCD 4A_259/2015 c. 1.5, FSCD 4A_132/2016 c. 2.3, FSCD 4A_322/2015 c. 3, FSCD 4A_173/2016 c. 1.3, FSCD 4A_42/2016 c. 3, FSCD 4A_342/2015 c. 3 (not published in FSCD 142 III 360), FSCD 4A_678/2015 c. 2.3, FSCD 4A_628/2015 c. 1.3 (not published in FSCD 142 III 296), FSCD 4A_510/2015 c. 3, FSCD 4A_356/2015 c. 1.4, FSCD 4A_222/2015 c. 3.3.4, FSCD 4A_572/2015 c. 3, FSCD 4A_568/2015 c. 2.3, FSCD 4A_172/2015 c. 2.4, FSCD 4A_378/2015 c. 3.2, FSCD 4A_54/2015 c. 2.3, FSCD 4A_246/2014 c. 3, FSCD 4A_684/2014 c. 2.3, FSCD 4A_709/2014 c. 2.2, FSCD 4A_623/2014 c. 2.3.1, FSCD 4A_636/2014 c. 2.3, FSCD 4A_374/2014 c. 4.2.3,

FSCD 4A_544/2014 c. 2.3, FSCD 4A_532/2014 & 4A_534/2014 c. 4.1, FSCD 4A_324/2014 c. 2.3, FSCD 4A_199/2014 c. 4, FSCD 4A_231/2014 c. 4.1, FSCD 4A_606/2013 c. 2, FSCD 4A_124/2014 c. 2.3, FSCD 4A_597/2013 c. 1.4, FSCD 4A_178/2014 c. 2.2, FSCD 4A_544/2013 c. 2.2, FSCD 4A_530/2013 c. 3, FSCD 4A_450/2013 c. 2.3, FSCD 4A_448/2013 c. 2.3, FSCD 4A_362/2013 c. 2.3, FSCD 4A_304/2013 c. 2.2, FSCD 4A_438/2013 c. 2.5 (not published in FSCD 140 III 134), FSCD 4A_490/2013 c. 2.1, FSCD 4A_509/2013 c. 3.2.2, FSCD 4A_305/2013 c. 2.3, FSCD 4A_232/2013 c. 3.1, FSCD 4A_330/2013 c. 2.3, FSCD 4A_274/2013 c. 2.3, FSCD 4A_95/2013 c. 2.3, FSCD 4A_682/2012 c. 3.1, FSCD 4A_476/2012 c. 2.4, FSCD 4A_672/2012 c. 2.3, FSCD 4A_524/2012 c. 2.4, FSCD 4A_515/2012 c. 2.4, FSCD 4A_522/2012 c. 2.3, FSCD 4A_552/2012 c. 2.3, FSCD 4A_407/2012 c. 2.4.1, FSCD 4A_538/2012 c. 3.2, FSCD 4A_244/2012 c. 2.4, FSCD 4A_146/2012 c. 2.6, FSCD 4A_414/2012 c. 1.4, FSCD 4A_635/2012 c. 3, FSCD 4A_314/2012 c. 3, FSCD 4A_76/2012 c. 2.3, FSCD 4A_312/2012 c. 3, FSCD 4A_240/2012 c. 2.3, FSCD 4A_54/2012 c. 1.6, FSCD 4A_488/2011 c. 3, FSCD 4A_682/2012 c. 2.4, FSCD 4A_654/2011 c. 2.3, FSCD 4A_16/2012 c. 2.3, FSCD 4A_627/2011 c. 3.1, FSCD 4A_428/2011 c. 1.6, FSCD 4A_528/2011 c. 1.4, FSCD 4A_526/2011 c. 1.3, FSCD 4A_631/2011 c. 2.3, FSCD 4A_214/2011 c. 1.6, FSCD 4A_162/2011 c. 1.3, FSCD 4A_404/2010 c. 3.4, FSCD 4A_640/2010 c. 2.3, FSCD 4A_604/2010 c. 2.1, FSCD 4A_326/2010 c. 1.3, FSCD 4A_402/2010 c. 1.3, FSCD 4A_482/2010 c. 3.1, FSCD 4A_392/2010 c. 3.1, FSCD 4A_386/2010 c. 3.1, FSCD 4A_428/2010 c. 1.3, FSCD 4A_234/2010 c. 2.1 (not published in FSCD 136 III 605), FSCD 4A_414/2010 c. 1.3, FSCD 4A_43/2010 c. 3.5, FSCD 4A_458/2009 c. 2.3.1, FSCD 4A_320/2009 c. 1.4, FSCD 4A_433/2009 c. 1.5, FSCD 4A_524/2009 c. 2, FSCD 4A_456/2009 c. 2.5.2, FSCD 4A_488/2009 c. 3.3.2, FSCD 4A_612/2009 c. 2.3, FSCD 4A_550/2009 c. 4, FSCD 4A_548/2009 c. 2.4, FSCD 4A_444/2009 c. 3, FSCD 4A_258/2009 c. 2.4, FSCD 4A_256/2009 c. 2.4, FSCD 4A_240/2009 c. 1.4, FSCD 4A_428/2009 c. 2.3, FSCD 4A_62/2009 c. 2.3, FSCD 4A_96/2009 & 4A_94/2009 c. 2.3, FSCD 4A_416/2008 c. 4 and c. 5.4, FSCD 4A_600/2008 c. 3, FSCD 4A_539/2008 c. 2.3, FSCD 4A_424/2008 c. 2.3, FSCD 4A_376/2008 c. 3.3, FSCD 4A_438/2008 c. 2.6, FSCD 4A_210/2008 c. 2.3, FSCD 4A_176/2008 c. 2.3, FSCD 4A_128/2008 c. 2.4, FSCD 4A_506/2007 c. 2.3, FSCD 4A_370/2007 c. 2.4, FSCD 4A_450/2007 c. 2.2, FSCD 4A_352/2007 c. 4, FSCD 4A_220/2007 c. 5.1

An *appellant's request to rectify or complete the findings of fact made by the *arbitrator pursuant to Articles 97(1) and 105(2) FSCA cannot be granted as the application of these two provisions is expressly excluded by Article 77(2) FSCA.

FSCD 4A_136/2015 c. 2.1

15.4 Exceptions

The Federal Supreme Court reserves the possibility to review the *facts underlying the challenged *award, if one of the *grounds for setting aside of Article 190(2) PILA is invoked against these *facts or if new *facts or *evidence are exceptionally taken into account in the proceedings of the *Appeal in Civil Matters (Art. 99(1) FSCA).

FSCD 142 III 220 [224], FSCD 140 III 278 [283], FSCD 140 III 477 [477], FSCD 138 III 29 [34], FSCD 133 III 139 [141], FSCD 129 III 727 [733], FSCD 128 III 50 [54], FSCD 4A_394/2017 c. 2.4, FSCD 4A_338/2018 c. 1.3, FSCD 4A_65/2018 c. 2.3, FSCD 4A_284/2018 c. 2.4, FSCD 4A_398/2017 c. 3.3 (not published in FSCD 144 III 559), FSCD 4A_438/2017 c. 1.2, FSCD 4A_525/2017 c. 2.1, FSCD 4A_578/2017 c. 3.3.1.1, FSCD 4A_345/2017 c. 1.2, FSCD 4A_491/2017 c. 3.1, FSCD 4A_170/2017 c. 3.3, FSCD 4A_478/2017 c. 2.2, FSCD 4A_583/2017 c. 1.5, FSCD 4A_247/2017 c. 2.2, FSCD 4A_580/2017 c. 1.5, FSCD 4A_260/2017 c. 2.2, FSCD 4A_490/2017 c. 2.4, FSCD 4A_356/2018 c. 1.3, FSCD 4A_157/2017 c. 2.2,

FSCD 4A_430/2017 c. 1.4, FSCD 4A_236/2017 c. 2.5, FSCD 4A_407/2017 c. 1.5, FSCD 4A_384/2017 c. 2, FSCD 4A_150/2017 c. 2.4, FSCD 4A_80/2017 c. 2.3, FSCD 4A_668/2016 c. 2.2, FSCD 4A_50/2017 c. 2.2, FSCD 4A_600/2016 c. 2, FSCD 4A_532/2016 c. 2.6, FSCD 4A_34/2016 c. 2.2, FSCD 4A_692/2016 c. 3, FSCD 4A_470/2016 c. 2.4, FSCD 4A_490/2016 c. 2.5, FSCD 4A_704/2015 c. 2, FSCD 4A_672/2016 c. 2.3, FSCD 4A_492/2016 c. 2.5, FSCD 4A_500/2015 c. 2.1 (not published in FSCD 143 III 55), FSCD 4A_188/2016 c. 3, FSCD 4A_32/2016 c. 3, FSCD 4A_116/2016 c. 3, FSCD 4A_497/2015 c. 1.5, FSCD 4A_136/2016 c. 3.1, FSCD 4A_310/2016 c. 2.3, FSCD 4A_616/2015 c. 3.1.2, FSCD 4A_156/2016 c. 1.3, FSCD 4A_355/2016 c. 2.2, FSCD 4A_202/2016 c. 2.2, FSCD 4A_110/2016 c. 1.3, FSCD 4A_259/2015 c. 1.5, FSCD 4A_132/2016 c. 2.3, FSCD 4A_322/2015 c. 3, FSCD 4A_173/2016 c. 1.3, FSCD 4A_42/2016 c. 3, FSCD 4A_342/2015 [4A_342/2015] c. 3 (not published in FSCD 142 III 360), FSCD 4A_678/2015 c. 2.3, FSCD 4A_628/2015 c. 1.3 (not published in FSCD 142 III 296), FSCD 4A_510/2015 c. 3, FSCD 4A_356/2015 c. 1.4, FSCD 4A_572/2015 c. 3, FSCD 4A_568/2015 c. 2.2, FSCD 4A_172/2015 c. 2.4, FSCD 4A_54/2015 c. 2.3, FSCD 4A_246/2014 c. 3, FSCD 4A_684/2014 c. 2.3, FSCD 4A_636/2014 c. 2.3, FSCD 4A_374/2014 c. 4.2.3, FSCD 4A_623/2014 c. 2.3.1, FSCD 4A_544/2014 c. 2.3, FSCD 4A_532/2014 & 4A_534/2014 c. 4.1, FSCD 4A_324/2014 c. 2.3, FSCD 4A_231/2014 c. 4.1, FSCD 4A_606/2013 c. 2, FSCD 4A_124/2014 c. 2.3, FSCD 4A_597/2013 c. 1.4, FSCD 4A_178/2014 c. 2.3, FSCD 4A_544/2013 c. 2.2, FSCD 4A_450/2013 c. 2.3, FSCD 4A_448/2013 c. 2.3, FSCD 4A_362/2013 c. 2.3, FSCD 4A_304/2013 c. 2.2, FSCD 4A_490/2013 c. 2.1, FSCD 4A_305/2013 c. 2.3, FSCD 4A_232/2013 c. 3.1, FSCD 4A_330/2013 c. 2.3, FSCD 4A_274/2013 c. 2.3, FSCD 4A_95/2013 c. 2.3, FSCD 4A_682/2012 c. 3.1, FSCD 4A_476/2012 c. 2.4, FSCD 4A_672/2012 c. 2.3, FSCD 4A_524/2012 c. 2.4, FSCD 4A_515/2012 c. 2.4, FSCD 4A_522/2012 c. 2.3, FSCD 4A_552/2012 c. 2.3, FSCD 4A_407/2012 c. 2.4.1, FSCD 4A_538/2012 c. 3.2, FSCD 4A_244/2012 c. 2.4, FSCD 4A_146/2012 c. 2.6, FSCD 4A_414/2012 c. 1.4, FSCD 4A_314/2012 c. 3, FSCD 4A_76/2012 c. 2.3, FSCD 4A_312/2012 c. 3, FSCD 4A_240/2012 c. 2.3, FSCD 4A_54/2012 c. 1.6, FSCD 4A_488/2011 c. 3, FSCD 4A_682/2012 c. 2.4, FSCD 4A_654/2011 c. 2.3, FSCD 4A_16/2012 c. 2.3, FSCD 4A_627/2011 c. 3.1, FSCD 4A_428/2011 c. 1.6, FSCD 4A_528/2011 c. 1.4, FSCD 4A_526/2011 c. 1.3, FSCD 4A_631/2011 c. 2.3, FSCD 4A_162/2011 c. 1.3, FSCD 4A_44/2011 c. 2.2, FSCD 4A_404/2010 c. 3.4, FSCD 4A_640/2010 c. 2.3, FSCD 4A_604/2010 c. 2.1, FSCD 4A_326/2010 c. 1.3, FSCD 4A_402/2010 c. 1.3, FSCD 4A_482/2010 c. 3.1, FSCD 4A_392/2010 c. 3.1, FSCD 4A_579/2010 c. 2.1, FSCD 4A_386/2010 c. 3.1, FSCD 4A_234/2010 c. 2.1 (not published in FSCD 136 III 605), FSCD 4A_414/2010 c. 1.3, FSCD 4A_43/2010 c. 3.5, FSCD 4A_458/2009 c. 2.3.1, FSCD 4A_320/2009 c. 1.4, FSCD 4A_433/2009 c. 1.5, FSCD 4A_456/2009 c. 2.5.2, FSCD 4A_524/2009 c. 2, FSCD 4A_444/2009 c. 3, FSCD 4A_612/2009 c. 2.3, FSCD 4A_550/2009 c.4, FSCD 4A_548/2009 c. 2.4, FSCD 4A_258/2009 c. 2.4, FSCD 4A_256/2009 c. 2.4, FSCD 4A_240/2009 c. 1.4, FSCD 4A_428/2009 c. 2.3, FSCD 4A_62/2009 c. 2.3, FSCD 4A_96/2009 & 4A_94/2009 c. 2.3, FSCD 4A_416/2008 c. 4, FSCD 4A_600/2008 c. 3, FSCD 4A_424/2008 c. 2.3, FSCD 4A_438/2008 c. 2.6, FSCD 4A_210/2008 c. 2.3, FSCD 4A_176/2008 c. 2.3, FSCD 4A_128/2008 c. 2.4, FSCD 4A_506/2007 c. 2.3, FSCD 4A_370/2007 c. 2.4, FSCD 4A_450/2007 c. 2.2, FSCD 4A_352/2007 c. 4, FSCD 4A_220/2007 c. 5.1

The party which claims an exception to the rule that the Federal Supreme Court is bound by the #facts established by the authority of lower instance and which seeks a correction or a supplementation of the #facts based on this, has to establish based on the file that this factual #claim has already been made in conformity with the procedural rules during the proceedings before the #arbitral tribunal.

FSCD 4A_338/2018 c. 1.3, FSCD 4A_284/2018 c. 2.4, FSCD 4A_60/2018 c. 1.3, FSCD 4A_583/2017 c. 1.5, FSCD 4A_580/2017 c. 1.5, FSCD 4A_490/2017 c. 2.4,

FSCD 4A_356/2018 c. 1.3, FSCD 4A_430/2017 c. 1.4, FSCD 4A_236/2017 c. 2.5, FSCD 4A_150/2017 c. 2.4, FSCD 4A_80/2017 c. 2.3, FSCD 4A_532/2016 c. 2.6, FSCD 4A_470/2016 c. 2.4, FSCD 4A_490/2016 c. 2.5, FSCD 4A_492/2016 c. 2.5, FSCD 4A_672/2016 c. 2.2, FSCD 4A_310/2016 c. 2.3, FSCD 4A_156/2016 c. 1.3, FSCD 4A_132/2016 c. 2.3, FSCD 4A_173/2016 c. 1.3, FSCD 4A_678/2015 c. 2.3, FSCD 4A_356/2015 c. 1.4, FSCD 4A_568/2015 c. 2.2, FSCD 4A_172/2015 c. 2.4, FSCD 4A_54/2015 c. 2.3, FSCD 4A_684/2014 c. 2.3, FSCD 4A_623/2014 c. 2.3.1, FSCD 4A_636/2014 c. 2.3, FSCD 4A_544/2014 c. 2.3, FSCD 4A_324/2014 c. 2.3, FSCD 4A_606/2013 c. 2, FSCD 4A_597/2013 c. 1.4, FSCD 4A_178/2014 c. 2.3, FSCD 4A_544/2013 c. 2.2, FSCD 4A_450/2013 c. 2.3, FSCD 4A_448/2013 c. 2.3, FSCD 4A_362/2013 c. 2.3, FSCD 4A_305/2013 c. 2.3, FSCD 4A_330/2013 c. 2.3, FSCD 4A_274/2013 c. 2.3, FSCD 4A_95/2013 c. 2.3, FSCD 4A_476/2012 c. 2.4, FSCD 4A_672/2012 c. 2.3, FSCD 4A_524/2012 c. 2.4, FSCD 4A_522/2012 c. 2.3, FSCD 4A_552/2012 c. 2.3, FSCD 4A_407/2012 c. 2.4.1, FSCD 4A_244/2012 c. 2.4, FSCD 4A_76/2012 c. 2.3, FSCD 4A_682/2012 c. 2.4, FSCD 4A_654/2011 c. 2.3, FSCD 4A_16/2012 c. 2.3, FSCD 4A_528/2011 c. 1.4, FSCD 4A_526/2011 c. 1.3, FSCD 4A_631/2011 c. 2.3, FSCD 4A_162/2011 c. 1.3, FSCD 4A_404/2010 c. 3.4, FSCD 4A_640/2010 c. 2.3, FSCD 4A_326/2010 c. 1.3, FSCD 4A_402/2010 c. 1.3, FSCD 4A_428/2010 c. 1.3, FSCD 4A_414/2010 c. 1.3, FSCD 4A_43/2010 c. 3.5, FSCD 4A_320/2009 c. 1.4, FSCD 4A_456/2009 c. 2.5.2, FSCD 4A_612/2009 c. 2.3, FSCD 4A_258/2009 c. 2.4, FSCD 4A_256/2009 c. 2.4, FSCD 4A_240/2009 c. 1.4, FSCD 4A_62/2009 c. 2.3, FSCD 4A_96/2009 & 4A_94/2009 c. 2.3, FSCD 4A_424/2008 c. 2.3, FSCD 4A_176/2008 c. 2.3

A legal opinion however may be taken into account.

FSCD 4A_374/2014 c. 4.2.3, FSCA 4A_232/2013 c. 3.3.2, FSCD 4A_146/2012 c. 2.6

On the basis of Article 99(1) FSCA, an #appellant must be authorized to state and prove #facts concerning a procedural deficiency that it could not invoke before the #award was issued.

FSCD 4A_490/2013 c. 2.2 (not published in FSCD 140 III 75)

Seized by an #Appeal in Civil Matters, the Federal Supreme Court decides on the basis of the #facts established by the lower court (Art. 105(1) FSCA). It can only depart from these #facts if they have been established in a manifestly incorrect manner – which notion corresponds to #arbitrariness – or by violation of the law within the meaning of Article 95 FSCA (Art. 105(2) FSCA). The #appellant has to show this in a clear and detailed way.

FSCD 4A_233/2010 c. 1.3.1, FSCD 4A_80/2010 c. 1.3, FSCD 4A_488/2009 c. 3.3.2, FSCD 4A_215/2008 c. 1.3

16 *Scope of Review with Regard to Law*

The Federal Supreme Court, even though it is ruling on an #appeal against an arbitral #award rendered by an #arbitral tribunal having its #seat in Switzerland and authorized to apply Swiss law on a supplementary basis, is bound to observe with respect to the manner in which the law is applied, the same distance as that which would be imposed when applying another law and it must not give in to the temptation to fully examine if the relevant rules of Swiss law have been interpreted or applied correctly, as it would do if it were seized of an #Appeal in Civil Matters against a cantonal decision.

FSCD 4A_312/2017 c. 3.3.4.2, FSCD 4A_32/2016 c. 4.3

It is not for the Federal Supreme Court to examine whether the #arbitral tribunal correctly applied in the given case the legal rules and #case law principles governing the #interpretation of contracts and in particular, the interaction between two agreements entered into successively concerning the same object.

FSCD 4A_668/2016 c. 4.2

The Federal Supreme Court, even examining with unfettered #powers of review legal questions relating to the #jurisdiction of the #arbitrators, is not an #appeal court. Therefore, it is not the Federal Supreme Court's task to research itself, in the challenged #award, the legal arguments which could justify the #grievance based on Article 190(2)(b) PILA. On the contrary, it is rather up to the #appellant to draw the attention of the Federal Supreme Court to these arguments, in order to satisfy the requirements of Article 42(2) FSCA.

FSCD 4A_160/2007 c. 3.1

17 *Setting Aside of the Award*

17.1 Principle

The *Appeal in Civil Matters under the FSCA may only seek the setting aside of the decision under *appeal (Art. 77(2) FSCA, which excludes the application of Art. 107(2) FSCA, to the extent that this provision allows the Federal Supreme Court to decide the matter itself).

FSCD 4A_394/2017 c. 2.2, FSCD 4A_65/2018 c. 2.1, FSCD 4A_308/2018 c. 2.2, FSCD 4A_642/2017 c. 2, FSCD 4A_284/2018 c. 2.2, FSCD 4A_398/2017 c. 3.1 (not published in FSCD 144 III 559), FSCD 4A_125/2018 c. 2.3, FSCD 4A_583/2017 c. 1.4, FSCD 4A_580/2017 c. 1.3, FSCD 4A_490/2017 c. 2.2, FSCD 4A_432/2017 c. 2.2, FSCD 4A_430/2017 c. 1.2, FSCD 4A_236/2017 c. 2.3, FSCD 4A_407/2017 c. 1.4, FSCD 4A_150/2017 c. 2.3, FSCD 4A_532/2016 c. 2.4, FSCD 4A_490/2016 c. 2.3, FSCD 4A_473/2016 c. 1, FSCD 4A_492/2016 c. 2.3, FSCD 4A_173/2016 c. 1.4, FSCD 4A_82/2016 c. 1.3, FSCD 4A_628/2015 c. 1.2 (not published in FSCD 142 III 296), FSCD 4A_422/2015 c. 2 (not published in FSCD 142 III 284), FSCD 4A_633/2014 c. 2.3 (not published in FSCD 141 III 229), FSCD 4A_623/2014 c. 2.2, FSCD 4A_598/2014 c. 1, FSCD 4A_335/2014 c. 3.2.2, FSCD 4A_662/2014 c. 1.4, FSCD 4A_378/2014 c. 1.1, FSCD 4A_74/2014 c. 2.4 (not published in FSCD 140 III 477), FSCD 4A_124/2014 c. 2.2, FSCD 4A_597/2013 c. 1.2, FSCD 4A_530/2013 c. 3, FSCD 4A_112/2014 c. 1.2 FSCD 4A_438/2013 c. 2.3 (not published in FSCD 140 III 134), FSCD 4A_43/2014 c. 1.2, FSCD 4A_450/2013 c. 2.2, FSCD 4A_460/2013 c. 2.3, FSCD 4A_333/2013 c. 2, FSCD 4A_67/2013 c. 1.3, FSCD 4A_205/2013 c. 2.1, FSCD 4A_476/2012 c. 2.2, FSCD 4A_439/2012 & 4A_457/2012 c. 3.1, FSCD 4A_524/2012 c. 2.2, FSCD 4A_515/2012 c. 2.3, FSCD 4A_388/2012 c. 2.2, FSCD 4A_576/2012 c. 2, FSCD 4A_407/2012 c. 2.2, FSCD 4A_244/2012 c. 2.2, FSCD 4A_537/2012 c. 2.1, FSCD 4A_414/2012 c. 1.3, FSCD 4A_50/2012 c. 2.3 (not published in FSCD 138 III 714), FSCD 4A_240/2012 c. 2.2, FSCD 4A_134/2012 c. 1, FSCD 4A_682/2012 c. 2.2, FSCD 4A_558/2011 c. 2.2 (not published in FSCD 138 III 322), FSCD 4A_627/2011 c. 2.3, FSCD 4A_428/2011 c. 1.4, FSCD 4A_246/2011 c. 1.2 (not published in FSCD 138 III 29), FSCD 4A_454/2011 c. 2.1, FSCD 4A_214/2011 c. 1.4, FSCD 4A_617/2010 c. 2.2, FSCD 4A_44/2011 c. 1, FSCD 4A_404/2010 c. 3.2, FSCD 4A_640/2010 c. 2.2, FSCD 4A_481/2010 c. 2, FSCD 4A_458/2009 c. 2.3.1, FSCD 4A_456/2009 c. 2.4, FSCD 4A_488/2009 c. 3.2, FSCD 4A_548/2009 c. 2.3, FSCD 4A_240/2009 c. 1.2, FSCD 4A_428/2009 c. 2.2, FSCD 4A_428/2008 c. 2.4, FSCD 4A_539/2008 c. 2.2, FSCD 4A_400/2008 c. 3.2, FSCD 4A_376/2008 c. 3.1, FSCD 4A_438/2008 c. 2.5, FSCD 4A_210/2008 c. 2.2, FSCD 4A_176/2008 c. 2.2, FSCD 21.09.2008 c. 5.1, FSCD 4A_128/2008 c. 2.3, FSCD 4A_506/2007 c. 2.3, FSCD 4A_450/2007 c. 2.2, FSCD 4A_352/2007 c. 4

The decision of the Federal Supreme Court on a *[former]* #motion for constitutional review leads in principle only to the #setting aside of the award [*Art. 85(c) fSOFJ*]. #Prayers for relief asking for modifications of the arbitral #award or asking for something different than the #setting aside of the #award are therefore not possible.

FSCD 128 III 50 [53], FSCD 127 III 279 [282], FSCD 126 III 524 [526], FSCD 122 I 120 [123], FSCD 117 II 94 [95-96], FSCD 4A_82/2016 c. 1.3, FSCD 4A_143/2015 c. 1.2, FSCD 4A_320/2009 c. 1.2, FSCD 4A_550/2009 c. 3, FSCD 4P.263/2002 c. 3.2, FSCD 4P.250/2002 c. 1.3, FSCD 4P.198/2002 c. 1.2, FSCD 4P.126/2001 c. 1b, FSCD 4P.188/2001 c. 1d, FSCD 4P.143/2001 c. 2b, FSCD 4P.124/2001 c. 1a, FSCD 15.06.1998 c. 1a, FSCD 09.06.1998 [(1998) ASA p. 655], FSCD 16.10.1997 c. 1b, FSCD 08.02.1994 c. 2a, FSCD 22.12.1992 [(1996) ASA p. 647], FSCD 08.07.1992 c. 1, FSCD 30.04.1992 c. 1, FSCD 06.02.1992 c. 1a

Pursuant to Article 77(2) FSCA, Article 107(2) FSCA, as far as it entitles the Federal Supreme Court to render a decision on the #merits, is not applicable to #appeals against #awards rendered by international #arbitral tribunals. This is why the Federal Supreme Court can, as under the former law, only set aside the challenged #award and can, as the case may be, refer the matter to the #arbitral tribunal for a new decision.

FSCD 4A_143/2015 c. 1.2, FSCD 4A_460/2013 c. 2.3, FSCD 4A_67/2013 c. 1.3, FSCD 4A_433/2009 c. 4, FSCD 4A_488/2009 c. 3.2, FSCD 4A_244/2007 c. 3

17.2 Partial Setting Aside

#Case law and legal writing recognize the possibility of partial #setting aside, even though a #motion for the setting aside of an international arbitral #award may only seek its setting aside.

FSCD 4A_246/2014 c. 8, FSCD 4A_623/2014 c. 2.2, FSCD 4A_438/2013 c. 2.3 (not published in FSCD 140 III 134), FSCD 4A_460/2013 c. 2.3, FSCD 4A_669/2012 c. 3.3, FSCD 4A_360/2011 c. 6.1, FSCD 4P.129/2002 c. 10, FSCD 4P.114/2001 c. 1c

A partial #setting aside is not possible when the issue challenged is not independent from the others and more specifically when the arbitral #award refers to global amounts in various currencies with no distinction between the different heads of claims and when such amounts are the result of a #set-off between the claims of the parties.

FSCD 4A_246/2014 c. 8, FSCD 4A_360/2011 c. 6.2

Even though the *[former]* #motion for constitutional review has a setting aside effect, it is possible to request only a partial #setting aside of an #award.

FSCD 4P.114/2001 c. 1c, FSCD 4P.212/1999 c. 1b

17.3 Exception: Jurisdiction

➤ See also Article 190(2)(b) PILA, section 2b.16

If the dispute relates to the #jurisdiction of the #arbitral tribunal, it is admitted that the Federal Supreme Court, by exception, could itself assert the #jurisdiction or the lack of #jurisdiction.

FSCD 140 III 520 [528], FSCD 136 III 605 [616], FSCD 127 III 279 [282], FSCD 117 II 94 [96], FSCD 4A_394/2017 c. 2.2, FSCD 4A_65/2018 c. 2.1, FSCD 4A_308/2018 c. 2.2, FSCD 4A_284/2018 c. 2.2, FSCD 4A_398/2017 c. 3.1 (not published in FSCD 144 III 559), FSCD 4A_583/2017 c. 1.3, FSCD 4A_580/2017 c. 1.3, FSCD 4A_490/2017 c. 2.2, FSCD 4A_432/2017 c. 2.2, FSCD 4A_430/2017 c. 1.2, FSCD 4A_236/2017 c. 2.3, FSCD 4A_407/2017 c. 1.4, FSCD 4A_150/2017 c. 2.3, FSCD 4A_532/2016 c. 2.4, FSCD 4A_34/2016 c. 2.111, FSCD 4A_490/2016 c. 2.3, FSCD 4A_473/2016 c. 1, FSCD 4A_492/2016 c. 2.3, FSCD 4A_173/2016 c. 1.4, FSCD 4A_82/2016 c. 1.3, FSCD 4A_628/2015 c. 1.2 (not published in FSCD 142 III 296), FSCD 4A_34/2015 c. 2.1 (not published in FSCD 141 III 495), FSCD 4A_676/2014 c. 2, FSCD 4A_633/2014 c. 2.3 (not published in FSCD 141 III 229), FSCD 4A_623/2014 c. 2.2, FSCD 4A_598/2014 c. 1, FSCD 4A_124/2014 c. 2.2, FSCD 4A_597/2013 c. 1.2, FSCD 4A_450/2013 c. 2.2, FSCD 4A_438/2013 c. 2.3 (not published in FSCD 140 III 134), FSCD 4A_460/2013 c. 2.3, FSCD 4A_74/2014 c. 2.4 (not published in FSCD 140 III 477), FSCD 4A_476/2012 c. 2.2, FSCD 4A_524/2012 c. 2.2, FSCD 4A_515/2012 c. 2.3, FSCD 4A_388/2012 c. 2.2, FSCD 4A_244/2012 c. 2.2, FSCD 4A_537/2012 c. 2.1, FSCD 4A_414/2012 c. 1.3, FSCD 4A_50/2012 c. 2.3 (not published in FSCD 138 III 714), FSCD 4A_240/2012 c. 2.2, FSCD 4A_627/2011 c. 2.3, FSCD 4A_428/2011 c. 1.4, FSCD 4A_246/2011 c. 1.2 (not published in FSCD 138 III 29), FSCD 4A_454/2011 c. 2.1, FSCD 4A_428/2011 c. 1.4, FSCD 4A_44/2011 c. 1, FSCD 4A_404/2010 c. 3.2, FSCD 4A_640/2010 c. 2.2, FSCD 4A_320/2009 c. 1.2, FSCD 4A_456/2009 c. 2.4, FSCD 4A_548/2009 c. 2.3, FSCD 4A_240/2009 c. 1.2, FSCD 4A_428/2009 c. 2.2, FSCD 4A_428/2008 c. 2.4, FSCD 4A_539/2008 c. 2.2, FSCD 4A_376/2008 c. 3.1, FSCD 4A_438/2008 c. 2.5, FSCD 4A_210/2008 c. 2.2, FSCD 4A_128/2008 c. 2.3, FSCD 4P.114/2006 c. 4.3, FSCD 4P.114/2004 c. 3, FSCD 23.03.1999 c. 4a, FSCD 16.10.1997 c. 1b, *VD 22.08.2007 c. 1c

If the dispute concerns the #jurisdiction of the #arbitral tribunal, the Federal Supreme Court, notwithstanding the usual #setting aside of the decision on a [former] #motion for constitutional review, exceptionally does not limit itself to a simple #setting aside of the #arbitral decision on #jurisdiction, but also determines – in the interest of the #legal certainty – the consequences thereof by deciding on the #jurisdiction in the #operative part of its decision on the [former] #motion for constitutional review.

FSCD 136 III 605 [614], FSCD 128 III 50 [53], FSCD 127 III 279 [282], FSCD 117 II 94 [96], FSCD 4P.263/2002 c. 3.2, FSCD 4P.198/2002 c. 1.2, FSCD 4P.126/2001 c. 1b, FSCD 4P.124/2001 c. 1a

Nothing would prevent the Federal Supreme Court from applying the adage *a maiore minus* to #stay the case if necessary, until the conciliation procedure is finished instead of finding that the #arbitral tribunal lacks #jurisdiction *ratione temporis*.

FSCD 4A_628/2015 c. 1.2 (not published in FSCD 142 III 296), FSCD 4A_124/2014 c. 2.2

If the #arbitral tribunal declines its #jurisdiction because one of the parties lacks the subjective #standing to sue and did not examine whether the #arbitration agreement has been validly concluded, the Federal Supreme Court cannot directly decide on the #arbitral tribunal's #jurisdiction.

FSCD 4A_428/2008 c. 2.4

For an #Appeal in Civil Matters concerning #jurisdiction, the Federal Supreme Court may, in derogation of Article 77(2) FSCA, modify the #operative part of the appealed #award on this point.

FSCD 4A_376/2008 c. 9

As the [former] #motion for constitutional review leads to the #setting aside of the #award, the #appellant cannot request a different apportionment of the #costs of the #arbitral proceedings.

FSCD 09.06.1998 [(1998) ASA p. 655]

17.4 Exception: Challenge of an Arbitrator

The Federal Supreme Court can decide on the #challenge of an #arbitrator if the #ground for setting aside of Article 190(2)(a) PILA is admitted.

FSCD 136 III 605 [616], FSCD 4A_308/2018 c. 2.2, FSCD 4A_284/2018 c. 2.2, FSCD 4A_398/2017 c. 3.1 (not published in FSCD 144 III 559), FSCD 4A_583/2017 c. 1.3, FSCD 4A_580/2017 c. 1.3, FSCD 4A_490/2017 c. 2.2, FSCD 4A_432/2017 c. 2.2, FSCD 4A_430/2017 c. 1.2, FSCD 4A_236/2017 c. 2.3, FSCD 4A_150/2017 c. 2.3, FSCD 4A_532/2016 c. 2.4, FSCD 4A_490/2016 c. 2.3, FSCD 4A_492/2016 c. 2.3, FSCD 4A_173/2016 c. 1.4, FSCD 4A_633/2014 c. 3.4, FSCD 4A_623/2014 c. 2.2, FSCD 4A_598/2014 c. 1, FSCD 4A_438/2013 c. 2.3 (not published in FSCD 140 III 134), FSCD 4A_537/2012 c. 2.1, FSCD 4A_110/2012 c. 1, FSCD 4A_54/2012 c. 1.4

It is not for the Federal Supreme Court to send the file to the Court of First Instance in Geneva with a view to appointing a new #arbitrator. It is up to the parties to take the necessary procedural steps as a consequence of the #setting aside of the #award.

FSCD 4A_490/2013 c. 4.3 (not published in FSCD 140 III 75)

If the Federal Supreme Court is seized by a #motion to set aside within the meaning of Article 191(1), can it decide itself on the replacement of an #arbitrator in case the #ground for setting aside of Article 190(2)(a) PILA is admitted? The question has not been decided so far.

FSCD 4A_539/2008 c. 2.2, FSCD 4A_210/2008 c. 2.2, FSCD 4P.196/2003 c. 2.2, FSCD 25.05.1992 c. 2d/cc

The #prayer for relief to the effect that the Federal Supreme Court decides on the replacement of the sole #arbitrator cannot be heard, if there is no reference to Article 190(2)(a) PILA and if there is no claim for the #setting aside of the #award based on the partiality of the #arbitrator.

FSCD 08.02.1994 c. 2b

17.5 Effect of the Setting Aside of the Award

The Federal Supreme Court may send the matter back to the #arbitral tribunal if it upholds the #appeal on the basis of the violation of the #right to be heard, as Article 77(2) FSCA excludes the applicability of Art. 107(2) FSCA only to the extent that it would empower the Federal Supreme Court to decide the matter itself.

FSCD 4A_432/2017 c. 2.2, FSCD 4A_580/2017 c. 1.3, FSCD 4A_430/2017 c. 1.2, FSCD 4A_532/2016 c. 2.4

Notwithstanding the #setting aside of the entire arbitral #award, it is only the claim in respect of which the #motion for setting aside has been granted which will need to be decided again in the new arbitral #award.

FSCD 4A_669/2012 c. 3.3, FSCD 4A_360/2011 c. 6.2

The #arbitral tribunal is bound by the reasons of the judgment of the Federal Supreme Court. #Arbitrators may only review the issues left open by the judgment of the Court and are otherwise bound by their first #award.

FSCD 4A_54/2012 c. 2.2.3

The same #arbitral tribunal has #jurisdiction in principle to issue a new decision when an #award is set aside. There is no need for a derogation from this principle when the violation of the #right to be heard was not manifestly serious enough to create an appearance of bias.

FSCD 4A_54/2012 c. 2.2.3

Procedural #*res judicata* created by the notification of the #award giving it substantive #*res judicata* ceases if the #award is set aside. In such circumstances, the legal situation is the same as that which existed before the final #award was communicated to the parties. As a consequence of the #setting aside, the parties are entitled to a final #award which will decide their dispute and put an end to the #arbitral proceedings. The #arbitrators' mission is not finished, or if one considers that it was temporarily finished, then it is reactivated. It is not illogical to find that the #arbitral tribunal was never *functus officio* or was only during the time between the notification of the #award and its #setting aside.

FSCD 4A_14/2012 c. 3.1.1 (not published in FSCD 138 III 270)

There is no objection to the same #arbitrators deciding the matter again when the final #award was set aside provided that the #ground of setting aside is not the irregular #composition of the #arbitral tribunal (Art. 190(2)(a) PILA) or the lack of #jurisdiction (Art. 190(2)(b) PILA) and provided that they were not validly challenged in the meantime (Art. 180 PILA).

FSCD 4A_14/2012 c. 3.1.1 (not published in FSCD 138 III 270)

If one admits that the mission of the #arbitrators continues as a consequence of the #setting aside of the final #award, it is sufficient that the #jurisdiction of the #arbitral tribunal to decide the matter again is not excluded by the law of the #seat of the #arbitral tribunal, by the applicable rules of an #arbitral institution or by the intent of all parties expressed before or after the communication of the #award which has been set aside. A party's refusal to agree may not stall the

#arbitral proceedings but it will delay them significantly because new #arbitrators will have to be appointed.

FSCD 4A_14/2012 c. 3.1.1 (not published in FSCD 138 III 270)

Ensuring #procedural economy justifies the same #arbitral tribunal deciding the matter again. To constitute a new #arbitral tribunal to decide a specific issue that was not dealt with in the #award which was set aside after hearing the case again completely or in part, would violate the principle of #procedural economy and delay the outcome of the proceedings to the detriment of the prevailing party.

FSCD 4A_14/2012 c. 3.1.4 (not published in FSCD 138 III 270)

The setting aside of the #award does not have an effect on the #arbitration agreement, subject however to the possibility for the parties to disqualify the #arbitrators for the sole reason that they took part in the #award that was set aside – only a final #award, ending the dispute being referred to – or for any other reason.

*VD 27.04.2012 c. 4.1

In light of the death of the presiding #arbitrator and the irregular character of the composition of the #arbitral tribunal which includes the two remaining #arbitrators, it is not possible to refer the case back to this authority in order to rule again.

VD 01.06.2011

17.6 Individual Cases

A #prayer for relief requesting that the #arbitrator be instructed to reject the #respondent's claim for the reasons set out in the judgment of the Federal Supreme Court is inadmissible.

FSCD 4A_633/2014 c. 2.3 (not published in FSCD 141 III 29), FSCD 4A_524/2012 c. 2.2

A #prayer for relief requesting the Federal Supreme Court to reject the #respondent's submissions and to rule differently on the #costs and expenses of the #arbitral proceedings is inadmissible.

FSCD 4A_598/2014 c. 1

A #prayer for relief requesting the Federal Supreme Court to rule that a party's submissions are founded in principle and to reject the monetary requests of the other party is inadmissible.

FSCD 4A_335/2014 c. 3.2.2

A #prayer for relief requesting that the matter be referred to the #arbitral tribunal for a new decision in accordance with the reasons of the Federal Supreme Court is superfluous.

FSCD 4A_530/2013 c. 3, FSCD 4A_682/2012 c. 2.2, FSCD 09.01.1995 [(2001) ASA p. 297], FSCD 08.02.1994 c. 2a

A #prayer for relief requesting the Federal Supreme Court to set aside the fines imposed by the other party is inadmissible.

FSCD 4A_43/2014 c. 2

A #prayer for relief which requests the payment of a sum of money by the #respondents is inadmissible.

FSCD 4A_454/2011 c. 3

A #prayer for relief requesting the Federal Supreme Court to rule that the #appellant was entitled to a certain amount of #fees is inadmissible.

FSCD 4A_333/2013 c. 2

A #prayer for relief requesting the Federal Supreme Court to not only set aside the challenged #award but also to declare that the #appellant must not provide any document to the other party and to order the latter to stop all inquiries concerning the #appellant is inadmissible.

FSCD 4A_67/2013 c. 2

A #prayer for relief requesting that the matter be referred to the #arbitral tribunal for a new decision in accordance with the #reasons of the Federal Supreme Court cannot be heard, especially if no exception recognized by #case law is fulfilled, in particular not a #motion to set aside with respect to the #jurisdiction of the #arbitral tribunal or a #challenge.

FSCD 15.06.1998 c. 1a

18 *Suspensive Effect of the Appeal*

18.1 With Regard to the Enforceability of the Award

The dismissal of the #appeal entails *ipso jure* the lapse of the #suspensive effect granted to the #appeal.

FSCD 4A_314/2017 c. 4

The #motion to set aside an #award does not stay the #enforcement of the decision under #appeal *per se* (Art. 103(1) FSCA).

FSCD 4A_636/2011 c. 2.3.2

According to Article 94 fSOFJ, #suspensive effect can be granted to a [*former*] #motion for constitutional review. If the #award ordered a debtor to pay an amount, a #stay of #enforceability is only justified when the debtor would encounter financial difficulties if it paid immediately or when repayment of the paid sum, in case the #award is set aside, appears to be uncertain because of doubts concerning the creditor's solvency.

FSCD 11.10.2000 [(2001) ASA p. 87], FSCD 14.12.1993 [(1994) ASA p. 53]

The #case law of the Federal Supreme Court is moving towards more restrictive conditions for granting #suspensive effect in international arbitration.

FSCD 11.10.2000 [(2001) ASA p. 87-88], FSCD 29.08.1990 [(1991) ASA p. 30]

According to Article 94 fSOFJ, #suspensive effect can only be granted to the #motion to set aside if the judicially protected interests of the #appellant are seriously threatened or if measures to maintain the factual situation appear indispensable.

FSCD 29.08.1990 [(1991) ASA p. 29], FSCD 14.12.1993 [(1994) ASA p. 53]

If a [*former*] #motion for constitutional review has been filed against an interim #decision challengeable pursuant to Article 190(3) PILA, e.g. a positive interim #award on the #arbitral tribunal's #jurisdiction, #suspensive effect is not granted because such a decision cannot be enforced (the same holds true for declaratory #decisions) and so it cannot cause serious #irreparable harm. If the #evidentiary proceedings continue with respect to the #merits, then, in case of a subsequent court decision denying the #arbitrators' #jurisdiction, the decision on #costs and #fees could take this situation into account when ruling in favour of the #appellant.

*FSCD 109 Ia 81 [84]

As a rule, #appeals to the Federal Supreme Court do not have a #suspensive effect, so that decisions subject to #appeal become final and enforceable once they have been issued (cf. Art. 103(1) FSCA). If, on the other hand, the appellate court grants #suspensive effect, the decision is not enforceable and therefore a certificate of enforceability cannot be issued. In the case of a pending #appeal on which a request for #suspensive effect has been filed, there is a state of suspension until the decision on the said request has been taken which also precludes #enforcement of the decision.

ZH 21.03.2018 c. 2.2

The mere filing of an #Appeal in Civil Matters does not in principle prevent the #enforcement of the contested decision, especially as the #appeal does not *per se* impede the enforceability of the object of #appeal. According to a majority of the doctrine, the latter is only the case if the #appeal has been granted #suspensive effect. Before this date, it considers the contested decision to be enforceable (see decision of the III. Civil Chamber of the Supreme Court of the Canton of Zurich of 2 February 2010, No. PG 090008, c. 4). In the event that the #appeal is later approved; this doctrine takes the view that a certificate which has already been issued loses its effect without further ado to the extent of the #setting aside of the arbitral #award.

ZH 21.03.2018 c. 2.4

This doctrine is convincing. The possibility of submitting a request for #suspensive effect at a later date does not alter the fact that the arbitral #award is enforceable until the receipt of such a request and that there is a right to the issuance of a corresponding confirmation by the certifying judge. If this were not the case, it would be in the hands of the #appellant to determine or delay the date from which the contested decision would be enforceable, and a certificate of enforceability could be issued by late filing of a request for #suspensive effect. The #appeal to the Federal Supreme Court would *de facto* have the same effect as an #appeal with #suspensive effect and Article 103(1) FSCA would be emptied of its meaning.

ZH 21.03.2018 c. 2.6

18.2 With Regard to the Subsequent Proceedings

If a party files a #motion for setting aside an interim #award on the #jurisdiction of the #arbitral tribunal, the #arbitrators can in principle continue the proceedings on the #merits notwithstanding the pending #motion for setting aside the positive interim #decision on #jurisdiction. However, when deciding on the #stay of the proceedings, the #arbitral tribunal must take into account considerations of #procedural economy, i.e. considerations of practicability.

*FSCD 109 Ia 81 [84-85]

19 *Second Exchange of Written Briefs*

19.1 Principle: No Further Exchange of Written Briefs

In general, there is no further exchange of written briefs (Art. 102(3) FSCA).

FSCD 4A_554/2014 c. 1, FSCD 4A_43/2010 c. 2, FSCD 4A_416/2008 c. 2, FSCD 4A_468/2007 c. 3, FSCD 4A_244/2007 c. 2, FSCD 4A_268/2007 c. 2.2, FSCD 4A_220/2007 c. 4

If the answers to the #appeal filed by the #respondent and the #arbitrator do not contain any new elements which could be decisive for the case, then a further exchange of written briefs is not necessary.

FSCD 4A_214/2011 c. 1.5

When applying the respective provision of the fSOFJ (Art. 93(3)), the Federal Supreme Court made a strict application of this rule, ordering a #reply and a #rejoinder only if they appeared as effectively indispensable to resolve the dispute by respecting the #right to be heard.

FSCD 4A_268/2007 c. 2.2, FSCD 4A_220/2007 c. 4, FSCD 4P.117/2004 c. 1.4 (not published in FSCD 130 III 755)

19.2 Exception: Admission of a Second Exchange of Briefs

A spontaneous #reply filed by the #appellant will be taken into account to the extent necessary in conformity with the case law of the European Court of Human Rights.

FSCD 4A_214/2011 c. 1.5

The party requesting the #setting aside may express itself again immediately with respect to the answer filed by the opposing party.

FSCD 4A_43/2010 c. 2, FSCD 4A_416/2008 c. 2

This position is due to the fact that #grievances have to be filed with the Federal Supreme Court within the #time limit for the filing of the #motion to set aside of 30 days. Therefore, a subsequent supplementation of the #motion to set aside is only admissible if the comments of the #arbitral tribunal or opposing party justify it.

FSCD 4A_268/2007 c. 2.2, FSCD 4A_220/2007 c. 4, FSCD 4P.226/2004 c. 1.1

According to Article 93(3) fSOFJ, a second exchange of written briefs only takes place exceptionally.

FSCD 4P.117/2004 c. 1.4, FSCD 4P.207/2002 c. 1.1, FSCD 4P.188/2001 c. 1a, FSCD 4P.143/2001 c. 1, FSCD 08.12.1999 [(2000) ASA p. 551]

There must be a reason to order a second exchange of written briefs, because proceedings ordered by the court must respect legal forms and #time limits and cannot accommodate an indeterminable exchange of further written briefs, if they are to be terminated in due course. #Prayers for relief and #grievances which could have already been made within the #time limit for the #motion to set aside cannot be invoked after the expiry of the #time limit for its filing.

FSCD 4P.207/2002 c. 1.1, FSCD 4P.188/2001 c. 1a, FSCD 08.12.1999 [(2000) ASA p. 551]

The order for a second exchange of written briefs, which the law exceptionally admits, presupposes good reason, otherwise it cannot be granted. A reason justifying a second exchange of written briefs can be that essential arguments are brought forth only in comments by the #arbitral tribunal or by the opposing party. In this case, the party which receives the comments as information must request a second exchange of written briefs as soon as it has been informed of the written brief of the opposing party.

FSCD 4P.137/2002 c. 4, FSCD 4P.207/2002 c. 1.1

19.3 Limited Scope of Briefs

The #reply may only be used to make points connected to the arguments in the briefs of another participant in the proceedings.

FSCD 4A_80/2017 c. 2.4, FSCD 4A_490/2016 c. 2.4, FSCD 4A_544/2014 c. 2.4, FSCD 4A_324/2014 c. 2.5, FSCD 4A_74/2014 c. 2.3 (not published in FSCD 140 III 477)

The possibility to submit a #rejoinder must be subject to the same restrictive rules as to the #admissibility of the #reply.

FSCD 4A_568/2015 c. 2.2

19.4 No Subsequent Supplementation of the Motion to Set Aside

Any #grievances which the #appellant could have raised within the #time limit to appeal are however inadmissible.

FSCD 142 III 296 [305], FSCD 4A_394/2017 c. 2.3, FSCD 4A_65/2018 c. 2.2, FSCD 4A_438/2017 c. 1.2, FSCD 4A_345/2017 c. 1.2, FSCD 4A_117/2018 c. 1, FSCD 4A_491/2017 c. 3.1, FSCD 4A_170/2017 c. 3.2, FSCD 4A_478/2017 c. 2.2, FSCD 4A_247/2017 c. 2.2, FSCD 4A_426/2017 c. 3.2.3, FSCD 4A_450/2017 c. 2.2, FSCD 4A_260/2017 c. 2.1, FSCD 4A_56/2017 c. 3.3.2, FSCD 4A_157/2017 c. 2.2, FSCD 4A_50/2017 c. 2.2, FSCD 4A_600/2016 c. 1.2, FSCD 4A_34/2016 c. 2.2, FSCD 4A_704/2015 c. 2, FSCD 4A_322/2015 c. 2.2.3, FSCD 4A_568/2015 c. 2.2, FSCD 4A_69/2015 c. 3.3.2, FSCD 4A_634/2014 c. 5.1.2, FSCD 4A_709/2014 c. 2.1, FSCD 4A_554/2014 c. 1, FSCD 4A_486/2014 c. 2, FSCD 4A_544/2014 c. 2.5, FSCD 4A_378/2014 c. 1.1, FSCD 4A_199/2014 c. 3.1, FSCD 4A_606/2013 c. 1.1, FSCD 4A_530/2013 c. 6.3, FSCD 4A_250/2013 c. 3.2, FSCA 4A_232/2013 c. 3.3.2, FSCD 4A_439/2012 & 4A_457/2012 c. 3.1, FSCD 4A_146/2012 c. 2.7, FSCD 4A_537/2012 c. 2.1, FSCA 4A_14/2012 c. 4 (not published in FSCD 138 III 270), FSCD 4A_652/2011 c. 3.2, FSCD 4A_428/2011 c. 2.2, FSCD 4A_214/2011 c. 1.5

A #reply does not allow a party to subsequently supplement reasons which were insufficient for the Federal Supreme Court to consider the #grievance as admissible.

FSCD 4A_394/2017 c. 2.3, FSCD 4A_65/2018 c. 2.2, FSCD 4A_314/2017 c. 2.4.2.2, FSCD 4A_491/2017 c. 3.1, FSCD 4A_170/2017 c. 3.2, FSCD 4A_478/2017 c. 2.2, FSCD 4A_247/2017 c. 2.2, FSCD 4A_260/2017 c. 2.1, FSCD 4A_56/2017 c. 3.3.2, FSCD 4A_157/2017 c. 2.2, FSCD 4A_50/2017 c. 2.2, FSCD 4A_600/2016 c. 1.2, FSCD 4A_34/2016 c. 2.2, FSCD 4A_704/2015 c. 2, FSCD 4A_116/2016 c. 4.3.3, FSCD 4A_322/2015 c. 2.2.3, FSCD 4A_520/2015 c. 3.3.1, FSCD 4A_568/2015 c. 2.2, FSCD 4A_634/2014 c. 5.1.2, FSCD 4A_709/2014 c. 2.1, FSCD 4A_554/2014 c. 1, FSCD 4A_486/2014 c. 2, FSCD 4A_544/2014 c. 2.4, FSCD 4A_378/2014 c. 1.1, FSCD 4A_199/2014 c. 3.1, FSCD 4A_606/2013 c. 1.1, FSCA 4A_232/2013 c. 3.3.2, FSCD 4A_439/2012 & 4A_457/2012 c. 3.1, FSCD 4A_537/2012 c. 2.1, FSCA 4A_312/2012 c. 4.3.2, FSCA 4A_14/2012 c. 4 (not published in FSCD 138 III 270)

The #reply shall only be used for statements arising from statements in the submission of another party to the proceedings.

FSCD 4A_580/2017 c. 1.4, FSCD 4A_236/2017 c. 2.4, FSCD 4A_532/2016 c. 2.7, FSCD 4A_470/2016 c. 2.5

The same applies concerning the content of a possible #rejoinder.

FSCD 4A_65/2018 c. 2.2

The reasons must be contained in the brief submitted within the #time limit to appeal; the #appellant may not supplement or improve its appeal brief by way of a #reply.

FSCD 4A_580/2017 c. 1.4, FSCD 4A_236/2017 c. 2.4, FSCD 4A_436/2017, FSCD 4A_80/2017 c. 2.4, FSCD 4A_532/2016 c. 2.7, FSCD 4A_470/2016 c. 2.5, FSCD 4A_490/2016 c. 2.4, FSCD 4A_492/2016 c. 2.4, FSCD 4A_497/2015 c. 1.4, FSCD 4A_259/2015 c. 1.4, FSCD 4A_324/2014 c. 2.5, FSCD 4A_74/2014 c. 2.3 (not published in FSCD 140 III 477), FSCD 4A_395/2012 c. 1

New #evidence annexed to the #reply is inadmissible at this stage of the procedure (Art. 99(1) FSCA).

FSCD 4A_32/2016 c. 3

Arguments which have not been raised during the #time limit for the filing of the #motion to set aside cannot be caught up in a subsequent brief.

FSCD 4P.104/2004 c. 4

Supplementation of the #motion to set aside by filing new #claims is admissible only under the conditions of Article 93(2) fSOFJ, even if there is a second exchange of written briefs. Arguments not alleged within the #time limit for filing the #motion to set aside cannot be brought forward afterwards.

FSCD 4P.137/2002 c. 4

Therefore, the #appellant cannot seize this opportunity to formulate #grievances which it could have formulated in its #motion to set aside. In principle, such #grievances cannot be heard. The same applies to the #prayers for relief which were not contained in the #motion to set aside. Thus, the #appellant cannot take advantage of the opportunity, which the Federal Supreme Court offered to it, to try to remedy, in its #reply, the imperfections and gaps of its #motion to set aside. A different treatment applies to the #claims, #grievances and #prayers for

relief which are exclusively based on comments presented by the #arbitral tribunal.

FSCD 4P.137/2002 c. 4, FSCD 11.05.1992 [(1992) ASA p. 383, 399]

A second exchange of written briefs does not have any effect on the principle developed by #case law with regard to Article 90(1)(b) fSOFJ, according to which the arguments must be completely stated in the #motion to set aside, the simple reference to other briefs not being sufficient.

FSCD 11.05.1992 [(1992) ASA p. 383]

20 *Comments by the Arbitral Tribunal*

A party cannot complain about the fact that comments on its #appeal have been formulated by the Secretary General of the #CAS rather than the #arbitral tribunal that rendered the challenged #award.

FSCD 4A_32/2016 c. 2, FSCD 4A_234/2010 c. 2.2

The comments of the presiding #arbitrator of the #arbitral tribunal, which cannot be attributed to the majority of the #arbitrators cannot be taken into account.

FSCD 4A_322/2015 c. 2.2.2

If an #arbitrator who has drafted a #dissenting opinion files different comments with the Federal Supreme Court, without having been invited to do so, such comments do not have to be taken into account. This is all the more true as the #dissenting opinion, even if it is formally included in the text of the #award is separate from it and does affect either its #reasons or its #operative part.

FSCD 4P.196/2003 c. 1.2

Article 93 fSOFJ gives the Federal Supreme Court the possibility to order an exchange of written briefs and to request comments, in particular from the authority which rendered the challenged decision. Therefore an #arbitrator who files comments in the context of #motions to set aside does not violate its #impartiality and #independence.

FSCD 4P.273/1999 c. 2

21 *No Compensation for the Arbitrators*

The #arbitrator or #arbitral tribunal whose #award is challenged does not have the right to #costs for the comments that it makes with respect to the #motion to set aside or other requests of the #appellant before the Federal Supreme Court.

FSCD 4A_188/2016 c. 6

There exists no legal ground for a compensation for the #costs of the proceedings for the #arbitrators.

FSCD 4A_188/2016 c. 6, FSCD 4P.99/2000 c. 7

The #arbitrator whose #award is confirmed by the Federal Supreme Court has to be assimilated to an authority which has succeeded before the Federal Supreme Court and which, according to Article 159(2) fSOFJ, in principle does not receive any compensation. Therefore, if the #arbitrator did not have indispensable #costs within the meaning of this provision, it is not granted any compensation.

FSCD 13.11.1998 [(1999) ASA p. 536]

According to Article 159(2) fSOFJ, the losing party has to indemnify the successful party for all the necessary #costs caused by the dispute. Therefore, the statute only provides for compensation in favour of the opposing party, but not in favour of the tribunal which has rendered the decision. Notwithstanding the fact that, in the proceedings on a [former] #motion for constitutional review, the authority which rendered the challenged decision is invited to submit its comments, only the party which was opposed to the #appellant in the previous proceedings is an appellee. The authority which rendered the decision challenged before the Federal Supreme Court does not have the position of a party. Therefore, it is not possible to grant to the #arbitrators a party compensation.

FSCD 07.12.1994 [(1995) ASA p. 233]

22 *Advance on Costs and Security for Costs*

In this case, the simplified procedure pursuant to Article 108(1) FSCA applies.

FSCD 4A_518/2017, FSCD 4A_504/2014, FSCD 4A_98/2011, FSCD 4A_204/2007 c. 2

It is undisputed and in accordance with the #case law of the Federal Supreme Court that under Article 62(2) FSCA, it is generally possible for State courts to impose a duty to pay security for #costs not only on natural persons or legal entities under private and public law, but such an obligation may also be imposed on foreign States because they have no domicile or seat within Switzerland. However, the obligation to pay security does not apply if an international treaty precludes this.

FSCD 4A_396/2017 c. 2.2

A State party may invoke Article 17 of the Hague Convention of 1 March 1954 on Civil Procedure which provides that no obligation to pay security may be imposed on nationals of the Contracting States based on a lack of domicile or residence at the place of the proceedings (in another contracting State).

FSCD 4A_396/2017 c. 2.2 & 2.3

Article 62(2) FSCA contains an exhaustive list of the grounds for security. As a further alternative prerequisite to imposing a duty on a party to pay security for potential party #costs, Article 62(2) FSCA – in addition to the lack of a fixed abode within Switzerland – solely cites that party's proven insolvency. According to the #case law of the Federal Supreme Court, proven insolvency within the meaning of this provision will be deemed present if loss certificates or lien loss certificates have been issued against the party in question, if insolvency proceedings have been opened or a composition moratorium has been requested or approved. It is not considered an assertion of illiquidity when a party requesting payment of security for potential litigation #costs asserts that the opponent merely lacks a willingness to pay, i.e. a willingness to comply with any potential duty to pay party #costs.

FSCD 4A_396/2017 c. 3.2

According to #case law on Article 62(2) FSCA, a #respondent wishing to obtain security for #costs must apply for such before proceeding in the Federal Supreme Court.

FSCD 4A_572/2015 c. 5

If the request for security for #costs (Art. 62(2) FSCA) is filed on the same day that the other party's request for a #stay of #enforcement was filed, and thus at a time when the expenses in this respect had already been incurred, it must be declared moot.

FSCD 4A_70/2015 c. 6

If a party requests security for #costs in its #motion to set aside pursuant to Article 150(2) fSOFJ, such security cannot be granted because the #costs have already been incurred when the request is filed. If the Federal Supreme Court drafts its decision #by circulation (that is, by circulating for comments its draft decision amongst the judges) (Art. 36b f SOFJ), there is no possibility of future #costs.

FSCD 4P.260/2000 c. 2, FSCD 07.12.1994 c. 5

23 *Language of the Ruling*

23.1 *Language of the Challenged Decision*

According to Article 54(1) FSCA, the ruling of the Federal Supreme Court is drafted in one of the official Swiss languages. It is generally the language of the challenged decision according to the *terms of reference signed by the parties which is decisive, regardless of the language used in the *motion to set aside.

FSCD 4A_65/2018 c. 1, FSCD 4A_474/2018 c. 1, FSCD 4A_308/2018 c. 1, FSCD 4A_301/2018 c. 1, FSCD 4A_284/2018 c. 1, FSCD 4A_398/2017 c. 2 (not published in FSCD 144 III 559), FSCD 4A_550/2017 c. 1, FSCD 4A_238/2018 c. 1, FSCD 4A_298/2018 c. 1, FSCD 4A_300/2018 c. 1, FSCD 4A_114/2018 c. 1, FSCD 4A_125/2018 c. 1, FSCD 4A_490/2017 c. 1, FSCD 4A_508/2017 c. 1, FSCD 4A_220/2017 c. 1, FSCD 4A_592/2017 c. 1, FSCD 4A_236/2017 c. 1, FSCD 4A_206/2017 c. 1, FSCD 4A_150/2017 c. 1, FSCD 4A_532/2016 c. 1, FSCD 4A_470/2016 c. 1, FSCD 4A_40/2017 c. 1, FSCD 4A_490/2016 c. 1, FSCD 4A_405/2016 c. 1, FSCD 4A_478/2016 c. 1, FSCD 4A_492/2016 c. 1, FSCD 4A_672/2016 c. 1, FSCD 4A_497/2015 c. 1.1, FSCD 4A_412/2016 c. 1, FSCD 4A_310/2016 c. 1, FSCD 4A_202/2016 c. 1, FSCD 4A_259/2015 c. 1.1, FSCD 4A_132/2016 c. 1, FSCD 4A_42/2016 c. 1, FSCD 4A_510/2015 c. 1, FSCD 08.02.2016 c. 1 (not published in FSCD 142 III 239), FSCD 4A_428/2015 c. 1, FSCD 4A_222/2015 c. 1, FSCD 4A_572/2015 c. 1, FSCD 4A_319/2015 c. 1, FSCD 4A_520/2015 c. 1, FSCD 4A_568/2015 c. 1, FSCD 4A_176/2015 c. 1, FSCD 4A_69/2015 c. 1, FSCD 4A_34/2015 c. 1 (not published in FSCD 141 III 495), FSCD 4A_378/2015 c. 2, FSCD 4A_54/2015 c. 1, FSCD 4A_246/2014 c. 1, FSCD 4A_684/2014 c. 1, FSCD 4A_124/2015 c. 1, FSCD 4A_676/2014 c. 1, FSCD 4A_633/2014 c. 1 (not published in FSCD 141 III 229), FSCD 4A_634/2014 c. 1, FSCD 4A_426/2014 c. 1, FSCD 4A_623/2014 c. 1, FSCD 4A_70/2015 c. 1, FSCD 4A_126/2015 c. 2, FSCD 4A_636/2014 c. 1, FSCD 4A_374/2014 c. 1, FSCD 4A_486/2014 c. 1, FSCD 4A_544/2014 c. 1, FSCD 4A_532/2014 & 4A_534/2014 c. 2, FSCD 4A_335/2014 c. 1, FSCD 4A_446/2014 c. 1, FSCD 4A_324/2014 c. 1, FSCD 4A_199/2014 c. 1, FSCD 4A_231/2014 c. 1, FSCD 4A_247/2014 c. 1, FSCD 4A_6/2014 c. 1 (not published in FSCD 140 III 520), FSCD 4A_118/2014 c. 1, FSCD 4A_90/2014 c. 1, FSCD 4A_124/2014 c. 1, FSCD 4A_178/2014 c. 1.2, FSCD 4A_508/2013 c. 1 (not published in FSCD 140 III 278), FSCD 4A_544/2013 c. 1, FSCD 4A_530/2013 c. 1, FSCD 4A_450/2013 c. 1, FSCD 4A_564/2013 c. 1, FSCD 4A_577/2013 c. 1, FSCD 4A_448/2013 c. 1, FSCD 4A_362/2013 c. 1, FSCD 4A_304/2013 c. 1, FSCD 4A_438/2013 c. 1 (not published in FSCD 140 III 134), FSCD 4A_446/2013 c. 1, FSCD 4A_460/2013 c. 1, FSCD 4A_282/2013 c. 1 (not published in FSCD 139 III 511), FSCD 4A_93/2013 c. 1, FSCD 4A_688/2012 c. 1, FSCD 4A_305/2013 c. 1, FSCD 4A_232/2013 c. 1, FSCD 4A_330/2013 c. 1, FSCD 4A_274/2013 c. 1, FSCD 4A_214/2013 c. 1, FSCD 4A_95/2013 c. 1, FSCD 4A_682/2012 c. 1, FSCD 4A_476/2012 c. 1, FSCD 4A_730/2012 c. 1, FSCD 4A_672/2012 c. 1, FSCD 4A_524/2012 c. 1, FSCD 4A_669/2012 c. 1, FSCD 4A_596/2012 c. 1, FSCD 4A_522/2012 c. 1.1, FSCD 4A_388/2012 c. 1, FSCD 4A_576/2012 c. 1, FSCD 4A_552/2012 c. 1, FSCD 4A_407/2012 c. 1, FSCD 4A_550/2012 c. 1, FSCD 4A_538/2012 c. 1, FSCD 4A_244/2012 c. 1, FSCD 4A_146/2012 c. 1, FSCD 4A_198/2012 c. 1, FSCD 4A_635/2012 c. 1, FSCD 4A_276/2012 c. 1, FSCD 4A_50/2012 c. 1 (not published in 138 III 714), FSCD 4A_314/2012 c. 1, FSCD 4A_76/2012 c. 1, FSCD 4A_312/2012 c. 1, FSCD 4A_274/2012 c. 1, FSCD 4A_240/2012 c. 1, FSCD 4A_570/2011 c. 1, FSCD 4A_150/2012 c. 1, FSCD 4A_636/2011 c. 1, FSCD 4A_488/2011 c. 1, FSCD 4A_682/2012 c. 1, FSCD 4A_654/2011 c. 1, FSCD 4A_16/2012 c. 1, FSCD 4A_763/2011 c. 1, FSCD 4A_558/2011 c. 1 (not published in FSCD 138 III 322), FSCD 4A_652/2011 c. 1, FSCD 4A_360/2011 c. 1, FSCD 4A_238/2011 c. 1, FSCD

4A_103/2011 c. 1, FSCD 4A_617/2010 c. 1, FSCD 4A_404/2010 c. 1, FSCD 4A_640/2010 c. 1, FSCD 4A_486/2010 c. 1, FSCD 4A_600/2010 c. 1, FSCD 4A_481/2010 c. 1, FSCD 4A_514/2010 c. 1, FSCD 4A_482/2010 c. 1, FSCD 4A_394/2010 c. 1, FSCD 4A_392/2010 c. 1, FSCD 4A_420/2010 c. 1, FSCD 4A_386/2010 c. 1, FSCD 4A_391/2010 & 4A_399/2010 c. 2 (not published in FSCD 136 III 597), FSCD 4A_458/2009 c. 1, FSCD 4A_620/2009 c. 1, FSCD 4A_456/2009 c. 1, FSCD 4A_624/2009 c. 1, FSCD 4A_584/2009 c. 1, FSCD 4A_4/2010 c. 1, FSCD 4A_488/2009 c. 1, FSCD 4A_464/2009 c. 1, FSCD 4A_612/2009 c. 1, FSCD 4A_548/2009 c. 1, FSCD 4A_260/2009 c. 1, FSCD 4A_348/2009 c. 1, FSCD 4A_428/2008 c. 1, FSCD 4A_600/2008 c. 1, FSCD 4A_400/2008 c. 1, FSCD 4A_424/2008 c. 1, FSCD 4A_392/2008 c. 1, FSCD 4A_210/2008 c. 1, FSCD 4A_258/2008 c. 1, FSCD 4A_18/2008 c. 1

23.2 Official Language Employed by Both Parties

When the challenged decision has been rendered in another language, the Federal Supreme Court uses the official language chosen by the parties.

FSCD 142 III 521 [524], FSCD 4A_65/2018 c. 1, FSCD 4A_474/2018 c. 1, FSCD 4A_308/2018 c. 1, FSCD 4A_301/2018 c. 1, FSCD 4A_284/2018 c. 1, FSCD 4A_398/2017 c. 2 (not published in FSCD 144 III 559), FSCD 4A_550/2017 c. 1, FSCD 4A_404/2017 c. 1, FSCD 4A_114/2018 c. 1, FSCD 4A_125/2018 c. 1, FSCD 4A_578/2017 c. 1, FSCD 4A_505/2017 c. 1, FSCD 4A_502/2017 c. 1, FSCD 4A_491/2017 c. 1, FSCD 4A_478/2017 c. 1, FSCD 4A_247/2017 c. 1, FSCD 4A_450/2017 c. 1, FSCD 4A_490/2017 c. 1, FSCD 4A_508/2017 c. 1, FSCD 4A_432/2017 c. 1, FSCD 4A_56/2017 c. 1, FSCD 4A_157/2017 c. 1, FSCD 4A_312/2017 c. 1, FSCD 4A_236/2017 c. 1, FSCD 4A_424/2017 c. 1, FSCD 4A_53/2017 c. 1 (not published in FSCD 143 III 589), FSCD 4A_206/2017 c. 1, FSCD 4A_12/2017 c. 1 (not published in FSCD 143 III 578), FSCD 4A_318/2017 c. 1, FSCD 4A_277/2017 c. 1, FSCD 4A_316/2017 c. 1, FSCD 4A_80/2017 c. 1, FSCD 4A_668/2016 c. 1, FSCD 4A_34/2016 c. 1, FSCD 4A_98/2017 c. 1 (not published in FSCD 143 III 462), FSCD 4A_500/2015 c. 1 (not published in FSCD 143 III 55), FSCD 4A_150/2017 c. 1, FSCD 4A_50/2017 c. 1, FSCD 4A_532/2016 c. 1, FSCD 4A_692/2016 c. 1, FSCD 4A_470/2016 c. 1, FSCD 4A_40/2017 c. 1, FSCD 4A_405/2016 c. 1, FSCD 4A_690/2016 c. 1, FSCD 4A_478/2016 c. 1, FSCD 4A_492/2016 c. 1, FSCD 4A_716/2016 c. 1, FSCD 4A_672/2016 c. 1, FSCD 4A_188/2016 c. 1, FSCD 4A_32/2016 c. 1, FSCD 4A_116/2016 c. 1, FSCD 4A_497/2015 c. 1.1, FSCD 4A_412/2016 c. 1, FSCD 4A_136/2016 c. 1, FSCD 4A_536/2016 c. 2, FSCD 4A_310/2016 c. 1, FSCD 4A_616/2015 c. 1, 4A_390/2014 c. 1

Before the *#*arbitral tribunal, the parties used a foreign language, whereas in their pleadings the parties used the same official language, in compliance therefore with Article 42(1) FSCA and Article 70(1) FC. In accordance with its practice, the Federal Supreme Court will render its ruling in this official Swiss language.

FSCD 4A_550/2017 c. 1, FSCD 4A_404/2017 c. 1, FSCD 4A_478/2017 c. 1, FSCD 4A_247/2017 c. 1, FSCD 4A_450/2017 c. 1, FSCD 4A_432/2017 c. 1, FSCD 4A_56/2017 c. 1, FSCD 4A_157/2017 c. 1, FSCD 4A_53/2017 c. 1 (not published in FSCD 143 III 589), FSCD 4A_12/2017 c. 1 (not published in FSCD 143 III 578), FSCD 4A_668/2016 c. 1, FSCD 4A_500/2015 c. 1 (not published in FSCD 143 III 55), FSCD 4A_116/2016 c. 1, FSCD 4A_136/2016 c. 1

If this language [*of the challenged decision*] is not an official language of Switzerland, the language used by the parties must be taken into account. If the

parties have drafted their written briefs submitted to the Federal Supreme Court in the same official language, the Federal Supreme Court renders its decision in this language.

FSCD 136 III 597 c. 2, FSCD 4A_238/2018 c. 1, FSCD 4A_490/2016 c. 1, FSCD 4A_202/2016 c. 1, FSCD 4A_322/2015 c. 1, FSCD 4A_342/2015 c. 1 (not published in FSCD 142 III 360), FSCD 4A_510/2015 c. 1, FSCD 08.02.2016 c. 1 (not published in FSCD 142 III 239), FSCD 4A_222/2015 c. 1, FSCD 4A_572/2015 c. 1, FSCD 4A_319/2015 c. 1, FSCD 4A_520/2015 c. 1, FSCD 4A_69/2015 c. 1, FSCD 4A_246/2014 c. 1, FSCD 4A_124/2015 c. 1, FSCD 4A_633/2014 c. 1 (not published in FSCD 141 III 229), FSCD 4A_634/2014 c. 1, FSCD 4A_426/2014 c. 1, FSCD 4A_374/2014 c. 1, FSCD 4A_486/2014 c. 1, FSCD 4A_544/2014 c. 1, FSCD 4A_532/2014 & 4A_534/2014 c. 2, FSCD 4A_335/2014 c. 1, FSCD 4A_446/2014 c. 1, FSCD 4A_324/2014 c. 1, FSCD 4A_231/2014 c. 1, FSCD 4A_247/2014 c. 1, FSCD 4A_6/2014 c. 1 (not published in FSCD 140 III 520), FSCD 4A_118/2014 c. 1, FSCD 4A_124/2014 c. 1, FSCD 4A_508/2013 c. 1 (not published in FSCD 140 III 278), FSCD 4A_450/2013 c. 1, FSCD 4A_564/2013 c. 1, FSCD 4A_448/2013 c. 1, FSCD 4A_362/2013 c. 1, FSCD 4A_304/2013 c. 1, FSCD 4A_438/2013 c. 1 (not published in FSCD 140 III 134), FSCD 4A_446/2013 c. 1, FSCD 4A_460/2013 c. 1, FSCD 4A_688/2012 c. 1, FSCD 4A_232/2013 c. 1, FSCD 4A_95/2013 c. 1, FSCD 4A_476/2012 c. 1, FSCD 4A_730/2012 c. 1, FSCD 4A_672/2012 c. 1, FSCD 4A_524/2012 c. 1, FSCD 4A_669/2012 c. 1, FSCD 4A_596/2012 c. 1, FSCD 4A_388/2012 c. 1, FSCD 4A_576/2012 c. 1, FSCD 4A_407/2012 c. 1, FSCD 4A_550/2012 c. 1, FSCD 4A_538/2012 c. 1, FSCD 4A_244/2012 c. 1, FSCD 4A_146/2012 c. 1, FSCD 4A_50/2012 c. 1 (not published in FSCD 138 III 714), FSCD 4A_76/2012 c. 1, FSCD 4A_240/2012 c. 1, FSCD 4A_150/2012 c. 1, FSCD 4A_682/2012 c. 1, FSCD 4A_16/2012 c. 1, FSCD 4A_763/2011 c. 1, FSCD 4A_558/2011 c. 1 (not published in FSCD 138 III 322), FSCD 4A_627/2011 c. 1, FSCD 4A_652/2011 c. 1, FSCD 4A_360/2011 c. 1, FSCD 4A_617/2010 c. 1, FSCD 4A_600/2010 c. 1, FSCD 4A_584/2009 c. 1, FSCD 4A_488/2009 c. 1, FSCD 4A_612/2009 c. 1, FSCD 4A_550/2009 c. 1, FSCD 4A_62/2009 c. 1, FSCD 4A_539/2008 c. 1, FSCD 4A_392/2008 c. 1, FSCD 4A_438/2008 c. 1, FSCD 4A_210/2008 c. 1, FSCD 4A_294/2008 c. 1, FSCD 4A_128/2008 c. 1, FSCD 4A_468/2007 c. 2, FSCD 4A_244/2007 c. 1, FSCD 4A_450/2007 c. 1, FSCD 4A_352/2007 c. 2, FSCD 4A_220/2007 c. 2, FSCD 4A_42/2007 c. 3

23.3 Official Language Employed by the Appellant

Before the [#]arbitral tribunal, the parties used a foreign language, whereas in the written brief containing the [#]motion to set aside, the [#]appellant used one of the official Swiss languages, in compliance therefore with Article 42(1) FSCA and Article 70(1) FC. In accordance with its practice, the Federal Supreme Court will render its ruling in the official Swiss language used by the [#]appellant in the [#]motion to set aside.

FSCD 142 III 521 [524], FSCD 4A_474/2018 c. 1, FSCD 4A_301/2018 c. 1, FSCD 4A_284/2018 c. 1, FSCD 4A_502/2017 c. 1, FSCD 4A_490/2017 c. 1, FSCD 4A_508/2017 c. 1, FSCD 4A_312/2017 c. 1, FSCD 4A_424/2017 c. 1, FSCD 4A_318/2017 c. 1, FSCD 4A_277/2017 c. 1, FSCD 4A_316/2017 c. 1, FSCD 4A_80/2017 c. 1, FSCD 4A_98/2017 c. 1 (not published in FSCD 143 III 462), FSCD 4A_50/2017 c. 1, FSCD 4A_692/2016 c. 1, FSCD 4A_40/2017 c. 1, FSCD 4A_690/2016 c. 1, FSCD 4A_492/2016 c. 1, FSCD 4A_716/2016 c. 1, FSCD 4A_672/2016 c. 1, FSCD 4A_32/2016 c. 1, FSCD 4A_536/2016 c. 2, FSCD 4A_616/2015 c. 1

Before the [#]arbitral tribunal, the parties used a foreign language, whereas in their pleadings the [#]appellant(s) used one official Swiss language whilst the [#]respondent(s) used another official Swiss language, in compliance therefore with Article 42(1) FSCA and Article 70(1) FC. In accordance with its practice, the Federal Supreme Court will render its ruling in the official Swiss language employed in the appeal brief.

FSCD 4A_65/2018 c. 1, FSCD 4A_578/2017 c. 1, FSCD 4A_505/2017 c. 1, FSCD 4A_491/2017 c. 1, FSCD 4A_34/2016 c. 1

If this language [*of the challenged decision*] is not an official language of Switzerland, the language used by the parties must be taken into account. If the parties have drafted their written briefs in two different official languages, and if the challenged [#]award is drafted in a foreign language, the Federal Supreme Court is, according to its [#]case law, free to choose between the two official languages, giving in general preference to the language of the written brief containing the [#]motion to set aside.

FSCD 4A_298/2018 c. 1, FSCD 4A_300/2018 c. 1, FSCD 4A_220/2017 c. 1, FSCD 4A_259/2015 c. 1.1, FSCD 4A_132/2016 c. 1, FSCD 4A_42/2016 c. 1, FSCD 4A_428/2015 c. 1, FSCD 4A_568/2015 c. 1, FSCD 4A_176/2015 c. 1, FSCD 4A_34/2015 c. 1 (not published in FSCD 141 III 495), FSCD 4A_378/2015 c. 2, FSCD 4A_54/2015 c. 1, FSCD 4A_684/2014 c. 1, FSCD 4A_676/2014 c. 1, FSCD 4A_623/2014 c. 1, FSCD 4A_70/2015 c. 1, FSCD 4A_636/2014 c. 1, FSCD 4A_199/2014 c. 1, FSCD 4A_90/2014 c. 1, FSCD 4A_178/2014 c. 1.2, FSCD 4A_544/2013 c. 1, FSCD 4A_577/2013 c. 1, FSCD 4A_282/2013 c. 1 (not published in FSCD 139 III 511), FSCD 4A_93/2013 c. 1, FSCD 4A_305/2013 c. 1, FSCD 4A_330/2013 c. 1, FSCD 4A_274/2013 c. 1, FSCD 4A_214/2013 c. 1, FSCD 4A_682/2012 c. 1, FSCD 4A_522/2012 c. 1.1, FSCD 4A_552/2012 c. 1, FSCD 4A_198/2012 c. 1, FSCD 4A_635/2012 c. 1, FSCD 4A_276/2012 c. 1, FSCD 4A_314/2012 c. 1, FSCD 4A_312/2012 c. 1, FSCD 4A_274/2012 c. 1, FSCD 4A_570/2011 c. 1, FSCD 4A_636/2011 c. 1, FSCD 4A_654/2011 c. 1, FSCD 4A_238/2011 c. 1, FSCD 4A_103/2011 c. 1, FSCD 4A_404/2010 c. 1, FSCD 4A_640/2010 c. 1, FSCD 4A_486/2010 c. 1, FSCD 4A_481/2010 c. 1, FSCD 4A_514/2010 c. 1, FSCD 4A_482/2010 c. 1, FSCD 4A_394/2010 c. 1, FSCD 4A_392/2010 c. 1, FSCD 4A_420/2010 c. 1, FSCD 4A_386/2010 c. 1, FSCD 4A_391/2010 & 4A_399/2010 c. 2 (not published in FSCD 136 III 597), FSCD 4A_254/2010 c. 1, FSCD 4A_43/2010 c. 1, FSCD 4A_458/2009 c. 1, FSCD 4A_620/2009 c. 1, FSCD 4A_456/2009 c. 1, FSCD 4A_624/2009 c. 1, FSCD 4A_4/2010 c. 1, FSCD 4A_444/2009 c. 1, FSCD 4A_464/2009 c. 1, FSCD 4A_612/2009 c. 1, FSCD 4A_548/2009 c. 1, FSCD 4A_260/2009 c. 1, FSCD 4A_348/2009 c. 1, FSCD 4A_428/2009 c. 1, FSCD 4A_428/2008 c. 1, FSCD 4A_416/2008 c. 3, FSCD 4A_600/2008 c. 1, FSCD 4A_400/2008 c. 1, FSCD 4A_424/2008 c. 1, FSCD 4A_460/2008 c. 2, FSCD 4A_176/2008 c. 1.1, FSCD 4A_506/2007 c. 1, FSCD 4A_42/2007 c. 3, FSCD 4A_17/2007 c. 2, FSCD 4P.168/2006 c. 1, FSCD 4P.298/2006 c. 2

Before the #arbitral tribunal, the parties used a foreign language. In the original version of its #motion to set aside, the #appellant used this same language. However, the #appellant also submitted at the same time a translation in an official Swiss language of the motion in compliance therefore with Article 42(1) FSCA and Article 70(1) FC. In accordance with its practice, the Federal Supreme Court will render its ruling in the official Swiss language used by the #appellant in the #motion to set aside. In order to judge the #merits of the motion, the Federal Supreme Court will only take into consideration the version of the motion which is in an official Swiss language.

FSCD 4A_188/2016 c. 1

24 *Translation of Documents*

According to Article 42(1) FSCA, submissions must be drafted in an official language. This means in German, French, Italian and Romansh for the relationships that the Confederation has with the people of the Romansh language (Art. 70(1) FC).

FSCD 4F_8/2018 c. 3.1

If the submission is not drafted in an official language, the Federal Supreme Court can send it back to the author; in this case, it will grant to the author an appropriate #time limit to remedy this irregularity and warn it that failing compliance, its submission will not be taken in consideration (Art. 42(6) FSCA).

FSCD 4F_8/2018 c. 3.1

In spite of the discretionary formulation of the first verb of the phrase in Article 42(6) FSCA ("can"), the Federal Supreme Court is not, in principle, free to immediately declare inadmissible a brief submitted in another language than an official language; it must rather fix an appropriate #time limit for the author to translate this writing, in order to avoid #excessive formalism.

FSCD 4F_8/2018 c. 3.1

However, this rule, far from being absolute, is subject to exceptions, in particular in the case of an #abuse of right.

FSCD 4F_8/2018 c. 3.1

It is not customary for the Federal Supreme Court to demand a translation of #awards and #decisions written in English.

FSCD 4A_508/2013 c. 1 (not published in FSCD 140 III 278), FSCD 4A_450/2013 c. 1

If a party submits documents which are not drafted in an official Swiss language, the Federal Supreme Court can forbear, with the consent of the other party, from ordering a translation (Art. 54(3) FSCA). If the opposing party proceeds without requesting a translation, the party waives its right to ask for a translation.

FSCD 4A_176/2008 c. 1.2, FSCD 4A_18/2008 c. 1

According to Article 54(4) FSCA, the Federal Supreme Court orders a translation if necessary.

FSCD 4A_18/2008 c. 1

25 *Representation*

In civil and criminal matters, parties can be represented before the Federal Supreme Court only by attorneys-at-law who are authorised by the Statute on Attorneys-at-law of 23 June 2000 (RS 935.61) or an international treaty to represent parties before Swiss judicial authorities (Art. 40(1) FSCA).

FSCD 4A_528/2007 c. C

26 *Public Hearing and Publication of the Decision*

The anonymisation of the parties is the rule for the publication of the decisions, as long as the knowledge of the names is not necessary for the understanding of the importance of the decision (Art. 27(2) FSCA).

FSCD 4A_436/2017, FSCD 4A_74/2014 c. 1 (not published in FSCD 140 III 477), FSCD 4A_666/2012 c. 2, FSCD 4A_669/2012 c. 2.3, FSCD 4A_146/2012 c. 2.4, FSCD 4A_54/2012 c. 1.6, FSCD 4A_360/2011 c. 2.3, FSCD 4A_210/2008 c. 6, FSCD 4A_468/2007 c. 3, FSCD 4A_244/2007 c. 2

The mere invocation of “grounds of privacy” does not amount to an interest worthy of protection for the non-publication of the judgment of the Federal Supreme Court.

FSCD 4A_74/2014 c. 1 (not published in FSCD 140 III 477)

When a case can be decided on the basis of the file, a #hearing is inappropriate (Art. 57 FSCA).

FSCD 4A_178/2014 c. 1.3

A mandatory public #hearing before the Federal Supreme Court is not required in proceedings against arbitral #awards pursuant to Article 77 FSCA.

FSCD 4A_404/2010 c. 2, FSCD 4A_612/2009 c. 4.2

If the parties request, based on interests worthy of protection, to exclude the public from the proceedings and not to publish the decision, such reasons have to be weighed, by taking into account all circumstances of the case at hand, against the important public interest in the proceedings being #open to the public (public deliberations and voting as well as public rendering of the judgment) respectively in the publication of the decision for the transparency of the dispensation of justice. It is in any case up to the party, which requests the exclusion of the public or the renunciation of the publication of the decision to substantiate and evidence its interest worthy of protection in such measures.

FSCD 4P.74/2006 c. 8.3

When balancing the parties’ interest in excluding the public from #appeals proceedings against an arbitral #award, it has to be taken into account that parties to #arbitral proceedings often need great discretion. This alone can be a reason for submitting a dispute first to an #arbitral tribunal and not to a State court with in principle proceedings which are open to the public. In order to avoid any risk that a dispute, which must be kept confidential in the parties’ view, be brought to the public knowledge by one of the parties through setting aside proceedings against the arbitral #award before the Federal Supreme Court, the parties have the possibility to exclude in their #arbitration agreement appeals against the #award (Art. 192 PILA). In cases in which the parties have not waived their right to file an #appeal against the #award, the principle of proceedings being #open to the public applying before the Federal Supreme Court should not lead to the result that the party which would like to file an #appeal renounces the legal protection, which the #appeal against the #award before the Federal Supreme Court aims at offering to, because it fears the dispute could become public.

FSCD 4P.74/2006 c. 8.3

On the contrary to the principle of public #hearings, the principle of public rendering of the judgment is not limited by Article 6(1) ECHR. Therefore, there is no room for appreciation for the question whether the judgment must be rendered publicly. The judgment must without exception be rendered publicly, even when the public was excluded from possible #hearings for sufficient cause.

FSCD 4P.74/2006 c. 8.4.1

However, neither the FC nor the ECHR specify in what way the judgment must be rendered publicly. It is in particular not necessary that the judgment be read and even that the #reasons be stated in a public #hearing. According to #case law, the principle of the dispute being #open to the public is satisfied if the public has the possibility by other means (publication in periodicals or in the internet; possibility to request a copy of the text of the judgment at the clerk's office or to read it there) to take note of the judgments. According to the #case law of the European Court of Human Rights, the requirement of the #public rendering of the judgment has to be handled with certain flexibility, by taking into account the circumstances of the case at hand, in particular the particularities of the concrete proceedings and of their organization before the national State courts as a whole.

FSCD 4P.74/2006 c. 8.4.1

According to the practice of the Federal Supreme Court, the publication is first made by the displaying of the administrative information [*Rubrum*] and of the #operative part of all and every final judgment during four weeks in the building of the Federal Supreme Court, where they are at everyone's disposal during 30 days. In only a few exceptional cases provided for by the statute the judgment is made anonymous. Are among these exceptional cases in particular the publications of judgments in assistance to victims, in international legal and administrative cooperation and in tax disputes, but not in arbitration. This display is sometimes combined with a right of third persons, upon request, to review the judgment, possibly after the judgment has been made anonymous.

FSCD 4P.74/2006 c. 8.2

Furthermore and in order to assure the transparency in #case law, since the year 2000, about two thirds of all complete texts of the judgments of the Federal Supreme Court are made available on the internet, mostly in an anonymous form because of the protection of personality rights and data privacy. Moreover, the #reasons of the most important decisions are reported in the official collection of the decisions of the Federal Supreme Court [*Amtliche Sammlung der Entscheidungen des Bundesgerichts (BGE), Recueil officiel des arrêts du Tribunal fédéral (ATF), Raccolta ufficiale delle decisioni del Tribunale federale (DTF)*].

FSCD 4P.74/2006 c. 8.2

The practice of the Federal Supreme Court with regard to publication aims at ensuring in the best way possible the transparency of the #case law, without however interfering excessively with the parties' personality rights: One can only find out about the parties' names through the display, limited in time, of the administrative information and the #operative part in the premises of the Federal Supreme Court. To the contrary, the #facts and the #reasons are also accessible from outside the Federal Supreme Court's premises and without restrictions with regard to time, in particular in case of a publication of the decision in an anonymous form via internet. In particular with regard to the extent to which the Federal Supreme Court makes available the text of the decision, the Federal

Supreme Court goes beyond the minimal right to a #public rendering of the judgment according to Articles 30(3) FC and 6(1) ECHR by publishing its judgments always in an unabbreviated form.

FSCD 4P.74/2006 c. 8.4.1

With regard to the display of the administrative information and the #operative part, it is not excluded, based on the #case law of the European Court of Human Rights, to deviate from the principle of publication of the parties' names and to also order the display in an anonymous form in other exceptional cases than the ones provided for by the statute. Taking into account the special nature of #arbitral proceedings and of setting aside proceedings against arbitral #awards and the often important need of the parties for discretion, it is possible to consider renouncing the non-anonymous display of the administrative information and the #operative part, if a well-established interest of the parties in the secrecy is proven in the case at hand.

FSCD 4P.74/2006 c. 8.4.1

With respect to the question whether third persons may, upon request, review the judgment, it has to be considered that the parties' interest in the protection of their personality and data privacy rights may be taken into account sufficiently by making the judgment anonymous and by deleting certain paragraphs of the text, which describe #facts worthy of secrecy or which could allow third persons to draw conclusions with respect to the parties. There is no justification and it would be disproportionate to withhold sufficiently anonymous judgments from the general public.

FSCD 4P.74/2006 c. 8.4.2

When balancing the public interest in the publication of a decision of the Federal Supreme Court on the internet or in the official collection of the decisions, it is important – in view of the principle of transparency of the #case law – whether and to what extent the judgment is important as a precedent or the public has an interest in observing the evolution and the constancy of the #case law in a given legal field also with respect to the concrete decision. In so far as the decision clarifies issues of general importance, the decision has to be made available to the interested persons by publication, in general in an anonymous and, if need be, in an abbreviated form. The principle of equality of arms, which provides that all citizens shall enjoy the same opportunities when searching for the effective #case law, requires the same.

FSCD 4P.74/2006 c. 8.5

Decisions are officially published because of their effect as precedents and because of the public's interest in knowing rulings concerning legal issues of general importance. The parties to judicial proceedings do not have a right to #confidentiality by anonymisation, because the principle of the dispute being #open to the public (Art. 30(3) FC) is incompatible with general secrecy of the parties' identity and with secrecy concerning circumstances relevant for the decision, which circumstances could allow to be drawn with respect to the identity of the parties.

FSCD 4P.207/2002 c. 1.2

However, the principle of the dispute being #open to the public does not generally exclude taking into account countervailing private interests in favour of

#confidentiality and therefore not publishing the parties' names. The parties' names are normally not published in order to protect privacy (Art. 13 FC), in so far as decisions which are not of fundamental importance are made accessible to the interested public via internet. Furthermore, the private interest in #confidentiality of identity is taken into account by anonymisation in cases where the knowledge of the identity of the parties does not enhance the comprehension of the matter and where there is a recognizable private interest contrary to the publication of identities. The fact that circumstances relevant for the decision possibly allow drawing conclusions with respect to the identity of the parties, does not justify a general omission of such information.

FSCD 4P.207/2002 c. 1.2

27 *Relationship with Article 29 of the 1998 ICC Rules*

The fact that a party files at the same time an application for the #correction of an #award pursuant to Article 29 of the 1998 ICC Rules does not prevent the Federal Supreme Court from hearing a #motion to set aside filed against the same #award.

FSCD 130 III 755 [762]

The corrected #award may in principle be set aside (see, *mutatis mutandis*, FSCD 130 III 125 c. 2.3 concerning the #interpretation of an #award), under conditions which remain to be specified. This possibility does not exclude however a #motion to set aside within the meaning of Article 190(1) & (2) PILA against the #award which has not yet been corrected. Assuming that this #motion to set aside is granted, this would simply have the consequence that the corrected #award which shares the fate of the original #award, would become *ipso facto* null and void by reason of the #setting aside of the original #award.

FSCD 130 III 755 [763]

28 *Legal Aid*

By virtue of Article 64(1) FSCA, a party can only be exempted from paying the judicial #costs if it does not have sufficient resources and then only if its submissions do not seem bound to fail.

FSCD 4A_143/2018 c. 9, FSCD 4A_690/2016 c. 5.2

In principle, nothing prevents the admission of a request for #legal aid (Art. 64(1) FSCA) even though the decision taken was rendered in the framework of an arbitration.

FSCD 4A_592/2017 c. 5, FSCD 4A_384/2017 c. 5

An #appeal is a procedure of public law and as such is subject to Article 29(3) FC, by virtue of which any person without sufficient financial means, unless that person's chance of winning its case seems completely hopeless, is entitled to free #legal aid. Article 64 FSCA, which concretizes this constitutional guarantee for cases heard by the Federal Supreme Court that do not fall under the exclusion clause of Article 77(2) FSCA, does not distinguish between proceedings successfully brought before the Federal Supreme Court. There is nothing, therefore, to prevent it from applying to an #Appeal in Civil Matters lodged against a decision rendered in a domestic or international arbitration. The Federal Supreme Court has in fact already decided in favour of this approach, although implicitly, when it examined the applicable conditions of Article 64(1) FSCA in the context of #appeals against arbitral #awards. This is also the prevailing opinion in the doctrine.

FSCD 4A_668/2016 c. 3.2.2, FSCD 4A_690/2016 c. 5.1

29 Costs

29.1 Inadmissibility due to Failure to Pay Advance on Costs

According to Article 62(3) FSCA, the examining magistrate fixes an appropriate #time limit for the payment of the #advance on costs or the guarantees. If the payment is not made within this #time limit, the magistrate fixes a supplementary #time limit. If the #advance on costs or the guarantees are not paid within this second #time limit, the #motion to set aside is inadmissible.

FSCD 4A_518/2017, FSCD 4A_480/2015, FSCD 4A_504/2014, FSCD 4A_325/2012, FSCD 4A_98/2011, FSCD 4A_362/2010, FSCD 4A_510/2009, FSCD 4A_204/2007 c. 2

The required #advance on costs was not made within the prescribed #time limit. The #appeal is therefore inadmissible for lack of payment of the #advance on costs (Art. 62(3) FSCA). The legal costs are to be borne by the #appellant (Art. 66(1) and (3) FSCA).

FSCD 4A_504/2014

29.2 Principle: Losing Party Bears Costs and Pays Compensation

The losing party has to bear the #costs of the federal proceedings (Art. 66(1) FSCA) and pay compensation to the opposing party (Art. 68(2) FSCA).

FSCD 4A_394/2017 c. 7, FSCD 4A_65/2018 c. 6, FSCD 4A_474/2018 c. 4, FSCD 4A_550/2017 c. 8, FSCD 4A_238/2018 c. 6, FSCD 4A_560/2018 c. 3, FSCD 4A_40/2018 c. 4, FSCD 4A_298/2018 c. 5, FSCD 4A_300/2018 c. 5, FSCD 4A_525/2017 c. 4, FSCD 4A_404/2017 c. 6, FSCD 4A_578/2017 c. 4, FSCD 4A_505/2017 c. 5, FSCD 4A_502/2017 c. 5, FSCD 4A_314/2017 c. 5, FSCD 4A_491/2017 c. 6, FSCD 4A_61/2018 c. 7, FSCD 4A_247/2017 c. 6, FSCD 4A_426/2017 c. 4, FSCD 5A_1056/2017 c. 7, FSCD 5A_862/2017 c. 4, FSCD 4A_143/2018 c. 9, FSCD 5A_907/2017 c. 6, FSCD 4A_450/2017 c. 6, FSCD 4A_260/2017 c. 6, FSCD 4A_432/2017 c. 4, FSCD 4A_56/2017 c. 5, FSCD 4A_220/2017 c. 4, FSCD 4A_157/2017 c. 4, FSCD 4A_312/2017 c. 4, FSCD 4A_407/2017 c. 3, FSCD 4A_424/2017 c. 5, FSCD 4A_53/2017 c. 4 (not published in FSCD 143 III 589), FSCD 4A_12/2017 c. 5 (not published in FSCD 143 III 578), FSCD 4A_277/2017 c. 4, FSCD 4A_318/2017 c. 5, FSCD 4A_316/2017 c. 4, FSCD 4A_80/2017 c. 9, FSCD 4A_668/2016 c. 5, FSCD 4A_98/2017 c. 4 (not published in FSCD 143 III 462), FSCD 4A_50/2017 c. 5, FSCD 4A_600/2016 c. 4, FSCD 4A_22/2017, FSCD 4A_34/2016 c. 5, FSCD 4A_692/2016 c. 7, FSCD 4A_40/2017 c. 6, FSCD 4A_490/2016 c. 4, FSCD 4A_704/2015 c. 2, FSCD 4A_473/2016 c. 6, FSCD 4A_512/2016 c. 9, FSCD 4A_690/2016 c. 5.2, FSCD 4A_716/2016 c. 4, FSCD 4A_500/2015 c. 4 (not published in FSCD 143 III 55), FSCD 4A_188/2016 c. 6, FSCD 4A_32/2016 c. 5, FSCD 4A_116/2016 c. 5, FSCD 4A_522/2016 c. 4, FSCD 4A_136/2016 c. 6, FSCD 4A_536/2016 c. 5, FSCD 4A_616/2015 c. 5, FSCD 4A_524/2016 c. 4, FSCD 5A_507/2016 c. 7, FSCD 4A_355/2016 c. 5, FSCD 4A_202/2016 c. 5, FSCD 4A_322/2016 c. 5, FSCD 4A_259/2015 c. 4, FSCD 4A_132/2016 c. 4, FSCD 4A_322/2015 c. 6, FSCD 4A_173/2016 c. 5, FSCD 4A_214/2016 c. 5, FSCD 4A_42/2016 c. 5, FSCD 4A_342/2015 c. 6 (not published in FSCD 142 III 360), FSCD 4A_620/2015 c. 2, FSCD 4A_422/2015 c. 5 (not published in FSCD 142 III 284), FSCD 4A_628/2015 c. 4 (not published in FSCD 142 III 296), FSCD 4A_510/2015 c. 7, FSCD 08.02.2016 c. 7 (not published in 142 III

239), FSCD 5A_441/2015 c. 5, FSCD 4A_428/2015 c. 4, FSCD 4A_222/2015 c. 4, FSCD 4A_572/2015 c. 5, FSCD 4A_319/2015 c. 5, FSCD 4A_520/2015 c. 4, FSCD 4A_392/2015 c. 5, FSCD 4A_176/2015 c. 4, FSCD 4A_218/2015 c. 4, FSCD 4A_69/2015 c. 4, FSCD 4A_568/2015 c. 6, FSCD 4A_136/2015 c. 3, FSCD 4A_74/2014 c. 6 (not published in FSCD 140 III 477), FSCD 4A_54/2015 c. 5, FSCD 4A_143/2015 c. 3, FSCD 4A_684/2014 c. 5, FSCD 4A_124/2015 c. 5, FSCD 4A_676/2014 c. 4, FSCD 4A_633/2014 c. 4 (not published in FSCD 141 III 229), FSCD 4A_634/2014 c. 6, FSCD 4A_709/2014 c. 8, FSCD 4A_426/2014 c. 6, FSCD 4A_623/2014 c. 4, FSCD 4A_70/2015 c. 6, FSCD 4A_554/2014 c. 3, FSCD 4A_126/2015 c. 5, FSCD 4A_636/2014 c. 5, FSCD 4A_374/2014 c. 6, FSCD 4A_486/2014 c. 9, FSCD 4A_544/2014 c. 4, FSCD 4A_609/2014 c. 3, FSCD 4A_532/2014 & 4A_534/2014 c. 6, FSCD 4A_598/2014 c. 4, FSCD 4A_599/2014 c. 9, FSCD 4A_335/2014 c. 5, FSCD 4A_662/2014 c. 3, FSCD 4A_378/2014 c. 4, FSCD 4A_446/2014 c. 4, FSCD 4A_324/2014 c. 7, FSCD 4A_199/2014 c. 7, FSCD 4A_274/2014 c. 3, FSCD 4A_231/2014 c. 6, FSCD 4A_247/2014 c. 4, FSCD 4A_606/2013 c. 7, FSCD 4A_90/2014 c. 4, FSCD 4A_124/2014 c. 4, FSCD 4A_597/2013 c. 5, FSCD 4A_178/2014 c. 6, FSCD 4A_508/2013 c. 5 (not published in FSCD 140 III 278), FSCD 4A_544/2013 c. 4, FSCD 4A_530/2013 c. 8, FSCD 4A_112/2014 c. 5, FSCD 4A_43/2014 c. 4, FSCD 4A_564/2013 c. 4, FSCD 4A_577/2013 c. 4, FSCD 4A_448/2013 c. 4, FSCD 4A_362/2013 c. 4, FSCD 4A_304/2013 c. 6, FSCD 4A_438/2013 c. 4 (not published in FSCD 140 III 134), FSCD 4A_451/2013 c. 7, FSCD 4A_446/2013 c. 7, FSCD 4A_460/2013 c. 4, FSCD 4A_490/2013 c. 6 (not published in FSCD 140 III 75), FSCD 4A_509/2013 c. 4, FSCD 4A_250/2013 c. 5, FSCD 4A_282/2013 c. 6 (not published in FSCD 139 III 511), FSCD 4A_333/2013 c. 5, FSCD 4A_93/2013 c. 6, FSCD 4A_305/2013 c. 5, FSCD 4A_232/2013 c. 6, FSCD 4A_330/2013 c. 4, FSCD 4A_214/2013 c. 6, FSCD 4A_274/2013 c. 4, FSCD 4A_214/2013 c. 6, FSCD 5A_68/2013 c. 5, FSCD 4A_188/2013 c. 5, FSCD 4A_67/2013 c. 4, FSCD 4A_95/2013 c. 4, FSCD 4A_682/2012 c. 9, FSCD 4A_205/2013 c. 3, FSCD 4A_476/2012 c. 5, FSCD 4A_41/2013, FSCD 4A_730/2012 c. 6, FSCD 4A_672/2012 c. 5, FSCD 4A_524/2012 c. 5, FSCD 4A_596/2012 c. 4, FSCD 4A_522/2012 c. 5, FSCD 4A_388/2012 c. 4, FSCD 4A_576/2012 c. 6, FSCD 4A_552/2012 c. 4, FSCD 4A_407/2012 c. 6, FSCD 4A_550/2012 c. 7, FSCD 4A_335/2012 c. 3, FSCD 4A_538/2012 c. 7, FSCD 4A_244/2012 c. 5, FSCD 4A_146/2012 c. 6, FSCD 4A_537/2012 c. 2.1, FSCD 4A_198/2012 c. 4, FSCD 4A_414/2012 c. 4, FSCD 4A_635/2012 c. 6, FSCD 4A_276/2012 c. 8, FSCD 4A_50/2012 c. 5 (not published in FSCD 138 III 714), FSCD 4A_395/2012 c. 4, FSCD 4A_314/2012 c. 7, FSCD 4A_76/2012 c. 5, FSCD 4A_110/2012 c. 4, FSCD 4A_312/2012 c. 7, FSCD 4A_274/2012 c. 5, FSCD 4A_240/2012 c. 5, FSCD 4A_119/2012 c. 5 (not published in FSCD 138 III 681) c. 5, FSCD 4A_134/2012 c. 3, FSCD 4A_150/2012 c. 6, FSCD 5A_754/2011 c. 7 (not published in FSCD 138 III 520), FSCD 4A_54/2012 c. 3, FSCD 4A_488/2011 c. 7, FSCD 4A_682/2012 c. 5, FSCD 4A_232/2012 c. 3, FSCD 4A_654/2011 c. 5.2, FSCD 4A_16/2012 c. 7, FSCD 4A_14/2012 c. 7 (not published in FSCD 138 III 270), FSCD 4A_558/2011 c. 5 (not published in FSCD 138 III 322), FSCD 4A_627/2011 c. 4, FSCD 4A_652/2011 c. 4, FSCD 4A_428/2011 c. 6, FSCD 4A_528/2011 c. 5, FSCD 4A_526/2011 c. 5, FSCD 4A_634/2011 c. 4, FSCD 4A_238/2011 c. 4, FSCD 4A_246/2011 c. 3 (not published in FSCD 138 III 29), FSCD 4A_454/2011 c. 5, FSCD 4A_214/2011 c. 8, FSCD 4A_103/2011 c. 5, FSCD 4A_222/2011 c. 3, FSCD 4A_162/2011 c. 3, FSCD 4A_254/2011 c. 6, FSCD 4A_617/2010 c. 4, FSCD 4A_44/2011 c. 4, FSCD 4A_404/2010 c. 6, FSCD 4A_640/2010 c. 4, FSCD 4A_604/2010 c. 4, FSCD 4A_614/2010 c. 3, FSCD 4A_486/2010 c. 3, FSCD 4A_600/2010 c. 5, FSCD 4A_481/2010 c. 6, FSCD 4A_514/2010 c. 5, FSCD 4A_326/2010 c. 4, FSCD 4A_402/2010 c. 5, FSCD 4A_482/2010 c. 5, FSCD 4A_394/2010 c. 6, FSCD 4A_392/2010 c. 7, FSCD 4A_579/2010 c. 4, FSCD 4A_440/2010 c. 6 (not published in FSCD 137 III 85), FSCD 4A_420/2010 c. 4, FSCD 4A_386/2010 c. 10, FSCD 4A_10/2010 c. 3, FSCD 4A_391/2010 & 4A_399/2010 c. 6 (not published in FSCD 136 III 597), FSCD 4A_428/2010 c. 5,

FSCD 4A_234/2010 c. 4.4 (not published in FSCD 136 III 605), FSCD 4A_414/2010 c. 3, FSCD 4A_279/2010 c. 4, FSCD 4A_124/2010 c. 8, FSCD 4A_254/2010 c. 4, FSCD 4A_43/2010 c. 6, FSCD 4A_233/2010 c. 4, FSCD 4A_458/2009 c. 5, FSCD 4A_320/2009 c. 5, FSCD 4A_620/2009 c. 4.4, FSCD 4A_456/2009 c. 4, FSCD 4A_80/2010 c. 3, FSCD 4A_490/2009 c. 3 (not published in FSCD 136 III 200), FSCD 4A_582/2009 c. 3 (not published in FSCD 136 III 200), FSCD 4A_644/2009 c. 2, FSCD 4A_624/2009 c. 5, FSCD 4A_566/2009 c. 2, FSCD 4A_584/2009 c. 4, FSCD 4A_4/2010 c. 4, FSCD 4A_524/2009 c. 6, FSCD 4A_464/2009 c. 7, FSCD 4A_488/2009 c. 5, FSCD 4A_444/2009 c. 6, FSCD 4A_612/2009 c. 7, FSCD 4A_550/2009 c. 8, FSCD 4A_548/2009 c. 5, FSCD 4A_258/2009 c. 5, FSCD 4A_256/2009 c. 5, FSCD 4A_260/2009 c. 4, FSCD 4A_348/2009 c. 4, FSCD 4A_352/2009 c. 5, FSCD 4A_96/2009 & 4A_94/2009 c. 6, FSCD 4A_416/2008 c. 8, FSCD 4A_539/2008 c. 7, FSCD 4A_400/2008 c. 4, FSCD 4A_424/2008 c. 4, FSCD 4A_460/2008 c. 7, FSCD 4A_376/2008 c. 9, FSCD 4A_294/2008 c. 6, FSCD 4A_258/2008 c. 5, FSCD 4A_176/2008 c. 6, FSCD 4A_215/2008 c. 8, FSCD 4A_194/2008 c. 6, FSCD 4A_352/2007 c. 6, FSCD 4A_268/2007 c. 4, FSCD 4A_220/2007 c. 13, FSCD 4A_160/2007 c. 7, FSCD 4A_42/2007 c. 8, FSCD 4A_17/2007 c. 6, FSCD 4A_18/2007 c. 6

29.3 Fixing the Costs of the Federal Proceedings

Given that the #appeal was partially admitted, it is justified to allocate the #costs of the federal proceedings by taking into account the fact that the #appellant was less successful in its conclusions than the #respondent (Art. 66(1) FSCA). For the same reason, a reduced compensation will be granted to the #respondent for its #costs (Art. 68(1) & (2) FSCA).

FSCD 4A_478/2017 c. 4

The Federal Supreme Court may in exceptional cases not impose on the losing party the payment of the #costs of the federal proceedings.

FSCD 4F_8/2018 c. 4, FSCD 4A_592/2017 c. 5, FSCD 4A_384/2017 c. 5, FSCD 4A_631/2011 c. 4

The Federal Supreme Court may not charge #costs for the federal proceedings if the losing party is in a precarious financial position.

FSCD 4A_592/2017 c. 5, FSCD 4A_530/2011 c. 4

In order to fix the #costs of the federal proceedings, the Federal Supreme Court will take into account on the one hand, the significant financial interests at stake, but also, on the other hand, the fact that the challenged #award was only a #preliminary decision which did not put an end to the dispute on the #merits and that the question of #jurisdiction ruled on has not yet been examined by the Federal Supreme Court.

FSCD 4A_98/2017 c. 4 (not published in FSCD 143 III 462)

When an #appeal has been upheld as to three of the nine #respondents, the #appellant shall bear two thirds of the #costs of the federal proceedings and the three #respondents shall severally bear one third of the #costs.

FSCD 4A_246/2014 c. 9

The #costs of the federal proceedings must be shared by the #appellant and the #respondent (Art. 66(1) FSCA) and no #costs will be awarded (Art. 68(1) FSCA) when the #appellant succeeds only with respect to one out of three #grievances,

the matter being incapable of #appeal as to the other two and the submission as to the #setting aside of the entire #award under #appeal being rejected.

FSCD 4A_6/2014 c. 5 (not published in FSCD 140 III 520)

When the #motion for setting aside has been admitted with respect to an issue which could be decisive as to the outcome of the claim brought against the #appellant, it is justified that each party should bear equally the #costs of the federal proceedings (Art. 66(1) FSCA) and that each party should bear its own #costs (Art. 68(1) FSCA).

FSCD 4A_450/2013 c. 5, FSCD 4A_46/2011 c. 7

When both of the parties lose, they must bear the #costs of the federal proceedings relating to their respective submissions.

FSCD 4A_439/2012 & 4A_457/2012 c. 7

The losing party shall not pay the #costs of the federal proceedings if it was granted #legal aid (Art. 64(1) FSCA). Its court-appointed counsel's #fees will be charged to the Purser of the Federal Supreme Court (Art. 64(2) FSCA).

FSCD 4A_730/2012 c. 6

The #costs of the federal proceedings must be shared when none of the parties prevails entirely (Art. 66(1) FSCA, Art. 68(1) & (2) FSCA).

FSCD 4A_515/2012 c. 6, FSCD 4A_669/2012 c. 5, FSCD 4A_360/2011 c. 7, FSCD 4A_433/2009 c. 5

The significant #amount in dispute justifies charging the maximum court fee (Art. 65(3)(b) & (5) FSCA).

FSCD 4A_146/2012 c. 6

To the extent that the #appeal has become moot, the decision as to the #costs of the federal proceedings is based on Article 71 FSCA. According to this provision, the Court issues a summary decision on #costs on the basis of the factual situation before the matter became moot. Should the outcome of the proceedings be difficult to ascertain, the normal procedural criteria shall apply. According to these criteria, the party that initiated the proceedings or the party that is responsible for why the proceedings became moot must pay the #costs and compensate the other party.

FSCD 4A_134/2012 c. 3, FSCD 4A_636/2011 c. 4

29.4 Fixing the Compensation of the Opposing Party

If the #respondent does not submit an answer to the #motion for setting aside, the #appellant does not have to pay any compensation.

FSCD 4A_474/2018 c. 4, FSCD 4A_560/2018 c. 3, FSCD 4A_298/2018 c. 5, FSCD 4A_300/2018 c. 5, FSCD 4A_502/2017 c. 5, FSCD 4A_61/2018 c. 7, FSCD 5A_862/2017 c. 4, FSCD 4A_143/2018 c. 9, FSCD 5A_907/2017 c. 6, FSCD 4F_8/2018 c. 4, FSCD 4A_518/2017, FSCD 4A_592/2017 c. 5, FSCD 4A_480/2015, FSCD 4A_384/2017 c. 5, FSCD 4A_277/2017 c. 4, FSCD 4A_318/2017 c. 5, FSCD 4A_316/2017 c. 4, FSCD 4A_98/2017 c. 4 (not published in FSCD 143 III 462), FSCD 4A_172/2017, FSCD 4A_40/2017 c. 6, FSCD 4A_444/2016, FSCD 4A_716/2016 c. 4, FSCD 4A_536/2016 c. 5, FSCD 4A_555/2016 c. 3.2, FSCD

4A_524/2016 c. 4, FSCD 4A_355/2016 c. 5, FSCD 4A_214/2016 c. 5, FSCD 4A_176/2015 c. 4, FSCD 4A_378/2015 c. 4, FSCD 4A_246/2014 c. 9, FSCD 4A_676/2014 c. 4, FSCD 4A_623/2014 c. 4, FSCD 4A_70/2015 c. 6, FSCD 4A_126/2015 c. 5, FSCD 4A_36/2015 c. 3, FSCD 4A_662/2014 c. 3, FSCD 4A_43/2014 c. 4, FSCD 4A_564/2013 c. 4, FSCD 4A_448/2013 c. 4, FSCD 4A_362/2013 c. 4, FSCD 4A_304/2013 c. 6, FSCD 4A_540/2013 c. 4, FSCD 4A_468/2013 c. 6, FSCD 4A_333/2013 c. 5, FSCD 4A_274/2013 c. 4, FSCD 4A_67/2013 c. 4, FSCD 4A_198/2012 c. 4, FSCD 4A_635/2012 c. 6, FSCD 4A_276/2012 c. 8, FSCD 4A_314/2012 c. 7, FSCD 4A_110/2012 c. 4, FSCD 4A_488/2011 c. 7, FSCD 4A_232/2012 c. 3, FSCD 4A_426/2011 c. 3, FSCD 4A_386/2010 c. 10, FSCD 4A_10/2010 c. 3, FSCD 4A_4/2010 c. 4, FSCD 4A_548/2009 c. 5, FSCD 4A_160/2007 c. 7

Given that the #appeal was partially admitted, it is justified to allocate the #costs of the federal proceedings by taking into account the fact that the #appellant was less successful in its conclusions than the #respondent (Art. 66(1) FSCA). For the same reason, a reduced compensation will be granted to the #respondent for its #costs (Art. 68(1) & (2) FSCA).

FSCD 4A_478/2017 c. 4

A party not taking an active part in the federal proceedings does not have the right to any compensation.

FSCD 4A_478/2017 c. 4

The #respondent, who is an attorney, represented itself until the end of the month of September 2017. The #respondent filed comments on the #suspensive effect which extend to three pages. This activity is not of such an intensity that it would justify the exceptional allocation of compensation for #costs to an attorney which has acted by itself.

FSCD 4A_407/2017 c. 3

The #respondent cannot claim the #costs incurred by an attorney who files submissions on the #merits spontaneously after the #time limit for the #reply to the #appeal, of which it had not requested the extension, had expired.

FSCD 4A_407/2017 c. 3

If the #respondent submits a late answer to the #motion for setting aside, the #appellant does not have to pay any compensation.

FSCD 4A_692/2016 c. 7, FSCD 4A_374/2014 c. 6

When the #motion for setting aside has been admitted with respect to an issue which could be decisive as to the outcome of the claim brought against the #appellant, it is justified that each party should bear equally the #costs of the federal proceedings (Art. 66(1) FSCA) and that each party should bear their own #costs (Art. 68(1) FSCA).

FSCD 4A_450/2013 c. 5, FSCD 4A_46/2011 c. 7

If the #respondent only stated its position as to the #stay of #enforcement and not as to the #setting aside proceedings, it is only entitled to limited #costs (Art. 68(1) FSCA).

FSCD 5A_507/2016 c. 7, FSCD 4A_178/2014 c. 6

If the #respondent does not incur any #costs as a result of the federal proceedings, it is not entitled to receive any compensation pursuant to Article 68(1) FSCA.

FSCD 4A_132/2016 c. 4, FSCD 4A_678/2015 c. 5, FSCD 4A_305/2013 c. 5, FSCD 4A_330/2013 c. 4, FSCD 4A_566/2009 c. 2

When an #appeal has been upheld as to three of the nine #respondents, the #appellant shall bear two thirds of the #costs of the federal proceedings and the three #respondents shall severally bear one third of the #costs.

FSCD 4A_246/2014 c. 9

If the #respondent is not represented by counsel but by an #association, it is not entitled to #costs.

FSCD 4A_246/2014 c. 9

When a party did not participate in the proceedings except as the judicial body of first instance through the Dispute Resolution Chamber and the Committee, it shall not bear part of the #costs (Art. 66(4) FSCA by analogy) and shall not be entitled to compensation either (Art. 68(3) FSCA by analogy).

FSCD 4A_246/2014 c. 9

If the #respondent has not been identified, it is not entitled to receive any compensation.

FSCD 4A_451/2013 c. 7

If the #respondent is not represented by counsel, it is not entitled to #costs for the comments it made as to the #stay of #enforcement.

FSCD 4A_550/2012 c. 7

If the #respondent appears without the assistance of counsel, it is not entitled to #costs.

FSCD 4A_652/2011 c. 4, FSCD 4A_644/2009 c. 2, FSCD 4A_624/2009 c. 5

If the #respondent wrongly submitted that the #appeal should be upheld, it cannot claim compensation (Art. 68(1) FSCA *a contrario*).

FSCD 4A_428/2011 c. 6

If the #respondent is not represented by counsel and submits an answer without being requested, it is not entitled to any compensation.

FSCD 4A_631/2011 c. 4

If the #respondent is not represented by counsel and submits a letter which is not a proper answer, the #appellant does not have to pay any compensation.

FSCD 4A_454/2011 c. 5

If the #respondent submits an answer to the #motion for setting aside after the expiry of the #time limit, the #appellant does not have to pay any compensation to this #respondent.

FSCD 4A_514/2010 c. 5

No #costs are awarded to the #respondent when it made no submissions in its brief and therefore did not prevail in the appeal proceedings (Art. 68(1) FSCA).

FSCD 4A_391/2010 & 4A_399/2010 c. 6 (not published in FSCD 136 III 597)

29.5 Inadmissibility of the Appeal

Where the #appeal is rejected as inadmissible, no #costs for the federal proceedings will be charged.

FSCD 4A_518/2017, FSCD 4A_444/2016, FSCD 4A_378/2015 c. 3.4, FSCD 4A_36/2015 c. 3, FSCD 4A_540/2013 c. 4, FSCD 4A_468/2013 c. 6, FSCD 4A_426/2011 c. 3, FSCD 4A_628/2009 c. 4

The manifest #inadmissibility of the two grounds for the #setting aside of an arbitral #award due to the lack of an attackable #award, should have followed the simplified procedure of Art. 108 FSCA if one of them had not become without object. As a result, the #appellant should bear the useless #costs that it caused (Art. 66(3) FSCA).

FSCD 4A_555/2016 c. 3.2

The #inadmissibility of the #appeal will be taken into account when fixing the #costs of the federal proceedings as well as the #costs of the #respondents.

FSCD 4A_476/2013 c. 3

It is justified to reduce the #costs incurred by the #respondents where they devoted significant attention to the #grounds raised in the #appeal brief even though they had noticed that the #appeal was inadmissible because it had been submitted late.

FSCD 4A_476/2013 c. 3

29.6 Withdrawal of Motion to Set Aside the Award

If a party withdraws its #motion to set aside an #award, it bears reduced #costs for the proceedings and a reduced compensation to the opposing party (Art. 66(2) & (3), Art. 68(4) FSCA; Art. 8(3) of the Regulation on the compensation paid to the opposing party [SR 173.110.210.3]).

FSCD 4A_371/2018, FSCD 4A_266/2018, FSCD 4A_294/2017, FSCD 4A_292/2018, FSCD 4A_640/2017, FSCD 4A_153/2018, FSCD 4A_507/2017, FSCD 4A_466/2017, FSCD 4A_38/2017, FSCD 4A_502/2015, FSCD 4A_441/2014, FSCD 4A_334/2014, FSCD 4A_563/2013, FSCD 4A_322/2013, FSCD 4A_133/2013, FSCD 4A_512/2011, FSCD 4A_14/2013, FSCD 4A_652/2012, FSCD 4A_122/2012, FSCD 4A_711/2011, FSCD 4A_602/2011, FSCD 4A_500/2010, FSCD 4A_345/2010, FSCD 4A_126/2010, FSCD 4A_102/2009, FSCD 4A_456/2008

29.7 Several Parties

In the absence of any provision to the contrary, several parties which have to bear in common the #costs, bear them in equal parts and jointly (Art. 66(5) and 68(2) & (4) FSCA).

FSCD 4A_438/2008 c. 5, FSCD 4A_468/2007 c. 8

29.8 Fine for Misconduct

The Federal Supreme Court has the #jurisdiction to impose disciplinary sanctions. Therefore the #respondent's request for the Federal Supreme Court to impose a fine for misconduct on the #appellant pursuant to Art. 33(1) FSCA is inadmissible. In any event, the arguments provided by the #respondent concern the #appellant's conduct during the #arbitral proceedings whereas the disposition referred to only governs the proceedings before the Federal Supreme Court.

FSCD 4A_704/2015 c. 7

30 Consolidation of Appeals

Proceedings 4A_396/2017 and 4A_398/2017 are based on comparable #facts, but the #appeals are not directed against the same decision and the respective #arbitral proceedings do not involve the same parties, which is why the two #appeal proceedings are not consolidated.

FSCD 4A_398/2017 c. 1 (not published in FSCD 144 III 559)

The #appeals addressed to the Federal Supreme Court both concern the #award rendered on 27 February 2017 by the #CAS. They concern the same dispute and the same parties, except that each of them is #appellant and each of them is #respondent. In these circumstances, #procedural economy justifies that the two cases be consolidated in order to be treated in the same decision.

FSCD 4A_170/2017 c. 1

Two #appeals aimed at two different #awards issued by the same #arbitral tribunal may be consolidated if they are closely connected. Each #appeal was made by the same club and the #respondent is the same club in both cases. The answer to the issue raised by the #appellant is the same in both appeals. #Procedural economy therefore calls for the consolidation of the appeals. The cases can be consolidated in accordance with Article 24 CCP which is applicable by analogy pursuant to Article 71 FSCA, to be addressed in one and the same judgment.

FSCD 4A_536/2016 c. 1

Two #appeals aimed at two different #awards issued by the same #arbitral tribunal may be consolidated if they are closely connected. Each #appeal was made by two companies belonging to the same group and the #respondent is the same in both cases. The answers to the issue raised by the #appellants are the same in both #appeals. #Procedural economy therefore calls for the consolidation of the #appeals. The cases can be consolidated in accordance with Article 24 CCP which is applicable by analogy pursuant to Article 71 FSCA.

FSCD 4A_532/2014 & 4A_534/2014 c. 1

There is in principle a possibility of consolidating different Federal Supreme Court proceedings. However, both #appeals filed by the #appellant are against #awards which were issued in two separate #arbitration proceedings, the opposing parties were different in each case and differing claims had to be reviewed. Although it essentially makes the same #grievance in both proceedings, owing to the identical #composition of the #arbitral tribunals, with respect to the lack of #impartiality of two of the #arbitrators (Art. 190(2)(a) PILA), the other #grievances are based on different factual and legal circumstances. There is therefore no need to consolidate the two proceedings.

FSCD 4A_258/2009 c. 1, FSCD 4A_256/2009 c. 1

If the same parties participate in the proceedings and the same #facts are the basis of several #appeals, the Federal Supreme Court treats the different #appeals in general in one single decision.

FSCD 4A_96/2009 & 4A_94/2009 c. 1, FSCD 23.03.1999 c. 1, FSCD 03.11.1997 c. 1, FSCD 16.10.1997 c. 1a, FSCD 29.01.1996 c. 2

31 *Cross Motion*

If the #respondent in setting aside proceedings requests that the Federal Supreme Court grant its corrected, and hence new, #prayers for relief, respectively that it refers the matter to the #arbitral tribunal, it files by analogy a #cross-motion to set aside. Such a motion is inadmissible in the proceedings on the [*former*] #motion for constitutional review.

FSCD 4P.129/2002 c. 9

32 *Conditional Appeal*

The conditional #appeal against a decision is – according to the principle that in general procedural claims cannot be made conditionally – possible only in exceptional cases. There is for instance such an exception if the #appeal is filed only “preventively” for the case that another instance seized does not hear another means of #appeal.

FSCD 23.03.2009 c. 4b/aa

33 *Appeal in Civil Matters and Revision*

There is no specific provision, such as Article 57(1) fSOFJ for the civil appeal or Article 6(1) CCP procedure in relation with Article 40 fSOFJ for the other #appeals, which would rule on the priority between the examination of a [*former*] #motion for constitutional review and a request for #revision against an #award rendered in an international arbitration. The goal pursued by these provisions, i.e. to avoid, for reasons of #procedural economy, that the Federal Supreme Court hears a case as long as the decision could be set aside by a cantonal instance (FSCD 83 II 422) – does not play any role in this context because the same authority is called to decide on related #claims. However, at the level of the cantons, the #revision is generally considered as being a subsidiary #means of appeal compared to the other types of #appeals put at the disposal of the #appellants. In the same sense, federal #case law considers that the grounds of Article 136 fSOFJ could not be claimed in a request for #revision of an international arbitral #award, whereas they may be claimed in a [*former*] #motion for constitutional review within the meaning of Article 190(2) PILA. Therefore, logic commands that the [*former*] #motion for constitutional review is examined first. However, this is only a general rule and it is well conceivable that in certain cases, such as those of Article 137(a) fSOFJ, it could be reasonable to start by examining the request for #revision.

FSCD 129 III 727 [729]

When the Federal Supreme Court has to examine an #Appeal in Civil Matters and a request for #revision, the #Appeal in Civil Matters is examined first.

FSCD 4A_231/2014 c. 2, FSCD 4A_352/2009 c. 1

34 *Revision*

34.1 *Admissibility*

There are some extreme situations in which the notions of justice and fairness absolutely require that an enforceable decision may not survive because it is based on flawed premises. It is precisely the role of #revision to afford a remedy.

FSCD 142 III 521 [525]

The PILA does not contain any provision regarding the #revision of #awards within the meaning of Articles 176 et seq. PILA. However, this gap in the law has been filled in by the Federal Supreme Court, which makes available to the parties in international #arbitral proceedings the extraordinary #means of appeal known as #revision.

FSCD 142 III 521 [525], FSCD 134 III 286 [286-287], FSCD 4A_412/2016 c. 2.1, FSCD 4A_645/2014 c. 1, FSCD 4A_247/2014 c. 2.2, FSCD 4A_688/2012 c. 4.2, FSCD 4A_666/2012 c. 3.1, FSCD 4A_750/2011 c. 1, FSCD 4A_570/2011 c. 2, FSCD 4A_763/2011 c. 2.2, FSCD 4A_222/2011 c. 1, FSCD 4A_212/2010 c. 1, FSCD 4A_237/2010 c. 2, FSCD 4A_144/2010 c. 2, FSCD 134 III 286 [286], FSCD 129 III 727 [729], FSCD 122 III 492 [493], FSCD 118 II 199 [200-204], FSCD 4A_368/2009 c. 1, FSCD 4A_596/2008 c. 3.1, FSCD 4A_234/2008 c. 1, FSCD 4A_528/2007 c. 2.1, FSCD 4P.102/2006 c. 1, FSCD 4P.237/2005 c. 2, FSCD 4P.120/2002 c. 1.1, FSCD 11.05.1999 [(2000) ASA p. 326], FSCD 08.04.1998 c. 1, FSCD 09.07.1997 [(1997) ASA p. 509], FSCD 25.11.1993 [(1994) ASA p. 253]

It is questionable whether a contractual #waiver of a #motion to set aside according to Article 192 PILA entails the #inadmissibility of the motion for #revision.

FSCD 02.07.1997 [(1997) ASA p. 497]

34.2 *Application of the FSCA*

The FSCA has entered into force on 1 January 2007. According to Article 132 FSCA, this act applies to the proceedings pending before the Federal Supreme Court after its entry into force; however, it applies to appeal proceedings only if the appealed decision has been rendered after its entry into force. As the #revision is not an #appeal within the meaning of Article 132(1) FSCA, the exception provided for in this provision does not apply to #revision proceedings.

FSCD 4A_596/2008 c. 1

34.3 Jurisdiction

The Federal Supreme Court is the competent judicial authority for the #revision of any international arbitral #award, be it final, partial or preliminary.

FSCD 142 III 521 [525], FSCD 134 III 286 [287], FSCD 122 III 492 [493-494], FSCD 118 II 199 [203-204], FSCD 4A_645/2014 c. 1, FSCD 4A_247/2014 c. 2.2, FSCD 4A_688/2012 c. 4.2, FSCD 4A_666/2012 c. 3.1, FSCD 4A_570/2011 c. 2, FSCD 4A_763/2011 c. 2.2, FSCD 4A_222/2011 c. 1, FSCD 4A_212/2010 c. 1, FSCD 4A_234/2008 c. 1, FSCD 4A_528/2007 c. 2.1, FSCD 4P.102/2006 c. 1, FSCD 4P.237/2005 c. 2, FSCD 11.05.1999 [(2000) ASA p. 326], FSCD 08.04.1998 c. 1, FSCD 09.07.1997 [(1997) ASA p. 509], FSCD 02.07.1997 [(1997) ASA p. 498], FSCD 25.11.1993 [(1994) ASA p. 253]

The Federal Supreme Court's #jurisdiction in this matter concerns only #awards which bind the #arbitral tribunal that rendered them, i.e. it does not apply to simple procedural orders and directives which can be modified or set aside in the course of the proceedings.

FSCD 136 III 597 [600], FSCD 136 III 200 [203], FSCD 122 III 492 [494], FSCD 4A_222/2011 c. 1, FSCD 4A_368/2009 c. 1, FSCD 4A_234/2008 c. 1, FSCD 4A_42/2008 c. 2.2, FSCD 4P.237/2005 c. 3.2, FSCD 02.07.1997 [(1997) ASA p. 498]

The Federal Supreme Court has #jurisdiction regardless of the nature of the arbitral #award which thus may be final, partial, preliminary or interim, provided however that the #award binds definitively the #arbitral tribunal which rendered it. This is not the case if the #award is subject to a modification which has been expressly reserved.

FSCD 134 III 286 [286-287], FSCD 122 III 492 [494], FSCD 4A_368/2009 c. 1, FSCD 4A_596/2008 c. 3.1

The #award must bind the #arbitral tribunal, because only legally binding decisions are subject to #revision. This is not the case, e.g. if a modification – even subject to certain conditions – has been explicitly reserved.

FSCD 134 III 286 [286-287], FSCD 4A_763/2011 c. 2.2, FSCD 4P.237/2005 c. 3.2

The general #jurisdiction of the Federal Supreme Court for all #revisions, except for the option pursuant to Article 191(2) fPILA, is all the more justified as any attempt to make distinctions depending on the final or partial nature of the #award, or the continuation or the end of the #arbitrators' mission, would only increase the uncertainty in a field where it is necessary to state a simple and clear rule of #jurisdiction.

FSCD 122 III 492 [494], FSCD 4A_596/2008 c. 3.1

This solution best respects the rule of Article 1(2) CC and is approved by doctrine. Therefore, this principle has a general scope and applies to all cases of #revision in international arbitration.

FSCD 122 III 492 [494]

34.4 Consolidation

In view of #procedural economy, #revision requests may be consolidated and decided in one judgment when they concern the same arbitral #award and relate to the same case and raise common legal issues.

FSCD 4A_688/2012 c. 2

The consolidated cases remain however autonomous and the grounds for #revision in each shall be dealt with separately.

FSCD 4A_688/2012 c. 2

34.5 Grounds for Revision

The #revision may be sought for one of the #grounds stated at Articles 121 to 123 FSCA.

FSCD 4A_412/2016 c. 2.2, FSCD 4F_8/2013 c. 1.1, FSCD 4A_212/2010 c. 1

34.5.1 Relationship between the former SOFJ and the FSCA

Formerly, the #grounds for revision were fixed by Article 137 fSOFJ. Today, they are fixed by Article 123 FSCA.

FSCD 142 III 521 [525], FSCD 4A_247/2014 c. 2.2, FSCD 4A_688/2012 c. 4.2, FSCD 4A_666/2012 c. 3.1, FSCD 4A_570/2011 c. 2, FSCD 4A_763/2011 c. 2.2, FSCD 4A_222/2011 c. 1, FSCD 4A_212/2010 c. 3.1, FSCD 4A_234/2008 c. 1, FSCD 4A_528/2007 c. 2.2

Under the fSOFJ, the #grounds for revision were those of Article 137 fSOFJ and Articles 140-143 of the fSOFJ applied by analogy to the proceedings (FSCD 118 II 199 [204], FSCD 4P.120/2002 c. 1.1). Basically, this was not changed by the new provisions of the FSCA, particularly for the #ground for revision of Article 123(2)(a) FSCA which corresponds to the one of Article 137(b) fSOFJ.

FSCD 134 III 286 [287], FSCD 134 III 45 [47], FSCD 4A_645/2014 c. 1, FSCD 4A_750/2011 c. 1, FSCD 4A_570/2011 c. 4.1, FSCD 4A_763/2011 c. 3.1, FSCD 4A_237/2010 c. 2.1.1, FSCD 4A_144/2010 c. 2.1.1, FSCD 4A_368/2009 c. 1, FSCD 4A_596/2008 c. 3.2, FSCD 4A_528/2007 c. 2.2, FSCD 03.09.2003 c. 1.1

Under the fSOFJ, repealed on 31 December 2006 (Art. 131(1) FSCA), the #grounds for revision of an international arbitral #award were those of Article 137 fSOFJ, whereas Articles 140-143 fSOFJ applied by analogy to the proceedings.

FSCD 118 II 199 [204], FSCD 4A_596/2008 c. 3.2

On the contrary, the grounds for #revision of Article 136 fSOFJ are not applicable. Since these grounds for setting aside are expressly covered by Article 190(2) PILA, they have to be claimed in proceedings for #setting aside.

FSCD 118 II 199 [204], FSCD 25.11.1993 [(1994) ASA p. 253]

As compared to the fSOFJ, Article 123 FSCA and Article 396 CCP avoid the use of the term “new” which had given rise to confusion. Moreover, these provisions expressly exclude #revision on the basis of #facts or #evidence arising after the decision. The improperly called “new elements” are therefore allowed, namely

elements which existed at the time of the proceedings but which for excusable reasons were not raised.

FSCD 4A_105/2012 c. 2.1

In order to be heard, the motion for #revision does not have to fulfil the prerequisites of Article 137 fSOFJ, because these are conditions related to the #merits but not conditions for #admissibility; it suffices on the contrary that the petitioner alleges that one of the prerequisites is fulfilled and that the motion satisfies the formal conditions provided for by the law (Arts. 140 and 141 fSOFJ).

FSCD 11.05.1999 [(2000) ASA p. 326], FSCD 09.07.1997 [(1997) ASA p. 509],
FSCD 02.07.1997 [(1997) ASA p. 498]

34.5.2 Decision Influenced by a Crime (Art. 123(1) FSCA)

According to Article 123(1) FSCA, #revision may be requested if criminal proceedings have established that a serious or minor #crime has influenced the decision to the detriment of the petitioner, even though no conviction has been handed down. If criminal proceedings are not possible, the proof may be established by other means.

FSCD 4A_65/2018 c. 4.4.3, FSCD 4A_412/2016 c. 2.2, FSCD 4A_509/2013 c. 3.2.1,
FSCD 4A_596/2008 c. 4.1, FSCD 4A_234/2008 c. 3.1

The use of the verb "have established" [*ergeben hat, établi, è dimostrato*] in the text of Article 123(1) FSCA clearly shows that this condition presupposes in principle that the criminal proceedings have been conducted until the end. Furthermore, it is necessary that the serious or minor #crime has produced a negative outcome for the petitioner.

FSCD 4A_509/2013 c. 3.2.1, FSCD 4A_234/2008 c. 3.1

It is without importance whether the crime has been committed by a party or by a third person. The essential element is the fact that there is a causal link between the committed crime and the #operative part of the decision of which the #revision is requested. In other words, the crime, independently of when it has been committed, must have had a real, direct or indirect, influence on the decision in question to the detriment of the petitioner who has suffered a negative result.

FSCD 4A_509/2013 c. 3.2.1, FSCD 4A_596/2008 c. 4.1

The influence to the detriment of the petitioner by a serious or minor #crime must have been established by a decision which terminates criminal proceedings which are different from the proceedings which led to the decision of which #revision is requested, such as an order closing the investigations or an order of judgment; the decision rendered by the criminal court must establish that the objective prerequisites of a serious or minor #crime are fulfilled. However, it is not necessary that the criminal proceedings led to a conviction, as Article 123(1) FSCA expressly provides. Therefore, a #revision is possible pursuant to this provision if the author of the crime has escaped a conviction because for example the author died during the investigations. In such a case, the court of #revision determines with unfettered powers whether the alleged crime has been committed.

FSCD 4A_509/2013 c. 3.2.1, FSCD 4A_596/2008 c. 4.1

The entry into force of the FSCA on 1 January 2007 (Art. 133 FSCA) did not change anything in this respect, as the #ground for revision of Article 123(1)(1st sentence) FSCA is derived from the rule contained in Article 137(a)(1st sentence) of the former SOFJ, which admitted a motion for #revision “if criminal proceedings establish that the decision has been influenced to the detriment of the requesting party by a crime or an offence, even if no conviction has taken place”. It follows therefore that the #case law rendered with respect to Article 137(a) FSOJ and the respective doctrine are still applicable.

FSCD 4A_596/2008 c. 3.2

It is without importance whether the criminal investigations have been conducted abroad, provided that they have respected the minimal procedural guarantees of Article 6(2) & (3) ECHR and Article 14(2)-(7) of the International Covenant on Civil and Political Rights.

FSCD 4A_596/2008 c. 4.1

Only serious and minor #crimes within the meaning of the Criminal Code are material, to the exclusion of #minor offences (Art. 103 CrimC) and offences of cantonal criminal law. The serious and minor #crimes are defined in Article 10 CrimC depending on the seriousness of the sentence: serious #crimes are crimes punishable by more than three years of detention (Art. 103(2) CrimC); minor #crimes are crimes punishable by less than three years of detention or a fine (Art. 103(3) CrimC).

FSCD 4A_596/2008 c. 4.1

To deceive the court in order to obtain a decision which violates the monetary interests of the opposing party may constitute a fraud of the proceedings [*Prozessbetrug*], covered by the definition of fraud within the meaning of Article 146 CrimC.

FSCD 4A_596/2008 c. 4.2.3

34.5.3 New Material Facts or Evidence (Art. 123(2)(a) FSCA)

34.5.3.1 *In General*

According to Article 123(2)(a) FSCA, #revision may be sought if the petitioner subsequently discovers material #facts or decisive #evidence which the petitioner could not rely on in the previous proceedings, to the exclusion of #facts and #evidence which were generated only after the decision.

FSCD 134 III 286 [287], FSCD 4A_412/2016 c. 2.2, FSCD 4A_645/2014 c. 3.1, FSCD 4A_247/2014 c. 2.3, FSCD 4A_688/2012 c. 4.3, FSCD 4A_750/2011 c. 2, FSCD 4A_570/2011 c. 4.1, FSCD 4A_763/2011 c. 3.1, FSCD 4A_222/2011 c. 2.1, FSCD 4A_212/2010 c. 3, FSCD 4A_144/2010 c. 2.1.2, FSCD 4A_368/2009 c. 1

The #revision only allows the correction of a decision which turns out to be retrospectively incomplete or inexact. It should not be used to adapt the decision to the subsequent evolution of circumstances.

FSCD 4A_105/2012 c. 2.2

34.5.3.2 *Relationship with the former SOFJ*

This provision [Article 123(2)(a) FSCA] incorporates in substance Article 137(b) fSOFJ, so that the former #case law keeps all its value.

FSCD 134 III 45 [47], FSCD 4A_412/2016 c. 2.2, FSCD 4A_645/2014 c. 3.1, FSCD 4A_247/2014 c. 2.3, FSCD 4A_688/2012 c. 4.3, FSCD 4A_105/2012 c. 2.2, FSCD 4A_212/2010 c. 3.1, FSCD 4A_368/2009 c. 1

Except with respect to some points concerning the #revision for a violation of the ECHR, the rules of the [former] SOFJ as to #revision were adopted by the FSCA. Some systematic and editorial changes were however made. As opposed to Article 137(b) fSOFJ, Article 123(2) FSCA no longer contains the inaccurate wording “new facts” but clearly states that they must be pertinent #facts discovered afterwards to the exclusion of #facts posterior to the #award.

FSCD 4A_247/2014 c. 2.3, FSCD 4A_688/2012 c. 4.3, FSCD 4A_570/2011 c. 4.1, FSCD 4A_763/2011 c. 3.1

As compared to the fSOFJ, Article 123 FSCA and Article 396 CCP avoid the use of the term “new” which had given rise to confusion. Moreover, these provisions expressly exclude #revision on the basis of #facts or #evidence arising after the decision. The improperly called “new elements” are therefore allowed, namely elements which existed at the time of the proceedings but which for excusable reasons were not raised.

FSCD 4A_105/2012 c. 2.1

34.5.3.3 *Notion of New Facts or Evidence*

New #facts do not represent a ground for a #motion to set aside but a ground for #revision.

FSCD 119 II 271 [(1993) ASA p. 406], FSCD 118 II 199 [204]

Only #facts which have taken place up to the moment at which, in the main proceedings, factual #claims could still be heard, but which were not known to the #petitioner notwithstanding its care and which have been discovered by it only after the rendering of the decision of which it requests #revision can justify a petition for #revision pursuant to Article 123 (2)(a) FSCA. Furthermore, these #facts must be material, i.e. capable of changing the #facts which underlie the challenged decision and of leading to a different outcome based on a correct legal examination.

FSCD 4A_412/2016 c. 2.2, FSCD 4A_645/2014 c. 3.1, FSCD 4A_247/2014 c. 2.3, FSCD 4A_688/2012 c. 4.3, FSCD 4A_570/2011 c. 4.1, FSCD 4A_763/2011 c. 3.1, FSCD 4A_212/2010 c. 3.1, FSCD 4A_237/2010 c. 2.1.2, FSCD 4A_144/2010 c. 2.1.2, FSCD 4A_368/2009 c. 1

According to Article 123(2)(a) FSCA - which has incorporated the content of Article 137(b) fSOFJ - a fact is new if it had already occurred at the time when it could still be relied upon in the previous proceedings, in accordance with the applicable procedural rules, but a party could not assert it because, while taking all necessary care, it only became aware of it later.

FSCD 4A_212/2010 c. 3.1

In order to be new, #evidence must pre-exist: the newness must refer only to the discovery or at least to the availability of the means of proof, not to its existence. The new #evidence must also be used to demonstrate new #facts in the sense just defined or #facts already known and asserted in the first trial, but which could not be proven.

FSCD 4A_212/2010 c. 3.1

The same applies, *mutatis mutandis*, to new #evidence.

FSCD 4A_368/2009 c. 1, FSCD 11.05.1999 [(2000) ASA p. 327]

Facts are new within the meaning of Article 137(b) fSOFJ even if they occur at a moment at which they could have been brought forth during the main proceedings, provided they were unknown to the petitioner who requests #revision, despite sufficient care on its part.

FSCD 4P.102/2006 c. 2.1, FSCD 4P.120/2002 c. 3.1 and 2.2.1, FSCD 11.05.1999 [(2000) ASA p. 326], FSCD 08.04.1998 c. 2b, FSCD 02.07.1997 [(1997) ASA p. 499]

34.5.3.4 *Necessity of Establishing the New Facts or Evidence*

The petitioner must have a document establishing the new #evidence or sufficient awareness of the same in order to be able to seek its admission into #evidence.

FSCD 4A_666/2012 c. 5.1, FSCD 4A_570/2011 c. 4.1, FSCD 4A_222/2011 c. 2.1

New #evidence has to establish the new material #facts founding the motion for #revision or #facts which were known in the previous proceedings, but which remained unproven to the disadvantage of the petitioner. If the petitioner wants to use the new #evidence to establish #facts which were already asserted, the petitioner has to establish that it could not submit the #evidence in the previous proceedings.

FSCD 4A_412/2016 c. 2.2, FSCD 4A_642/2010 c. 3, FSCD 4A_144/2010 c. 2.1.2 & 2.3, FSCD 4A_42/2008 c. 4.1, FSCD 4P.102/2006 c. 2.1

It is crucial that the #evidence not only serves to appreciate but to establish the #facts. There is no ground for #revision if the court wrongly assessed #facts which were already known in the main proceedings. On the contrary, the assessment must have been wrong because #facts which were material for the decision remained unproven.

FSCD 4A_144/2010 c. 2.1.2 & 2.4, FSCD 4A_42/2008 c. 4.1, FSCD 4P.102/2006 c. 2.1

34.5.3.5 *Materiality of Facts or Evidence*

#Evidence is material if it can be assumed that it would have led to a different judgment if the court had been aware of it in the main proceedings. The decisive factor is that the #evidence does not merely serve to assess the #facts but to ascertain them.

FSCD 4A_412/2016 c. 2.2

The new #facts have to be material, i.e. they have to be able to modify the #facts underlying the challenged #award and lead to a different #award if correctly evaluated with respect to the law.

FSCD 118 II 199 [205], FSCD 4A_247/2014 c. 2.3, FSCD 4A_750/2011 c. 2, FSCD 4A_144/2010 c. 2.1.2, FSCD 4A_528/2007 c. 2.5.2.1, FSCD 4A_42/2008 c. 4.1, FSCD 4P.102/2006 c. 2.1, FSCD 4P.120/2002 c. 1.3, FSCD 11.05.1999 [(2000) ASA p. 326], FSCD 08.04.1998 c. 2b, FSCD 02.07.1997 [(1997) ASA p. 499]

#Evidence is material within the meaning of this provision [Article 123(2)(a) FSCA, Article 137(b) fSOFJ] if it can lead to a modification of the #award in favour of the petitioner who requests #revision; this presupposes that the #evidence relates to material #facts and that the #evidence is such as to establish these #facts.

FSCD 118 II 199 [205], FSCD 4A_642/2010 c. 3, FSCD 4P.120/2002 c. 1.3

If the #revision of an international arbitral #award is sought, the Federal Supreme Court has to examine based on the #reasons given in the #award, whether the fact is material and – had it been established – would have led to a different outcome.

FSCD 4A_237/2010 c. 2.1.2, FSCD 4A_144/2010 c. 2.1.2, FSCD 4A_42/2008 c. 4.1, FSCD 4P.102/2006 c. 2.1

#Evidence is material if it can be assumed that it would have led to a different outcome, had the court been aware of it in the main proceedings.

FSCD 4A_144/2010 c. 2.1.2, FSCD 4A_42/2008 c. 4.1, FSCD 4P.102/2006 c. 2.1

34.5.3.6 *Unknown Facts or Evidence and Duty of Diligence*

The petitioner must show that it could not have raised the fact or #evidence in the previous proceedings despite all the diligent efforts that it made. There is a lack of diligence when the discovery of new elements results from research that could and should have been made in the previous proceedings. One should exercise restraint in admitting the existence of excusable grounds because #revision should not be used to remedy an omission made by the petitioner during the proceedings.

FSCD 4A_247/2014 c. 2.3, FSCD 4A_688/2012 c. 4.3, FSCD 4A_105/2012 c. 2.3, FSCD 4A_212/2010 c. 3.1

The investigations which could and should have been carried out during the #arbitral proceedings do not imply a general discovery obligation on the petitioner's part. The duty to carry them out simply arises from the very nature of the petition for #revision and from the duty of diligence, even curiosity, which is inherent to this extraordinary legal recourse.

FSCD 4A_763/2011 c. 3.3.2

#Revision is an extraordinary legal recourse and it does not allow the continuation of the proceedings. The parties have the duty to timely produce evidence in accordance with the rules of procedure in order to contribute to the clarification of the #facts. It is only with restraint that the Federal Supreme Court can find that it was impossible to bring forward #facts and evidence in the previous proceedings. This applies particularly when the proceedings for #revision seek to prove with allegedly new discovered #evidence some factual claims already made

in the #arbitration proceedings which the #arbitral tribunal found inappropriate on the basis of elaborate #evidentiary proceedings with several experts. The petitioner must accordingly show in the request for #revision that notwithstanding proper care, it was unable to submit the #evidence in the prior proceedings.

FSCD 4A_144/2010 c. 2.3

Special #evidence, i.e. #evidence brought forth specifically in the motion for #revision, can only be taken into account in the context of Article 137(b) fSOFJ if the petitioner did not behave negligently during the proceedings with respect to such #evidence.

FSCD 02.07.1997 [(1997) ASA p. 504]

35.5.3.7 Individual Cases

New #facts or #evidence which exclusively relate to the authenticity of a #witness statement do not fall within the definition of Article 137(b) fSOFJ. The conditions under which the #claims of a #witness can lead to #revision are exclusively mentioned in Article 137(a) fSOFJ.

FSCD 118 II 199 [205]

The Federal Supreme Court has left open the question of whether a medical #expert opinion established after the challenged decision can constitute new evidence justifying the #revision. It has expressed serious doubts given the clear wording of Article 123(2) FSCA excluding #evidence posterior to the decision. The legal doctrine has essentially taken an interest in the question of whether the discovery of new methods of scientific investigation can open the way for a #revision.

FSCD 4A_105/2012 c. 2.2

The #revision of a decision cannot be obtained by subsequently presenting or requesting a new #expert opinion supporting a submission made in the previous proceedings. This applies to both the case where one questions the conclusions of an #expert opinion in the previous #proceedings and the case where the judge refused an #expert opinion following an anticipated assessment of the #evidence. The #revision should allow the petitioner to produce evidence that it did not have the possibility of providing previously: however, parties can always request an #expert opinion in the #proceedings.

FSCD 4A_105/2012 c. 2.2

The #expert opinion must not only contain another view but reveal new factual elements which calls into question the decision. In order to justify a #revision, it is not sufficient that an #expert subsequently draws different conclusions from the #arbitral tribunal with respect to #facts that are already known.

FSCD 4A_105/2012 c. 2.2

The Federal Supreme Court left open the questions whether a judgment of another court represents a new fact which is not admissible as such, or new #evidence within the meaning of Article 137(a) fSOFJ, and, in case it constitutes new #evidence, whether #revision can be requested based on #evidence which did not exist at the moment when the #award was rendered but which aims at establishing #facts which are prior to the rendering of the #award.

FSCD 09.07.1997 [(1997) ASA p. 511]

34.6 Standing

#Revision may only be sought by a party to the procedure that led to the decision which is the subject of the request for #revision or by the legal successor of that party.

FSCD 4A_688/2012 c. 3

A company which was a party to the #arbitral proceedings but is now bankrupt, liquidated and removed from the Trade Register as well as its former shareholders do not have standing to file a request for #revision.

FSCD 4A_688/2012 c. 3

34.7 Legal Interest Worthy of Protection

The #revision of an arbitral #award requires a legal interest worthy of protection . It is not sufficient in this respect that the #award under review would not have granted, or not fully granted some of the petitioner's submissions. Rather, it is necessary that the decision as to #revision should be appropriate to provide the petitioner with the success on the #merits it seeks.

FSCD 114 II 189 [190], FSCD 4A_763/2011 c. 2.2, FSCD 4A_237/2010 c. 2

The #admissibility of the motion for #revision is subject to the existence of a legal interest worthy of protection. The petitioner must have a specific and present interest in the modification of the decision, the #revision of which is sought.

FSCD 4F_8/2013 c. 1.1

The petitioner has a legal interest worthy of protection to seek a finding that new #facts exist when they would lead to the #arbitral tribunal issuing a new #award which would release the petitioner from any payment to the #respondent or would significantly reduce the amount.

FSCD 4A_763/2011 c. 2.2

The #revision is subject to the existence of a legal interest worthy of protection. The petitioner must have a specific and actual interest in the modification of the decision for which the #revision is requested and the #revision must be proper to achieve this result. This prerequisite of an actual interest is for example lacking for a motion for #revision of a decision of extradition, if this decision has already been executed and if the requesting party has been convicted abroad.

FSCD 4A_596/2008 c. 3.5

34.8 Ground for Revision and Challenge of the Arbitrator/Setting Aside of the Award

- For the timeliness of the #ground for #challenge, see Article 180(2) PILA

Given that #revision is a subsidiary legal recourse as compared to the #motion for setting aside pursuant to Article 190(2) PILA, it is not admissible to invoke one of the grounds in this latter provision if it was discovered before the #time limit to #appeal ran out.

FSCD 143 III 589 [598], FSCD 129 III 727 [729], FSCD 4A_310/2016 c. 3.2.3, FSCD 4A_247/2014 c. 2.3, FSCD 4A_570/2011 c. 4.1

The Federal Supreme Court left open the following question: if a ground is covered at the same time by Article 121(a) FSCA (discovery of a ground for #revision) and by Article 123(2)(a) FSCA (discovery of a new material fact), should the #case law established under the former SOFJ according to which it is not possible to base a motion for #revision on circumstances which can be invoked in a motion for #setting aside pursuant to Article 190(2) PILA be maintained, or should the means of #revision be opened in case the #ground for revision is discovered only after the expiration of the #time limit for the #motion for setting aside.

FSCD 143 III 589 [597], FSCD 142 III 521 [526], FSCD 4A_234/2008 c. 2.1

On a factual basis, the #ground for #challenge of an #arbitrator discovered afterwards (Art. 121(a) FSCA) coincides with the newly discovered relevant #facts (Art. 123(2)(a) FSCA). The Federal Supreme Court left open the question whether the #case law under the former SOFJ according to which no #revision may be requested for #grounds for setting aside according to Article 190(2) PILA (FSCD 129 III 727 [729]) must be continued or whether, since the introduction of the FSCA, a #revision is possible in such cases based on Articles 121 and 123 FSCA, if the #ground for #challenge of an #arbitrator is discovered only after the expiry of the #time limit to file a #motion to set aside.

FSCD 143 III 589 [597], FSCD 142 III 521 [526], FSCD 4A_528/2007 c. 2.5

Based on Article 121 FSCA, one could admit a #revision only if the petitioner could not have discovered and asserted the #ground for #challenge already during the #arbitral proceedings.

FSCD 143 III 589 [597], FSCD 4A_528/2007 c. 2.5.1

The discovery of a ground that would have required the #disqualification of a sole #arbitrator or of all of the members of the #arbitral tribunal after the #time limit to appeal an international arbitral #award expired may lead to the submission of a request for #revision of the aforesaid #award to the Federal Supreme Court provided that the petitioner could not have discovered the ground for #disqualification during the #arbitral proceedings by paying the attention required under the circumstances. However, it does not appear appropriate to decide the issue in dispute definitively.

FSCD 142 III 521 [535]

The same is true under Article 123 FSCA. Even admitting in international arbitration, the subsequent discovery of a #ground for revision as new material

fact within the meaning of Article 123(2)(a) FSCA, only a party which did not know this fact despite sufficient attention during the proceedings could invoke it. The attention is insufficient if the discovery of new #facts or #evidence is based on investigations which could and should have been conducted already in the previous proceedings. One should not admit easily that it was impossible for a party to assert a certain fact in the previous proceedings, because the #ground for revision of new #facts does not serve to repair omissions in the conduct of the proceedings. This is why under Article 123 FSCA too, a #revision could only come into consideration if the petitioner could not discover and assert the #ground for #challenge during the #arbitral proceedings.

FSCD 4A_570/2011 c. 4.1, FSCD 4A_763/2011 c. 3.1, FSCD 4A_458/2009 c. 3.2.2, FSCD 4A_234/2008 c. 2.2.1, FSCD 4A_528/2007 c. 2.5.1 et seq.

There is no ground for #revision if a challengeable #arbitrator has participated in the #award.

FSCD 25.11.1993 [(1994) ASA p. 254]

34.9 Revision of a Decision of the Federal Supreme Court

Decisions of the Federal Supreme Court have the force of law on the day they are issued (Art. 61 FSCA). A re-examination of the dispute on which a judgment of the Federal Supreme Court is based is generally excluded. The Court can only review its judgment if one of the grounds for #revision listed in Articles 121-123 FSCA exists. The application for #revision must invoke such a ground or at least state #facts which are covered by a statutory ground for #revision.

FSCD 4F_16/2018 c. 1.1

Pursuant to Article 121(d) FSCA, a #revision of a decision of the Federal Supreme Court may be requested if the Court has failed to take into account material #facts in the file by mistake. An oversight within the meaning of this provision shall be deemed to have occurred if a fact or a certain document on file has been overlooked or misread.

FSCD 4F_9/2015 c. 2.1 & 2.2

A distinction must be made between this and any inaccurate assessment of #evidence. Like the allegedly incorrect legal assessment of a fact, this does not entitle one to a #revision. Accordingly, the #ground for revision of Article 121(d) FSCA is not made out if the Federal Supreme Court has taken into account the documents on file and the submissions in question, but has not assessed or judged them the way the #applicant wished it to do so and as requested in the #setting aside proceedings. Nor does the #revision serve the purpose of subsequently remedying any omissions in the proceedings before the lower instance or the substantiation of the #motion for setting aside before the Federal Supreme Court. The ground for #revision under Article 121(d) FSCA naturally presupposes that the Federal Supreme Court could have taken the #facts in question into account in its decision. Otherwise, there is no oversight. The #subject-matter of the case which was to be assessed in the decision challenged by the #revision is therefore decisive.

FSCD 4F_9/2015 c. 2.2

Pursuant to Article 121(d) FSCA, the #revision of a decision of the Federal Supreme Court may be sought when it inadvertently did not take some pertinent #facts from the file into consideration. This ground for #revision refers to a case in which the Federal Supreme Court decided on the basis of #facts that are incomplete or different from those resulting from the file. The oversight implies an error and consists of either disregarding or distorting a fact or an exhibit. It must relate to the very content of the fact and its perception by the Court, but not to the legal assessment of the fact. The #facts must be apparent from the file.

FSCD 4F_8/2013 c. 2.1

The oversight must concern a fact likely to result in a different decision, more favourable to the petitioner.

FSCD 4F_9/2015 c. 2.3, FSCD 4F_8/2013 c. 2.1

34.10 Time Limit for the Filing of the Motion for Revision

34.10.1 In General

With respect to the grounds stated at Article 123 FSCA, the petition for #revision must be filed with the Federal Supreme Court under penalty of #waiver within 90 days after the discovery of the ground for #revision (Art. 124(1)(d) FSCA), taking into account that the legal #time limit is stayed pursuant to Article 46 FSCA.

FSCD 142 III 521 [526], FSCD 4A_506/2017 c. 4.2, FSCD 4A_412/2016 c. 2.3, FSCD 4A_645/2014 c. 2, FSCD 4A_247/2014 c. 2.3, FSCD 4A_688/2012 c. 4.3, FSCD 4A_666/2012 c. 5.1, FSCD 4A_570/2011 c. 4.1, FSCD 4A_763/2011 c. 2.2, FSCD 4A_222/2011 c.2.2

The motion for #revision has to be filed, for violation on the provisions on challenges, within 30 days from the discovery of the ground for #revision (Art. 124(1)(a) FSCA) and within 90 days after the discovery of the ground for #revision (Art. 124(1)(d) FSCA).

FSCD 134 III 286 [287], FSCD 4A_368/2009 c. 3.2.2, FSCD 4A_596/2008 c. 3.3

A motion for #revision is not subject to the rules of Article 77 FSCA and Articles 190 to 192 PILA but to provisions that govern the #revision of the decisions of the Federal Supreme Court (Arts 121 to 128 FSCA). As a result, Article 48(3) FSCA is applicable. Therefore, the #time limit within which the present motion for #revision must be submitted to the Federal Supreme Court will be considered as observed to the extent that the submission transmitted to this authority was addressed before the #time limit to the Court of justice of the Canton of Geneva.

FSCD 4A_506/2017 c. 3

This is an issue of #admissibility and not of the #merits.

FSCD 4A_247/2014 c. 2.3, FSCD 4A_688/2012 c. 4.3, FSCD 4A_570/2011 c. 4.1, FSCD 4A_222/2011 c. 2.1

The motion for #revision must be filed within the #time limit set out at Article 124(1) FSCA depending on the ground invoked.

FSCD 4F_8/2013 c. 1.1

34.10.2 Start Date of Time Limit

The motion for #revision can at the earliest be filed from the notification of the complete #award or from the closure of the criminal proceedings (Art. 124(1)d FSCA).

FSCD 4A_247/2014 c. 2.3, FSCD 4A_688/2012 c. 4.3, FSCD 4A_666/2012 c. 5.1, 5.2.2

When several grounds for #revision are raised, the #time limit starts separately for each of them.

FSCD 4A_666/2012 c. 5.1

If the object of the application for #correction of the #award has nothing to do with the grounds for #revision invoked, there is no reason to postpone the start of the #time limit of Article 124(1)(d) FSCA to the date that the #correction of the #award is notified.

FSCD 4A_666/2012 c. 5.2.2

In the case provided for in Article 123(1) FSCA, the time runs from the moment when the requesting party was aware that the conviction entered into force or, if a conviction is no longer possible, the existence of the crime and the proof thereof.

FSCD 4A_666/2012 c. 5.1, FSCD 4A_596/2008 c. 3.3

34.10.3 Discovery of the Ground for Revision

The discovery of the ground for #revision is the moment where the petitioner is aware of the ground for #revision with enough certainty to invoke it.

FSCD 4P.120/2002 c. 1.2, FSCD 08.04.1998 c. 2, FSCD 02.07.1997 [(1997) ASA p. 499]

The discovery of the ground for #revision is the moment where the petitioner has knowledge of the ground for #revision with enough certainty to invoke it, even if it is not in a position to prove it with certainty. A mere assumption is however not sufficient.

FSCD 4A_247/2014 c. 2.3, FSCD 4A_688/2012 c. 4.3, FSCD 4A_666/2012 c. 5.1, FSCD 4A_570/2011 c. 4.1, FSCD 4A_222/2011 c. 2.1, FSCD 4P.120/2002 c. 1.2, FSCD 08.04.1998 c. 2, FSCD 02.07.1997 [(1997) ASA p. 499]

34.10.4 Burden of Proof

With respect to new #evidence, in particular, the petitioner must have a document or sufficient knowledge to require its submission.

FSCD 4A_247/2014 c. 2.3, FSCD 4A_688/2012 c. 4.3

The petitioner bears the #burden of proof with regard to the relevant circumstances which permit verifying the respect of this #time limit.

FSCD 4A_247/2014 c. 2.3, FSCD 4A_688/2012 c. 4.3, FSCD 4A_666/2012 c. 5.1, FSCD 4A_570/2011 c. 4.1, FSCD 4A_222/2011 c. 2.1, FSCD 4P.120/2002 c. 1.2, FSCD 08.04.1998 c. 2, FSCD 02.07.1997 [(1997) ASA p. 499]

34.10.5 Individual Cases

It would be contrary to the exceptional nature of #revision proceedings and to the spirit of the #case law relating to Article 124(1)(d) FSCA to allow a party discovering conclusive #evidence to postpone the filing of its motion for #revision and to benefit from the subsequent discovery of new #evidence summarily corroborating the previous #evidence in order to artificially benefit from an extension of the #time limit to file a motion for #revision.

FSCD 4A_666/2012 c. 5.2.1

Sometimes the Federal Supreme Court has declared inadmissible a premature motion for #revision and sometimes it has rejected such a motion. This issue is theoretical as it is undisputed that the Federal Supreme Court cannot review the #merits of a premature motion for #revision and that the petitioner may renew it at the proper time if it still has a legally interest worthy of protection to obtain the #revision.

FSCD 4A_666/2012 c. 5.2.2

By exception to the absolute #time limit of ten years after which the #revision is not possible any more pursuant to Article 124(2) *in initio* FSCA, the #revision remains possible ten years after the entry into force of the decision if this decision has been influenced to the disadvantage of the requesting party by a serious or minor #crime (Art. 124(2)(b) FSCA).

FSCD 4A_596/2008 c. 3.3

34.11 Subject Matter and Burden of Proof

The role of the Federal Supreme Court consists exclusively in a hypothetical review of the relevance of the new #facts with regard to the legal #reasons underlying the #award for which the #revision has been requested. In other words, the Federal Supreme Court, when deciding on a motion for #revision of an #award within the meaning of Articles 176 et seq PILA, only has to verify, taking into account the legal #reasons set forth in the challenged #award, whether the new #facts, had they been known by the #arbitrators, would have led them, in all probability, to render a different #award.

FSCD 118 II 199 [205], FSCD 4P.120/2002 c. 1.3 and 2.2.2, FSCD 11.05.1999 [(2000) ASA p. 327], FSCD 08.04.1998 c. 2b, FSCD 02.07.1997 [(1997) ASA p. 499-500]

#Evidence must establish either the new important #facts on which the motion for #revision is founded, or the #facts which were known during the previous proceedings, but which could not have been proven, which circumstance was of detriment to the petitioner.

FSCD 4A_105/2012 c. 2.2, FSCD 4A_642/2010 c. 3, FSCD 4P.120/2002 c. 1.3, FSCD 11.05.1999 [(2000) ASA p. 327], FSCD 02.07.1997 [(1997) ASA p. 500]

It is not sufficient to ground a motion for #revision that the tribunal may have erroneously assessed #facts which were already known during the principal proceedings. The erroneous assessment must be due to the circumstance that #facts which are material for the decision were not known during the principal proceedings or remained unproven.

FSCD 4A_105/2012 c. 2.2, FSCD 4P.102/2006 c. 2.1, FSCD 4P.120/2002 c. 1.3 & 2.2.2, FSCD 11.05.1999 [(2000) ASA p. 327]

If the new #evidence aims at establishing previously alleged #facts, the petitioner must also prove that it was not possible for it to invoke this #evidence during the previous proceedings.

FSCD 4A_642/2010 c. 3, FSCD 4P.120/2002 c. 1.3 & 2.2.2, FSCD 11.05.1999 [(2000) ASA p. 327], FSCD 02.07.1997 [(1997) ASA p. 500]

#Evidence is material if one must admit that its knowledge would have led to a different decision by the judge in the principal proceedings. It is decisive that the #evidence serves not merely to assess but to establish the #facts.

FSCD 4A_642/2010 c. 3, FSCD 4P.120/2002 c. 1.3, FSCD 11.05.1999 [(2000) ASA p. 327], FSCD 02.07.1997 [(1997) ASA p. 500]

34.12 Effects of the Revision

If the Federal Supreme Court grants a motion for #revision, it does not decide itself on the substantive issues but refers the case to the #arbitral tribunal which rendered the #award or to a new #arbitral tribunal to be constituted.

FSCD 142 III 521 [525], FSCD 134 III 286 [287], FSCD 4A_412/2016 c. 2.1, FSCD 4A_247/2014 c. 2.2, FSCD 4A_688/2012 c. 4.2, FSCD 4A_666/2012 c. 3.1, FSCD 4A_570/2011 c. 2, FSCD 4A_763/2011 c. 2.2, FSCD 4A_642/2010 c. 1.2, FSCD 4A_212/2010 c. 1, FSCD 4A_237/2010 c. 2, FSCD 4A_144/2010 c. 2, FSCD 4A_368/2009 c. 1, FSCD 4A_596/2008 c. 4.2.3, FSCD 4A_234/2008 c. 1, FSCD 4A_528/2007 c. 2.1, FSCD 4P.237/2005 c. 2, FSCD 4P.102/2006 c. 1, FSCD 4P.117/2003 c. 1.1

If the motion for #revision is granted, the Federal Supreme Court does not have to decide how the new fact alleged by the petitioner affects the #award that will be rendered if the #revision is granted. It is up to the #arbitral tribunal to which the matter is referred, or up to an #arbitral tribunal newly constituted for this purpose to decide this issue (see also Art. 43 fConcordat).

FSCD 118 II 199 [205], FSCD 4P.117/2003 c. 1.1, FSCD 4P.120/2002 c. 1.4, FSCD 11.05.1999 [(2000) ASA p. 327], FSCD 08.04.1998 c. 2b, FSCD 09.07.1997 [(1997) ASA p. 509], FSCD 02.07.1997 [(1997) ASA p. 499-500]

If the Federal Supreme Court grants a motion for #revision, it does not decide itself on the #merits but renders a decision setting aside the #award (*judicium rescindens*) and refers the case to the #arbitral tribunal which rendered the #award or to a new #arbitral tribunal to be constituted.

FSCD 4A_596/2008 c. 3.1

34.13 No Revision of Expert Opinion

- See also Article 182(3) PILA, section 3.3.9; and Article 190(2)(d) PILA, section 2d.3.7

The #revision only applies to arbitral #awards and not to #expert opinions.

*FSCD 117 Ia 365 [369-370], FSCD 4A_438/2008 c. 3.2.1

34.14 Costs

If the motion for #revision is dismissed, the petitioner has to pay the #costs for the proceedings (Art. 66(1) FSCA) and pay compensation to the opposing party (Art. 68(2) FSCA).

FSCD 4A_506/2017 c. 5, FSCD 4A_386/2015 c. 4 (not published in FSCD 142 III 521), FSCD 4A_645/2014 c. 4, FSCD 4A_247/2014 c. 4, FSCD 4F_8/2013 c. 3, FSCD 4A_688/2012 c. 7, FSCD 4A_666/2012 c. 7, FSCD 4A_750/2011 c. 3, FSCD 4A_570/2011 c. 5, FSCD 4A_763/2011 c. 4, FSCD 4A_642/2010 c. 6, FSCD 4A_237/2010 c. 4, FSCD 4A_144/2010 c. 3, FSCD 4A_62/2009 c. 6, FSCD 4A_428/2008 c. 4, FSCD 4A_392/2008 c. 5, FSCD 4A_234/2008 c. 4, FSCD 4A_506/2007 c. 5, FSCD 4A_42/2008 c. 5, FSCD 4A_2/2007 c. 5

The petitioner's request concerning the advance of these #costs does not constitute an obstacle to the condemnation of the latter to pay such #costs given that the #legal aid was requested in the alternative without giving any grounds and even more so given that a #legal person cannot in principle claim such aid.

FSCD 4A_506/2017 c. 5

If the #respondent does not submit an answer to the motion for #revision, it is not entitled to any compensation.

FSCD 4A_506/2017 c. 5, FSCD 4F_2/2014 c. 3

Where the request for #revision is rejected as inadmissible, no #costs for the federal proceedings will be charged.

FSCD 4F_2/2014 c. 3

The amount of the #costs will be determined taking into account that the #respondents had to deal with two requests for #revision that were different in part.

FSCD 4A_688/2012 c. 7

The petitioner which has failed to pay the advance on #costs within the imparted deadline has to pay the #costs of the #revision proceedings up to that point.

FSCD 4A_325/2012

The opposing party has the right to the #costs incurred in the #revision proceedings until they were terminated on the grounds that the petitioner did not pay the advance on #costs.

FSCD 4A_325/2012

There is no reason to treat the #costs of the winning party in #revision proceedings in the same manner as those in a direct action in front of the Federal

Supreme Court. Given the specificities of the #revision proceedings, the #costs must be awarded as they would be in an appeal proceeding.

FSCD 4A_750/2011 c. 3

34.15 Individual Cases

There is no ground for #revision if one of the #witnesses heard by the #arbitral tribunal has a personal interest in a certain outcome of the proceedings, because the #validity, the trustworthiness and the arbitral assessment of a #witness testimony are not within the scope of Article 137(b) fSOFJ, a violation of Article 137(a) fSOFJ not having been claimed *in casu*.

FSCD 118 II 199 [204-205]

There is no new #evidence within the meaning of Article 137(b) FSCA in the case where the petitioner would have been able to retrieve the same #evidence previously by paying for it.

FSCA 4A_642/2010 c. 4.1

There is no ground for #revision if the petitioner did not exhaust all procedural remedies available during the #arbitral proceedings to obtain #evidence in support of a new fact.

FSCD 4A_237/2010 c. 3

Whether or not medical #expert opinions which were issued after the arbitral #award was rendered are to be considered as subsequently discovered #evidence within the meaning of Article 123(2)(a) FSCA is debatable. This also applies if one assumes that the algorithm relied upon in the #expert opinions was in principle available before the issuance of the #award but at this point would not have been appropriate as #evidence.

FSCD 4A_144/2010 c. 2.2

There is no ground for #revision if a party does not succeed in submitting in time documents which the party itself archived and which are thus under its control.

FSCD 4A_42/2008 c. 4.2

If the #arbitral tribunal mentions in a preliminary #award that it will hear supplementary arguments with respect to the decided issues, a motion for #revision cannot be heard, notwithstanding the fact that the #arbitral tribunal decided - from a formal point of view - in this preliminary #award the question of the #validity of the termination of an agreement and the principle of liability.

FSCD 4P.237/2005 c. 3.2

35 Correction of the Award

- See also Article 189(1) PILA, section 1.3; Article 190(2) PILA, section 2.12; and Article 190(2)(b) PILA, section 2b.5

35.1 Principle

The PILA does not expressly provide for the #interpretation of #awards or #correction of an inadvertence. However, Swiss law allows the #arbitral tribunal, with respect to international arbitration in Switzerland, to interpret its #award and to correct an inadvertence.

FSCD 126 III 524 [527], FSCD 4P.200/2001 c. 3b

It would amount to #excessive formalism to prohibit the #arbitral tribunal from rectifying a manifest inadvertence, as this would prevent it from indicating the meaning of decisions that fall within its #jurisdiction.

FSCD 126 III 524 [527]

35.2 Relationship with the Motion to Set Aside the Original Award

The specificity of the #correction proceedings and the accessory character of the correcting #award also have an influence on the manner in which to resolve the problems arising due to the coexistence of these proceedings with #setting aside proceedings against the original #award. In general, these two proceedings should not interfere with each other. This is why the filing of a request for #correction of the initial #award does not suspend the #time limit to file a #motion to set aside this #award.

FSCD 131 III 164 [169], FSCD 4A_666/2012 c. 5.2.2

The application (by analogy) of Article 86(1) fSOFJ in the field of international arbitration does not go without saying, with perhaps the exception of the question of exhaustion of internal means of #appeal (requirement for a first #appeal to a superior #arbitral tribunal if such a possibility exists), and it is not clear that a party can be forced to file proceedings for #correction and #interpretation of the award before filing a [former] #motion for constitutional review.

FSCD 131 III 164 [169-170], FSCD 130 III 755 [762], FSCD 4P.198/2002 c. 1.2

This would bear the risk that this party could no longer file a #motion to set aside, because if the #arbitral tribunal does not hear or dismiss the request for #correction, the #time limit for the filing of the #motion to set aside would be elapsed before having been used.

FSCD 131 III 164 [170]

One could of course imagine to let the #time limit for the filing of the #motion to set aside run from the moment when the #award dismissing the request for #correction has been notified; but this would open the door to dilatory manoeuvres such as the systematic filing of a request for #correction of the #award with the goal to delay by the same time the #enforcement of the #award.

FSCD 131 III 164 [170]

In the absence of a #motion to set aside or when the #motion to set aside the original #award is not heard or dismissed, the corrected #award replaces the original #award. If the request for #correction is not granted, the first #award continues to be in force.

FSCD 131 III 164 [170]

The correcting #award *lato sensu* can in any case be challenged by a #motion to set aside, under its restrictive conditions. In case this #motion to set aside the original #award is granted and the corrected #award is set aside, the original #award comes alive again. If the #motion to set aside the original #award is granted and this #award is set aside, the correcting #award – in the case the request for #correction has been granted – rendered in the meantime does *ipso facto* not exist any longer, because of the setting aside of the #award of which it is a part. In the case where the correcting #award has not yet been rendered, the proceedings for #correction would lose their object, there being no #award to correct.

FSCD 131 III 164 [170]

35.3 Setting Aside of the Correcting Award

It is in accordance with its accessory character that the correcting #award follows the regime of the initial #award. Where this #award is not a final #award, the possibility to file a #motion to set aside before the Federal Supreme Court is subject to the same prerequisites as the #motion to set aside against a partial #award *lato sensu* of which the #correction has been claimed.

FSCD 131 III 164 [167], FSCD 4A_426/2015 c. 1.2.1

If the #award rendered by the #arbitral tribunal – on request to correct an error or even by its own motion (cf. Art. 29(1) of the 1998 ICC Rules) – can be challenged by a #motion to set aside with the Federal Supreme Court, this motion must be filed within 30 days from the notification of this #award (Art. 89(1) SFOJ by reference of Art. 191(1) PILA).

FSCD 131 III 164 [168], FSCD 116 II 86 [88] (*mutatis mutandis*)

The fact, on the one hand, that an #award has already been rendered and the limited scope of the #correction proceedings on the other hand, are elements which should not be neglected when determining which are, within the limits of Article 190(2) PILA, the #grounds for setting aside which can be raised against a #correcting award. The fact that there is a pre-existing #award is not without importance in this respect. Benefitting from the *res judicata* effect as from its #notification (Art. 190(1) PILA), this original #award can only be challenged by a specific #motion to set aside, for exhaustively enumerated grounds and within a certain #time limit, which cannot be extended.

FSCD 131 III 164 [168]

The #correction proceedings do not aim at changing this system by offering the parties another possibility to set aside the original #award. It is not and should not be seen as a supplementary #motion to set aside. Its only goal is to permit the #correction of a real error (error in computation, clerical error, typographical error, etc.) affecting the original #award, on the contrary to an intellectual error or an error of law, without having an incidence on the *res judicata* effect. It is

consistent with the finality of these proceedings to limit to the same extent the possibility to attack the correcting #award. Therefore, the #motion to set aside such an #award may only concern the #correction itself.

FSCD 131 III 164 [168], FSCD 116 II 86 [88] (*mutatis mutandis*)

This #motion to set aside cannot serve as a pretext to challenge the initial #award, be it that this #award has not been set aside within the #time limit or that the #motion to set aside filed against it has not been heard or been dismissed.

FSCD 131 III 164 [169]

In a #motion to set aside a correcting #award *lato sensu* – i.e. an #award rendered on a request for #correction or on the #arbitral tribunal's own motion, independently of the decision taken in this #award – the #petitioner may thus claim that the #arbitral tribunal has rendered this #award (and not the initial #award) in an irregular #composition (Art. 190(2)(a) PILA); that it admitted or declined wrongly its #jurisdiction to rectify the initial #award, or that it exceeded its #jurisdiction in this respect and modified the content of the #award (Art. 190(2)(b) PILA; cf. FSCD 126 III 524 c. 2); that by rendering the correcting #award, it decided *ultra petita* or has omitted to decide one of the #prayers for relief of the request for #correction (Art. 190(2)(c) PILA); that the #correction proceedings violated the #equal treatment of the parties or their #right to be heard (Art. 190(2)(d) PILA); finally, that the correcting #award is incompatible with substantive #public policy (quite theoretical case) or procedural #public policy (yet more plausible) (Art. 190(2)(e) PILA).

FSCD 131 III 164 [169]

To the contrary, it is excluded that by a #motion to set aside the correcting #award, a party attacks, for the first time or once more, the initial #award which this party failed to challenge within the #time limit fixed for this or which this party challenged without success.

FSCD 131 III 164 [169]

An #appeal against a correcting decision is admissible only with respect to the #correction thereby made, and only to the extent that the #correction modified the #operative part of the original decision to the detriment of one of the parties.

FSCD 4A_426/2015 c. 1.2.1

36 *Interpretation of the Award*

36.1 Principle

#Interpretation of an #award in the field of international arbitration is possible by analogous application of Article 145 fSOFJ.

ZH 30.06.2003 p. 8

Even though proceedings for #interpretation of an arbitral #award have often been discussed and are considered necessary by part of the doctrine in Switzerland and abroad, current Swiss legislation does not provide for it.

VD 04.08.1989 [(1990) ASA p. 268]

36.2 Appeal against an Interpretation of the Award

An #interpretation of an #award can be challenged by a #motion to set aside according to Article 190(2) PILA.

FSCD 130 III 125 [131], ZH 30.06.2003 p. 8

Article 192

X. Waiver to File an Appeal

¹ If none of the parties have their domicile, their habitual residence, or a business establishment in Switzerland, they may, by an express statement in the arbitration agreement or by a subsequent written agreement, waive the appeal against arbitral awards; they may also limit it to one or several of the grounds listed in Article 190(2).

² If the parties have waived the appeal against the awards and if the awards are to be enforced in Switzerland, the New York Convention of June 10, 1958 on the Recognition and Enforcement of Foreign Arbitral Awards applies by analogy.

X. Verzicht auf Rechtsmittel

¹ Hat keine der Parteien Wohnsitz, gewöhnlichen Aufenthalt oder eine Niederlassung in der Schweiz, so können sie durch eine ausdrückliche Erklärung in der Schiedsvereinbarung oder in einer späteren schriftlichen Übereinkunft die Anfechtung der Schiedsentscheide vollständig ausschliessen; sie können auch nur einzelne Anfechtungsgründe gemäss Artikel 190 Absatz 2 ausschliessen.

² Haben die Parteien eine Anfechtung der Entscheide vollständig ausgeschlossen und sollen die Entscheide in der Schweiz vollstreckt werden, so gilt das New Yorker Übereinkommen vom 10. Juni 1958 über die Anerkennung und Vollstreckung ausländischer Schiedssprüche sinngemäss.

X. Renonciation au recours

¹ Si les deux parties n'ont ni domicile, ni résidence habituelle, ni établissement en Suisse, elles peuvent, par une déclaration expresse dans la convention d'arbitrage ou un accord écrit ultérieur, exclure tout recours contre les sentences du tribunal arbitral; elles peuvent aussi n'exclure le recours que pour l'un ou l'autre des motifs énumérés à l'art. 190, al. 2.

² Lorsque les parties ont exclu tout recours contre les sentences et que celles-ci doivent être exécutées en Suisse, la convention de New York du 10 juin 1958 pour la reconnaissance et l'exécution des sentences arbitrales

étrangères s'applique par analogie.

X. Rinuncia
all'impugnazione

¹ Qualora non abbiano il domicilio, la dimora abituale o una stabile organizzazione in Svizzera, le parti possono, con dichiarazione espressa nel patto di arbitrato o in un successivo accordo scritto, escludere completamente l'impugnabilità delle decisioni arbitrali; possono anche escludere soltanto alcune delle impugnative previste nell'articolo 190 capoverso 2.

² Se le parti hanno escluso completamente l'impugnabilità di una decisione e questa dev'essere eseguita in Svizzera, si applica per analogia la convenzione di Nuova York del 10 giugno 1958 concernente il riconoscimento e l'esecuzione delle sentenze arbitrali estere.

1 Prerequisites (1)

1.1 Exceptional Character

#Case law, which is approved by legal doctrine, only admits #exclusion agreements in a restrictive manner.

FSCD 143 III 589 [591], FSCD 143 III 55 [58], FSCD 131 III 173 [176], FSCD 4A_238/2011 c. 2.1, FSCD 4A_486/2010 c. 2.1, FSCD 4A_514/2010 c. 4.1.1, FSCD 4A_464/2009 c. 3.1.1, FSCD 4P.98/2005 c. 4.1

This provision is an exception to the principle according to which an arbitral #award must be able to be referred to a State court so that it may decide on certain essential #grounds for the setting aside of the #award.

FSCD 141 III 596 [605]

A waiver of #appeal contained in an #arbitration agreement in a domestic arbitration is ineffective.

FSCD 4A_214/2013 c. 2

1.2 Ratio legis

By introducing in Article 192 PILA the possibility for the parties to waive the #appeal against the #award, the legislator pursued two goals: on the one hand, to strengthen the attractiveness of Switzerland as a place for arbitration in international arbitrations, by avoiding that the #award be subject to a double control by the appeal authority and the court of #enforcement; on the other hand, to relieve the Federal Supreme Court. The idea underlying the first of these goals was that the international #award would in any case be subject to a judicial control at the #enforcement stage, by application of the NYC, and Article 192 PILA wanted to achieve the same in case the #award is executed in Switzerland (Message of the Federal Council of 10.11.1982 concerning the PILA, FS 1983 I 255 et seq., p. 451). Therefore, the *ratio legis* of Article 192 PILA clearly shows that, in the mind of the legislator, this provision was designed to apply primarily in international commercial arbitration and, more specifically, to #awards ordering a party to pay a certain amount of money, #awards which have to be submitted to the court of #enforcement.

FSCD 141 III 596 [605], FSCD 133 III 235 [242], *FSCD 4P.110/2006 c. 1.1

The *ratio legis* of Article 192 PILA which is to protect the Swiss courts from dilatory #appeals in disputes without a real connection to Switzerland (Message concerning the PILA, FS 135/1983 I 465) does not allow one to draw a rule of #interpretation according to which a #waiver to file an #appeal cannot be easily admitted.

FSCD 141 III 596 [605], FSCD 4P.114/2006 c. 5.2

Article 192 PILA aims at ensuring the highest possible degree of efficiency in the arbitral resolution of disputes and at protecting the Swiss courts from dilatory #appeals in disputes without a real connection to Switzerland.

FSCD 4P.198/2005 c. 2.1

1.3 Waiver by All Parties to the Arbitral Proceedings

The definite article “the” inserted between the terms “if” and “two” has disappeared both from the printed version and the electronic version of the Systematic Collection of Federal Law, the latter of which is now the prevailing version. Doubtless, this is only a *lapsus calami* but this clerical error should be corrected as the sentence in question, with this definite article omitted, could be interpreted as meaning that in an international arbitration involving more than two parties, it would be sufficient for two of them to make the explicit declaration provided for in Article 192(1) PILA for the others to be considered as having also waived the right to #appeal against the #award concerning them. However, such is clearly not the meaning of the provision cited for which the German and Italian versions show better than the French version the condition requiring that the #waiver emanates from all parties to the #arbitral proceedings. In any case, the text with the “the” included corresponds to the one published in the Official Collection of Federal Laws, which prevails in case of divergence from that of the printed or electronic version of the Systematic Collection of Federal Law.

FSCD 143 III 589 [590-591], FSCD 143 III 55 [57-58]

1.4 Notion of Appeal

The word “appeal” in a broad sense is a generic term which extends to all diverse legal means and which corresponds to “*recours*” in French or “*Rechtsmittel*” in German. However, the same word, used in a more restrictive sense, refers to an #appeal in the strict sense of the word, namely an ordinary means of #appeal which generally has a suspensory, dispositive and reformatory effect.

FSCD 143 III 589 [592], FSCD 131 III 173 [180]

The #inadmissibility of an #appeal in the strict sense of the term, which allows a State court to carry out a #revision on the #merits of the decision, constitutes the rule in international arbitration.

FSCD 143 III 589 [592], FSCD 131 III 173 [180]

1.5 Binding Nature of Arbitration Agreement containing Waiver

A valid #waiver to file an #appeal requires that the parties must be bound subjectively by the #arbitration agreement in which the #waiver is contained.

FSCD 4A_631/2011 c. 3.1

1.6 Express Statement

1.6.1 Clear Expression of Intent to Waive

In order to establish the clear common intent of the parties to waive the possibility to challenge the #awards rendered by the #arbitral tribunal by means of the #appeal according to Article 192(2) PILA, it is not necessary that the parties cite a certain statutory provision nor that they use a certain expression. It is necessary that the express statement of the parties shows unquestionably their common intent to waive any #appeal. To know whether this is indeed the case is a question of #interpretation and will always remain one. It is therefore out of the question to establish rules in this respect which could apply to all possible situations.

FSCD 143 III 589 [591], FSCD 143 III 55 [58], FSCD 133 III 235 [241], FSCD 131 III 173 [178], FSCD 4A_633/2014 c. 2.2.1 (not published in FSCD 141 III 229), FSCD 4A_577/2013 c. 3.1, FSCD 4A_460/2013 c. 2.2, FSCD 4A_238/2011 c. 2.1, FSCD 4A_631/2011 c. 3.2, FSCD 4A_486/2010 c. 2.1, FSCD 4A_514/2010 c. 4.1.1, FSCD 4A_464/2009 c. 3.1.1, FSCD 4A_352/2009 c. 3, FSCD 4A_194/2008 c. 2.1, FSCD 4P.206/2006 c. 3.1, FSCD 4P.114/2006 c. 5.2, *FSCD 4P.110/2006 c. 1.2, FSCD 4P.98/2005 c. 4.1, FSCD 4P.198/2005 c. 1.1, FSCD 4P.62/2004 c. 1.2, FSCD 22.07.1991 c. 2

The expression “unquestionably” [*“sans conteste”*] only tends to indicate that the result of the objective #interpretation of a #waiver must not be debatable. However, the necessity to interpret an expression of intent presupposes, by definition, that the parties disagree on the meaning which should be given to this declaration, in other words that there is a dispute with respect to this question.

FSCD 133 III 235 [241]

Contrary to the #exclusion agreement pursuant to Article 176(2) PILA, the appeals proceedings according to the PILA are not merely replaced by [*former*] cantonal proceedings which also permit a review, but the review by a State court is as such excluded. If an #exclusion agreement according to Article 176(2) PILA requires a clear expression of the parties' intent (FSCD 115 II 390), this must apply all the more so to the #waiver to file an #appeal pursuant to Article 192 PILA.

FSCD 117 II 94 [(1991) ASA p. 163], FSCD 116 II 639 [641]

In view of the importance of the #waiver to an appeal, the intent to waive must be clearly expressed as the parties thereby deprive themselves of any possibility to have the #award reviewed by a State court, except for the #respondent's possible defences at the #enforcement stage, even though the #award may be most seriously flawed and violate the fundamental rights of the parties.

FSCD 116 II 639 [640], FSCD 4A_194/2008 c. 2.1

It must be unmistakably clear from the declaration that both parties wish to make use of the possibility of Article 192(1) PILA and waive their rights to file an #appeal against an international arbitral #award with the Federal Supreme Court. Whether or not this is the case must be determined by interpreting the specific #arbitration agreement.

FSCD 4A_258/2009 c. 2.2, FSCD 4A_256/2009 c. 2.2

The requirement laid down by the Federal Supreme Court for an express #waiver of the #SADOSP in the #arbitration agreement must be upheld. An #arbitration agreement waives proceedings before a State court in favour of an #arbitral tribunal for the purposes of the proceedings for a decision but does not also waive enforcement proceedings which are not arbitrable. By waiving the #SADOSP, the parties waive a legal institution which is outside the #jurisdiction of the #arbitral tribunal. Parties which waive the #SADOSP thus waive the possibility of a provisional seizure or the inclusion of a list of goods [*Güterverzeichnis, inventaire, inventario*] (cf. Art. 83(1) SDCB). To assume such a far-reaching #waiver without a corresponding express formulation goes too far, in addition for reasons of #legal certainty. There is already some uncertainty in practice with respect to the question of what falls under the term “express declaration” within the meaning of Article 192 PILA. A #waiver of the requirement of explicitness would lead to even greater uncertainty. There is therefore no reason to deviate from the Federal Supreme Court’s #case law.

ZH 06.03.2015 c. II.4.2

1.6.2 No Requirement for Express Reference to Provisions of PILA

With respect to a direct #waiver, it does not necessarily have to include a reference to Article 190 PILA or Article 192 PILA.

FSCD 143 III 589 [591], FSCD 143 III 55 [58], FSCD 4A_194/2008 c. 2.1

Article 192 PILA does not require an express mention, in the #arbitration agreement, of Article 190 PILA. The reference in the very text of the #arbitration agreement to Article 190 and/or Article 192 PILA constitutes without doubt the best way to avoid any discussions with respect to the scope of the #waiver, because it allows to identify with certainty the #appeal which is waived. Therefore, such a reference is advisable. However, this does not permit to request that such a reference is a *conditio sine qua non* for a valid #waiver to file an #appeal against an international arbitral #award.

FSCD 133 III 235 [241], FSCD 131 III 173 [177], clarifying FSCD 116 II 639 [640]; FSCD 4A_238/2011 c. 2.1, FSCD 4A_631/2011 c. 3.2, FSCD 4A_464/2009 c. 3.1.1, FSCD 4A_18/2007 c. 3.1, FSCD 4P.114/2006 c. 5.2, FSCD 4P.98/2005 c. 4.1, FSCD 4P.198/2005 c. 1.1, FSCD 4P.98/2005 c. 4.1, FSCD 4P.154/2005 c. 4, FSCD 07.12.1994 c. 1

1.6.3 Rigorous Review

The liberalism which characterises the #case law with regard to the form of the #arbitration agreement in international arbitration is also reflected in the flexibility the #case law applies for the problem of the #arbitration agreement by reference (FSCD 129 III 727 [735]), including in sports arbitration (FSCD 4P.253/2003 of 25.03.2004 c. 5.4, FSCD 4P.230/2000 of 07.02.2001 c. 2a and FSCD 4C.44/1996 of 25.03.1996 c. 3c). Conversely, #case law is rigorous with respect to the #waiver to file an #appeal, because it excludes the indirect #waiver and it excludes in principle that the #waiver is invoked against an athlete.

FSCD 133 III 235 [244-245], FSCD 4A_640/2010 c. 3.2.2

The prerequisites for the validity of an #arbitration agreement (and therefore for the #waiver of the State courts and the corresponding #powers of review of the

Federal Supreme Court) are less strict than those for the #waiver to file an #appeal pursuant to Article 192 PILA.

FSCD 133 III 235 [245], FSCD 4A_18/2008 c. 3.3

1.6.4 No Indirect Waiver

#Case law allows #waivers only restrictively and considers insufficient an indirect #waiver. A #waiver is indirect when it does not directly result from the #arbitration agreement or a subsequent written agreement, but figures in a different pre-existing document to which the parties refer. Therefore, the requirement that the #waiver must be express excludes the reference to arbitration rules which provide for such a #waiver.

FSCD 143 III 589 [591], FSCD 143 III 55 [58], FSCD 133 III 235 [241], FSCD 116 II 639 [640], FSCD 4A_633/2014 c. 2.2.1 (not published in FSCD 141 III 229), FSCD 4A_238/2011 c. 2.1, FSCD 4A_486/2010 c. 2.1, FSCD 4A_514/2010 c. 4.1.1, FSCD 4A_18/2007 c. 3.1, FSCD 4P.62/2004 c. 1.2

1.6.5 No Generic Waiver

The #waiver is not valid if the parties generically waive #motions to set aside ("*sans appel*"). Owing to the wide-ranging effects of a #waiver, it is a requirement that the parties should clearly express their intention by referring to specific setting aside proceedings and waiving them.

FSCD 129 III 675 [681], FSCD 116 II 639 [640-641], FSCD 4P.62/2004 c. 1.2, FSCD 02.07.1997 [(1997) ASA p. 497], FSCD 21.01.1997 c. 1a, FSCD 08.07.1992 c. 2, FSCD 22.07.1991 c. 2

Considering its importance, such a #waiver must express the intent of the parties and indicate the #appeal which they exclude.

FSCD 117 II 94 [(1991) ASA p. 163], FSCD 02.07.1997 [(1997) ASA p. 496-497], FSCD 18.08.1992 c. 2 (not published in FSCD 118 II 359)

1.6.6 Waiver of Certain Grounds for Setting Aside

If the parties wish to waive the #appeal only for certain #grounds for setting aside listed in Article 190(2) PILA – which is possible (Art. 192(1) PILA *in fine*) –, they could hardly do this without expressly mentioning the #ground(s) waived in the #arbitration agreement, be it by indicating the corresponding alphabetic letter(s) of Article 190(2) PILA, by copying the text from the statute or any other wording permitting to identify with certainty the waived #ground for setting aside.

FSCD 131 III 173 [178-179], FSCD 4P.98/2005 c. 4.1

1.6.7 Use of the Term “final”

A statement providing that the #award is final cannot be interpreted as a sufficiently explicit and complete #waiver of the provisions for the #setting aside of the arbitral #award.

FSCD 117 II 94 [(1991) ASA p. 162], FSCD 116 II 639 [640], FSCD 4A_460/2013 c. 2.2, FSCD 4A_93/2013 c. 3, FSCD 4A_514/2010 c. 4.1.1, FSCD 4A_464/2009 c. 3.1.1, FSCD 4A_258/2009 c. 2.2, FSCD 4A_194/2008 c. 2.1, FSCD 4A_18/2007 c. 3.2, FSCD 4P.114/2006 c. 5.3, FSCD 4P.207/2002 c. 1, FSCD 15.11.1993 c. 2, FSCD 18.08.1992 c. 2 (not published in FSCD 118 II 359)

A statement providing that the #award shall be “final and binding” and that the parties “shall accept the #award and proceed accordingly” is not sufficient for a #waiver.

FSCD 4A_514/2010 c. 4.1.1, FSCD 4A_464/2009 c. 3.1.2

As used in common civil procedure parlance, describing a #decision as “final” does not exclude extraordinary appeals but merely the free review of the #decision in an ordinary #appeal.

FSCD 4A_258/2009 c. 2.2, FSCD 4A_256/2009 c. 2.2, FSCD 4A_194/2008 c. 2.2

For example, Article 190 PILA provides in (1) that the #award of the #arbitral tribunal is “final” but provides in the following two paragraphs (2) & (3), in connection with Article 191 PILA, for an extraordinary #appeal, for the reasons limitatively set forth, with the Federal Supreme Court as sole appeal instance by way of an #Appeal in Civil Matters according to Art. 77 FSCA.

FSCD 4A_258/2009 c. 2.2, FSCD 4A_256/2009 c. 2.2

The same applies if the disputed #arbitration agreement is contained in an international treaty between States, which has originally not been concluded by the parties to the #arbitral proceedings.

FSCD 4P.114/2006 c. 5.4

A statement providing that the #award is “final and executive” is not sufficient for a #waiver.

FSCD 22.07.1991 c. 2

1.7 Reference to Article 28 of the 1998 ICC Arbitration Rules

There is no valid #waiver by an express statement if the parties refer in their #arbitration agreement to the ICC Arbitration Rules which provide in Article 35(6) [*Article 28 of the 1998 version*] that the #award is final and that the parties waive all #appeals.

FSCD 116 II 639 [640-641], FSCD 4A_633/2014 c. 2.2.2 (not published in FSCD 141 III 229), FSCD 4A_414/2012 c. 1.2, FSCD 4A_464/2009 c. 3.1.2, FSCD 4A_194/2008 c. 2.2, FSCD 4P.62/2004 c. 1.2, FSCD 19.11.1998 c. 1b, FSCD 20.10.1998 c. 1a, FSCD 15.06.1998 c. 1b, FSCD 08.07.1992 c. 2, FSCD 22.07.1991 c. 2

1.8 Personal Scope of Application of the Waiver

The personal scope of application of an #arbitration agreement including a #waiver to file an #appeal raises a specific problem concerning the form of the #waiver, because Article 192(1) PILA requires an express statement of the parties to the #arbitration agreement for the validity of the #waiver of any #appeal. This problem does not arise in the case where the two parties to the #arbitration agreement have made the express statement required by Article 192 PILA and where only the material scope of application of the #arbitration agreement is disputed.

FSCD 134 III 260 [267]

1.9 Material Scope of Application of the Waiver

The #waiver to file an #appeal is admissible for all #awards and for all #grounds for setting aside the #award.

FSCD 143 III 589 [591], FSCD 143 III 55 [58], FSCD 133 III 235 [240], FSCD 131 III 173 [174], FSCD 4A_514/2010 c. 4.1.2, FSCD 4P.198/2005 c. 2.2

The #waiver to file an #appeal also extends to the #ground for setting aside relating to the #arbitral tribunal's #jurisdiction (Art. 190(2)(b) PILA). The #waiver of any #appeal within the meaning of Article 192(1) PILA also includes this #ground for setting aside.

FSCD 143 III 589 [591], FSCD 143 III 55 [58], FSCD 134 III 260 [265]

The #waiver to file an #appeal extends to all the grounds listed in Article 190(2) PILA, including the ground relating to the irregular #composition of the #arbitral tribunal unless the parties have excluded an #appeal only in relation to one of these grounds.

FSCD 143 III 589 [591], FSCD 143 III 55 [58]

The #waiver is admissible for all #awards, including those which relate to the #composition and the #jurisdiction of the #arbitral tribunal, and not only to the final #award.

FSCD 133 III 235 [240], FSCD 131 III 173 [174], FSCD 4A_631/2011 c. 3, FSCD 4P.114/2006 c. 5.1

The grounds for #appeal of an international arbitral #award are left to the determination of the parties in the framework of Article 192 PILA.

FSCD 4A_74/2014 c. 2.2 (not published in FSCD 140 III 477)

If the parties agree, even implicitly, to extend the material scope of application of an #arbitration agreement to disputes regarding a contract without an #arbitration agreement, the #waiver contained in the #arbitration agreement also applies to these disputes.

FSCD 4P.198/2005 c. 1.3 & 1.4

1.10 Waiver to File an Appeal and Lack of Jurisdiction

The parties may waive the possibility to file an *#appeal* exclusively with respect to the *#arbitrators' #jurisdiction*.

FSCD 143 III 55 [58], FSCD 134 III 260 [265], FSCD 4P.98/2005 c. 4.2

The parties which waive any *#appeal* assume the risk that the *#arbitrators* arrogate for themselves *#jurisdiction* which they did not have and decide a *#subject-matter* which is not covered by the terms of the *#arbitration agreement*. Therefore, it cannot be claimed afterwards that the *#waiver* in dispute would only be valid if the *#arbitral tribunal* had correctly accepted its *#jurisdiction *ratione materiae**. To claim this would unduly restrict the scope of application of the *#waiver* by excluding the case where the *#arbitral tribunal* wrongly extended its *#jurisdiction* to legal relationships which were concluded between the same parties, but in another context not covered by the *#arbitration agreement*. There is no reason to condition the *#validity* of a complete *#waiver* by the prior admission that one of the *#grounds* for appeal which could have been invoked without the *#waiver* would have been granted.

FSCD 134 III 260 [266]

With respect to the plea of lack of *#jurisdiction* of the *#arbitral tribunal*, no distinction should be made, with regard to the *#waiver* to file an *#appeal*, between the case where the *#arbitrators* extended their *#jurisdiction* to an asserted legal relationship without any connection with the one covered by the *#arbitration agreement*, and the case, e.g. where they decided a dispute which is not arbitrable.

FSCD 134 III 260 [266]

1.11 Specificities in Sports Arbitration

- See also Article 178(2) PILA, section 2.4

There is little chance that the legislator thought about international arbitration in the field of sports, and even less about disputes relating to the suspension of athletes, when adopting this provision. As the IOC and the majority of the big international sports *#federations* have established their seat in Switzerland, the prerequisite of Article 192(1) PILA according to which none of the parties shall have its seat in Switzerland, excluded from the beginning all *#waivers* to file an *#appeal* against *#awards* rendered in disputes implicating such *#legal persons*. Furthermore, the sanctions imposed on athletes, such as disqualification or suspension, do not need *#enforcement proceedings* in order to be executed. From a historical perspective, Article 192(1) PILA seems thus not to be designed to apply to the *#appeals* directed against *#awards* ordering sanctions provided for in *#statutes* in sports.

FSCD 133 III 235 [242]

It follows from the wording of Article 192(1) PILA that the *#waiver* to file an *#appeal* presupposes an *agreement* [*accord*, *Übereinkunft*, *accordo*] between the parties, be it in the *#arbitration agreement* or in a subsequent written agreement. This agreement, like any contract, is concluded if the parties manifest their mutual assent to waive to file an *#appeal*. The freedom of contract, as part of the

#autonomy of will requires that such a manifestation does not follow from a will which is flawed by any kind of impediment. It is all the more important that the #expression of intent to waive an #appeal is not flawed by any form of constraint, as such a #waiver deprives its author of the possibility to challenge any future #award, notwithstanding that this #award violates fundamental principles of a State of law, such as #public policy or essential procedural guarantees like the correct #constitution of the #arbitral tribunal, its #jurisdiction, the equality of the parties or their #right to be heard in #adversarial proceedings.

FSCD 133 III 235 [242-243]

Competitive sports are characterised by a highly hierarchical organisation, on the international level as well as on the national level. Such vertically organised relations between the athletes and the organisations in charge of the different kind of sports are therefore different from the horizontal relationships established between parties to a contract.

FSCD 133 III 235 [243], FSCD 129 III 445 [461]

This structural difference between the two types of relationships is not without influence on the conclusion of the contract. In general, when two parties have contacts on an equal level, every party expresses its will without being subject to the will of the other. This is in general the case in international commercial relationships. In sports, the situation is completely different. Except the rather theoretical case of a well-known athlete who by its reputation could impose its conditions on the competent international #federation, experience shows that in most cases, an athlete is not independent enough from its #federation and must, whether one likes it or not, comply with its prerequisites. Thus, the athlete who wants to participate in a competition organised under the control of a sports #federation having rules which provide for arbitration, does not have any choice and must accept the #arbitration agreement, particularly by adhering to the #statutes of the sports #federation containing the #arbitration agreement, all the more when the athlete is a professional. The athlete would be confronted with the following dilemma: agree to the arbitration or practice its sport as an amateur. Faced with the choice to submit to arbitration or to practice one's sport "in one's garden", by watching the competitions "on TV", the athlete who wants to compete with real competitors or who is forced to do so because this represents its only source of income (monetary and specific prizes, advertising revenue, etc.) will be obliged *de facto* to opt, whether it likes it or not, for the first branch of the alternative.

FSCD 133 III 235 [243]

It is obvious that the #waiver to file an #appeal against a future #award made by an athlete is in general not the result of a freely expressed will. Therefore, the assent which results from the concordance between this will and the will expressed by the interested sports #federation is, from the very beginning, flawed by the forced consent of one of the parties. By accepting any future #award, the athlete deprives itself straightaway of its right to later have sanctioned the violation of fundamental principles and essential procedural guarantees which the #arbitral tribunal could commit. Furthermore, in case of a disciplinary measure against the athlete such as a suspension, which does not need #enforcement proceedings, it would not have the possibility to raise these #grievances before the court of #enforcement.

FSCD 133 III 235 [244], FSCD 4A_488/2011 c. 6.2

Therefore, due to its importance, the #waiver to file an #appeal can in principle not be opposed against the athlete and this notwithstanding the fact that the #waiver satisfies the formal requirements of Article 192(1) PILA. This conclusion is all the more obvious as the refusal to hear the #motion to set aside of the athlete who did not have any choice and had to accept the #waiver to file an #appeal in order to be entitled to participate in the competitions appears to be questionable with respect to Article 6(1) ECHR.

FSCD 133 III 235 [244 and 246]

The liberalism which characterises the #case law with regard to the form of the #arbitration agreement in international arbitration is also reflected in the flexibility the #case law applies for the problem of the #arbitration agreement by reference (FSCD 129 III 727 [735]), including in sports arbitration (FSCD 4P.253/2003 of 25.03.2004 c. 5.4, FSCD 4P.230/2000 of 4P.230/2000 c. 2a and FSCD 4C.44/1996 of 25.03.1996 c. 3c). Conversely, #case law is rigorous with regard to the #waiver to file an #appeal, because it excludes an indirect #waiver and it excludes in principle that the #waiver is invoked against an athlete.

FSCD 133 III 235 [244-245], FSCD 4A_640/2010 c. 3.2.2

It is true that there is a contradiction, in theory, in treating differently the #arbitration agreement and the #waiver to file an #appeal, with respect to the form and the mutual assent. However, this differential treatment follows a logic which, on the one hand, favours the speedy resolution of disputes, particularly in sports, by specialised #arbitral tribunals presenting sufficient guarantee of #independence and #impartiality, by assuring, on the other hand, that the parties, and in particular the professional athletes, do not without thinking waive their right to challenge the #awards of the last arbitral instance before the supreme judicial authority of the State of the #seat of the #arbitral tribunal. In other words: according to this logic, the maintaining of a means of #appeal constitutes a counterweight to the “benevolence” by which one has to examine the question of whether the parties agreed to arbitration in sports.

FSCD 133 III 235 [245], FSCD 4A_640/2010 c. 3.2.2

Article R59(4) of the Procedural Rules contained in the #CAS Code, by merely paraphrasing the text of Article 192(1) PILA, does not exclude a #motion to set aside against an #award of the #CAS, in the absence of another written agreement excluding this possibility.

FSCD 133 III 235 [245], FSCD 4A_93/2013 c. 3

1.12 Compatibility with Public Policy

The #waiver to file an #appeal also excludes the review of the #award for violation of #public policy pursuant to Article 190(2)(e) PILA. The #waiver to file an #appeal according to Article 192(1) PILA has the consequence that the Swiss Federal Supreme Court as the ordinary court of the State of the #seat of the arbitration cannot review the #award. This also applies to the review of the compatibility of the #award with the fundamental principles of a State of law, which should normally be guaranteed by the #grievance pursuant to Article 190(2) PILA.

FSCD 4P.198/2005 c. 2.2

This does however not mean that #awards, which violate fundamental principles of a State of law, could be enforced without any problems. As specified in Article 192(2) PILA, a review of these #awards is reserved in the context of the #recognition and the #enforcement of the #awards in Switzerland pursuant to Article V NYC.

FSCD 4P.198/2005 c. 2.2

The #waiver to file an #appeal, which the Federal Supreme Court has, as an #appeals instance, to comply with under the conditions of Article 192(1) PILA, does not lead to unbearable results from a substantive point of view, but aims at avoiding dilatory #appeals and at enhancing the efficiency of arbitration.

FSCD 4P.198/2005 c. 2.2

In an international comparison, Article 192 PILA may be an exceptional provision by the fact that it admits a #waiver in advance of the possibility to file an #appeal. However, this does not change the fact that according to the legislator's clear intent, this provision aims at avoiding the delay, which regularly results from the filing of hopeless #appeals. This excludes a correction *contra legem* on the ground of #public policy.

FSCD 4P.198/2005 c. 2.2

1.13 Compatibility with Article 6 ECHR

Due to its importance, the #waiver to file an #appeal can in principle not be invoked against the athlete and this notwithstanding the fact that the #waiver satisfies the formal requirements of Article 192(1) PILA. This conclusion is all the more obvious as the refusal to hear the #motion to set aside of the athlete who did not have any choice and had to accept the #waiver to file an #appeal in order to be entitled to participate in the competitions appears to be questionable with respect to Article 6(1) ECHR.

FSCD 133 III 235 [244]

It is possible to waive the right to file an #appeal against a future arbitral #award without violating Article 6(1) ECHR. The letter and spirit of the latter provision do not prevent a party from waiving such guarantees as long as such a #waiver is not equivocal and does not conflict with any important public interest. Article 192(1) PILA meets these requirements as it demands an express #waiver, which must be the object of an agreement between the parties and therefore excludes any unilateral waiver. In addition, a #waiver which was coerced from a party could be invalidated on the ground of a lack of consent. Furthermore, as arbitration is a contractual method of resolving disputes by recourse to private judges that the parties may choose, one does not see which important public interest a #waiver could possible harm. Article 192(1) PILA is therefore compatible with Article 6(1) ECHR.

FSCD 4A_238/2011 c. 3.2

1.14 Mandatory Provisions of a Third State

Article 192 PILA leaves no room for the application of mandatory provisions of a third State, because Article 19 PILA does not apply in this context.

FSCD 4P.198/2005 c. 2.1

Article 192 PILA aims at assuring the highest possible degree of efficiency in the arbitral resolution of disputes and at protecting the Swiss courts from dilatory #appeals in disputes without a real connection to Switzerland. Therefore, the taking into account of mandatory provisions of third States would also run counter to the *ratio legis* of Article 192 PILA.

FSCD 31.01.2005 c. 2.1

1.15 Relationship with the Waiver to File an Appeal against a Judgment

Contrary to proceedings before a State court, which follow strict procedural rules, #arbitral proceedings are largely left at the parties' disposal. It results from this an even more pressing need for a way of #appeal designed to safeguard the parties' fundamental rights, as is provided for in Article 190(2) PILA. As the dispute resolution through #arbitral proceedings does not offer the same guarantees as through court proceedings, without taking into account that the means to challenge international arbitral #awards are in any case limited, it is justified that the #waiver to use these possibilities are subject to stricter requirements than those on which depend the validity of a #waiver to challenge the judgment rendered by a State court.

*FSCD 4P.110/2006 c. 1.2, *FSCD 4C.202/2005 c. 2.2

1.16 Applicability to the Motion for Revision

It seems however difficult to admit that a party which has explicitly waived its right to file a #motion to set aside, i.e. to invoke the ground of Article 190(2)(a) PILA, could nevertheless in a roundabout way seize the Federal Supreme Court by invoking the same ground, discovered before the expiry of the #time limit to file a #motion to set aside, by a motion for #revision. Otherwise, Article 192 PILA would become meaningless.

FSCD 143 III 589 [598], FSCD 4A_368/2009 c. 1, FSCD 4A_234/2008 c. 2.1

That a litigant, having waived together with the opposing party, the bringing of a future #motion to set aside in order to denounce the irregular #constitution of the future #arbitral tribunal for all reasons capable of making it such, including a case of #challenge, could get around this obstacle by filing a request for #revision is excessively contrary to the rules of #good faith.

FSCD 143 III 589 [598]

Whether a contractual #waiver of a #motion to set aside according to Article 192 PILA entails the #inadmissibility of the motion for #revision is questionable.

FSCD 02.07.1997 [(1997) ASA p. 497]

1.17 Waiver Prior to the Entry into Force of the PILA

The Federal Supreme Court left open the question of whether the parties' #exclusion agreement would be admissible even if it was made prior to the entry into force of the PILA, i.e. under a law which did not allow the parties to make such an agreement.

FSCD 117 II 94 [(1991) ASA p. 163], FSCD 116 II 639 [641], FSCD 4A_194/2008 c. 2.2

1.18 Individual Cases

The following text constitutes a valid #waiver of all #appeals, within the meaning of Article 192(1) PILA: "[...] the parties who exclude all and any rights of appeal from all and any awards insofar as such exclusion can validly be made [...]".

FSCD 143 III 589 [592], FSCD 131 III 173 [179]

The expression that the #award is "*definitive et insusceptible* [sic] *d'appel*" is not a sufficient #waiver.

FSCD 143 III 589 [592], FSCD 4P.206/2006 c. 3.2

The wording "neither party shall seek recourse to a law court nor other authorities to appeal for revision of this decision" can only be understood in #good faith as meaning that the parties wanted to opt out of any #appeal to a State body to review the arbitral #award.

FSCD 143 III 589 [593], FSCD 4A_577/2013 c. 3.4

The #arbitration agreement which provides that "Awards rendered in any arbitration hereunder shall be final and conclusive and judgment thereon may be entered into any court having jurisdiction for enforcement thereof. There shall be no appeal to any court from awards rendered hereunder" constitutes a valid #waiver as it undoubtedly shows the common intent of the parties to waive the right to #appeal against every decision of the #arbitral tribunal before any State court. This intent is reinforced and confirmed indirectly by the phrase which precedes this passage, which not only insists on the definitive character of the #awards to be handed down by the use of the two similar adjectives ("final" and "conclusive") but also provides that these #awards can be enforced before the competent State court. It goes without saying that the link established by the last phrase of the #arbitration agreement between the terms "appeal" and "awards" allows one to exclude straightaway that the parties only wanted to prohibit an #appeal to the State courts and not the #arbitral tribunal for the judgment of their respective future claims, given that it is true that the exclusion expressed in the disputed passage can only concern an #appeal available against #awards to be rendered and not the type of #jurisdiction that is to be seized at the first instance.

FSCD 143 III 589 [594]

A statement providing that “the decision of the arbitration shall be final and binding and neither party shall have any right to appeal such decision to any court of law” constitutes a valid #waiver. This intent to rule out any #appeal is confirmed by the preceding sentence providing that the State courts could not be seized by any party except to obtain the #enforcement of an #award issued by the #arbitral tribunal.

FSCD 143 III 589 [592-593], FSCD 4A_238/2011 c. 2.2.3, FSCD 4A_486/2010 c. 2.2

The #arbitration agreement which provides that “The decision of the arbitrator in any such proceeding will be final and binding and not subject to judicial review. Appeals to the Swiss Federal Tribunal from the award of the arbitrator shall be excluded” undoubtedly constitutes a valid #waiver.

FSCD 143 III 55 [58]

An #appellant acts contrary to the rules of #good faith (Art. 2(1) CC) when it submits on the one hand that the contract does not exist in order to circumvent the #waiver clause to which it validly consented and that on the other hand that the contract does exist in order to obtain payment of the sum it claims from the #respondent.

FSCD 143 III 55 [62-64]

The following sentence satisfies the formal requirements of Article 192(1) PILA and the related #case law: “*Le Parti rinunciano fin d’ora ad ogni ricorso ordinario e straordinario contro la decisione che sarà resa*”.

FSCD 134 III 260 [264]

The #appellant’s general statement in the proceedings that “the first goal [of the parties] was to avoid proceedings in the national courts” does not constitute a valid #waiver.

FSCD 4A_633/2014 c. 2.2.2 (not published in FSCD 141 III 229)

The wording “neither party shall seek recourse to a law court nor other authorities to appeal for revision of this decision” can only be understood in #good faith as meaning that the parties wanted to opt out of any #appeal to a State body to review the arbitral #award.

FSCD 4A_577/2013 c. 3.4

The following agreement satisfies the requirements of Article 192(1) PILA and the related #case law: “The parties expressly waive recourse to the Swiss Federal Tribunal against awards of the FAT [*Fédération Internationale de Basketball Association Arbitral Tribunal*] as provided in Article 192 of the Swiss Act on Private International Law.”

FSCD 4A_232/2012 c. 2.1

The following text constitutes a valid #waiver of all #appeals within the meaning of Article 192(1) PILA: “The parties expressly agree to waive their rights to a) challenge any determination(s) of award(s) by the Arbitrator through set aside proceedings or any other proceedings; b) oppose enforcement of the Arbitrator’s determination(s) or award(s) in any jurisdiction”.

FSCD 4A_514/2010 c. 4.1.2

The wording of the #arbitration agreement according to which disputes arising from the agreement are decided “finally, excluding the jurisdiction of the general courts, in accordance with the rules of the arbitral tribunal of the International Chamber of Commerce” does not satisfy the requirements of an express #waiver within the meaning of Article 192 PILA. First, the reference to the exclusion of the #jurisdiction of the “general courts” merely expresses that an #arbitral tribunal instead of the State courts should decide on any disputes. An intent of the parties to waive an #appeal against the arbitral #award to the Federal Supreme Court cannot be derived here from. Second, designating an #award as “final” according to customary language usage in civil procedural law does not exclude an #appeal by way of extraordinary legal remedies but merely the (free) review of the #award by way of ordinary legal remedies, such as for example, an #appeal.

FSCD 4A_258/2009 c. 2.2, FSCD 4A_256/2009 c. 2.2

The wording at hand, according to which the #award will be final for all parties involved in the dispute (*“Il verdetto dell’arbitro è definitivo per tutte le Parti contraenti che sono nella controversia”*) does not meet the requirement of a specific #waiver within the meaning of Article 192(1) PILA. [...] To interpret the disputed clause at hand as a #waiver against the #award, an additional sentence should have been included, making the #waiver clear, indicating for instance that the parties waived any legal recourse against the #award. The fact that the #respondent accepted the #award as a consequence of the #arbitration agreement and did not #appeal cannot lead to the conclusion that the parties would have jointly intended to renounce any legal recourse.

FSCD 4A_194/2008 c. 2.2

The expression that the “decision shall be final and binding upon the parties to the dispute” does not meet the requirements for an express #waiver within the meaning of Article 192 PILA.

FSCD 4P.114/2006 c. 5.3

The following statement expresses clearly the intent of the parties to waive any #appeal for the ground expressly mentioned by this provision, i.e. #jurisdiction (even though Art. 190(2)(b) PILA has not been mentioned): “The Parties undertake that they will not challenge the jurisdiction of the UNCITRAL Tribunal whether before the UNCITRAL Tribunal itself or before any national courts. For the avoidance of doubt, the Parties and Y._____ do not hereby waive their right to challenge any award in the UNCITRAL Arbitration in the place where the award is made or to resist enforcement thereof in the country or countries where enforcement is sought on the grounds contained in the applicable arbitration laws of those countries, save that the Parties will not do so on the ground that the UNCITRAL Tribunal lacked jurisdiction to consider one or more of the issues before it”.

FSCD 4P.98/2005 c. 4.2

The following text constitutes a valid #waiver of all #appeals, within the meaning of Article 192(1) PILA: "The decision of the Arbitral Tribunal shall be final, and the parties waive all challenge of the award in accordance with Article 192 Private International Law Statute. The award shall be recognised and enforced by all applicable jurisdictions pursuant to the Uniform Rules of the UN Convention on the Recognition and Enforcement of Foreign Arbitral Awards".

FSCD 4P.198/2005 c. 1.2

The expression that "[a]ll disputes arising out of this Letter of Commitment shall be finally decided by a court of three arbitrators [...]" does not meet the requirements for an express #waiver within the meaning of Article 192 PILA.

FSCD 07.12.1994 c. 1

2 *Application by Analogy of the NYC (2)*

The #waiver to file an #appeal also excludes the review of the #award for violation of #public policy pursuant to Article 190(2)(e) PILA. The #waiver to file an #appeal according to Article 192(1) PILA has the consequence that the Swiss Federal Supreme Court as the ordinary court of the State of the #seat of the arbitration cannot review the #award. This also applies to the review of the compatibility of the #award with the fundamental principles of a State of law, which should normally be guaranteed by the #grievance pursuant to Article 190(2) PILA.

FSCD 4P.198/2005 c. 2.2

This however does not mean that #awards, which violate fundamental principles of a State of law, could be enforced without any problems. As specified in Article 192(2) PILA, a review of #awards is reserved in the context of the #recognition and the #enforcement in Switzerland pursuant to Article V NYC.

FSCD 4P.198/2005 c. 2.2

Article 193

XI. Deposit and Certificate of Enforceability

¹ Each party may at its own expense deposit a copy of the award with the Swiss court at the seat of the arbitral tribunal.

² At the request of a party, the court shall certify the enforceability of the award.

³ At the request of a party, the arbitral tribunal shall certify that the award has been rendered pursuant to the provisions of this Statute; such certificate has the same effect as the deposit of the award.

XI. Vollstreckbarkeitsbescheinigung

¹ Jede Partei kann auf ihre Kosten beim schweizerischen Gericht am Sitz des Schiedsgerichts eine Ausfertigung des Entscheides hinterlegen.

² Auf Antrag einer Partei stellt das Gericht eine Vollstreckbarkeitsbescheinigung aus.

³ Auf Antrag einer Partei bescheinigt das Schiedsgericht, dass der Schiedsspruch nach den Bestimmungen dieses Gesetzes ergangen ist; eine solche Bescheinigung ist der gerichtlichen Hinterlegung gleichwertig.

XI. Dépôt et certificat de force exécutoire

¹ Chaque partie peut déposer, à ses frais, une expédition de la sentence auprès du tribunal suisse du siège du tribunal arbitral.

² Le tribunal suisse certifie, sur requête d'une partie, que la sentence est exécutoire.

³ A la requête d'une partie, le tribunal arbitral certifie que la sentence a été rendue conformément aux dispositions de la présente loi; un tel certificat vaut dépôt.

XI. Deposito e attestazione dell'esecutività

¹ Ogni parte può, a sue spese, depositare un esemplare del lodo presso il tribunale svizzero del luogo di sede del tribunale arbitrale.

² Ad istanza di una parte, il tribunale attesta l'esecutività.

³ Ad istanza di una parte, il tribunale arbitrale attesta che il lodo è stato pronunciato secondo le disposizioni della

presente legge; siffatta attestazione equivale a deposito giudiziale.

1 *Deposit of the Award (1)*

Only the parties, but not the #arbitral tribunal, can deposit an #award.

ZH 16.04.2002 p. 2

2 Certification of Enforceability (2)

2.1 Purpose

The certificate of enforceability serves as proof that the arbitral #award is enforceable under the Swiss law of the #seat.

ZH 25.10.2018 c. II/2, ZH 24.09.2018 c. II/2, ZH 30.05.2018 c. III/2, ZH 05.11.2013 c. III/3

2.2 Competent Authority

As the #arbitral tribunal had its seat in Zurich, the #jurisdiction of the Supreme Court of the Canton of Zurich is given (Art. 193(2) PILA, Art. 356(1)(b) CCP in connection with Section 46 GOG [*Gerichtsorganisationsgesetz*]). The fact that this #jurisdiction results from an analogous application of Section 46 GOG corresponds to the established practice of the Administrative Commission of the Supreme Court of the Canton of Zurich.

ZH 25.10.2018 c. II/1, ZH 24.09.2018 c. II/1, ZH 30.05.2018 c. II, ZH 21.03.2018 c. 2, ZH 10.08.2017 c. 2.1, ZH 21.04.2016 c. 1, ZH 22.12.2015 c. II/1, ZH 21.01.2015 c. II/1, ZH 06.06.2014 c. 6, ZH 07.02.2014 c. 3, ZH 19.12.2013 c. 4, ZH 19.11.2013 c. 4, ZH 05.11.2013 c. 2, ZH 05.12.2012 c. 4, ZH 27.08.2012 c. 5, ZH 18.06.2012 c. 4, ZH 12.06.2012 c. 5, ZH 23.02.2012 c. 5, ZH 14.11.2011 c. 5

The Committee of the Court of Appeal of the Canton Basel-Stadt has #jurisdiction *ratione materiae* (analogous to § 10(3)(2) of the Act on the Introduction of the CCP [EG ZPO, SG 221.100]).

BS 04.05.2016 c. 1

A decision of the higher cantonal court in proceedings concerning a certificate of enforceability pursuant to Article 386(3) CCP cannot be attacked by virtue of the internal cantonal appeal within the meaning of Articles 319 et seq. CCP because this State court is the only cantonal authority that can decide.

ZH 05.11.2013 c. 4.2

For the examination of the substantive grounds for refusal of #enforcement - such as those of the NYC of 1958 - it is not the authority certifying enforceability that is competent, but only a court specifically dealing with an application for #enforcement.

ZH 27.08.2012 c. 8.2

The arbitral #award in the form of Article 189 PILA, and the certification of enforceability according to Article 193(2) PILA, have to be submitted to the judge deciding on the motion to #SADOSP. However, in the proceedings to #SADOSP [Art. 80 SDCB], enforceability can also be established in a way other than by a certification of enforceability. The judge deciding on the motion to #SADOSP is bound by the certification of enforceability.

SO 27.09.2001 [(2003) ASA p. 421-422]

The judge deciding on the #SADOSP has no #jurisdiction to examine the decision of the tribunal which issued the certification.

SO 27.09.2001 [(2003) ASA p. 423]

2.3 Applicable Law

Certification according to the law of the #seat of arbitration is sufficient. Cantonal procedural law can soften or even eliminate this prerequisite.

ZG 27.02.1998 [(2000) ASA p. 364]

2.4 Prerequisites

The issuance of a certificate of enforceability requires that a final arbitral #award exists which has not been challenged, that a challenge does not have #suspensive effect or that the challenge has been definitively rejected. In addition, proof must be provided that the arbitral #award has been served with legal effect. Furthermore, it must be proven that the arbitral #award has been validly notified to the parties.

ZH 30.05.2018 c. III/2, ZH 21.03.2018 c. 1, ZH 10.08.2017 c. 2.2(a), ZH 21.04.2016 c. 2, ZH 22.12.2015 c. I/2, ZH 21.01.2015 c. II/2, ZH 07.02.2014 c. 1, ZH 05.11.2013 c. 1

The criterion of the existence of a final arbitral #award requires (1) that there is a valid #waiver of the right to #appeal, (2) that no challenge to the arbitral #award has been made within the #time limit, (3) that an #appeal lodged in due time has been withdrawn, has become moot or has been finally dismissed, or (4) that the appellate court has not granted a #suspensive effect to a pending #appeal or that the appeal has no #suspensive effect.

ZH 25.10.2018 c. II/2, ZH 24.09.2018 c. II/2, ZH 30.05.2018 c. III/2, ZH 21.03.2018 c. 2.1

As a rule, #appeals to the Federal Supreme Court do not have a #suspensive effect, so that decisions subject to #appeal become final and enforceable once they have been issued (cf. Art. 103(1) FSCA). If, on the other hand, the appellate court grants #suspensive effect, the decision is not enforceable and therefore a certificate of enforceability cannot be issued. In the case of a pending #appeal in relation to which a request for #suspensive effect has been filed, there is a state of suspension until the decision on the said application has been made which also precludes #enforcement of the decision.

ZH 21.03.2018 c. 2.2

The mere filing of an #Appeal in Civil Matters does not in principle prevent the #enforcement of the contested decision, especially as the #appeal does not *per se* impede the enforceability of the object of #appeal. According to a majority of the doctrine, the latter is only the case if the #appeal has been granted #suspensive effect. Before this date, it considers the contested decision to be enforceable (see decision of the III. Civil Chamber of the Supreme Court of the Canton of Zurich of 2 February 2010, No. PG 090008, c. 4). In the event that the #appeal is later approved; this doctrine takes the view that a certificate which has already been

issued loses its effect without further ado to the extent of the #setting aside of the arbitral #award.

ZH 21.03.2018 c. 2.4

This doctrine is convincing. The potential possibility of submitting a request for #suspensive effect at a later date does not alter the fact that the arbitral #award is enforceable until the receipt of such a request and that there is a right to the issuance of a corresponding confirmation by the certifying judge. If this were not the case, it would be in the hands of the appealing party to determine or delay the date from which the contested decision would be enforceable, and a certificate of enforceability could be issued by the late filing of a request for #suspensive effect. The #appeal to the Federal Supreme Court would *de facto* have the same effect as an #appeal with #suspensive effect and Article 103(1) FSCA would be emptied of its meaning.

ZH 21.03.2018 c. 2.6

The issue of a certificate of enforceability during pending #appeal proceedings is also unproblematic with regard to any subsequent proceedings for #SADOSP. The granting of #suspensive effect in #appeal proceedings after the issuance of the certificate of enforceability would lead to the dismissal of the #SADOSP, without a formal revocation of the certificate of enforceability being necessary, since the binding effect of the court of appeal on the certificate of enforceability relates only to the time of its issuance. The mere filing of an #Appeal in Civil Matters without a simultaneous application for #suspensive effect therefore does not preclude #enforcement of the contested decision. Moreover, such an understanding also corresponds to Article 44(1)(c) fConcordat, which provided that the judge would issue a certificate of enforceability to a party upon request if an #appeal for annulment filed in due time had not been granted #suspensive effect.

ZH 21.03.2018 c. 2.6

The court only examines whether it is an arbitral #award, whether it has been duly served on the parties and whether it is final and enforceable.

BS 04.05.2016 c. 2

It is not necessary for the applicant to provide detailed reasons and proof of the legal basis according to which it needs what type of certificate of enforceability for which #enforcement.

ZH 07.02.2014 c. 2

The enforceability of a decision presupposes that it is formally final. In order to issue a certificate of enforceability, it is necessary that the arbitral #award has not been challenged within the #time limit, that an appeal lodged in due time has been withdrawn, has been definitively rejected, that there is a valid #waiver of appeal by the parties or that a pending #appeal has not been granted #suspensive effect.

ZH 05.11.2013 c. 3.3

In the case of a pending #appeal, there is a state of limbo until a decision on the granting of #suspensive effect by the appellate court has been reached which precludes #enforcement.

ZH 05.11.2013 c. 3.3

2.5 Grievances and Defences

#Grievances not provided for in the #grounds for setting aside of Article 190(2) PILA cannot be heard in the proceedings on the #SADOSP. However, #grounds for setting aside which can be pleaded in the #motion to set aside, must in principle be pleaded in these proceedings and not in the subsequent proceedings on the #SADOSP. In fact, in such a case, possibilities of #setting aside are provided by the statute. The same applies to #grievances which can be raised in the proceedings on the certification of enforceability pursuant to Article 193(2) PILA.

FSCD 130 III 125 [129], *FSCD 117 III 57 [59-60], BS 05.11.2003 [p. 3]

The #respondent has not made use of the possibility of submitting comments, nor has it designated a domicile for service in Switzerland. Thus, it can be assumed, as threatened, that the #respondent waived the right to comment and that further notifications will be made by publication.

ZH 05.12.2012 c. 3, ZH 18.06.2012 c. 3, ZH 23.02.2012 c. 3, ZH 14.11.2011 c. 3

2.6 Effects

The court which has to certify that the #award is enforceable examines, *inter alia*, whether there is an #award and thereby takes into consideration the #invalidity as well as obvious formal mistakes in the submitted #award.

FSCD 130 III 125 [129-130], *FSCD 117 III 57 [59], *FSCD 107 Ia 318 [324], ZH 05.07.2001 [p. 2]

The deposit and the certification are optional and do not have any effect on the enforceability of the #award. However, in #SADOSP proceedings filed in Switzerland, the creditor must in fact establish by a document that the #award is enforceable. Thus, it must file with the judge of the #SADOSP either the certificate provided for in Article 193 PILA or another document showing the enforceability of the #award.

FR 24.03.2004 c. 2

2.7 Request by the Arbitral Tribunal

According to the wording of Article 193(2) PILA, only the parties may request a certificate of enforceability of the #award. However, nothing in the *ratio legis* of this provision prevents this possibility from also being granted to the #arbitral tribunal. This holds all the more true as, in case of a procedural decision, the #arbitral tribunal has an evident legal interest in the issuance of such a certificate.

ZH 01.12.2005

Therefore, there is a true gap in the statute within the meaning of Article 1 CC. This gap has to be filled as if the legislator had, when passing Article 193 PILA, envisaged the #facts not covered by the statute, i.e. that the parties to the contract do provide for an #arbitral tribunal, file proceedings accordingly, but then do not pay the #advance on costs (cf. Art. 40(3) in connection with Art. 41(4) [*of the 2004*] Swiss Rules) and therefore do not have a proper interest in the certificate of enforceability of the #award.

ZH 01.12.2005

2.8 No Certification for Expert Determination

The certification of enforceability applies only to #awards and not to #expert determinations.

*FSCD 107 Ia 318 [323-324]

3 *Certification of Conformity with the PILA (3)*

Article 194

XII. Foreign Arbitral Awards

The recognition and enforcement of a foreign arbitral award is governed by the New York Convention of 10 June 1958 on the Recognition and Enforcement of Foreign Arbitral Awards.

XII. Ausländische Schiedssprüche

Für die Anerkennung und Vollstreckung ausländischer Schiedssprüche gilt das New Yorker Übereinkommen vom 10. Juni 1958 über die Anerkennung und Vollstreckung ausländischer Schiedssprüche.

XII. Sentences arbitrales étrangères

La reconnaissance et l'exécution des sentences arbitrales étrangères sont régies par la convention de New York du 10 juin 1958 pour la reconnaissance et l'exécution des sentences arbitrales étrangères.

XII. Lodi stranieri

Il riconoscimento e l'esecuzione di lodi stranieri sono regolati dalla convenzione di Nuova York del 10 giugno 1958 concernente il riconoscimento e l'esecuzione delle sentenze arbitrali estere.

1 Principle

Foreign arbitral #awards may be considered an enforceable title within the meaning of Article 80 SDCB; they must be recognised and declared enforceable if there are no grounds for refusal under the NYC.

FSCD 144 III 360 [361-362]

Pursuant to Article 80(1) SDCB, the creditor availing itself of an #enforcement judgment may ask the court to #SADOSP. #Case law assimilates arbitral #awards with court judgments.

FSCD 5A_409/2014 c. 4, FSCD 4A_250/2013 c. 4.3.1, GE 16.10.2015 c. 3.1.1, GE 22.03.2013 c. 5.1, VD 30.10.2018 c. III.b, VD 05.03.2015 c. II.a

The decisions of #arbitral tribunals which do not have their #seat in Switzerland are foreign arbitral #awards. Like foreign judgments rendered by State courts, they need to be recognized in order to produce their effects in Switzerland. In #SADOSP proceedings, this #enforcement decision is taken incidentally on the basis of Article 81(3) SDCB. To this end and in order to rule on the admissible exceptions pursuant to this provision, the judge ruling on the #SADOSP must by virtue of Article 194 PILA apply the NYC.

FSCD 5A_409/2014 c. 4, VD 30.10.2018 c. III.b, VD 05.03.2015 c. II.a

Decisions of #arbitral tribunals which do not have their #seat in Switzerland are foreign arbitral #awards. These arbitral #awards, as well as foreign judgments, require #recognition by State courts in order to have effect in Switzerland. A Swiss State court is therefore only bound by the legal effect of a foreign arbitral #award if it can be recognised in Switzerland.

FSCD 4A_508/2010 c. 3.1

An independent #recognition procedure is not necessary: If a party in proceedings before a Swiss State court objects that a question has already been finally decided by a foreign #arbitral tribunal, the court must rather examine as a #preliminary issue whether the conditions for the #recognition of the foreign arbitral #award are met.

FSCD 4A_508/2010 c. 3.1

The conditions under which a foreign arbitral #award may be recognised are governed by Article 194 PILA in accordance with the NYC.

FSCD 4A_508/2010 c. 3.2

If the conditions for the #recognition of a foreign judgment are met, the foreign judgment shall be treated in the same way as a domestic judgment. On the one hand, it follows from this that a judgment handed down abroad cannot have any more far-reaching effect in Switzerland than in the sentencing state; #recognition can only extend to Switzerland the effects existing in the State of origin but cannot create new effects. On the other hand, even in comparison to a corresponding domestic judgment, the recognised judgment cannot have any other substantially more far-reaching effects. The legal effect of a foreign arbitral #award in Switzerland can therefore only be as far-reaching as the procedural law of the State of origin provides for. Conversely, it cannot go beyond the #legal force of an identical decision of an #arbitral tribunal having its #seat in Switzerland.

FSCD 4A_508/2010 c. 3.3

Any arbitral #award issued by an #arbitral tribunal domiciled abroad shall be deemed foreign within the meaning of the NYC and Article 194 PILA.

FSCD 4A_508/2010 c. 3.1, ZH 23.09.2016 c. III/4.1

Switzerland has been a party to the NYC since 1965.

ZH 05.11.2018 c. 4.1

As soon as it is notified, an arbitral #award deploys the same effects as a judicial decision (Art. 387 CCP). As a result, it constitutes a title for the #SADOSP within the meaning of Article 80 SDCB when it condemns a party to pay a sum of money.

GE 23.01.2018 c. 3.1

The decisive factor here is the information on the #seat of arbitration in the arbitral #award by which Swiss courts, which decide on #recognition and #enforcement, are bound. The place where any hearings have taken place and where the #arbitrator has acted is irrelevant.

ZH 23.09.2016 c. III/4.1 & III/4.2

Article 81(3) SDCB refers to the grounds for refusal of the NYC.

ZH 23.09.2016 c. III/4.4

Exequatur, i.e. the #recognition of the enforceability in Switzerland of foreign arbitral #awards, is in principle treated as a precondition for the #SADOSP, so that the creditor is not required to initiate specific proceedings prior to the proceedings for the #SADOSP.

GE 16.10.2015 c. 3.1.1

Foreign arbitral #awards are enforced like foreign decisions (FSCD 101 Ia 521). Enforceability is either decided on a preliminary basis in #enforcement proceedings (proceedings for #SADOSP or proceedings for the #attachment of assets), or the conditions of enforceability are examined in separate exequatur proceedings.

ZH 11.06.2014 c. 4b

Formally, the declaration of #enforceability of an arbitral #award ordering payment of money or provision of a security, like the declaration of #enforceability of a foreign civil judgment, can be made in a preliminary way in the #SADOSP

proceedings. A prior separate exequatur procedure is admissible, but not necessary.

ZG 30.07.2013 c. 4

The NYC applies to the #recognition and #enforcement of arbitral #awards which have been rendered in the territory of a State other than the one where the #recognition and #enforcement of the #awards are sought and resulting from disputes between natural or #legal persons.

GE 11.04.2014 c. 4.1.2

The enforcement of a foreign #award which includes a judgment ordering the payment of money takes place in the framework of the proceedings for the #SADOSP. The #respondent may invoke the grounds foreseen in the NYC, which by virtue of Article 194 PILA, are of general application or “erga omnes”.

GE 22.03.2013

2 *Relationship with the PILA*

If the #award, the #recognition of which is requested, has been rendered by an #arbitral tribunal having its #seat abroad, the dispute on exequatur is not governed by the PILA (Art. 176(1)), but the NYC, as provided for in Article 194 PILA.

FSCD 135 III 136 [139], FSCD 5A_754/2011 c. 3.3 (not published in FSCD 138 III 520)

The entry into force of Article 194 PILA has implicitly repealed the prerequisite of reciprocity introduced in 1995 pursuant to Article I(1)(2nd sentence) NYC.

VD 25.01.2001 c. 2

3 *Competent Authority*

Parties may expressly opt out of the proceedings for a provisional #SADOSP and agree on arbitration as the exclusive remedy instead. Absent such an express clause, an #arbitration agreement cannot be interpreted and construed as implying a #waiver of the #jurisdiction of the State courts to grant a provisional #SADOSP.

FSCD 136 III 583 [586]

An #award for the payment of an amount of money has to be enforced by #debt enforcement proceedings (Art. 38(1) SDCB). According to federal law (Art. 81(3) SDCB), the judge who decides on the #enforcement has #jurisdiction over the #SADOSP.

*FSCD 101 Ia 521 [523], FSCD 5A_754/2011 c. 3.3 (not published in FSCD 138 III 520), FSCD 17.10.1991 [(1992) SJ p. 180], FSCD 25.06.1991 [(1991) SJ p. 611], *FSCD 09.01.1995 [(2001) ASA p. 297], *FSCD 08.02.1978 [(1980) SJ p. 69], VD 30.08.2007 c. III, BS 05.11.2003 p. 3, GE 15.04.1999 [(2000) ASA p. 788], AR 05.08.1994 p. 3, TI 19.06.1990 [(1991) Rep p. 499], BS 06.09.1968 [(1968) RSJ p. 379]

Where there is a bi- or multinational international treaty binding Switzerland to the State where the judgment or arbitral #award was rendered, the judge responsible for the #SADOSP shall be the enforcement judge, provided that the judgment or foreign arbitral #award order the losing party to pay a sum of money or provide security. Article 81(3) SDCB therefore does not require, in these cases, an #enforcement procedure separate from that of the procedure for the #SADOSP.

GE 22.03.2013 c. 5.1

4 Powers of Review

Article 81(3) SDCB gives the debtor the right to plead the treaty-based defences with respect to the enforceability of foreign decisions against the creditor's request for the #SADOSP. If the court before which the #debt enforcement proceedings are pending was bound by a declaratory judgment as to enforceability of the #award rendered in separate #recognition proceedings, federal procedural law would be modified so as to become an unfettered review of the debtor's defences against the enforceability of the foreign decision, if the court were to decide that the #SADOSP would no longer be possible. Therefore, the question arises whether the court deciding on the #SADOSP has to examine with unfettered #powers of review the debtor's defences based on the treaty, irrespective of prior #recognition proceedings and regardless of the cantonal procedural law.

FSCD 116 Ia 394 [400-401], FSCD 5A_754/2011 c. 3.3 (not published in FSCD 138 III 520)

If the court acknowledges the authority of the foreign judgment and rejects the defences invoked by the debtor on the basis of an applicable international treaty, it still has to review the possible objections afforded by Swiss law originating in a fact after the judgment, to the extent that the debtor invokes them, if they may be invoked validly and can lead to the petition being rejected; these are the exceptions set forth at Article 81(1) SDCB.

FSCD 4A_250/2013 c. 4.3.1

Pursuant to Article 81(1) SDCB, when the collection procedure is based on an enforceable judgment issued by a Swiss court or administrative body, the judge sets aside the debtor's objection unless it proves by conclusive documents – among other possible defences – that the debt was extinguished after the judgment. Extinction of the debt in law does not merely mean payment but also any other civil law cause. It is for the debtor to establish that the debt is extinguished.

FSCD 4A_250/2013 c. 4.3.1

As opposed to what applies to provisional #SADOSP (Art. 82(2) SDCB), the debtor cannot merely show that it is likely to have been liberated; to the contrary, it must bring conclusive evidence. Moreover, the summary nature of the debt collection procedure based on a judgment does not allow the court to decide any delicate issues of substantive law or those for which the court's discretion plays an important role, as such issues belong exclusively with the court addressing the #merits. Moreover, Article 81(1) SDCB requires proof by conclusive documents of the extinction of the debt in order to uphold the objection. The enforcement title within the meaning of Article 81(1) SDCB creates a presumption that the debt exists, and this presumption may be reversed only by conclusive evidence to the contrary.

FSCD 4A_250/2013 c. 4.3.1

The debtor's defences in the #SADOSP proceedings are narrowly limited; in order to prevent any obstruction of the #enforcement, the final order for the #SADOSP can therefore only be reversed by strict #evidence to the contrary, i.e. perfectly clear titles. Thus, it is not for the judge hearing a request for the #SADOSP to decide on questions of substantive law or questions, the solution of which

requires the exercise of significant discretion, the decision on such questions being reserved for the judge of the #merits; the same applies to the question of whether the creditor's behaviour constitutes an #abuse of right and violates the rules of #good faith, because the answer to these questions requires an analysis of the legal situation according to the substantive law.

GE 22.03.2012 c. 5.1

The procedure for the #SADOSP cannot lead to a review on the #merits of the decision ordering payment of a sum of money, the judge having #jurisdiction only to examine, as the case may be, the enforceability, *res judicata* or binding nature of the judgment relied on by the creditor and not to examine whether the procedure leading to the judgment was flawed, subject to the means reserved by a bilateral or multilateral treaty on reciprocal #enforcement (Art. 83(1) SDCB).

GE 22.03.2012 c. 5.1

When the #award, the #enforcement of which is claimed, is invoked as a title for the claim under #enforcement, the judge hearing the motion for the #SADOSP decides on the issue of #enforcement, without it being necessary to mention the exequatur in the #operative part of the judgment, whether the #SADOSP is granted or not. In particular, if the #SADOSP is rejected based on a ground in relation with the conditions under which the foreign decision is enforced or based on another ground, the #operative part will not decide on the exequatur.

VD 30.08.2007 c. III

The #powers of review of the #court deciding on a motion to #SADOSP in the context of Article 80 SDCB, with regard to the #grounds for setting aside pursuant to Article 190(2) PILA, are limited to the #facts which are susceptible of making the #award appear to be absolutely null and void.

ZH 30.06.2003 p. 9

The judge deciding on the #SADOSP has no #jurisdiction to examine the decision of the tribunal which issued the certification.

SO 27.09.2001 [(2003) ASA p. 423]

5 *Documents to Submit*

In principle, the creditor only has to submit to the judge deciding on the #SADOSP, the #award pursuant to Article 189 PILA and possibly the certification of enforceability according to Article 193(2) PILA.

FSCD 130 III 125 [129], FSCD 5A_682/2009 c. 4.2.3.3

If these documents are presented, there is little space left for #grievances that there is no #award at all within the meaning of Article 189 PILA or that the #award is null and void or not enforceable.

FSCD 130 III 125 [129], *FSCD 117 III 57 [59]

It is not arbitrary to grant definitively the #SADOSP even without the submission of an #arbitration agreement.

FSCD 130 III 125 [130]

In proceedings for the #SADOSP, the judge only decides on the basis of the documents produced, in this case an enforceable judgment or a title treated as such. It is not required to review or interpret the #title to #SADOSP which has been produced; for judgments, only the #operative part counts. Arbitral #awards are assimilated to judgments.

GE 22.03.2013 c. 7.1

6 *Grievances and Defences*

#Grievances not provided for in the #grounds for setting aside of Article 190(2) PILA cannot be heard in the proceedings for the #SADOSP. However, #grounds for setting aside which can be pleaded in the #motion to set aside, must in principle be pleaded in these proceedings and not in the subsequent proceedings on the #SADOSP. In fact, in such a case, possibilities of setting aside are provided by the statute. The same applies to #grievances which can be raised in the proceedings on the certification of enforceability pursuant to Article 193(2) PILA.

FSCD 130 III 125 [129], *FSCD 117 III 57 [59-60], BS 05.11.2003 [p. 3]

A #grievance regarding a lack of #jurisdiction of the #arbitral tribunal cannot be heard in the proceedings for the #SADOSP.

FSCD 130 III 125 [129]

Since a lack of #reasons of an #award does not constitute a #ground for setting aside pursuant to Article 190(2) PILA, this fact cannot hinder the #enforcement.

FSCD 130 III 125 [130]

There can be cases where there is a non-award, respectively an #award which is null and void, which have to be taken into account in the #enforcement proceedings despite the fact that there is a #ground for setting aside pursuant to Article 190(2) PILA. It could be that an #award cannot be recognised as a decision because of its appearance, so that the party does not have any reason to challenge the non-award. When there is no #arbitration agreement at all, and when no proceedings have taken place, it is also possible that the #award is flawed by an error which is so fundamental that it is null and void.

FSCD 130 III 125 [132]

Article 81(3) SDCB gives the debtor the right to plead the treaty-based defences with respect to the enforceability of foreign decisions against the creditor's request for the #SADOSP. If the court before which the #debt enforcement proceedings are pending was bound by a declaratory judgment as to the enforceability of the #award rendered in separate #recognition proceedings, federal procedural law would be modified so as to become an unfettered review of the debtor's defences against the enforceability of the foreign decision, if the court were to decide that the #SADOSP would no longer be possible. Therefore, the question arises whether the court deciding on the #SADOSP has to examine with unfettered #powers of review the debtor's defences based on the treaty, irrespective of prior #recognition proceedings and regardless of the cantonal procedural law.

FSCD 116 Ia 394 [400-401]

The debtor's defences are those provided for in Article 81(1) SDCB, as well as those reserved by the applicable international convention.

GE 22.03.2013 c. 5.1

7 *Special Proceedings Requesting the Attachment of Assets*

A judge hearing a request for the #attachment of assets on the basis of a foreign arbitral #award can rule incidentally on the enforceability of the arbitral #award following a #summary examination of the law applied to the #facts and will thereafter issue a provisional decision. A more in-depth examination of the conditions found in Article 5 NYC will take place subsequently in the objection procedure to the attachment order.

FSCD 139 III 135 [141], VD 19.12.2014 c. IV.b.

However, given the consequences of its decision – although provisional – on the debtor’s estate, the judge must examine with care the conditions for the #recognition and #enforcement, in particular if the foreign judgment has been rendered by default or in a State with which there is no reciprocity with respect to the #recognition and #enforcement of decisions.

FSCD 139 III 135 [143], VD 19.12.2014 c. IV.b., VD 11.11.2014 c. II.b

Doctrine and #case law agree that the notion of a definitive title to the #SADOSP within the meaning of Article 271(1)(6) SDCB includes all Swiss and foreign judgments including the “non Lugano” judgments and foreign arbitral #awards.

VD 19.12.2014 c. IV.b., VD 11.11.2014 c. II.b

Initially - after the introduction of the new ground for #attachment of assets under Article 271(1)(6) SDCB - it was controversial what could be regarded as the definitive title to the #SADOSP in this context. In the meantime, the FSCD 139 III 135, cited several times, has been issued and has created clarity in various respects: even foreign non-Lugano Convention titles, including arbitral #awards, belong in this category and can form the basis of an #attachment of assets, even if they have not previously been declared enforceable.

ZH 14.03.2014 c. 3a

An affidavit or an affidavit under oath under foreign law is understood to mean “written declarations of facts which are accepted by a competent official abroad in a certain procedure under special, criminal-law sanctioned confirmation of the truth for the attention of a court or an authority”. Whether and how they can be taken into account by the law of #evidence of the CCP is controversial. The extent to which a counsel’s declaration of enforceability proves a fact or whether it is more an issue of answering a legal question cannot be generally assessed. Such an affidavit is not necessary in proceedings such as the present one [*#attachment of assets*], where enforceability merely has to be made credible, at any rate. Whether or not an #appeal has #suspensive effect by operation of law is a question of the relevant appeal system; whether its #suspensive effect has been granted or withdrawn in an individual case is first and foremost a question of whether deviations from the statutory provision are permissible, and secondly whether a corresponding application has been filed and granted. If enforceability has been shown to be credible, no additional confirmation is required.

ZH 14.03.2014 c. 7

A final and enforceable arbitral #award constitutes a definitive #title for the #SADOSP. This is therefore a case of #attachment - that of Article 271(1)(6)

SDCB - and the likelihood of the existence of the debt follows directly from the title produced.

VD 03.04.2013 c. II.b

There is controversy as to whether foreign rulings outside the scope of the Lugano Convention and foreign arbitral #awards are also considered definitive titles for the #SADOSP within the meaning of Article 271(1)(6) SDCB. As far as can be ascertained, the question has not yet been clarified by the highest court. The Message expressly states that the ground for #attachment of assets pursuant to para. 6 is also available to the persons entitled under a foreign decision or an equivalent instrument, such as a foreign enforceable authentic instrument, outside the scope of the Lugano Convention (Message of the Swiss Federal Council of 18 February 2009, FS 2009 1777 et seq., 1821). By contrast, the Message does not explicitly comment on the quality of the title of foreign arbitral #awards within the meaning of Article 271(1)(6) SDCB. However, doctrine submits that such arbitral #awards can be declared enforceable as a preliminary issue and that such a #summary examination is sufficient as a precondition for the granting of #attachment of assets.

SZ 19.07.2012 c. 2a

Where arbitral #awards are made in countries which are member States of the NYC, #recognition and #enforcement shall take place in accordance with Article 1(2) PILA in conjunction with Article I NYC. That Convention, as well as Articles 25 et seq. PILA for decisions of foreign State courts outside the scope of the Lugano Convention, in contrast to the Lugano Convention, do not in themselves provide for a unilateral declaration of #enforceability; rather, it provides for the debtor to be heard during the procedure for the declaration of #enforceability. However, a declaration of #enforceability as a #preliminary issue proves to be sufficient as the debtor has the possibility to later object to the prerequisites of the declaration of enforceability according to Article I NYC and Articles 25 et seq. PILA respectively within the framework of the objection to the #attachment proceedings and the proceedings for the #SADOSP.

SZ 19.07.2012 c. 2a; see also ZG 07.02.2013 c. 3

An #attachment may be ordered upon presentation of a foreign judgment rendered outside the scope of the Lugano Convention in the absence of a prior exequatur decision. The same applies to an arbitral #award, in particular when it is subject to the NYC.

VD 12.04.2012 c. II. Cc

8 *Special Proceedings for Declarations of Enforceability*

Judgments or #awards which order a debtor to pay a certain amount of money or a security deposit, can be declared enforceable by the competent cantonal authority at the request of the creditor, independently of #debt enforcement proceedings or proceedings for the #SADOSP; even with regard to Article 81(3) SDCB, the cantons are not prohibited from providing special enforcement proceedings for declarations of enforceability of foreign judgments or arbitral #awards ordering the payment of money or a security, even though a treaty is applicable. It is adequate under federal law if the creditor cannot be referred to independent proceedings for the #recognition and #enforcement after the filing of #debt enforcement proceedings.

FSCD 130 III 125 [128-131], *FSCD 116 Ia 394 [400], GE 10.10.1985 [(1987) Yearbook p. 509], *FSCD 08.02.1978 [(1980) SJ p. 69]; see however FSCD 25.06.1991 [(1991) SJ p. 611-612]

9 *Interpretation of the Award*

The NYC, to which Switzerland is a party, determines the conditions under which foreign arbitral #awards can be executed in the member States, but not how they will be executed. Therefore, in most cases the #award will be declared enforceable with its ambiguities, contradictions and gaps.

VD 04.08.1989 [(1990) ASA p. 268]

It is therefore up to the enforcing court to interpret the #award if necessary.

VD 04.08.1989 [(1990) ASA p. 269]

10 *Remedy Against a Decision on Recognition and Enforcement*

10.1 Appeal in Civil Matters

The #appeal was filed within the #time limit (Art. 100(1) FSCA) against a final decision (Art. 90 FSCA) rendered by a higher court having ruled on the #appeal (Art. 75(1) & (2) FSCA) concerning the exequatur of foreign arbitral #awards – by virtue of the NYC – in the framework of proceedings to finally dismiss objections (Art. 72(2)(b)(1) FSCA in connection with Art. 81(3) SDCB and 194 PILA). The #amount in dispute reaches the legal threshold (Art. 74(1)(b) FSCA in connection with Art 52 FSCA). The #appellant who was unsuccessful before the prior authority has an interest worthy of protection in the modification of the decision taken and therefore is entitled to #appeal (Art. 76(1) FSCA).

FSCD 5A_862/2017 c. 1

Filed by a party which participated in the previous instance and has lost in its #prayers for relief (Art. 76(1) FSCA), against a final decision (Art. 90 FSCA) concerning the #recognition and #enforcement of an foreign arbitral #award (Art. 72(2)(b)(1) FSCA) rendered by a cantonal instance of last resort (Art. 75(1) FSCA) in a financial matter whose #amount in dispute largely exceeds the threshold of CHF 30,000 of Article 74(1)(b) FSCA, the #appeal is in principle admissible, as it has been filed in the #time limit (Art. 100(1) FSCA) and the form (Art. 42 FSCA) provided for by the statute.

FSCD 5A_862/2017 c. 1, FSCD 4A_250/2013 c. 1.1, FSCD 5A_68/2013 c. 1.2, FSCD 5A_754/2011 c.1.1 (not published in FSCD 138 III 520), FSCD 4A_124/2010 c.1.1, FSCD 4A_233/2010 c. 1.1, FSCD 4A_403/2008 c. 1.1 (not published in FSCD 135 III 136)

Based on the exception of Article 106(2) FSCA, the Federal Supreme Court does not hear #appeals based on the violation of a Constitutional right or on an issue related to cantonal or intercantonal law if the #ground for appeal has not been stated and reasoned in detail by the #appellant. Otherwise, the Federal Supreme Court applies the law *ex officio* (Art. 106(1) FSCA), without being bound by the arguments made in the #appeal or by the #reasons stated in the appealed decision; therefore, the Federal Supreme Court may grant an #appeal for other reasons than those which have been brought forward, or – to the contrary – dismiss an #appeal by adopting a different reasoning than the one of the previous instance.

FSCD 4A_250/2013 c. 1.2, FSCD 5A_68/2013 c. 2.1, FSCD 4A_124/2010 c. 1.2, FSCD 4A_233/2010 c. 1.3.1, FSCD 4A_403/2008 c. 1.2 (not published in FSCD 135 III 136)

However, taking into account the requirement of stating #reasons pursuant to Article 42(1) & (2) FSCA, without which the #appeal would not be heard (Art. 108(1)(b) FSCA), the Federal Supreme Court examines in principle only the #grounds for appeal which have been pleaded. It does not have to treat all legal issues as a court of first instance would do, if these issues are not discussed any more before it. In an #Appeal in Civil Matters, the Federal Supreme Court develops its legal #reasons based on the #facts established by the previous authority (Art. 105(1) FSCA). It can only depart from these #facts if the #fact-findings of the cantonal authority have been done in a manifestly inexact way,

notion which corresponds to the one of *arbitrariness* within the meaning of Article 9 FC – or in violation of the law within the meaning of Article 95 FSCA (Art. 105(2) FSCA), provided that the correction of the flaw is proper to influence the outcome of the case (Art. 97(1) FSCA). It is up to the *appellant* to expressly claim a *ground* in this respect and to present a clear and detailed demonstration. No new *evidence* or fact may be presented, save if it results from the decision of the previous authority (Art. 99(1) FSCA). The Federal Supreme Court may not go beyond the parties' *prayers for relief*. Any new *prayer for relief* may not be heard (Art. 99(2) FSCA).

FSCD 4A_250/2013 c. 1.2, FSCD 5A_68/2013 c. 2.1, FSCD 4A_124/2010 c. 1.2 & c. 1.3, FSCD 4A_233/2010 c. 1.3.1, FSCD 4A_403/2008 c. 1.2 (not published in FSCD 135 III 136)

The *Appeal in Civil Matters* as defined in Articles 95 and 96 FSCA may be filed for a violation of the law. Seized by an *appeal* for a violation of an international treaty (Art. 95(b) FSCA), the Federal Supreme Court examines with unfettered *powers of review* the *merits* of the claims based on a violation of an international convention.

FSCD 4A_124/2010 c.1.2, FSCD 4A_233/2010 c. 1.3.1, FSCD 4A_403/2008 c. 1.2 (not published in FSCD 135 III 136)

10.2 Admissible Prayers for Relief

Due to the requirements of Article 90(1)(b) fSOFJ with respect to the indication of *reasons*, the *appellant* has to indicate, based on the challenged decision, what provision of the treaty has been violated in its view and to specify what constituted the violation.

FSCD 4P.173/2003 c. 1.2

A *prayer for relief* requesting that the matter be referred for a new decision in accordance with the *reasons* of the Federal Supreme Court is superfluous.

FSCD 09.01.1995 [(2001) ASA p. 297]

In the context of a [*former*] *motion for constitutional review* pursuant to Article 84(1)(c) fSOFJ, the Federal Supreme Court can be requested not only to set aside the challenged decision, but also to grant the *SADOSP*, if the situation is clear. Thus, the *prayer for relief* to grant the *SADOSP* is admissible. However, if the Federal Supreme Court grants the motion merely for a violation of Article 8 FC, it can then only set aside the challenged decision and must refer the matter to the inferior instance for a new decision on the *SADOSP*.

FSCD 5P.371/1999 [(2002) ASA p. 267]

10.3 New Factual and Legal Claims

In [*former*] *motions for constitutional review* based on violations of international treaties, there is a general *prohibition* against submitting new factual or legal *claims* and requesting the taking of new *evidence*. However, the following four exceptions apply. New factual and legal *claims* are admissible if the *reasons* given in the challenged decision trigger the submission of new *claims*. New *claims* are also admissible on points which are evident, and which therefore should obviously have been taken into account by the cantonal authority.

Another exception applies to #claims which become important for the first time in the context of the determination of #facts pursuant to Article 95 fSOFJ. New legal #claims are finally admissible if the last cantonal instance had unfettered #powers of review and had to apply the law *ex officio*.

FSCD 128 I 354 [357-358]

According to Article 86(2) fSOFJ, new legal means can only be heard in this matter if the cantonal authority of last instance had unfettered #powers of review and had to apply the law *ex officio*.

FSCD 09.01.1995 [(2001) ASA p. 297]

10.4 Powers of Review of the Federal Supreme Court

The Federal Supreme Court examines the interpretation and the application of an international treaty such as the NYC, provided the #appellant's #grievances respect Article 90(1)(b) fSOFJ, within the limits of the #grievances raised, with unfettered #powers of review, since these violations represent the specific #ground for setting aside of Article 84(1)(c) fSOFJ.

FSCD 128 I 354 [357], FSCD 119 II 380 [382-383], FSCD 108 Ib 85 [87], FSCD 101 Ia 521 [523], FSCD 5P.371/1999 c. 1a, FSCD 09.01.1995 [(2001) ASA p. 296]

The Federal Supreme Court examines the application of Articles 80 and 81 SDCB only with #powers of review limited to #arbitrariness.

FSCD 125 III 386 [388], FSCD 5P.371/1999 [(2002) ASA p. 267], FSCD 09.01.1995 [(2001) ASA p. 296]

The Federal Supreme Court only reviews whether the application of a foreign law in a financial matter is arbitrary.

FSCD 5A_862/2017 c. 3.2

Seized by a [former] #motion to set aside pursuant to Article 84(1)(c) fSOFJ, the Federal Supreme Court examines with unfettered #powers of review, within the limit of the #grievances raised, whether an international treaty has been violated (FSCD 108 Ib 85 [87]); if the challenged decision has been rendered by a judicial authority, the Federal Supreme Court's #powers of review are, on the contrary, limited to #arbitrariness with regard to the examination of the #facts, the #claim of new #facts is therefore not possible.

FSCD 4P.173/2003 c. 1.3

**Convention on the Recognition and Enforcement
of Foreign Arbitral Awards (New York, 1958)**

Article I

- 1. This Convention shall apply to the recognition and enforcement of arbitral awards made in the territory of a State other than the State where the recognition and enforcement of such awards are sought, and arising out of differences between persons, whether physical or legal. It shall also apply to arbitral awards not considered as domestic awards in the State where their recognition and enforcement are sought.**
- 2. The term "arbitral awards" shall include not only awards made by arbitrators appointed for each case but also those made by permanent arbitral bodies to which the parties have submitted.**
- 3. When signing, ratifying or acceding to this Convention, or notifying extension under Article X hereof, any State may on the basis of reciprocity declare that it will apply the Convention to the recognition and enforcement of awards made only in the territory of another Contracting State. It may also declare that it will apply the Convention only to differences arising out of legal relationships, whether contractual or not, which are considered as commercial under the national law of the State making such declaration.**

1 Scope of Application (1)

1.1 Principle

If an #arbitration defence is raised before a State court in Switzerland and the #arbitration agreement provides that the #seat of the #arbitral tribunal is in Switzerland, the NYC does not apply.

FSCD 122 III 139 [141]

The question of whether a foreign arbitral #award is capable of #enforcement is always governed by the provisions of the NYC.

FSCD 116 Ia 394 [397], FSCD 5A_68/2013 c. 4.1

Any arbitral #award issued by an #arbitral tribunal domiciled abroad shall be deemed foreign within the meaning of the NYC and Article 194 PILA.

FSCD 4A_508/2010 c. 3.1, ZH 23.09.2016 c. III/4.1

The decisive factor here is the information on the #seat of arbitration in the arbitral #award by which the Swiss courts, which decide on #recognition and #enforcement, are bound. The place where any hearings have taken place and where the #arbitrator has acted is irrelevant.

ZH 23.09.2016 c. III/4.1 & III/4.2

Foreign arbitral #awards are enforced like foreign decisions (FSCD 101 Ia 521). Enforceability is either decided on a preliminary basis in #enforcement proceedings (proceedings for the #SADOSP or proceedings for the #attachment of assets), or the conditions of enforceability are examined in separate exequatur proceedings.

ZH 11.06.2014 c. 4b

This Treaty, initially ratified by Switzerland under the condition of reciprocity, is applied in Switzerland *erga omnes* since 23 April 1993. It applies as soon as there is a foreign arbitral #award, i.e. as soon as the #award in question has been rendered by an #arbitral tribunal which has its #seat outside of Switzerland.

VD 25.01.2001 c. 2, GE 15.04.1999 [(2000) ASA p. 788]

It does not matter whether the parties are domiciled and whether the #seat of the arbitration is in a member State of the NYC. It is sufficient that the seized State court is a State court of a member State. This principle deserves to be repeated, contrary to a decision of the Federal Supreme Court (FSCD 121 III 38) which seems to impose prerequisites which are not provided for in the NYC.

VD 25.01.2001 c. 2

The fact that one of the parties had its #seat in a State which is not a member of the NYC is of no importance.

GE 14.04.1983 [(1984) SJ p. 38]

1.2 Interpretation of the NYC

The NYC must be interpreted in accordance with Articles 31-33 of the Vienna Convention on the Law of Treaties of 23 May 1969. According to Article 31(1) of the Vienna Convention, a treaty shall be interpreted in #good faith in accordance with the ordinary meaning to be given to the terms of the treaty in light of its context and its object and purpose.

FSCD 138 III 520 [525-526]

The purpose of the NYC is to facilitate the #recognition and #enforcement of foreign arbitral #awards thus requiring the treaty to be interpreted in favour of #enforcement. Courts should therefore take a pragmatic, flexible and non-formalistic approach.

FSCD 138 III 520 [526], FSCD 5A_467/2014 c. 2.3, VD 30.10.2018 c. III.b, VD 05.03.2015 c. IV.b

1.3 “Arbitral Awards”

The NYC does not define what should be understood as an arbitral #award.

FSCD 4A_374/2014 c. 4.3.2.1

It is debated whether the characterization as an arbitral #award within the meaning of the NYC depends upon the law of the State of origin of the decision, upon the law of the State of #enforcement or is an autonomous decision to be made on the basis of the NYC.

FSCD 4A_374/2014 c. 4.3.2.1

In order to be characterized as an arbitral #award, a decision of private origin must be comparable to that of a State court.

FSCD 4A_374/2014 c. 4.3.2.1

If a State Court is entitled to modify an arbitral #award in proceedings on a #motion to set aside, its decision is no longer an arbitral #award. Articles 25 et seq. PILA are decisive for the #recognition and #enforcement of such a State court decision. The NYC is not applicable.

FSCD 4A_233/2010 c. 1.2, FSCD 4A_137/2007 c. 5

1.4 NYC and PILA

If the #arbitration agreement provides for an international arbitration and the #seat of the #arbitral tribunal is within Switzerland, the question whether the #arbitration agreement excludes the substantive #jurisdiction of the State court has to be examined pursuant to Article 7 PILA.

FSCD 4A_160/2009 c. 4.1

The NYC prevails in principle over the PILA (Art. 1(2) PILA).

SG 16.01.2007 c. 1, VD 22.12.2004 c. 3

If the alleged #seat of the #arbitral tribunal is not in Switzerland – as in the case at hand, in The Hague – the NYC is applicable and not the PILA, whose application presupposes that the #seat of the #arbitral tribunal is in Switzerland (Art. 176(1), Art. 1(2) PILA).

VD 02.05.2006 p. 5-6

The relationship between the PILA and the NYC is governed by the most favourable principle [*Günstigkeitsprinzip*], i.e. the NYC does not exclude the application of the PILA, but the provisions which are more favourable to the creditor apply in each case.

ZH 30.05.2005 c. 2

1.5 NYC and Lugano Convention

According to Article 1(1), first sentence and 1(2)(d) of the Lugano Convention, the Convention applies in civil and commercial matters irrespective of the nature of the #jurisdiction. Arbitration is excluded from its application. Indeed, different international agreements, notably the NYC, already set forth rules which must be respected by State jurisdictions concerning the #recognition and #enforcement of arbitral #awards.

FSCD 5A_1056/2017 c. 5.1.1

The notion of arbitration is interpreted in an autonomous manner in order to ensure the uniform application of the Lugano Convention.

FSCD 5A_1056/2017 c. 5.1.1

The exclusion concerns arbitration as a whole, including the proceedings introduced before State jurisdictions. Are notably concerned the decision regarding the #validity of the #arbitration agreement, the #setting aside, modification, #recognition and #enforcement of arbitral #awards as well as those regarding the implementation of the #arbitral proceedings.

FSCD 5A_1056/2017 c. 5.1.1

With respect to the State proceedings foreseen, it concerns those which are functionally linked to the #arbitral proceedings. In order to determine them, only the principal object of the proceeding must be taken into account, or the nature of the right which this proceeding ensures the safeguard of, which falls or not within the scope of application of the Lugano Convention. This is linked to arbitration when it aims to protect the right of the parties to submit their dispute to this method of dispute resolution. Therefore, the proceeding which is being carried out in parallel to the #arbitral proceedings and is intended to support this proceeding is subject to the Lugano Convention (parallel proceeding) whilst the proceeding whose object is to execute the #arbitral proceeding (ancillary proceeding) is excluded from its scope. A State decision which is functionally linked to arbitration will be recognized and enforced according to an international convention or according to the national rules of the requested State.

FSCD 5A_1056/2017 c. 5.1.1

The Lugano Convention does not apply to arbitration (Art. 1(2)(4) Lugano Convention).

FSCD 4A_160/2009 c. 4.1

The arbitral #awards, court decisions which assist #arbitral proceedings (e.g. those regarding the appointment or the challenge of #arbitrators, the determination of the #seat of the #arbitral tribunal, the extension of the time limit for the rendering of the #award) or which are however connected to it (e.g. those which decide on the #validity of an #arbitration agreement, or those which concern the setting aside, the modification, the #recognition and #enforcement of an arbitral #award) cannot be subject to exequatur under the Lugano Convention. Decisions which only incorporate an arbitral #award, as it is often the case in the United Kingdom, or which only confirm them, are likewise excluded from the scope of application of the Lugano Convention.

*TI 21.07.1997 [(2000) ASA p. 361]

1.6 Distinction Between Recognition and Enforcement

The distinction between #recognition and #enforcement of a judgment or an #award is delicate. The two notions must be distinguished. In principle, all judgments can be subject to #recognition. On the contrary, constitutive and declaratory #operative parts of judgments which cannot be subject to #debt enforcement proceedings cannot be the object of a declaration of enforceability (exequatur) within the precise meaning of this notion.

NE 15.01.1996 [(1996) RJN p. 61]

If the #enforcement of a foreign arbitral #award is refused with regard to a portion of the #operative part, this constitutes a decision not to hear the case due to procedural #inadmissibility, which does not have any substantive #legal force as to the #recognition; such a decision does not in principle hinder a new request for #recognition of this specific portion of the #operative part of the #award.

NE 15.01.1996 [(1996) RJN p. 61-62]

1.7 No Retroactive Effect

It is not possible to attach any #retroactive effect to the Federal Ordinance of 2 March 1965 by which Switzerland has acceded to the NYC. Therefore, the NYC is not applicable to arbitral #awards rendered before the ratification of the NYC by Switzerland.

GE 12.05.1967 [(1968) SJ p. 638]

1.8 Uncertain Seat of the Arbitral Tribunal

The #recognition of arbitral #awards in Switzerland is governed by the NYC even when the #seat of the #arbitral tribunal is not determined.

TI 19.06.1990 [(1991) Rep p. 499]

1.9 Principle of Good Faith and the Prohibition of an Abuse of Right

The principles of #good faith in procedure and the prohibition of an #abuse of right, now anchored in Article 52 CCP, apply to the #recognition and #enforcement of foreign judgments and arbitral #awards and, in particular, to #arbitral proceedings. These principles prohibit, in particular, the adoption of contradictory conduct.

VD 30.10.2018 c. IV.b.cc

2 *Specific and Permanent Arbitral Bodies (2)*

The NYC treats in the same manner arbitral #awards issued as a result of institutional and ad hoc arbitration.

FSCD 4A_374/2014 c. 4.3.2.1

3 *Limitations of the Scope of Application (3)*

This Treaty, initially ratified by Switzerland under the condition of reciprocity, is applied in Switzerland *erga omnes* since 23 April 1993. It applies as soon as there is a foreign arbitral [#]award, i.e. as soon as the [#]award in question has been rendered by an [#]arbitral tribunal which has its [#]seat outside of Switzerland.

VD 30.08.2007 c. III, GE 15.04.1999 [(2000) ASA p. 788]

The entry into force of Article 194 PILA has implicitly repealed the prerequisite of reciprocity introduced in 1995 pursuant to Article I(1)(2nd sentence) NYC.

VD 25.01.2001 c. 2

Article II

- 1. Each Contracting State shall recognize an agreement in writing under which the parties undertake to submit to arbitration all or any differences which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not, concerning a subject matter capable of settlement by arbitration.**
- 2. The term "agreement in writing" shall include an arbitral clause in a contract or an arbitration agreement, signed by the parties or contained in an exchange of letters or telegrams.**
- 3. The court of a Contracting State, when seized of an action in a matter in respect of which the parties have made an agreement within the meaning of this article, shall, at the request of one of the parties, refer the parties to arbitration, unless it finds that the said agreement is null and void, inoperative or incapable of being performed.**

1 *Arbitration Agreement (1)*

1.1 Examination of the Validity

Article II(1) & (2) NYC allow the State court, before which the #recognition and #enforcement of the arbitral #award is sought, to examine the formal and substantive #validity of the #arbitration agreement. The formal requirement of an "agreement in writing" being one of the conditions for the application of the NYC, the Swiss court deciding on the #SADOSP must decide in a preliminary manner on the #validity of the agreement on which the #arbitrators based their #jurisdiction and on the basis of which they rendered the #award.

GE 14.04.1983 [(1984) SJ p. 39]

1.2 Law Applicable to the Validity

Within its scope of application, the NYC replaces national law and it therefore guarantees a uniform application by the member States.

FSCD 21.03.1995 [(1996) ASA p. 259]

Therefore, the question of (formal) #validity has to be examined exclusively according to the treaty. The requirement for a written agreement pursuant to Article II NYC must be interpreted independently, without taking national law into account.

FSCD 21.03.1995 [(1996) ASA p. 259]

Issues which are not uniformly regulated by the NYC itself, such as the material scope of application of the #arbitration agreement, have to be decided in accordance with the law designated by the conflict of law rules of Article V(1)(a) NYC, which override the otherwise applicable #conflict of law rules of the State of #enforcement according to its autonomous law.

FSCD 21.03.1995 [(1996) ASA p. 259-260]

The substantive #validity and the material scope of the #arbitration agreement are among such legal issues.

FSCD 21.03.1995 [(1996) ASA p. 260-261]

According to prevailing doctrine and pursuant to Article V(1)(a) NYC, the question of the #validity of the #arbitration agreement has to be examined, in the absence of a #choice of law, in accordance with the law of the #seat of the #arbitral tribunal (respectively, pursuant to the NYC, according to the law of the State where the #award has been rendered).

ZH 26.05.1994 [(1997) ASA p. 265]

1.3 Autonomy

- For the #autonomy of the #arbitration agreement according to the PILA, see Article 178(3) PILA

The principle of #autonomy of the #arbitration agreement with regard to its #validity is generally recognised in international arbitration. In fact, such a clause can be validly concluded even if this is not the case for the contract in which it is inserted, and conversely.

GE 14.04.1983 [(1984) SJ p. 40]

1.4 Interpretation of Unclear Dispute Resolution Clauses

A valid #arbitration agreement can only be concluded by a common intent of the parties to submit a possible dispute to arbitration. The existence of such an agreement has to be interpreted according to the general principles of the CO, in particular Article 2 CO. As an #arbitration agreement has significant consequences, the court should not admit too easily the conclusion of such an agreement.

VD 30.03.1993 [(1995) ASA p. 66]

In a context where the conclusion of an agreement should not be admitted too easily, one cannot be satisfied with an unclear clause as #evidence for an agreement with an uncertain object.

VD 30.03.1993 [(1995) ASA p. 67]

There is no valid #arbitration agreement if the parties have agreed, when concluding their contract, on the #jurisdiction of the State courts at the seat of the supplier and then one of the parties later sent a new clause with the term "jurisdiction: Milan" to the opposing party and finally sent a third version in which "Milan" was replaced by "International Chamber of Commerce in Paris", even if the addressee did expressly agree to the third clause.

VD 30.03.1993 [(1995) ASA p. 66]

1.5 Power of Attorney of the Signatory of the Arbitration Agreement

A valid #arbitration agreement can be concluded by the written confirmation of a contract referring to the buyer's #general terms and conditions which contain an #arbitration agreement, even when the signatory of the confirmation was not entitled to bind the company it represented by its signature. The #power of attorney can in fact be given informally, even by #implied actions, and in particular by tolerating actions of an employee who appears as an authorised person to third parties. Furthermore, the existence of a #power of attorney for a corporation does not require a record in the commercial register and the conclusion of a sales contract with an #arbitration agreement is not an extraordinary action which would have needed special authorisation in a company active in import/export.

FSCD 76 I 338 [351-354]

1.6 Participation of Parties who are not Bound by the Arbitration Agreement

If parties which are not bound by the #arbitration agreement participate in a #multi-party dispute, the #arbitration agreement is in principle binding on the other parties which have signed it, even if this amounts to a splitting of the proceedings. The mere risk that the different proceedings could lead to contradictory rulings in the field of application of the NYC does not deprive the #arbitration agreement of its #validity or its enforceability and does not exclude the #jurisdiction of the #arbitral tribunal.

FSCD 124 III 83 [88]

The parties which are not bound by the #arbitration agreement can be referred to proceedings before the State courts.

FSCD 124 III 83 [88]

1.7 Simulated Arbitration Agreement

The party resisting #enforcement cannot allege that the agreement containing the #arbitration agreement is simulated. Whether a contract is simulated or not concerns its substantive existence.

ZH 26.05.1994 [(1997) ASA p. 266]

The intent of the NYC is to largely limit the #jurisdiction of the State court in the #enforcement proceedings of arbitral #awards to procedural issues and to avoid that the proceedings be reopened with respect to substantive issues.

ZH 26.05.1994 [(1997) ASA p. 266]

If a *prima facie* examination reveals a formally valid #arbitration agreement, the #respondent must plead in the #arbitral proceedings and must allege the #facts which establish a simulation. To decide the contrary would empty the whole field of international arbitration of its substance, because the #enforcement court could examine once again in each case the substantive content of the contractual relationship.

ZH 26.05.1994 [(1997) ASA p. 266]

This is why simulation cannot be invoked as a #ground for refusal pursuant to Article V(1)(a) NYC. One must assume that the party which signed an #arbitration agreement of its own free will is bound by it, independently of what the parties wanted in the hidden contract.

ZH 26.05.1994 [(1997) ASA p. 267]

1.8 Incorporation of an Arbitration Agreement via General Terms and Conditions

If an #arbitration agreement is entered into via a reference to #general terms and conditions or in a #standard-form contract, it does not matter in principle whether the opposing party has indeed read the conditions and therefore knew that the #general terms and conditions contained an #arbitration agreement.

FSCD 110 II 54 [59], FSCD 76 I 338 [350], ZH 30.08.1993 [(1993) ASA p. 536]

1.9 Jurisdiction of the Arbitral Tribunal

- For the #jurisdiction of the #arbitral tribunal according to the PILA, see Article 186(1) PILA

In the absence of an agreement to the contrary, an #arbitration agreement in a contract also extends to the question of whether the contract and the #arbitration agreement have been validly concluded and hence whether the #arbitral tribunal has #jurisdiction.

ZH 26.05.1994 [(1997) ASA p. 266]

2 "Agreement in Writing" (2)

- For the notion of #arbitration agreement under the PILA, see Article 178 PILA

2.1 Arbitration Agreement and Submission Agreement

The agreement in writing by which the parties agree on arbitration can be either an #arbitration agreement or a #submission agreement. The #arbitration agreement subjects to arbitration a dispute which has not yet arisen, but which results from a legal relationship which the parties intend to form. The #submission agreement, on the contrary, is a contract which the parties conclude when a conflict has already arisen between them; the scope of this contract is to allow the #arbitrators to decide the dispute which has already arisen.

FSCD 111 Ib 253 [254]

2.2 Relationship with the UNCITRAL Model Law

Article II(2) NYC has to be interpreted taking into account the UNCITRAL Model Law [*UNCITRAL Model Law on International Commercial Arbitration (1985)*], the authors of which have thus sought to adapt the rules of the NYC to current needs, without having to modify them.

FSCD 121 III 38 [43], BL 05.07.1994 [(1995) BJM p. 256]

Article 178 PILA is clearly based on the text of Article 7(2) *in initio* of the UNCITRAL Model Law [*UNCITRAL Model Law on International Commercial Arbitration (1985)*]. Its wording which has taken into account the development of modern means of communication, must also be considered when interpreting Article II(2) NYC. Therefore, the formal requirements of the international treaty and of Article 178 PILA are in fact the same.

FSCD 121 III 38 [43-44], FSCD 31.10.1996 [(1986-98) Digest CAS p. 588-589], SG 16.01.2007 c. 1, BL 05.07.1994 [(1995) BJM p. 256]

2.3 Relationship with Swiss Law

According to the wording of Article II(2) NYC, the requirement of the written form is, on the one hand, less strict than that of Article 6 fConcordat which has to be understood through an application by analogy of Article 13 CO; on the other hand, it is stricter than that of Article 178 PILA, which only requires a form of communication allowing the agreement to be evidenced by a text.

FSCD 121 III 38 [43], VD 19.05.1999 p. 10

Article II NYC overrides national laws and constitutes a #uniform standard law with respect to the form of the #arbitration agreement or the #submission agreement.

FSCD 111 Ib 253 [254-255], FSCD 110 II 54 [58-59], BS 27.02.1989 [(1991) BJM p. 144], BL 03.06.1971 [(1973) BJM p. 195]

The #recognition of the #arbitration agreement may neither require a stricter nor a less strict form than the form defined by Article II(2) NYC.

FSCD 111 Ib 253 [255]

However, Article VII NYC gives the parties the possibility to rely on rules which are more favourable to #recognition, to the extent that they can invoke the national law or the treaties of the country in which #enforcement of the #award is sought.

FSCD 111 Ib 253 [255], BL 05.07.1994 [(1995) BJM p. 258]

In contrast to several foreign legal systems, the rule of the NYC is very strict. Article II NYC does not only provide for a maximum but also for a minimum standard. It is clear that a member State cannot impose more stringent requirements with respect to form. Nor can it limit itself to less strict formal requirements (FSCD 111 Ib 253 [255]). Article II NYC does not allow the #validity of an #arbitration agreement to be admitted which does not fulfil its conditions. This issue is not so important given that Article 178(1) PILA as well as Article 6 fConcordat do not go further than Article II NYC.

BL 05.07.1994 [(1995) BJM p. 258]

Article II(2) NYC overrides Swiss #case law principles developed on the basis of Articles 29 and 30 FC as to the binding character of #arbitration agreements contained in #standard-form contracts.

BS 27.02.1989 [(1991) BJM p. 146]

It is questionable whether Article 178 PILA has an independent meaning as the form of an #arbitration agreement is uniformly regulated by Article II(1) & (2) NYC which Switzerland has ratified. This provision which prevails over national law, is a so-called “*loi uniforme*” (FSCD 110 II 54 [57]) which has to be taken into account in a member State not only in the context of the #recognition and #enforcement of an already rendered #award but also when the #arbitration agreement provides for proceedings which lead to a foreign #award within the meaning of the NYC. In Switzerland, this applies to #arbitral proceedings having their #seat abroad.

ZH 25.08.1992 [(1993) ZR p. 77–78]

2.4 Formal Requirements

2.4.1 State-of-the-Art Means of Communication

One must distinguish between #arbitration agreements contained in a document which must in principle be signed, and agreements which result from an exchange of written declarations which do not have to be signed.

FSCD 121 III 38 [45], BL 05.07.1994 [(1995) BJM p. 255–256]

One must take into account that with the development of modern means of communication, documents which are not signed have become more and more important and frequent, that the prerequisite of the signature becomes less important, in particular in international commerce, and that the difference in the treatment of signed and non-signed documents has to be questioned. Further-

more, in certain situations, a given behaviour can, based on the principle of #good faith, replace the observation of a specific form.

FSCD 121 III 38 [45], FSCD 08.12.1999 [(2000) ASA p. 557]

The written form required by Article II NYC in the first alternative of its paragraph 2 implies that the #arbitration agreement be signed "by the parties", i.e. by the persons bound by the said #arbitration agreement, in other words by all the persons who decide to be subject to it, waiving thereby their right to the State #jurisdiction.

FSCD 110 II 54 [58]

By mentioning telegrams, the authors of the NYC were aiming to take into account the means of communication generally used in international trade for the conclusion of contracts. This purpose has to be taken into consideration when interpreting this provision. It is no longer disputed that the exchange of communications through telex is equivalent to the exchange by telegrams. Article 178(1) PILA confirms this and adds the telefax as well as any other form of communication allowing the agreement to be evidenced by a text. This wording allows an immediate adaptation to the actual state-of-the-art means of communication. As this evolution is merely a continuation of the technical progress, which was only at its beginning in 1958, Article 178(1) PILA is without any doubt compatible with Article II(2) NYC.

BL 05.07.1994 [(1995) BJM p. 256]

By requesting the written form, Article II NYC wants to exclude a merely oral or tacit #arbitration agreement. In comparison with several foreign legal systems, the rule of the NYC is very strict. Article II NYC provides not only for a maximum but also for a minimum standard. It is clear that a member State cannot provide for more stringent requirements with regard to form. Nor can it limit itself to less strict formal requirements (*FSCD 111 Ib 253 [255]). Article II NYC does not allow the #validity of an #arbitration agreement to be admitted which does not fulfil the conditions set out. This issue is not so important given that Article 178(1) PILA as well as Article 6 fConcordat do not go further than Article II NYC.

BL 05.07.1994 [(1995) BJM p. 258]

The writing requirement no longer means that the #arbitration agreement has to materially exist in this form; it is sufficient if the agreement is saved on a medium which allows written reproduction and the confirmation of the mutual agreement of the parties.

BL 05.07.1994 [(1995) BJM p. 256-257]

It is obvious that by assimilating an “agreement in writing” with an #arbitration agreement contained in an exchange of telegrams, Article II NYC refers in a general manner to transmissions by telecommunication of messages reproduced on a permanent medium. In this respect, telex produces messages which are superior to classical telegraphy and whose addressor and addressee can be identified. This is also the opinion expressed in the Message of the #Federal Council, according to which the NYC provides for a less strict written form taking into account international #trade usages: it is sufficient that the #arbitration agreement is based on an exchange of letters or of telegrams between the parties. Furthermore, these days the use of telex is generalised to a point that it has almost completely replaced traditional telegrams.

GE 14.04.1983 [(1984) SJ p. 40-41]

Another #interpretation method of Article II NYC leads to the same result. According to the so-called “evolving” or “updating” method applied by the Federal Supreme Court in public law, an #interpretation *contra legem* is possible if the strict application of the law is not reasonable and would be contrary to the meaning of the provision. Article II NYC recognises, even though the text is not absolutely clear, alongside written and signed documents, documents with a less strict form established by #trade usages.

GE 14.04.1983 [(1984) SJ p. 41]

2.4.2 Exchange of Written Declarations

It is true that the Federal Supreme Court has assimilated a telex with a telegram, but the parties must nevertheless express in writing their intent to be subject to arbitration.

FSCD 121 III 38 [43], FSCD 111 Ib 253 [255], FSCD 12.01.1989 [(1990) Yearbook p. 511], BS 29.10.2004 c. 2b, BL 05.07.1994 [(1995) BJM p. 256], GE 08.06.1967 [(1968) RSJ p. 57]

If the signatures of the parties are lacking, the #arbitration agreement or the #submission agreement can result from an exchange of letters or telegrams. An exchange of telexes is equivalent to an exchange of telegrams.

FSCD 111 Ib 253 [255], BL 05.07.1994 [(1995) BJM p. 256], BL 03.06.1971 [(1973) BJM p. 195-196], GE 08.06.1967 [(1968) RSJ p. 56-57]

However, there has to be an exchange of communications. If an #arbitration agreement is proposed in writing or by telegram and accepted orally or tacitly, the formal requirements of Article II(2) NYC are not fulfilled.

FSCD 111 Ib 253 [255]

This provision requires a written arbitration offer, written acceptance by the other party and communicating this response back to the proposing party.

FSCD 111 Ib 253 [255], VD 25.01.2001 p. 10, FSCD 12.01.1989 [(1990) Yearbook p. 511], BL 05.07.1994 [(1995) BJM p. 256], BL 03.06.1971 [(1973) BJM p. 196]

The fact of pleading in writing without making reservations can replace the written form, provided the parties’ intent to accept the #jurisdiction of the #arbitral tribunal results from their behaviour.

FSCD 4P.102/2001 [(2003) ASA p. 373]

The most authoritative doctrine and the largely dominant #case law of the member States consider that the tacit #acceptance of the #arbitration agreement proposed by one of the parties does not fulfil the requirements of Article II(2) NYC; in particular, #implied actions, such as the performance of the contract, do not satisfy this formal requirement.

VD 25.01.2001 p. 11

By requiring the written form, Article II NYC intends to exclude a merely oral or tacit #arbitration agreement.

BL 05.07.1994 [(1995) BJM p. 258]

Written acceptance of an #arbitration agreement does not have to refer in particular to the #arbitration agreement but can refer as a whole to the contract including the #arbitration agreement.

BL 05.07.1994 [(1995) BJM p. 256]

In public law, an #interpretation *contra legem* is admissible if the strict application of the legal provision would be unreasonable and contrary to the meaning of the provision. Therefore, Article IV(1)(b) NYC also recognizes, apart from written and signed documents, documents whose form is less strict, but which are acknowledged by the #trade usages of the parties.

GE 11.12.1997 [(1997) ASA p. 672]

Silence cannot be interpreted as an acceptance, except if the rules of #good faith require that the party concerned express its disagreement if it does not want to be bound. Silence with respect to a confirmation letter can be interpreted as an agreement if the confirming party departs in #good faith from an oral agreement or refers in #good faith to an agreement which it considers as concluded.

GE 08.06.1967 [(1968) RSJ p. 57]

2.4.3 Arbitration Agreement in a Document and in an Exchange of Letters

The relevant formal requirements are different for an #arbitration agreement contained in a document or in an exchange of letters or telegrams. In the first case, a signature is required whereas it is not required in the case of an exchange of written declarations.

FSCD 121 III 38 [45], VD 25.01.2001 p. 12

2.4.4 Individual Cases

There is a **formally valid #arbitration agreement** within the meaning of this provision in the following cases:

- The principle of #good faith leads to the #validity of the #arbitration agreement despite the fact that the formal requirements of Article II(2) NYC are not met, if the #arbitration agreement in a #bill of lading has been signed solely by the #carrier (and not by the #consignor who only filled in the #bill of lading). The #consignor knew of the existence of an #arbitration agreement in the #bill of lading, not only because of its long-standing business relationship with the #carrier, but also because of its experience in

maritime matters, and the #consignee (which belonged to the same corporate group as the #consignor) had signed (when endorsing) the #bill of lading; under these circumstances the #arbitration agreement was held to be formally valid despite the fact that it was contained in #general terms and conditions printed on the back of the #bill-of-lading form.

FSCD 121 III 38 [45-46]

- In a case in which the #arbitration agreement was contained in a #charter party signed by the owner and the #charterer, if the #bill of lading contained a #global reference to such #charter party and had been signed solely by the #consignor and the #charterer but not by the #consignee. The court considered that the #consignor had signed the #bill of lading on behalf of the #consignee, that the #consignee and the parties to the #charter party were companies experienced in oil trade, that the #consignor and the #consignee were part of the same corporate group and that there was a reasonable interest that the #arbitral tribunal should have #jurisdiction to hear all claims arising out of both the #bill of lading and the #charter party.

FSCD 110 II 54 [60]

- In a case in which the original contract is completed by an addendum signed only by an intermediary who refers to form no. 8 of the Grain and Feed Trade Association (GAFTA), if this addendum expressly mentions the #arbitral proceedings pending between the parties and explicitly stipulates that all other terms and conditions of the contract remain unchanged.

FSCD 12.01.1989 [(1990) Yearbook p. 511]

- In the case of an #arbitration agreement contained in an unsigned amendment to a contract for the sale of goods. The court considered that the parties were experienced in the trade of commodities, that they had referred to the Grain and Feed Trade Association (GAFTA) conditions which were generally known by commodity traders, that the #incorporation of GAFTA conditions was standard practice in trade, and that a decision to the effect that the #arbitration agreement was valid and binding would not and could not disappoint the parties' legitimate expectations under the circumstances of the particular case.

ZH 14.12.1989 [(1990) ZR p. 193-198]

There is **no formally valid #arbitration agreement** within the meaning of this provision in the following cases:

- In a case where the #arbitration agreement has been proposed in writing, but has only been accepted orally or tacitly, because there must be not only a written offer but also a corresponding written acceptance which has to be communicated to the other party.

FSCD 111 Ib 253 [255]

- The formal requirements of Article II(2) NYC are not fulfilled if an #arbitration agreement is contained in a document drafted by one party and simply accepted orally or tacitly by the other. It is a requirement that the offer be contained in a document and that the acceptance also be contained in a document which is notified to the other party. Consequently, an #arbitration agreement contained in a confirmation letter (e.g. a confirmation of sale

sent by the seller to the buyer) will not be valid unless the addressee has accepted and returned the confirmation to the sender. The fact that the Message of the Swiss #Federal Council on the NYC explains that the NYC does not allow the oral or the semi-written (only one party expresses itself in writing whereas the other agrees orally) form (FS 1964 II 610) does not have any influence. If the NYC considered the signature as necessary in case of an exchange of letters, it would state this requirement expressly.

FSCD 111 Ib 253 [255], BL 03.06.1971 [(1973) BJM p. 195], GE 08.06.1967 [(1968) RSJ p. 57]

- If it is not established that the party resisting #enforcement of the #award has ever seen the #arbitration agreement.
FSCD 4P.104/2001 [(2003) ASA p. 371-372]
- The party seeking #enforcement used different sets of #general terms and conditions depending on the particular nature of the transaction. The court considered that the reference to #general terms and conditions was too vague in the case under consideration, so that the other party was unable to identify the particular set of #terms and conditions intended to apply, despite the fact that both parties were sophisticated and experienced business people for whom the conclusion of an #arbitration agreement was not an exceptional step to make.
GE 16.12.1988 [(1989) ASA p. 167]
- In a case where the confirmation of an order containing the #arbitration agreement has not been signed by the other party and if this party did not send to the other party a text of its own.
GE 08.06.1967 [(1968) RSJ p. 56-57]

2.5 Arbitration Agreement by Reference

- See also Article 178(2) PILA, section 2.5

2.5.1 Principle

An #arbitration agreement is valid if it is contained in a document other than the contract concluded between the parties (e.g. #general terms and conditions) if the contract expressly refers to the #arbitration agreement (#incorporation by specific reference).

FSCD 110 II 54 [58-59], FSCD 12.01.1989 [(1990) Yearbook p. 511], BL 05.07.1994 [(1995) BJM p. 257], ZH 25.08.1992 [(1993) ZR p. 78], GE 16.12.1988 [(1989) ASA p. 167]

If, however, the main contract refers, without further precision, to another document which contains an #arbitration agreement (#incorporation by global reference), the #validity or the #invalidity of the #arbitration agreement depends on the circumstances of the case at hand.

FSCD 110 II 54 [59], BL 05.07.1994 [(1995) BJM p. 257], ZH 25.08.1992 [(1993) ZR p. 78], GE 16.12.1988 [(1989) ASA p. 167]

As the wording of Article II(2) NYC does not address this issue, the provision has to be interpreted with regard to its scope and by taking into account the interests that it obviously intends to protect.

FSCD 110 II 54 [59], BL 05.07.1994 [(1995) BJM p. 257]

Therefore, one must take into account, on the one hand, the necessity of facilitating the resolution of disputes by arbitration, in particular in international commerce, where #arbitration agreements are very often used; on the other hand, the parties have to be protected from commitments undertaken without reflection. However, this protection is sufficiently satisfied if the parties had the opportunity to read the #general terms and conditions to which their contract refers.

FSCD 110 II 54 [59], BL 05.07.1994 [(1995) BJM p. 257-258]

One must examine, in particular, whether the parties are business people experienced in commercial matters, whether the content of the document incorporated by reference is known to them or whether it should have been known by them, especially because the #arbitration agreement is usual in the commercial field considered.

FSCD 110 II 54 [59], BL 05.07.1994 [(1995) BJM p. 257], ZH 25.08.1992 [(1993) ZR p. 78], ZH 14.12.1989 [(1990) ZR p. 197], GE 16.12.1988 [(1989) ASA p. 167]

In such a case the #general terms and conditions do not have to be communicated to the other party because it has been made aware of the existence of the #arbitration agreement included in the #general terms and conditions and it would have been in a position to consult its wording.

BL 05.07.1994 [(1995) BJM p. 257]

This is the case if the conditions are printed on the back of the main contract (which refers to them) or if they are known to the parties because of their regular business relationship. It would go too far to request a specific reference to the #general terms and conditions even when the party which receives the offer already has them and knows their content.

BL 05.07.1994 [(1995) BJM p. 258]

However, if the #general terms and conditions are not communicated with the main contract, a global reference to such #general terms and conditions (or to the provisions of another contract) can only be sufficient, if the other party should have known the document to which reference is made, because of #trade usages and the nature of the legal transactions.

BL 05.07.1994 [(1995) BJM p. 258]

An #arbitration agreement is valid even if the parties have referred to the #general terms and conditions in which it is contained only by mistake in a document signed by both parties, even though this reference has been corrected by a subsequent exchange of letters in which however only one party had signed, if the #arbitration agreement in the mistakenly chosen #general terms and conditions is identical to the one finally incorporated, if both parties have accepted it and if their alleged dissent appears to this extent as an abusive defence.

ZH 14.12.1989 [(1990) ZR p. 193-198]

Global #incorporation of #general terms and conditions providing for mandatory arbitration is only valid if the designation of the #general terms and conditions in the main contract is free of any ambiguity or imprecision.

GE 16.12.1988 [(1989) ASA p. 168]

The #burden of proof rests on the party alleging the #waiver of the guarantee of a #court established by law.

GE 16.12.1988 [(1989) ASA p. 168]

2.5.2 Individual Cases

There is a **valid #arbitration agreement** by reference in the following cases:

- In a case in which the #arbitration agreement was contained in a #charter party signed by the #owner and the #charterer, if the #bill of lading contained a #global reference to such #charter party and had been signed solely by the #consignor and the #charterer but not by the #consignee. The court considered that the #consignor had signed the #bill of lading on behalf of the #consignee, that the #consignee and the parties to the #charter party were companies experienced in oil trade, that the #consignor and the #consignee were part of the same corporate group and that there was a reasonable interest that the #arbitral tribunal should have #jurisdiction to hear all claims arising out of both the #bill of lading and the #charter party.
FSCD 110 II 54 [60]
- In presence of an #incorporation by specific reference to #general terms and conditions containing the arbitration agreement by the term "Based on our overleaf General Business Regulations including the E.C. Conditions we have sold to you [...]" in the written confirmation of order, if this letter has been accepted by a positive answer ("*BETR./RE: Ihre Confirmation of Order vom Dez. 1991*") by fax and thus in a form equivalent to the written form.
BL 05.07.1994 [(1995) BJM p. 256-258]
- In presence of an #arbitration agreement in the #general terms and conditions of the Grain and Feed Trade Association (GAFTA) which are well known in the field of grain trade, if the parties are experienced companies, if their reference to these #general terms and conditions corresponds to a #trade usage and if, *in casu*, the #validity of the #arbitration agreement is not surprising for either of the parties so that any other result would be contrary to the purposes of Article II NYC.
ZH 14.12.1989 [(1990) ZR p. 193-198]
- In a case in which the original contract is completed by an addendum signed only by an intermediary who refers to form no. 8 of the Grain and Feed Trade Association (GAFTA), if this addendum expressly mentions the #arbitral proceedings pending between the parties and explicitly stipulates that all other terms and conditions of the contract remain unchanged.
FSCD 12.01.1989 [(1990) Yearbook p. 511]

There is **no valid #arbitration agreement** by reference in the following cases:

- In presence of a written offer by a seller with a global reference to its #general terms and conditions, but without a specific reference to the #arbitration agreement contained therein, if the seller uses for the negotiations a letter with the mention “#forum: Zurich” and if the parties did not have any prior business relationship, if their correspondence was always in German and if the #general terms and conditions in English were submitted to the buyer only after the conclusion of the contract; in such a situation, the #arbitration agreement is unusual and surprising for the buyer and does not have any binding effect.
ZH 25.08.1992 [(1993) ZR p. 78-79]
- In presence of a reference to #general terms and conditions if the party proposing their #incorporation uses several sets of #general terms and conditions depending on the particular nature of the transaction. The court considered that the reference to #general terms and conditions was too vague in the case under consideration, so that the other party was unable to identify the particular set of #general terms and conditions intended to apply, despite the fact that both parties were sophisticated and experienced business people for whom the conclusion of an #arbitration agreement was not an exceptional step to take.
GE 16.12.1988 [(1989) ASA p. 167]

2.6 Subsequent Arbitration Agreement

In presence of an explicit #arbitration agreement which is concluded once a concrete dispute has arisen, one must not examine whether this #arbitration agreement can be based on a previous #arbitration agreement and whether this #arbitration agreement fulfilled the formal requirements of Article II(2) NYC.

FSCD 111 Ib 253 [256]

2.7 Principle of Good Faith and the Prohibition of an Abuse of Right

One must take into account that with the development of modern means of communication, documents which are not signed have become more and more important and frequent, that the prerequisite of the signature becomes less important, in particular in international commerce, and that the difference in the treatment of signed and non-signed documents has to be questioned. Furthermore, in certain situations, a given behaviour can, based on the principle of #good faith, replace the observation of a specific form.

FSCD 121 III 38 [45], FSCD 08.12.1999 [(2000) ASA p. 557]

The #appellant is committing an #abuse of right by invoking the formal requirements of Article II(2) NYC. Indeed, as already mentioned, during the #arbitral proceedings, the #appellant not only refrained from contesting the existence of an #arbitration agreement binding on the parties, although not signed by them, but also claimed itself the existence and content of this #arbitration agreement by arguing that it was binding on the parties. In these circumstances, the

exercise of the right to challenge the #recognition of the arbitral #award on the ground that there is no #arbitration agreement between the parties, or no formally valid agreement, clearly contradicts the conduct it has previously adopted and on which the #respondent could rely in #good faith.

VD 05.03.2015 c. VI.c.

In addition, according to #case law and doctrine, when the requirements of Article II(2) NYC are not fulfilled, the conduct of the parties may, in particular circumstances and in accordance with the principle of #good faith, replace the absence of form.

VD 05.03.2015 c. VI.c.

Silence cannot be interpreted as a manifestation of an agreement, except if the rules of #good faith require that the party concerned express its disagreement if it does not want to be bound. Silence with respect to a confirmation letter can be interpreted as an agreement if the confirming party departs in #good faith from an oral agreement or refers in #good faith to an agreement which it considers as concluded.

GE 08.06.1967 [(1968) RSJ p. 57]

3 Arbitration Defence (3)

- See also Article 178(3) PILA, section 3.8

3.1 Relationship with Article 7 PILA

The content of Article II(3) NYC is the same as that of Article 7 PILA.

FSCD 124 III 83 [87], FSCD 4A_279/2010 c. 2

Article 7 PILA helps interpret and clarify Article II(3) NYC, irrespective of the fact that the NYC is a uniform treaty.

VD 22.12.2004 c. 3

3.2 Scope of Application of Article II(3) NYC

3.2.1 Seat of the Arbitral Tribunal Abroad

If the #arbitral tribunal has its #seat abroad, the Swiss State court before which an #arbitration defence is raised must examine the #validity of the #arbitration agreement based on Article II(2) NYC.

FSCD 121 III 38 [42], FSCD 4A_279/2010 c. 2

3.2.2 Seat of the Arbitral Tribunal in Switzerland

Article II(3) NYC is not applicable if the #arbitral tribunal which would have #jurisdiction over the dispute has its #seat in Switzerland.

FSCD 122 III 139 [141-142], FSCD 31.10.1996 [(1986-98) Digest CAS p. 586]

If the #arbitration agreement provides that the #seat of the #arbitral proceedings is in Switzerland, the Swiss State court has to decide on the basis of the PILA whether the #arbitration defence is founded.

FSCD 122 III 139 [141-142]

In case of a negative decision on #jurisdiction by the (PILA) #arbitral tribunal, the #claimant can again file its claim before a State court. Based on the final arbitral lack of #jurisdiction decision, this State court must consider the #arbitration agreement as ineffective within the meaning of Article II(3) NYC and – if the other conditions for its #jurisdiction are fulfilled – grant its #jurisdiction. From this perspective, the first decision by the first cantonal instance has only a limited precedential effect.

LU 23.04.2008 c. 4.4.4

3.2.3 Arbitration Agreement without a Clear Indication of the Seat

If it is not clear whether the possibly competent #arbitral tribunal has its #seat in Switzerland, the #validity of the #arbitration agreement is not examined pursuant to Article 178 PILA but according to Article II(3) NYC.

ZH 25.08.1992 [(1993) ZR p. 77]

3.2.4 Relationship with Other International Treaties

Article II(3) NYC replaces the Geneva Protocol on Arbitration Agreements of 24 September 1923 with respect to the relationship between the contracting States.
FSCD 110 II 54 [57]

3.2.5 Personal Scope of Application of the Arbitration Agreement

Article II(3) NYC implicitly requires the #arbitral tribunal to determine the "*ratione personae*" scope of application of the #arbitration agreement concluded in writing. According to the general principles arising from this provision, the personal scope of the #arbitration agreement is not limited, and may not be defined solely by the signatories to the #arbitration agreement; under certain conditions, non-signatories may be considered as parties: for example, by virtue of representation, succession of parties, corporate group theory, lifting the corporate veil and estoppel.

VD 30.10.2018 c. IV.b.bb

It follows that it is admitted that third parties who are not expressly mentioned in the #arbitration agreement concluded in writing can nevertheless be included in the "*ratione personae*" scope of application. In any event, it is the law of the #seat of the arbitration, or the law applicable to the contract in question, which allows one to determine if a non-signatory is bound by an #arbitration agreement.

VD 30.10.2018 c. IV.b.bb

3.3 Exclusion of the State Courts' Jurisdiction

Provided that the requirements of Article II(3) NYC are fulfilled, the fact that a party raises an #arbitration defence before a State court within the scope of application of the NYC entails that the State court will not have #jurisdiction to hear the case, independently of whether the #arbitral proceedings are already pending or not.

FSCD 124 III 83 [87], FSCD 4A_279/2010 c. 2, ZG 16.08.2006 c. 2.4

A foreign State court which does not refer the parties to arbitration despite the fulfilment of the prerequisites of Article II NYC, but adjudicates itself the dispute, lacks indirect #jurisdiction pursuant to Article 25(a) PILA; therefore, its decision cannot be recognised in Switzerland, unless the lack of #jurisdiction of the #arbitral tribunal is determined by the #arbitral tribunal itself or on #appeal by an ordinary appeals instance.

FSCD 124 III 83 [87]

The mere danger that different proceedings could possibly lead to contradictory decisions, does not entail, within the scope of application of the NYC, that the #arbitration agreement becomes inoperative or incapable of being performed and that the #jurisdiction of the #arbitral tribunal is excluded.

FSCD 124 III 83 [88]

Contrary to the other provisions of the NYC, Article II NYC does not directly relate to the #recognition and #enforcement of foreign arbitral #awards, but obliges the contracting States to recognize, under certain conditions, the #arbitration agreement itself, which has the effect of depriving the State judge of #jurisdiction over the dispute which this agreement aims at resolving.

FSCD 110 II 54 [57]

3.4 Procedural Aspects

3.4.1 Powers of Review of the State Court

If the #arbitral tribunal has its #seat abroad, the Swiss State court before which an #arbitration defence is raised has to decide on this means of defence with unfettered #powers of review with regard to the filed #grievances and in particular the one derived from Article II(3) NYC, without being allowed to limit itself to a *prima facie* examination.

FSCD 121 III 139 [142], FSCD 121 III 38 [42], FSCD 4A_279/2010 c. 2, VD 02.05.2006 p. 6, VD 25.01.2001 p. 10

Therefore, the State court has to decide with unfettered #powers of review on the #arbitration defence in the light of the #validity criteria set out in the international treaty, but it cannot invoke other grounds for invalidity of the #arbitration agreement going beyond the international legal order.

FSCD 121 III 38 [42], VD 02.05.2006 p. 6

3.4.2 Applicable Procedural Rules

This provision gives the parties to an #arbitration agreement the right to invoke the #arbitration agreement only to refuse the #jurisdiction of the State judge because of a lack of #jurisdiction; however, the procedural rules applicable to the #arbitration defence are not governed by the NYC but by the national law of the State whose courts have been seized (*lex fori*).

FSCD 111 II 62 [65-66]

3.4.3 Time at Which the Arbitration Defence Must Be Raised

The #arbitration defence has to be raised at the outset of the proceedings and the parties, as the case may be, have to be referred immediately to the #arbitral proceedings; one should avoid delaying the proceedings by a lack of #jurisdiction defence which is raised too late; such an #interpretation is not only in conformity with the national laws of the majority of the contracting States, but also with Article VI(1) of the European Convention on International Commercial Arbitration of 21 April 1961.

FSCD 111 II 62 [65-66]

3.5 Declaratory Action for Jurisdiction

The rule provided for in Article II(3) NYC applies exclusively to the case where a State court is seized of a dispute which should have been examined by an

#arbitral tribunal. It does not apply to declaratory #actions regarding arbitral #jurisdiction, respectively lack of #jurisdiction.

*FSCD 26.01.1987 [(1987) SJ p. 230]

Article II(3) NYC does not exclude the faculty of a party to claim the absence or the #invalidity of an #arbitration agreement before the State courts by a declaratory #action but neither does it proscribe this way. Therefore, it leaves it to the State courts to decide whether they prefer letting the #arbitrators decide on their own #jurisdiction or not.

*FSCD 26.01.1987 [(1987) SJ p. 230]

Article III

Each Contracting State shall recognize arbitral awards as binding and enforce them in accordance with the rules of procedure of the territory where the award is relied upon, under the conditions laid down in the following articles. There shall not be imposed substantially more onerous conditions or higher fees or charges on the recognition or enforcement of arbitral awards to which this Convention applies than are imposed on the recognition or enforcement of domestic arbitral awards.

1 *In General*

In Article III NYC, the NYC itself makes clear that each signatory State permits arbitral #awards to be enforced in line with the procedural requirements of the sovereign territory in which enforcement of the arbitral #award is being sought.

FSCD 144 III 411 [419]

An examination of potential #grounds of refusal does require that the proceedings in which such a review will take place are procedurally admissible. In this context, the Federal Supreme Court has pointed out that the rule governing proceedings for #recognition and #enforcement under the NYC is, as a general principle, governed by domestic law.

FSCD 144 III 411 [419]

2 *Procedural Requirements*

The requirement of a sufficient domestic connection relates to the issue of the #jurisdiction of the Swiss authorities over a foreign State and thus constitutes a procedural prerequisite. If, in a dispute regarding approval of #attachment against a foreign State, there is a lack of a sufficient domestic connection, then a *prima facie* showing of grounds for #attachment will already fail under Article 271(1)(6) SDCB because the enforcement judge will, in all likelihood, decline even to commence proceedings for #enforcement of an #attachment or an action brought to validate the #attachment by the foreign State due to the lack of #jurisdiction over the defendant foreign State.

FSCD 144 III 411 [421]

In accordance with the #enforcement of a domestic arbitral #award, the court fee for the preliminary examination of enforceability in #enforcement proceedings is calculated pursuant to Article 48 of the Schedule of Fees to the SDCB (SR 281.35). In the case of separate exequatur proceedings, such as the certificate of enforceability pursuant to Article 193(2) PILA, on the other hand, the court fee is calculated on the basis of the #amount in dispute of the principal matter.

ZH 11.06.2014 c. 4b

Domestic arbitral #awards do not have to be declared enforceable. They have the effect of a legally binding and enforceable court decision (Art. 387 CCP) when they are issued, unless an #appeal is granted #suspensive effect, in which case enforceability is suspended. Switzerland therefore lacks a corresponding procedure which could be used for direct comparison. For domestic arbitral #awards, however, Article 356(1)(b) CCP provides for the possibility of requesting a certificate of enforceability from the Supreme Court of the Canton of Zurich (Section 46 *Gerichtsorganisationsgesetz*). This certifies that the arbitral #award has been duly notified and is enforceable. The scope of the judge's examination is therefore very limited.

ZH 11.06.2014 c. 4b

In the context of the examination of a foreign arbitral #award, the court must examine whether the application is accompanied by the duly authenticated (certified) original of the arbitral #award and the #arbitration agreement or a copy thereof (cf. Art. IV NYC). The #respondent to the #enforcement proceedings may oppose #enforcement if it can prove one of the #grounds for refusal set forth in Article V(1)(a-e) NYC. It follows from this that the proceedings concerning the certificate of enforceability of a domestic arbitral #award on the one hand and the certificate of enforceability of a foreign arbitral #award on the other hand are only comparable in terms of effort if no #grounds for refusal of #recognition are invoked. If, on the other hand, one or more grounds for refusal of #recognition are invoked, the proceedings can sometimes entail a significant amount of work. Accordingly, it cannot be concluded that Article III NYC is violated due to the different criteria for the fixing of court fees for the two aforementioned proceedings.

ZH 11.06.2014 c. 4b

In addition, not only the amount in dispute of the principal matter but also the time spent by the court (Section 2(1)(c) Schedule of Fees to the SDCB) and the

difficulty of the case (Section 2(1)(d) Schedule of Fees to the SDCB) are decisive for the assessment of court fees in exequatur proceedings, which is repeated in Section 4(2) Schedule of Fees to the SDCB for disputes of financial interest, whereby in the case of reduction of the basic fee - in contrast to the increase - there is no lower limit.

ZH 11.06.2014 c. 4b

The principle of equivalence means that a fee must not be manifestly disproportionate to the objective value of the service and must remain within reasonable limits. The value of the service shall be measured by the economic benefit it brings to the obligor or by the cost of the actual use in relation to the total cost of the branch of the administration concerned, using schematic measures based on probability and average experience. It is not necessary for the fees to correspond exactly to the administrative burden in each case, but they should be based on objectively justifiable criteria and should not make distinctions for which there are no reasonable grounds. In the case of court fees, in particular, the #amount in dispute may play a decisive role, whereby the State is allowed to use the fees for significant transactions in order to compensate for the default in less significant cases (FSCD 130 III 225 c. 2.3).

ZH 11.06.2014 c. 4b

Article IV

- 1. To obtain the recognition and enforcement mentioned in the preceding article, the party applying for recognition and enforcement shall, at the time of the application, supply:**
 - a. The duly authenticated original award or a duly certified copy thereof;**
 - b. The original agreement referred to in Article II or a duly certified copy thereof.**
- 2. If the said award or agreement is not made in an official language of the country in which the award is relied upon, the party applying for recognition and enforcement of the award shall produce a translation of these documents into such language. The translation shall be certified by an official or sworn translator or by a diplomatic or consular agent.**

1 Documents to Supply (1)

1.1 Purpose and Interpretation of Article IV(1) NYC

The formal requirements are not strictly applicable and an excessively formalistic #interpretation of the provision must be avoided.

ZH 29.09.2017 c. 4.4, ZH 23.09.2016 c. III/4.1

Excessive formalism should be avoided when applying Article IV(1)(b) NYC. Accordingly, the invocation of the absence of authentication of the #arbitration agreement must be rejected when the party raising such objection does not dispute the authenticity of the #arbitration agreement.

FSCD 5A_427/2011 c. 5, FSCD 5A_467/2014 c. 2.3, VD 05.03.2015 c. IV.b., VD 12.04.2012 c. II.c

A certificate of enforceability is not required.

FSCD 5P.292/2005 c. 3.2, TI 09.12.2010 [14.2010.98] c. 5 & 9, TI 22.02.2010 [14.2009.104] c. 4

The Federal Supreme Court decided that even in proceedings for the definitive #SADOSP - where, in contrast to the proceedings for the #attachment of assets, the mere *prima facie* evidence of a title for enforcement is not sufficient - the formal requirement of certification of the #arbitration agreement pursuant to Article V(1)(b) NYC may be waived if its authenticity is not disputed (FSCD 5A_427/2011 c. 5). No more stringent requirements can apply in proceedings for the #attachment of assets.

ZH 29.09.2017 c. 4.4

What the Federal Supreme Court has said in relation to the authentication of the #arbitration agreement must also apply to the authentication and certification of the arbitral #award, since the purpose of the formalities is to prevent #enforcement from taking place in the absence of an authentic #arbitration agreement or arbitral #award. This danger does not exist if authenticity is not contested.

ZH 29.09.2017 c. 4.4, ZH 23.09.2016 c. III/4.1

Certification means the official confirmation that the copy corresponds to the original.

ZH 23.09.2016 c. III/4.1

A foreign authentication or legalisation must either be re-authenticated by a Swiss authority or be accompanied by an apostille within the meaning of the Convention on the Exemption of Foreign Public Documents from Certification of 5 October 1961 (SR 0.172.030.4).

ZH 23.09.2016 c. III/4.1

At least in proceedings concerning the authorisation of an #attachment of assets [*Arrestbewilligungsverfahren*] or the objection to the #attachment of assets [*Arresteinspracheverfahren*] it is sufficient to present only an officially certified

copy of the arbitral #award, which means that neither the original #award nor an authentication of the arbitral #award is required.

ZH 23.09.2016 c. III/4.1

According to the #case law of the Federal Supreme Court, which takes into account in particular the above-mentioned purpose of the NYC and is in line with the view of the doctrine, the formal requirements of Article IV NYC must not be interpreted strictly; a formal #interpretation of this provision must be avoided; the purpose is, in particular, to ensure that the authority has in its possession an understandable copy of the #arbitration agreement, making it possible to examine the existence of any #grounds for refusal provided for by Article V NYC.

VD 05.03.2015 c. IV.b

In the same vein, the words “at the same time as the request” in Article IV(1) NYC (“at the time of application”) must also not be interpreted strictly, as the party requesting #recognition must be allowed to complete its production during the procedure.

VD 05.03.2015 c. IV.b.

Article IV NYC does not contain the same requirement [as Article 5 of the Convention between Switzerland and Italy on the recognition and enforcement of judicial decisions of 3 January 1933] in order to avoid “double enforcement” and merely provides for production of the decision and the agreement, with translation thereof where necessary.

TI 22.08.2012 c. 3.2(a)

Article IV NYC has to be interpreted in conformity with the spirit of the NYC. The member States wanted to reduce as much as possible the obligations of the party requesting #recognition and #enforcement of the foreign arbitral #award.

GE 15.04.1999 [(2000) ASA p. 789], GE 21.05.1987 [(1987) Yearbook p. 519-520]

The courts should not set excessively high standards for the formal requirements (authentication, certification of the absence of means of appeal) when the conditions for #recognition are undisputed and are substantively beyond doubt. In fact, it makes no sense to protect a party against its will if this party expressly agrees with the #recognition of a foreign commercial #award rendered against it.

GE 15.04.1999 [(2000) ASA p. 790], ZH 20.04.1990 [(1990) ASA p. 185-186]

The requesting party must at least submit a copy of the #arbitration agreement and the arbitral #award. Without these documents, the seized authority should not admit the request for #enforcement. The tribunal should however be liberal when examining in what way these documents are submitted, i.e. in the form of authenticated originals or of duly certified copies.

GE 15.04.1999 [(2000) ASA p. 790]

The fulfilment of the formal requirements of this provision, which has to be examined by the seized court, should not be submitted to excessively restrictive conditions.

GE 11.12.1997 [(1997) ASA p. 671-672]

1.2 “Award” (a)

The submission of copies does not cause any harm if the authenticity is not disputed.

FSCD 5A_467/2014 c. 2.3, ZH 18.10.2018 c. IV/3.1

Where the authenticity of the arbitral #award is not in dispute, the certification of the signature of the presiding #arbitrator of the #arbitral tribunal is sufficient. The certification of the signatures of the #co-arbitrators and other persons who signed the arbitral #award is not necessary.

FSCD 4A_124/2010 c. 4.2, ZH 29.09.2017 c. 4.4

Authentication within the meaning of this provision means confirmation of the authenticity of the signatures of the #arbitrators.

ZG 30.07.2013 c. 4

A foreign authentication must be re-authenticated by the respective Swiss representation abroad or be certified in accordance with the Hague Convention for the Exemption of Foreign Public Documents from the Certification of 5 October 1961 (SR 0.172.030.4).

ZG 30.07.2013 c. 4

In FSCD 4A_124/2010 of 4 October 2010 c. 4, the Federal Supreme Court considered that while certain formalities were unavoidable when enforcing foreign judgments in the interests of legal #certainty, it would be diametrically opposed to the purpose of the NYC which is to facilitate the #enforcement of foreign arbitral #awards, to refuse #enforcement solely on the basis of the lack of evidence of the authenticity of the submitted arbitral #award if the authenticity of the document was not at all disputed. Analogous considerations must also apply in connection with the recognition of foreign arbitral #awards.

BS 29.09.2011 c. 3.1

The arbitral #award does not constitute a title for the #SADOSP of a party's #costs for legal representation in the first instance #arbitral proceedings, which is why no #SADOSP can be granted for them.

ZG 18.10.2010 p. 3-4

1.3 “Agreement” (b)

In public law, an interpretation *contra legem* is admissible if a strict application of the legal provision would be unreasonable and contrary to the meaning of the provision. Therefore, Article IV(1)(b) NYC recognizes, apart from written and signed documents, also documents whose form is less strict, but which are acknowledged by the #trade usages of the parties.

GE 11.12.1997 [(1997) ASA p. 672]

1.4 Agreement (b) as Prerequisite for Further Examination

If the court asserts non-conformity of the #arbitration agreement submitted in accordance with Article IV(1)(b) NYC, it must not even consider the arbitral #award submitted according to Article IV(1)(a) NYC. It should state that the NYC is not applicable and that, due to the lack of an applicable international treaty, the definitive #SADOSP cannot be granted, on the basis of the submitted #award, pursuant to Article 81(3) SDCB. The issue of #enforcement of this #award could only be resolved according to the cantonal law or possibly by way of exequatur.

GE 14.04.1983 [(1984) SJ p. 40]

On the contrary, if the court finds that the #arbitration agreement fulfils the requirements of Article II NYC, it must examine the #grounds for refusal invoked by the party resisting #enforcement, i.e. the #validity of the #arbitration agreement and the civil #capacity of the contracting parties (Art. V(a) NYC), the flaws affecting the #arbitral proceedings (Art. V(b) & (d) NYC) and the flaws affecting the #award itself (Art. V(c) & (e) NYC).

GE 14.04.1983 [(1984) SJ p. 40]

1.5 Burden of Proof

It results from the text of Articles III to V NYC and the systematics of this agreement that it is the responsibility of the party requesting #recognition and #enforcement of an arbitral #award to comply with the conditions of Article IV NYC. If these conditions are met, it is for the other party, against whom the #award is invoked and the exequatur requested, to invoke the fulfilment of one of the five grounds for refusing #recognition and #enforcement listed in Article V(1) NYC and to prove the #facts on which it is based; if it does not do so or if it fails in its demonstration and there are also no absolute #grounds for refusal within the meaning of Article V(2) NYC, the #award shall be recognised and enforced in Switzerland.

VD 30.10.2018 c. III.b, VD 05.03.2015 c. IV.a.

Articles IV(1)(b) and V(1)(a) NYC should therefore not be confused. If the original or a certified copy of the document is "prima facie" an #arbitration agreement, the party seeking #recognition and #enforcement does not need to establish that the #arbitration agreement complies with the written form prescribed by Article II(2) NYC (formal validity), or that it is valid under the law applicable to arbitration under Article V(1)(a) NYC (substantive validity). It is for the party against whom the #award is invoked to prove otherwise pursuant to Article V(1)(a) NYC.

VD 05.03.2015 c. IV.a.

The party applying for #recognition and #enforcement does not have to claim or prove the #validity of the #arbitration agreement (cf. Art. IV(1)(b) NYC), since it is for the #respondent in the #recognition and #enforcement proceedings to state any grounds leading to the nullity of the #arbitration agreement as #grounds for refusal within the meaning of Article V(1)(a) NYC.

ZG 30.07.2013 c. 5, ZG 09.09.2011 p. 2, ZG 18.10.2010 p. 3

If the #arbitration agreement is contained in an exchange of faxes, the requesting party may file the documents in its possession of which the authenticity is not attested; to the contrary, it is up to the #respondent which contests this authenticity to participate in the establishment of the proof for which it bears the #burden of proof by submitting the originals in its possession.

VD 25.01.2001 p. 14

Whereas the Geneva Convention on the Execution of Foreign Arbitral Awards of 1927 (Art. 4) requires the requesting party to submit, together with the relevant documents, extensive #evidence which is sometimes so difficult to establish that the #enforcement of the #award becomes problematic, the NYC constitutes a remarkable progress in this respect. Indeed, by establishing the principle that the arbitral #award and the #arbitration agreement in the hands of the requesting party constitute documents which can be trusted absent #evidence to the contrary, the NYC shifts the #burden of proof to the #respondent.

GE 15.04.1999 [(2000) ASA p. 789]

By submitting the #arbitration agreement and the arbitral #award, the requesting party *prima facie* shows that it has a definitive and binding arbitral #award, rendered on the basis of a valid #arbitration agreement. Therefore, it is up to the #respondent in the #enforcement proceedings to allege and to establish the existence of a ground preventing the #recognition and #enforcement of this #award.

GE 15.04.1999 [(2000) ASA p. 789]

1.6 Right to Be Heard

According to Article 29(1 & 2) FC as well as Article 6(1) ECHR, the parties to legal proceedings have a #right to be heard and are entitled to a fair trial, taking into account the principle of #equality of arms. These guarantees include the right to be informed of, and to be heard on, all submissions to the State court, regardless of whether the submissions contain new and/or material elements. It is for the parties to decide whether or not a response is necessary. The exercise of the right of #reply presupposes that the submission in question is served on the party. The Federal Supreme Court has repeatedly stated that the parties to the proceedings are entitled to be served with submissions. The State court must serve submissions received before a judgment is delivered to the parties so that they can come to a conclusion as to whether or not they wish to comment on them.

FSCD 4A_660/2012 c. 2.2

1.7 Resubmission of Application

The wording of Article IV(1) NYC does not suggest that an application for #recognition and #enforcement of an #award that has been withdrawn may not be submitted anew.

FSCD 4A_124/2010 c. 3.1, BS 29.09.2011 c. 3.1

The requirement that documents shall be submitted together with the application refers only to the application made in the same proceedings. The NYC does not

preclude the re-filing of an application that was withdrawn or had failed because no supporting documents were filed or because such documents failed to comply with applicable formal requirements.

FSCD 4A_124/2010 c. 3.1

The case in which the application is withdrawn in order to be brought anew in an improved form is one of the exceptional cases in which a decision to remove a case from the docket does not have *res judicata* effect as a matter of federal law and the cantonal law of procedure may permit the application to be brought anew.

FSCD 4A_124/2010 c. 3.2

1.8 Individual Cases

The copy of an arbitral *award* which is accompanied by an attestation signed by GAFTA [*Grain and Free Trade Association*]'s general director certifying that the copy is a true copy of the original *award* in circumstances where the authenticity of the general director's signature had been certified by an English notary public, whose capacity had also been certified by an apostille affixed by the English competent authority, complies with the requirement of Article IV(1)(a) NYC.

FSCD 5A_441/2015 c. 3.1

Even though the *arbitration agreement* was not duly certified, the fact that the *respondent* has previously claimed that it was bound by the *arbitration agreement* and has previously admitted that the contract concluded with the other party was subject to arbitration is sufficient to conclude that the *arbitration agreement* was *prima facie* authentic and binding on the parties.

FSCD 5A_441/2015 c. 3.2

Even though the document containing the *arbitration agreement* was not a certified copy of the original document but was a fax, the authenticity of the *arbitration agreement* was not disputed by the *appellant* at first instance. Accordingly, the ground raised by the *appellant* based on the lack of authenticity must be rejected.

FSCD 5A_427/2011 c. 5

The *respondent* produced copies of the *arbitration agreement* as well as the arbitral *award*, authenticated by an Austrian notary public, whose qualification was attested by an apostille of the competent Austrian authority. The *respondent* therefore complied with the requirements of Article IV (1) NYC.

FR 07.02.2018 c. 3

In the present case, not only did the *claimant* not contest the authenticity of the *arbitration agreement* and *award* filed by the *respondent*, but it also filed the *award* of 1 June 2007 (and not in the form of an original document or a certified copy). It would therefore be overly formalistic to allow the *res judicata* defence to fail because of the formal requirement.

BS 29.09.2011 c. 3.1

It may be left open whether the translation of the arbitral #award and the #arbitration agreement submitted by the applicant, together with the authentication and the apostille of R., notary public in London, complies with the requirements of Article IV(2) NYC, since both the arbitral #award and the #arbitration agreement in the sales contracts are easily understandable.

ZG 18.10.2010 p. 3

The requirements of Article IV(1)(b) NYC are fulfilled if the parties have concluded three contracts with the same wording referring to the same #arbitration agreements contained in #general terms and conditions, on the basis of which #arbitral proceedings have been conducted abroad, if the #respondent (later the party resisting #enforcement) did not object to the #jurisdiction of the #arbitral tribunal, when the party requesting #enforcement, in the subsequent #enforcement proceedings, submits only two contracts in the original, the third however solely as a non-signed copy, if the file shows that the party resisting #enforcement is in all probability in possession of an original of the third contract but never submitted it. It can be assumed in such a situation that the requirements of this provision can also be considered as fulfilled with regard to the third #arbitration agreement.

GE 11.12.1997 [(1997) ASA p. 672]

If the #arbitration agreement is submitted in the form of a copy of a fax, this is in principle not sufficient. However, if this copy covers the entire agreement, including the #arbitration agreement, and if the party against whom #enforcement is sought does not contest its authenticity, such a document can be sufficient.

FSCD 09.01.1995 [(2001) ASA p. 298]

An #award made by the *Chambre Arbitrale Maritime de Paris* can be recognised if its #formal legal force and its enforceability are not disputed by the parties, if no #grounds for refusal according to Article 17 of the Treaty between Switzerland and France on Judicial Jurisdiction and the Enforcement of Judgments in Civil Matter of 15 June 1869 or Article V NYC are invoked or result from the file, even though the formal requirements for #recognition of a foreign #award according to the NYC and the Treaty between Switzerland and France are not fulfilled.

ZH 20.04.1990 [(1990) ASA p. 185]

2 Translation (2)

2.1 Purpose and Interpretation of Article IV(2) NYC

Article IV(2) NYC purports to submit the arbitral #award to the court in the State of #enforcement in an understandable version so that a decision can be issued on the reasons to refuse #enforcement pursuant to Article V NYC.

FSCD 138 III 520 [526]

Accordingly, a translation is not necessary in the case of arbitral #awards rendered in English.

FSCD 138 III 520 [526], ZH 23.09.2016 c. III/4.1

According to the #case law of the Federal Supreme Court, the requirements of form set out in Article IV NYC should not be applied strictly and an overly formalistic application of this provision should be avoided.

FR 07.02.2018 c. 4, ZH 29.09.2017 c. 4.4, ZH 23.09.2016 c. III/4.1, VD 05.03.2015 c. IV.b

In a recent decision [FSCD 138 III 520], the Federal Supreme Court judged that Article IV(2) NYC was not a mandatory provision according to which a translation of the entire documents should always be required.

VD 05.03.2015 c. IV.b

Article IV(2) NYC relates to the situation where a party relies upon an #award before a State authority of the requested State.

BS 05.11.2003 c. 3a

This provision provides formal requirements for #recognition and #enforcement. The purpose of this provision is to give the judge, who does not understand the original language and who must decide on #recognition and #enforcement, a safe basis to decide, not only on the #grounds for refusal raised by the debtor, but also on those of Article V(2) NYC, which are to be taken into account *ex officio*, such as lack of #arbitrability of the #matter in dispute and violation of #public policy.

ZG 27.02.1998 [(2000) ASA p. 364]

2.2 No Replacement of the Arbitration Agreement

The translation of the #arbitration agreement has to be attached to the original text, respectively to the authentic copy, but cannot replace it.

FSCD 09.01.1995 [(2001) ASA p. 298]

2.3 No Requirement of a Translation of an Award in English

As a rule, courts will not require a translation of an #award in English.

FSCD 138 III 520 [527], FSCD 5A_441/2015 c. 3.2, ZH 18.10.2018 c. IV/3.1, FR 07.02.2017 c. 4, VD 05.03.2015 c. IV.b, SZ 10.10.2011 c. 5a

2.4 Translation Upon Request

Part of the doctrine even considers that the requesting party need not provide a translation if the tribunal should understand the original language. In such a case, the requesting party can only be ordered to translate the document if the tribunal or the opposing party asks that it be translated.

GE 15.04.1999 [(2000) ASA p. 790]

2.5 Individual Cases

It would be formalistic to require a translation of the rest of the arbitral #award in addition to the #operative part and the chapter on #costs given that only the issue as to the attribution of #costs was in dispute and was the basis for the alleged ground to refuse #enforcement pursuant to Article V NYC.

FSCD 138 III 520 [526-527]

The production of a translation of an extract of the #appeal against the #award which reproduced the #arbitration agreement is sufficient. It does not matter that this was a free translation and was not certified.

FSCD 5A_441/2015 c. 3.2

The entire text of the arbitral #award in English, accompanied by a certified translation in French of the #operative part of this #award was filed. The #award was not very lengthy, of 36 pages, widely spaced, of which the text was structured in 27 chapters and drafted in current English which was easy to understand. In light of these circumstances, the requirement of an official translation in French of the entire arbitral #award would constitute an #excessive formalism, which should be avoided with respect to the #recognition and #enforcement of foreign arbitral #awards.

FR 07.02.2018 c. 4

It may be assumed (in addition on the basis of the lower court's discussion of the #arbitral tribunal's reasoning with regard to the VAT) that the lower court, like the board of appeal of the cantonal court, has sufficient knowledge of English. For reasons of #procedural economy, a translation is therefore not necessary (especially as there is a non-certified translation of the #reasons for the decision on costs as well as a translation of the explanatory decision, the correctness of which has not been disputed by the #respondent in a detailed way).

SZ 10.10.2011 c. 5a

The translation made by a third person may be certified, according to the NYC, by a diplomatic or consular agent, who can obviously be assumed to master the languages at stake. By analogy, certification by a public notary in its capacity as an official person who can verify the translation based on its own language skills, should be considered sufficient.

ZG 27.02.1998 [(2000) ASA p. 365-366])

The production of a translation of an #award in Dutch by the Swiss General Counsel in Rotterdam fulfils the prerequisites of Article IV(1) NYC as Dutch is not an official language in Switzerland.

BL 03.06.1971 [(1973) BJM p. 195]

Article V

- 1. Recognition and enforcement of the award may be refused, at the request of the party against whom it is invoked, only if that party furnishes to the competent authority where the recognition and enforcement is sought, proof that:**
 - a. The parties to the agreement referred to in article II were, under the law applicable to them, under some incapacity, or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made; or**
 - b. The party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case; or**
 - c. The award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, that part of the award which contains decisions on matters submitted to arbitration may be recognized and enforced; or**
 - d. The composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties, or, failing such agreement, was not in accordance with the law of the country where the arbitration took place; or**
 - e. The award has not yet become binding on the parties, or has been set aside or suspended by the competent authority of the country in which, or under the law of which, that award was made.**
- 2. Recognition and enforcement of an arbitral award may also be refused if the competent authority in the country where recognition and enforcement is sought finds that:**
 - a. The subject matter of the difference is not capable of settlement by arbitration under the law of that country; or**
 - b. The recognition or enforcement of the award would be contrary to the public policy of that country.**

1 *Grounds for Refusal (1)*

1.1 Exhaustive List, Restrictive Interpretation and Purpose

The #grounds for refusal of #recognition and #enforcement of an #award set out in Article V NYC are exhaustive.

FSCD 144 III 411 [419], FSCD 135 III 136 [139], FSCD 108 Ib 85 [87], FSCD 4A_374/2014 c. 4.2.2, FSCD 5A_68/2013 c. 4.2, FSCD 4A_508/2010 c. 3.2, FSCD 4A_233/2010 c. 3.2.1, ZH 05.11.2018 c. 4.2, VD 30.10.2018 c. III.b, FR 28.02.2018 c. 3.3.1, VD 05.03.2015 c. IV.a, VD 24.12.2014 c. 4.a.aa, VD 19.12.2014 c. IV.e., VD 11.11.2014 c. II.c.bb, GE 16.10.2015 c. 3.1.2, GE 22.03.2013 c. 2.2.1, TI 22.02.2010 c. 8, BS 27.02.1989 [(1991) BJM p. 146]

Such grounds must be interpreted restrictively in order to facilitate the #enforcement of the arbitral #award.

FSCD 135 III 136 c. 3.3, FSCD 4A_374/2014 c. 4.2.2, FSCD 5A_409/2014 c. 5.2.1, FSCD 5A_68/2013 c. 4.2, FSCD 4A_233/2010 c. 1.3.1, FR 28.02.2018 c. 3.3.1, GE 16.10.2015 c. 3.1.2, VD 30.10.2018 c. III.b, VD 05.03.2015 c. IV.b, VD 24.12.2014 c. 4.a.aa

The #recognition and #enforcement of the #award may only be refused at the request of the party against whom it is invoked if that party proves that a #ground for refusal within the meaning of Art. V(1)(a-d) NYC is present.

FSCD 4A_508/2010 c. 3.2, GE 16.10.2015 c. 3.1.2, ZG 18.10.2010 p. 3

Doctrine and #case law admit that this provision, when it refers to Article II NYC, which describes the form of an #arbitration agreement, refers to the formal invalidity of this agreement. For the rest, Article V(1)(a) in fine NYC refers to the substantive invalidity of the latter.

VD 05.03.2015 c. VI.b.aa

Article V NYC establishes an exhaustive system of #grounds for refusal; #recognition and #enforcement may not be refused on grounds which are not listed under this provision.

SZ 27.02.2013 c. 5b

The purpose of the NYC is to limit the #jurisdiction of the court in the #enforcement proceedings of arbitral #awards largely to procedural issues and to avoid that the proceedings be reopened on substantive issues.

VD 28.05.1998 p. 9, ZH 26.05.1994 [(1997) ASA p. 266]

The objection that an invitation has not been worded in a language understandable to a party, but in the language of the State where the #arbitral tribunal has its #seat, is not part of this list. According to the NYC, only certain decisive documents such as e.g. the #award itself have to be translated for #recognition purposes (see Art. IV(2) NYC).

BS 27.02.1989 [(1991) BJM p. 146]

1.2 Upon Request (1) or *Ex Officio* (2)

The party resisting #enforcement has to establish that a #ground for refusal pursuant to Article V(1) NYC is fulfilled.

FSCD 135 III 136 [139], FSCD 110 Ib 191 [195], FSCD 108 Ib 85 [87], FSCD 4A_374/2014 c. 4.2.2, FSCD 5A_409/2014 c. 5.2.1, FSCD 5A_68/2013 c. 4.2, FSCD 4A_233/2010 c. 1.3.1, FSCD 4P.173/2003 c. 3.1, ZH 18.10.2018 c. IV/3.1, FR 28.02.2018 c. 3.3.1, ZH 23.09.2016 c. III/4.1, GE 16.10.2015 c. 3.1.2, VD 05.03.2015 c. IV.a, VD 19.12.2014 c. IV.e.aa, GE 11.04.2014 c. 4.4.1, ZH 14.03.2014 c. II.6, SZ 27.02.2013 c. 5b, GE 04.03.2010 c. 2, BS 05.11.2003 p. 6

The #grounds for refusal set out in Article V(1) NYC can only be examined at the request of the party resisting #enforcement, which must provide proof. #Enforcement can only be refused *ex officio* if the subject matter is not arbitrable or if the #public policy of the country of #enforcement is violated.

FSCD 4A_374/2014 c. 4.2.2 & 4.3.2.3, FSCD 5A_68/2013 c. 4.2, FSCD 4A_233/2010 c. 1.3.1, ZH 05.11.2018 c. 4.2, ZH 20.03.2018 c. III/3.5, FR 28.02.2018 c. 3.3.1, ZH 23.09.2016 c. III/4.1, GE 22.03.2013 c. 2.2.1, VD 12.04.2012 c. II.d, TI 22.02.2010 c. 10 & c. 15, AR 05.08.1994 p. 3-4

In particular, the party resisting #enforcement must establish the content of the foreign law that it invokes in support of its arguments.

FSCD 5A_409/2014 c. 5.2.1, GE 11.04.2014 c. 4.4.1

Article V(1) NYC lists #grounds for refusal which are primarily related to procedural flaws and which have to be invoked by the party resisting #enforcement, which bears the #burden of proof of the reality of the flaws, whereas Article V(2) NYC relates to two issues concerning #public policy and the court has to examine *ex officio* whether the arbitral #award violated such #public policy, Article V(2)(b) NYC representing the defence of internal #public policy.

FSCD 08.02.1978 [(1980) SJ p. 70-71]

It results from the text of Articles III to V NYC and the systematics of this treaty that it is the responsibility of the party requesting #recognition and #enforcement of an arbitral #award to comply with the conditions of Article IV NYC. If these conditions are met, it is for the other party, against whom the #award is invoked and the exequatur requested, to invoke the fulfilment of one of the five #grounds for refusing #recognition and #enforcement listed in Article V(1) NYC and to prove the #facts on which it is based; if it does not do so or if it fails in its demonstration and there are also no absolute #grounds for refusal within the meaning of Article V(2) NYC, the #award shall be recognised and enforced in Switzerland.

VD 30.10.2018 c. III.b, VD 05.03.2015 c. IV.a.

Articles IV(1)(b) and V(1)(a) NYC should therefore not be confused. If the original or a certified copy of the document is "*prima facie*" an #arbitration agreement, the party seeking #recognition and #enforcement does not need to establish that the #arbitration agreement complies with the written form prescribed by Article II(2) NYC (formal validity), or that it is valid under the law applicable to arbitration under Article V(1)(a) NYC (substantive validity). It is for the party against whom the #award is invoked to prove otherwise pursuant to Article V(1)(a) NYC.

VD 05.03.2015 c. IV.a.

The #grounds for refusal set out in Article V(1) NYC have to be taken into account in possible proceedings concerning an objection to the #attachment of assets (*Arresteinspracheverfahren*; Article 271(1)(6) SDCB).

ZH 18.10.2018 c. IV/3.1

The situation is different in the case of the #grounds for refusal set out in Article V(2) NYC, which are to be examined *ex officio*.

VD 30.10.2018 III.b, ZH 18.10.2018 c. IV/3.1

By their very nature, the #grounds for refusal under Article V(1) NYC cannot yet be taken into account in proceedings concerning the authorisation of the #attachment of assets [*Arrestbewilligungsverfahren*]; they can only be taken into account in proceedings concerning an objection to the #attachment of assets [*Arresteinspracheverfahren*] if they are then brought forward.

ZH 23.09.2016 c. III/4.1

The #recognition and #enforcement of the #award may only be refused at the request of the party against whom it is invoked if that party proves that a #ground for refusal within the meaning of Art. V(1)(a-d) NYC is present.

ZG 18.10.2010 p. 3

An #appellant who asserts that the #arbitral proceedings lasted too long bears the #burden of proof of this #claim.

BS 05.11.2003 c. 3b

The Message of the #Federal Council stated that if the formal requirements of Article IV NYC are fulfilled, the NYC shifts the #burden of proof by putting it henceforth on the #respondent's side. According to Article V NYC, the party resisting #enforcement has to prove that the request for #recognition or #enforcement is ill-founded, except if the competent court dismisses the request *ex officio* pursuant to Article V(2) NYC.

GE 14.04.1983 [(1984) SJ p. 39]

1.3 Waiver of Right to Invoke Grounds

According to the well-established #case law of the Federal Supreme Court, it is contrary to Article 2 CC (or Art. 52 CCP, as the case may be) to invoke formal #grievances, which could have been raised at an earlier stage of the proceedings, at a later date if the outcome was unfavourable. For example, a #challenge must be made immediately after knowledge of the #ground for #challenge, with the consequence that otherwise it will be forfeited.

FSCD 141 III 210 [216]

The principle of #good faith and the prohibition of #abuse of right also apply in cross-border relationships.

FSCD 141 III 210 [216]

They are also important in the context of the international #recognition of State court judgments and arbitral #awards: In particular, they must be observed when asserting procedural #grounds for refusal under the NYC. Even if the latter does not require the exhaustion of the possibilities for setting aside the arbitral

#award at the #seat of the #arbitral tribunal, the parties are nevertheless obliged, pursuant to the requirement of #good faith, to raise their objections in good time in the #arbitral proceedings, otherwise they can no longer invoke them in the #enforcement proceedings.

FSCD 141 III 210 [216]

In FSCD 4A_374/2014, the Federal Supreme Court left open the issue of whether or not this also applies to errors concerning procedural #public policy.

FSCD 141 III 210 [217]

The duty to act in accordance with #good faith and the prohibition of an #abuse of right are principles which also apply in international relationships, notably at the stage of the #recognition and #enforcement of foreign judgments and arbitral #awards.

FSCD 5A_441/2015 c. 4.2

According to the principle of #good faith and the prohibition of an #abuse of contractual or legal rights, it is inadmissible for a party not to raise formal objections which could have been raised at an earlier stage of the proceedings until after the outcome of those proceedings has turned out to be unfavourable to such party.

FSCD 5A_441/2015 c. 4.2, FSCD 4A_124/2010 c. 6.3.3.1

The formal #validity of an #arbitration agreement, being one of the conditions of the valid recourse to an #arbitral tribunal, cannot be disputed for the first time at the #enforcement stage.

FSCD 5A_441/2015 c. 4.2

It is not permissible to keep in reserve #grievances concerning procedural defects which could have been rectified immediately and raise them only in the event of an unfavourable outcome of the #arbitral proceedings.

FSCD 4A_374/2014 c. 4.2.2

The NYC does not require that a party which raised a procedural objection that was not upheld in the arbitration should pursue all remedies available in order to challenge the #award.

FSCD 4A_374/2014 c. 4.2.2, FSCD 4A_124/2010 c. 6.3.3.1

However, it is far from clear that a #waiver could also extend to an objection falling within procedural #public policy, such as the compliance with the #right to be heard which is both a #ground for refusal to be invoked by the parties (Art. V(1)(b) NYC) and an *ex officio* #ground of refusal (Art. V(2)(b) NYC). Moreover, the issue of #waiver is strongly disputed in such a case both by the #case law and doctrine. In addition, it cannot be disassociated from the circumstances of the case at hand, so that it would be incorrect to attempt to definitively resolve this issue in the abstract.

FSCD 4A_374/2014 c. 4.2.2

Conduct which is contrary to #good faith that was adopted by a party during the arbitration, notably the omission to assert a procedural defect, prevents it from invoking a ground for the refusal of #enforcement.

FSCD 5A_409/2014 c. 5.2.1, FR 28.02.2018 c. 3.3.1, GE 16.10.2015 c. 3.1.2, TI 22.02.2010 [14.2009.104] c. 10 & 11

1a *Incapacity of the Parties and Invalidity of the Arbitration Agreement ((1)(a))*

- As to the invalidity of the #arbitration agreement, see also Article II(2) NYC

1a.1 Principle

In the absence of a #choice of law, the law of the #arbitral tribunal applies to the #arbitration agreement, with regard to the #merits and with regard to the issues which are not covered by the NYC itself.

FSCD 21.03.1995 [(1996) ASA p. 261], VD 19.05.1999 p. 12

According to Article V(1) NYC, it is for the #appellant to prove that the #arbitration agreement was invalid.

FR 07.02.2018 c. 5.2

According to various scholars, the lack of #power of representation of the person signing the #arbitration agreement falls under the category of subjective inability to arbitrate. The question of the #power of representation is not to be assessed according to the law governing the status of the (insufficiently) represented party. In the case of a #legal person, this in turn must be assessed on the basis of Article 154 PILA.

ZG 30.07.2013 c. 5.1

An #arbitration agreement may be invalid in particular because a party was not properly represented when the #arbitration agreement was concluded. In this area, however, the question of the #power of representation is not to be assessed according to the law governing the status of the insufficiently represented party, but according to the law agreed by the parties or, subsidiarily, according to the law of the country in which the arbitral #award was made.

ZG 30.07.2013 c. 5.2

It does not harm the #respondent to have omitted the plea of a lack of #jurisdiction of the #arbitral tribunal during the #arbitral proceedings. A different decision would only have to be made if the #respondent had unconditionally entered into the #arbitral proceedings or had waived its right to challenge a preliminary #award on #jurisdiction in the State in which the #arbitral tribunal had its #seat by claiming that the #arbitral tribunal had wrongly considered itself to have #jurisdiction. Accordingly, the #respondent may, not only in the #enforcement proceedings but also in the present #attachment of assets proceedings, in which it must be shown that the arbitral #award can be recognised and enforced in Switzerland, argue that the International Arbitral Tribunal of the Chamber of Commerce and Industry of the Republic of Kazakhstan has declared itself as having #jurisdiction on the basis of an ineffective #arbitration agreement, such defect having not been remedied.

ZG 07.02.2013 c. 5.9

According to the prevailing doctrine and pursuant to Article V(1)(a) NYC, the question of the #validity of the #arbitration agreement has to be examined, in the

absence of a #choice of law, according to the law of the #seat of the #arbitral tribunal (respectively, pursuant to the NYC, according to the law of the State where the #award has been rendered).

ZH 26.05.1994 [(1997) ASA p. 265]

1a.2 Individual Cases

The President of the Chamber of Commerce and Industry of the Republic of Kazakhstan, who was called upon by the complainant, appointed the International Arbitral Tribunal at the Chamber of Commerce and Industry of the Republic of Kazakhstan without any prior attempt by the parties to reach an agreement and without consulting the #respondent at all, and the #arbitral tribunal in question declared itself as having #jurisdiction without further ado in the #award. This procedure violates the European Convention on International Commercial Arbitration, which was invoked by the aforementioned instances. The #arbitral tribunal thus declared itself as having #jurisdiction in violation of Kazakh procedural rules. As a result, the pathological #arbitration agreement in the agreement of 5 August 2008 could not be cured and the #ground for refusal of #recognition under Art. V(1)(a) NYC is credible.

ZG 07.02.2013 c. 5.7

1b *Inability of a Party to Present its Case ((1)(b))*

1b.1 Principle

Pursuant to Article V(1)(b) NYC, the #recognition and #enforcement of an #award will only be refused, at the request of the party against which it is invoked, if this party provides the competent authority of the country where the #recognition and #enforcement is sought, with the proof that the party against which the #award is invoked, was not duly informed of the appointment of the #arbitrator or the #arbitral proceedings, or that it was impossible for it for another reason to present its case.

FSCD 5A_68/2013 c. 4.2.1, ZH 20.03.2018 c. III/3.5, FR 28.02.2018 c. 3.3.4

This is the #ground for refusal of the violation of the #right to be heard.

SZ 27.02.2013 c. 5c

Article V(1)(b) NYC guarantees the minimal requirements of a fair and correct procedure ("standards of #due process", "principle of fair hearing and #adversarial proceedings").

FSCD 12.01.1989 [(1990) Yearbook p. 512]

1b.2 Applicable Law

With regard to the law that the #enforcement judge must apply to rule on letter b, it is first necessary to distinguish the subject matter of this letter from that of the letter d of Article V(1) NYC. The autonomy of the parties to organise the #arbitral proceedings, enshrined in the latter provision is limited by the prohibition of the violation of the #right to be heard sanctioned by Article V(1)(b) NYC; however, this only applies as a minimum standard. Compliance with this minimum standard cannot therefore be measured, or at least not only, according to the agreement of the parties; to admit otherwise would make letter b practically superfluous. An agreement providing for a lower standard of protection than that guaranteed by Article V(1)(b) NYC nevertheless has the consequence that the violation of letter b can only be admitted in the most flagrant cases.

FSCD 5A_409/2014 c. 5.2.2.1

That being said, the question of whether Article V(1)(b) NYC establishes an international standard for the #right to be heard or only contains a reference to the law of the enforcement State is controversial. The tendency is to start from the conception of the #right to be heard of the enforcement State but to render decisions in the case in point which take into account the specificities of arbitration and international criteria.

FSCD 5A_409/2014 c. 5.2.2.2

1b.3 Notification of Procedural Acts

More specifically, the notification of procedural acts, as an element of the #right to be heard, must respect certain minimal requirements. Information is duly communicated when it has been sent, notably in an adequate form and to the correct address.

FSCD 5A_409/2014 c. 5.2.2.2

With respect to form, in order to rule on its adequacy, the national rules applicable to judicial proceedings led by State courts are not pertinent. As a consequence, a good number of different forms of notification have been judged adequate, notably by ordinary mail, registered mail, fax or telex. However, it is accepted that notification which is carried out in conformity with the law of the State of the recipient's home suffices in all cases.

FSCD 5A_409/2014 c. 5.2.2.2

Concerning the address, tribunals have considered that communication made to the last known address of a party, in conformity with the arbitration rules to which they have been subjected is sufficient to respect the #right to be heard, in particular, when the recipient must have reasonably expected such a communication.

FSCD 5A_409/2014 c. 5.2.2.2

The #respondent must at least be able to acquaint itself with the #claimant's claims, even if they are formulated in a summary manner, as well as with the names of the #arbitrators. The effectiveness of the notification must in principle be determined on the basis of the law of the State where the addressee is domiciled. Most legal systems, including Switzerland, accept that the notification rules concerning judicial documents do not apply to #arbitral proceedings and that, in the context of such proceedings, notification by simple postal channels is recognised.

GE 11.04.2014 c. 4.3.1

1b.4 Proper Notice of the Appointment of the Arbitrator

Article V(1)(b) NYC requires that a party be informed of the commencement of the #arbitral proceedings, that all documents be communicated to it, that it be granted the possibility of submitting its own documents and of appearing or being represented before the #arbitral tribunal at the time of the #hearing.

FSCD 12.01.1989 [(1990) Yearbook p. 512]

According to the wording of Article V(1)(b) NYC, it is sufficient to notify the #respondent that #arbitral proceedings have been instituted against it. It must therefore have been served with the document commencing the proceedings. If this is not done, procedural #public policy is also violated.

SZ 27.02.2013 c. 5c/bb

The NYC states that the notice must be "proper" without, however, specifying the modalities. This means that the parties may freely agree on the manner in which the notice is to be made. In the absence of an agreement, any service which

ensures that the document comes within the sphere of control of the addressee and thus gives the addressee the opportunity to actually take note of it must be regarded as proper. Service by post is generally permissible. Only if the document does not come under the control of the addressee does the question arise as to whether and to what extent a fiction of service can occur. The predominant view is that the effectiveness of service must in principle be assessed in accordance with the law of the country of residence of the party to be served. The *lex fori* is therefore decisive.

SZ 27.02.2013 c. 5c/bb

1b.5 Tribunal Appointed by a Professional Association

The mere fact that the #arbitrators belong to the #association [*in casu* the Grain and Feed Trade Association (GAFTA)] does not suffice, in a dispute between a member and a non-member, to prejudice the #equal treatment of the parties as far as the #composition of the tribunal is concerned. It does not suffice either, by itself, to justify the refusal of #enforcement of the #award for reasons of #public policy. This is all the more true if the #appellant could have chosen the party-appointed #arbitrator from the list of #arbitrators of the #association but voluntarily chose not to do so and if it wrote to the #arbitrator appointed *ex officio* thanking him for having accepted the appointment and offering to pay #fees and expenses.

FSCD 12.01.1989 [(1990) Yearbook p. 513-514]

1b.6 Violation of the Right to Be Heard

- See also Article 182(3) PILA, section 3.3; and Article 190(2)(d) PILA, section 2d.3

1b.6.1 Principle

Article V(1)(b) NYC sanctions every violation of the #right to be heard.

FSCD 5A_68/2013 c. 4.2.1

Article V(1)(b) NYC allows a party resisting #enforcement of an #award to object, for any reason whatsoever, that it has been deprived of the possibility of presenting its case. By its broad wording, this provision covers any restriction, of any nature whatsoever, to the parties' rights. It seems to relate *inter alia* to the #right to be heard.

FSCD 08.02.1978 [(1980) SJ p. 74]

However, according to the prevailing doctrine and court practice, only very serious violations of the #right to be heard under the law of the State of enforcement lead to refusal of the #recognition and #enforcement pursuant to Article V(1)(b) NYC.

ZH 20.03.2018 c. III/3.5

According to this provision [Art. V(1)(b) NYC], a violation of the #right to be heard of one of the parties grounds the refusal to recognise and enforce an arbitral #award.

GE 11.04.2014 c. 4.3.1

The formulation of Article V(1)(b) NYC covers, in principle, any violation of the #right to be heard, the scope of the #right to be heard being determined by the law of the country in which #recognition or #enforcement is sought. Before the Swiss enforcement judge, the content of the #right to be heard, which is also governed by Article V(2)(b) NYC (as part of procedural #public policy) does not go beyond what can be required under Article 182(3) PILA from an #arbitral tribunal sitting in Switzerland.

ZG 30.07.2013 c. 5.3

This text essentially covers any violation of the #right to be heard. It does not, however, go further than to ensure compliance with minimum requirements for a fair trial. The NYC commands, in principle, an autonomous #interpretation of this concept, but failing that, it authorizes the judge to be inspired by the solutions applied in international arbitration in Switzerland. Thus, it is not possible to admit grievances based on solutions applied by the #arbitral tribunal in accordance with the arbitral procedure or rules chosen by the parties and within the limits comparable to those set out in Article 182(3) PILA. Likewise, the party which could not be heard at a specific time of the #arbitral proceedings, but which continued to proceed without making a reservation, cannot invoke this ground as a #ground for refusing #enforcement of the #award.

GE 22.03.2013 c. 3.1

The #grievance of a violation of the #right to be heard is a #ground for refusal according to Article V(1)(b) NYC. The principle of #good faith, the need for #legal certainty and the principle of #due process require that the party affected by a violation of the #right to be heard must immediately complain about the procedural error in front of the #arbitral tribunal. If it fails to complain in the absence of good reason for not complaining, it waives the right to invoke the #ground for refusal in the #enforcement proceedings.

AR 05.08.1994 p. 6

1b.6.2 Right to an Expert Opinion

The #arbitrator has the possibility to appoint a neutral #expert in order to clarify technical issues which it cannot resolve based on its personal knowledge.

FSCD 08.02.1978 [(1980) SJ p. 73]

However, this possibility allowing the #arbitrator to take the opinion of third persons, in order to make its decision on the basis of #facts relevant for the outcome of the dispute, does not relieve it from observing the fundamental principles of #due process.

FSCD 08.02.1978 [(1980) SJ p. 73]

1b.6.3 Right to Be Heard on Legal Issues

In international arbitration, the Federal Supreme Court considered that in Switzerland, the #right to be heard relates mainly to the determination of #facts. The right of the parties to be questioned on legal questions is only recognised in a limited way. As a general rule, according to the adage *jura novit curia*, State courts or #arbitral tribunals freely assess the legal scope of the #facts and may also rule on the basis of rules of law other than those invoked by the parties. Consequently, insofar as the #arbitration agreement does not restrict the #arbitral tribunal's mission to the legal grounds raised by the parties, they do not have to be heard specifically on the scope to be given to the rules of law. Exceptionally, they should be questioned when the judge or #arbitral tribunal intends to base its decision on a norm or legal consideration that has not been mentioned during the procedure and that the parties could not have guessed the relevance. Incidentally, knowing what is surprising is a matter of appreciation.

GE 22.03.2013 c. 3.1

Even though the #arbitrator does not have to submit the legal principles on which it will base its decision to the parties for discussion, the specialised #arbitrator who has access to sources of knowledge not available to the parties has however the obligation to inform the parties in advance about the fundamental technical elements on which its decision will be based. This applies *a fortiori* when the #arbitrator uses the knowledge of third persons whom it consults as #expert.

FSCD 08.02.1978 [(1980) SJ p. 73-74]

1b.7 Violation of the Principle of Adversarial Proceedings

According to the #adversarial maxim, it is up to the parties to allege and to prove the #facts on the basis of which the #arbitral tribunal makes its decision. Therefore, the #arbitrator can only take into account #facts alleged in the proceedings. The #facts cannot be supplemented or corrected *ex officio* and it is up to the parties to submit the #evidence by which they want to prove the alleged #facts. In principle, the #arbitrator can only take #evidence which has been offered by the parties.

FSCD 08.02.1978 [(1980) SJ p. 73]

However, this maxim has to be limited in so far as its literal application could hinder the adjudicating process. In fact, the #arbitrator has to ensure that the #facts which form the basis of its legal analysis are complete and correspond to reality. If the #facts are incomplete, unclear or imprecise, it can order *ex officio* investigations and use certain types of #evidence such as for instance #expert opinion, #site visit, etc.

FSCD 08.02.1978 [(1980) SJ p. 73]

1b.8 Individual Cases

The fact that no #reasons were given for the decision refusing the #challenge of an #arbitrator does not violate Article V(1)(b) NYC. According to the clear wording of Article 7(4) of the 1998 ICC Arbitration Rules, the ICC Court rules finally on the #appointment, confirmation, #challenge and replacement of the

#arbitrator. The reasons for these decisions are not communicated. Although the lack of reasoning makes the task of the enforcing judge more difficult, such a risk must be supported by a party which freely accepted, for other advantages, to submit to arbitration. If one allowed this party to invoke the simple lack of #reasons to resist the #enforcement of the #award rendered by virtue of this freely chosen procedure, this would be tantamount to protecting an attitude which is contrary to #good faith. The fact that the decisions of State authorities must be reasoned does not mean that the same principles should apply to #arbitral proceedings where the autonomy of the parties plays a much more important role, and which is chosen freely due to other advantages. It should therefore not necessarily provide the same guarantees as an #appeal before an ordinary state jurisdiction.

FSCD 5A_68/2013 c. 4.2.1

The #hearing of an #expert on technical issues without the parties having had knowledge thereof, and without having been present at the #hearing of the #expert, does not violate Article V(1)(b) & (d) NYC, when the #representative of the #respondent has been informed by the #arbitral tribunal with respect to the consultation of a third person and the questions to be submitted to it, but the #representative did not react hereto, if the #award has been rendered one year later and if the irregularity has been criticised by the #respondent only during the #enforcement proceedings. In such a case, the party resisting #enforcement will be estopped from complaining of a breach of #due process because this would amount to an #abuse of right.

FSCD 08.02.1978 [(1980) SJ p. 74-75]

The refusal by the #secretary of an #arbitral tribunal to grant an extension of a #time limit for the #respondent to nominate its #arbitrator and to submit its #statement of defence is neither contrary to the arbitration rules chosen by the parties [in casu *the ones of the Nederlands Huiden- & Lederbeurzen*] nor to the #right to be heard, because it can be expected from a #corporate body that it is able to take the necessary measures to maintain its capacity to act even in the absence of one or several of its officers or organs [in casu *because of mandatory military service*].

BL 03.06.1971 [(1973) BJM p. 198]

1c Award Ultra or Extra Petita ((1)(c))

➤ See also Article 190(2)(c) PILA

The first alternative of Article V(1)(c) NYC covers the defence that the #arbitral tribunal decided on claims for which it did not have #jurisdiction (*extra potestatem*) because the dispute did not fall within the objective or subjective scope of the #arbitration agreement.

FSCD 4A_508/2010 c. 3.2

The grounds for refusal set out in Article V(1)(c) NYC enshrine the principle that the #arbitral tribunal only has #jurisdiction to decide the questions that the parties have agreed to submit to arbitration. The cases covered by this provision concern cases where the #arbitral tribunal has ruled on claims for which it did not have #jurisdiction (*extra potestatem*), because the subject matter of the dispute was not within the scope of the #arbitration agreement (FSCD 4A_508/2010 of 14 February 2011, c. 3.2.); in other words, this #ground for refusal concerns cases where the #arbitrators have exceeded the scope *ratione materiae* of the #arbitration agreement. This ground concerns the absence of #jurisdiction (dispute not included in the scope of the #arbitration agreement) and the #arbitrator's excess of power (within the limits of its #jurisdiction).

VD 30.10.2018 c. IV.b.aa

1d *Incorrect Composition of the Arbitral Tribunal or Incorrect Arbitral Procedure ((1)(d))*

1d.1 No Minor Violation

Article V(1)(d) NYC - in accordance with its wording - only covers procedural errors (the arbitral procedure). According to the prevailing doctrine, only serious procedural errors should be covered by this standard. This refers to the procedural modalities chosen by the parties. The violation of substantive law is not covered by Article V(1)(d) NYC. Neither does Article V(1)(d) NYC cover an alleged violation of the #conflict of laws rules or an alleged application of the wrong substantive law.

ZH 05.11.2018 c. 7.1 & 7.3

According to the legal doctrine, one cannot accept that every violation, even minor, could constitute an obstacle to #enforcement. It is appropriate to require that the irregularity committed be such as to result in the #award being set aside under the applicable procedural law.

GE 22.03.2013 c. 2.3.1

1d.2 Incorrect Composition of the Arbitral Tribunal

➤ See also Article 190(2)(a) PILA

The irregularity in the #composition of the #arbitral tribunal must also be connected to the outcome of the dispute.

FSCD 4A_233/2010 c. 3.2.1, FR 28.02.2018 c. 3.3.3

If an incompetent #chamber of commerce imposes an #arbitrator upon the parties, the #award rendered by this #arbitrator does not have to be enforced in Switzerland pursuant to Article V(1)(d) NYC, because such an #arbitral tribunal does not correspond to the #arbitration agreement between the parties.

BS 06.09.1968 [(1968) RSJ p. 379]

1d.3 Different Arbitral Institution

Where the parties have agreed to resort to institutional arbitration and the agreed #arbitral institution is no longer in existence, the parties are deemed to have agreed to the replacement of the agreed institution by the legal successor.

FSCD 4A_124/2010 c. 6.1

1d.4 Incorrect Arbitral Procedure

1d.4.1 Party Autonomy

Within the limits of #party autonomy, the parties can freely determine their procedure. It results from Article V(1)(d) NYC that the #arbitral proceedings are in the first place governed by the parties' agreement respectively, in the absence of such an agreement, by the law of the State in which the arbitration took place. By giving preference to the intent of the parties, the NYC gives them the possibility of either agreeing on their own procedural rules or of choosing already existing private or State procedural rules.

FSCD 108 Ib 85 [88-89], GE 13.03.1986 [(1987) Yearbook p. 522]

The autonomy given to the parties with respect to the organisation of their procedural rules furthermore entails that the parties can also exclude the application of mandatory State procedural rules and replace them by provisions developed by themselves.

FSCD 108 Ib 85 [89]

#Party autonomy within the meaning of Article V(1)(d) NYC gives the parties the possibility to tailor procedural rules which are completely their own creations, in place of State procedural rules.

FSCD 108 Ib 85 [90]

This principle also gives the parties the possibility of declaring applicable in principle a system of State procedural rules, but of amending or replacing this system by specific agreements. This also applies to the question of when an arbitral #award becomes binding on the parties.

FSCD 108 Ib 85 [90]

Where there is no indication that the parties have agreed otherwise, parties are deemed to have agreed to the replacement of the chosen previous institutional arbitration rules by the rules of the new #arbitral institution provided that these rules are not fundamentally different from those of the previous institution and do not curtail the parties' rights. The application of the new rules cannot be denied solely on the ground that the new rules provide for a duty to pay a deposit.

FSCD 4A_124/2010 c. 6.2.1

1d.4.2 Limits of Party Autonomy

#Party autonomy is not without limits. It is subject to State control to the extent that the parties are in any case bound by the #public policy principles of the State of #enforcement (Art. V(2)(b) NYC).

FSCD 108 Ib 85 [89]

Where the parties have chosen a specific national law to govern the #arbitral procedure, the question is debated whether its #public policy rules also have to be respected.

FSCD 108 Ib 85 [89]

1d.5 Bifurcation of the Arbitral Proceedings

If the #arbitration agreement refers to arbitration rules which provide that the dispute has to be decided in a single arbitration, a foreign #award rendered in a bifurcated arbitration (arbitration with regard to the quality of the goods and to the law) is in principle not enforceable in Switzerland, if the parties did not expressly or tacitly agree to the modification of the proceedings.

BS 06.09.1968 [(1968) RSJ p. 379]

1e *Inexistence of a Binding Award (1(e))*

1e.1 “Binding” Award

1e.1.1 Principle

The foreign arbitral #award is “binding” [*“obligatoire”*] on the parties, if it cannot or not any longer be challenged by an ordinary #appeal. This concept is approved by modern doctrine.

FSCD 135 III 136 [140], FSCD 5P.292/2005 c. 3.2

For the purposes of Article V(1)(e) NYC, it is not necessary for an arbitral #award to be declared enforceable in the State of origin, unless that is a condition for its #validity under the law of that State.

FSCD 135 III 136 c. 2.2, FSCD 5P.292/2005 c. 3.2, TI 09.12.2010 [14.2010.98] c. 9, TI 22.02.2010 [14.2009.104] c. 13

A foreign arbitral #award is binding on the parties when an ordinary #appeal is not or is no longer available against it, when it has not been declared null and void or set aside in the State of origin or when #suspensive effect has not been granted by a State court decision, to a nullity appeal by the competent authority.

FSCD 5A_409/2014 c. 6.1

Exequatur will be refused if the #award can still be set aside by an ordinary #appeal before a State court, if it has been declared null and void or has been set aside in the State where the #award has been made or if #suspensive effect has been granted to a nullity appeal by the competent authority.

FSCD 5P.292/2005 c. 3.2, FSCD 4P.173/2003 c. 3.1

The [former] ICC Arbitration Rules provide in Article 34(6) that “each award shall be binding on the parties. By availing themselves of arbitration under the Rules, the parties undertake to comply promptly with any award; to the extent legally permissible, such availment shall be deemed a waiver by the parties of their right to seek any remedy”. With regard to this type of clause, it is stated in BSK IPRG-Patocchi/Jermini (2nd edition, N. 59 to Art. 194) that if the parties have expressly agreed to comply immediately after the notification of the #award and to refrain from any appeal [...] that party cannot, in principle, invoke the #grounds for refusal of Article V(1) NYC in the #enforcement proceedings. How clear a #waiver of an #appeal must be is disputed. From the point of view of “waiver of appeal”, the mere indication that the arbitral #award is final or similar and the general reference to rules of procedure which in turn provide for a #waiver of #appeal are considered problematic.

FSCD 5A_409/2014 c. 6.1

1e.1.2 Applicable Law

Whether an arbitral #award is binding [*verbindlich*, *obligatoire*] on the parties pursuant to Article V(1)(e) NYC must be determined by the law applicable to the #arbitral proceedings.

FSCD 108 Ib 85 [88]

In order to determine whether an arbitral #award is binding independently of a possible setting aside or suspension, one must look at the arbitral procedure chosen by the parties in accordance with the principle set out at Article V(1)(d) NYC. In the absence of such an agreement, it is appropriate to apply the law of the country of the #seat of the arbitration, but solely to the extent that one must determine if the parties are bound by the #award, namely whether the #award has *res judicata* effect.

GE 22.03.2013 c. 2.4.1

An #award is binding in the sense of this provision if it fulfils the requirements of enforceability in the State where it has been rendered.

BS 06.09.1968 [(1968) RSJ p. 379]

1e.1.3 Motion to Set Aside

The mere fact that a #motion to set aside is possible or has been filed in the State of origin against the #award of which #recognition is sought in a third State does not deprive this #award of its "binding" [*"obligatoire"*] nature.

FSCD 135 III 136 [140], TI 22.08.2012 [14.2012.102] c. 3.2(c)

Where appropriate, the #enforcement court should therefore be able to decide on #enforcement only after the relevant proceedings have been concluded. This is subject to the condition that a #motion for setting aside or for #suspensive effect has been filed with the competent authority under Article V(1)(e) NYC, which the party resisting #enforcement must prove.

FSCD 5A_165/2014 c. 7.1

It is not decisive whether a #motion to set aside or for a #stay, even with #suspensive effect, has been filed against the #award in the country in which the #award was made. In such a case, Article VI NYC provides that the authority before which the #award is sought to be relied upon may, if it considers it proper, #stay the decision on #enforcement of the #award.

FSCD 09.01.1995 [(2001) ASA p. 301], GE 25.04.1985 [(1987) Yearbook p. 508-509]

1e.1.4 Party Autonomy

The principle of #party autonomy (Art. V(1)(d) NYC) also gives the parties the possibility of declaring applicable in principle a system of State procedural rules, but of amending or replacing this system by specific agreements. This also applies to the question of when an arbitral #award becomes binding between the parties.

FSCD 108 Ib 85 [90]

1e.1.5 Burden of Proof

The party resisting #enforcement has to prove one of the #grounds for refusal within the meaning of this provision.

FSCD 110 Ib 191 [195], FSCD 4P.173/2003 c. 3.1

1e.2 No Double Exequatur

1e.2.1 Principle

In order to be qualified as “binding” [*“obligatoire”*], the foreign #award does not need to be enforceable in its State of origin, as the NYC precisely aims at avoiding any “double exequatur”.

FSCD 135 III 136 [140], FSCD 108 Ib 85 [91], FSCD 5P.292/2005 c. 3.2, GE 11.04.2014 c. 4.4.1, GE 22.03.2013 c. 2.4.1

An #award can be “binding” within the meaning of Article V(1)(e) NYC without being enforceable in its State of origin. Therefore, it is of no importance whether the #award has been converted into an enforceable judgment.

FSCD 108 Ib 85 [91], FSCD 4P.173/2003 c. 3.1, FSCD 09.01.1995 [(2001) ASA p. 301]

The purpose of the NYC was to avoid double exequatur proceedings, as it was not expressly provided for but in fact necessary under the Geneva Convention on the Execution of Foreign Arbitral Awards of 1927.

FSCD 108 Ib 85 [88, 91], FSCD 4P.173/2003 c. 3.1

The prerequisite of a declaration of enforceability at the place in which the arbitral #award was made would be contrary to the purpose of the NYC which wanted to avoid double exequatur. To find that an #award has a binding nature is sufficient in order to be subject to exequatur in the State where it has been rendered.

FSCD 108 Ib 85 [91]

The authors of the NYC wanted to exclude the requirement of an exequatur in the State of origin of the #award, as well as any other proceedings aimed at confirming the enforceability of the #award in this State.

FSCD 5P.292/2005 c. 3.2

An #award is not binding on the parties if in the country of origin, the #award has been set aside or if, for the duration of the setting aside proceedings, its effect have been suspended by the competent authority.

GE 22.03.2013 c. 2.4.1

1e.2.2 Individual Cases

The “confirmation” of an #award pursuant to Section 7510 New York Civil Practice Law and Rules aims at the judicial determination of its enforceability; therefore, it is not necessary to the extent that #enforcement of the #award in another State is at stake.

FSCD 108 Ib 85 [88]

An arbitral #award rendered in England is binding pursuant to this provision even without a declaration of enforceability by an English court.

FSCD 09.01.1995 [(2001) ASA p. 301]

1e.3 Suspension

1e.3.1 Principle

The new opinion of the Federal Supreme Court [FSCD 5P.292/2005] according to which the #suspension of the #award in the State of origin constitutes a #ground for refusal within the meaning of Article V(1)(e) NYC only if the #suspension has been granted by a State court decision, but not if it merely results by law from the #appeal against the #award, has been approved by doctrine.

FSCD 135 III 136 [142], TI 22.08.2012 [14.2012.102] c. 3.2(c)

The #case law initiated by FSCD 5P.371/1999 of 21.03.2000 has to be confirmed. First, it is in harmony with the text of the NYC which with respect to the #ground for refusal in question mentions an #award “suspended by the competent authority of the country in which, or under the law of which, that award was made”. A #suspension *ex lege* manifestly goes beyond the limits of this provision. Furthermore, the #grounds for refusal have to be interpreted restrictively in order to favour the exequatur of the arbitral #award. Finally, it seems too delicate, from a theoretical point of view, to hinder an international convention which wants to facilitate the #recognition of foreign arbitral #awards by invoking a simple procedural rule of the State of the #seat of the arbitration, which suspends the #enforcement of the #award in this State as long as it is possible to challenge it by an extraordinary #appeal.

FSCD 135 III 136 [142-143]

There is a #suspension of the #award when an authority, which observes that a flaw could affect the #award, hinders its #enforcement until the issue is decided on the #merits by the court seized with a #motion to set aside.

FSCD 5P.371/1999 [(2002) ASA p. 268]

1e.3.2 Individual Cases

The fact that [former] Article 1506 NCPC provides for a #stay in case of an #application to set aside does not constitute a #ground for refusal within the meaning of Article V(1)(e) NYC.

FSCD 135 III 136 [143]

1e.4 Burden of Proof

According to Article V(1)(e) NYC, and contrary to numerous treaties on #recognition and #enforcement of foreign judgments, it is up to the party resisting #enforcement to prove that the #award has not yet become binding on the parties, or has been set aside or suspended under the law on the basis of which the #award was made.

FSCD 110 Ib 191 [195], FSCD 108 Ib 85 [87], FSCD 4P.173/2003 c. 3.1, AG 23.07.1992 [(1995) ASA p. 242-243]

If the law under which the #award was made is a foreign law [in casu *the law of the State of New York*], the party invoking Article V(1)(e) NYC must also prove its content.

FSCD 108 Ib 85 [87, 90-91], FSCD 4P.173/2003 c. 3.1

Switzerland has ratified the NYC being aware that the statute which is relevant for #enforcement proceedings is the SDCB (Art. 25(2), 81 and 84 SDCB) and being aware of the distribution of the #burden of proof under the NYC. It was a deliberate choice in the NYC that the party requesting #enforcement is relieved of the #burden to prove enforceability of the #award, whereas the party losing the #arbitral proceedings and resisting #enforcement should bear the burden of the counter-proof of the non-enforceability of the #award; this, on the one hand, to avoid that this party can file a #motion to set aside only in order to delay the #enforcement of the #award, and, on the other hand, because the counter-proof of non-enforceability of the #award due to the filing of an admissible #motion to set aside is easier to establish than proof of enforceability of the #award.

AG 23.07.1992 [(1995) ASA p. 242]

The NYC provides for speedy #enforcement which cannot be delayed by the filing of a #motion to set aside by the losing party which resisted #enforcement and which should be granted in accordance with the distribution of the #burden of proof with regard to the binding effect and enforceability of the #award in Article V(1)(e) NYC. According to this provision, an #award submitted for #enforcement has to be considered as binding and enforceable, provided the party resisting #enforcement does not establish its lack of enforceability.

AG 23.07.1992 [(1995) ASA p. 242-243]

The fact that the #time limits of the proceedings to #SADOSP are rather short, does not change the distribution of the #burden of proof provided for in the NYC.

AG 23.07.1992 [(1995) ASA p. 241-242]

2 *Other Grounds for Refusal (2)*

- For the taking into account *ex officio* of the #grounds for refusal of Article V(2) NYC, see Article V(1), section 1.2

2a *Lack of Arbitrability (2)(a)*

➤ See also Article 177 PILA

In Switzerland, #arbitrability is governed by Article 177(1) PILA, which provides that any dispute of a financial interest may be the subject of arbitration.

ZH 23.09.2016 c. III/4.1

The definition of #arbitrability of disputes does not necessarily overlap with that of #public policy. Thus, certain foreign #awards relating to a non-arbitrable dispute pursuant to Article 177(1) PILA may, if appropriate, not be contrary to Swiss #public policy. Article 177(1) PILA is only relevant in relation to an international arbitration which is seated in Switzerland. It does not apply to foreign #awards, in respect of which the lack of #arbitrability is sanctioned in Switzerland only to the extent that it results in a violation of #public policy. Consequently, the #arbitrability requirement of Article V(2)(a) NYC has a scope no wider than that of the #public policy of the enforcement country.

GE 22.03.2013 c. 2.2.1

The question of the objective #arbitrability has to be decided exclusively based on the *lex fori*. The Swiss judge who examines a foreign #award or the #jurisdiction of a foreign #arbitral tribunal within the scope of application of the NYC has to determine according to Swiss law whether the dispute is arbitrable.

ZG 16.08.2006 c. 2.4.1

The difficulty lies in the fact that there is no uniform Swiss definition of objective #arbitrability. Whereas, according to Article 177(1) PILA, any dispute of financial interest may be the subject of an arbitration, Article 5 fConcordat provides that the arbitration may relate to any claim of which the parties may freely dispose, unless the claim falls within the exclusive #jurisdiction of a State authority by virtue of a mandatory provision of law.

ZG 16.08.2006 c. 2.4.2

2b Violation of Public Policy (2)(b)

➤ See also Article 190(2)(e) PILA

2b.1 Notion of Public Policy

#Public policy, which applies restrictively in particular in the context of exequatur, forbids the #enforcement of a foreign arbitral #award which shocks in an unbearable way the #sense of justice as it stands in Switzerland and violates fundamental rules of the Swiss legal system.

FSCD 101 Ia 521 [526], FSCD 93 I 49 [58], FSCD 4A_374/2014 c. 4.2.2, FSCD 4A_124/2010 c. 5.1, FSCD 4A_233/2010 c. 3.2.1, FSCD 4P.173/2003 c. 4.1, FSCD 09.01.1995 [(2001) ASA p. 302-303], FSCD 08.02.1978 [(1980) SJ p. 71], VD 30.10.2018 c. VI.b.aa, ZH 18.10.2018 c. IV/3.1, ZH 23.09.2016 c. III/4.1, VD 24.12.2014 p.11, SZ 10.10.2011 c. 5b, VD 25.01.2001 p. 14, VD 28.05.1998 p. 11, GE 11.12.1997 [(1997) ASA p. 673], ZH 26.05.1994 [(1997) ASA p. 268-269], TI 19.06.1990 [(1991) Rep p. 500], BL 03.06.1971 [(1973) BJM p. 199-200]

#Recognition would be contrary to #public policy if the domestic #sense of justice were to be violated in an intolerable manner by the #recognition and #enforcement of a foreign decision, because this would result in fundamental provisions of the Swiss legal system being disregarded.

FSCD 5A_165/2014 c. 5

A foreign decision can be incompatible with Swiss #public policy, not only because of its substantive content, but also because of the proceedings by which it has been rendered.

FSCD 101 Ia 521 [526], FSCD 4A_374/2014 c. 4.2.2, FSCD 5A_165/2014 c. 5, FSCD 5A_68/2013 c. 4.2.1, FSCD 5A_427/2011 c. 7.1, FSCD 4A_124/2010 c. 5.1, FSCD 4A_233/2010 c. 3.2.1, FSCD 4P.173/2003 c. 4.1, VD 30.10.2018 c. VI.b.aa

In order for a foreign arbitral #award to be considered as contrary to Swiss #public policy within the meaning of Article V(2)(b) NYC, there must be a violation of the fundamental principles of the Swiss legal order which offends in an intolerable manner the spirit of the law.

FSCD 5A_68/2013 c. 4.2.4, VD 24.12.2014 c. 4.a.bb

This assessment must be carried out taking into account the #facts of the case.

VD 19.12.2014 c. IV.e.bb

A violation of #public policy occurs when the #recognition or #enforcement of a foreign decision intolerably offends Swiss conceptions of justice.

FSCD 5A_427/2011 c. 7.1, VD 19.12.2014 c. IV.e.bb

An #award is incompatible with #public policy if it violates the widely recognized and essential values which, according to the views prevailing in Switzerland, should constitute the foundation of every legal system.

FR 28.02.2018 c. 3.3.5

#Public policy of the NYC encompasses transnational #public policy, the application of which is independent from specific links with Switzerland.

GE 22.03.2013 c. 6.1

Substantive #public policy relates to the #merits of the dispute. The exception of #public policy must make it possible not to provide protection to situations which shockingly offend the most essential principles of the legal system, as conceived in Switzerland.

VD 11.11.2014 c. II.c.cc

2b.2 Restrictive Scope of Application

The Swiss #public policy defence has a more restricted scope of application in the field of #recognition and #enforcement of foreign arbitral #awards than in the direct application of foreign law by Swiss State courts. With respect to the #merits, this means that #enforcement does not have to be refused when the State court considers that if it had to apply directly the foreign law based on a #choice of law provision, it could refuse to do that because of the incompatibility between this law and the Swiss legal system. With respect to the proceedings, this means that a procedural flaw should not entail the refusal to enforce the foreign #award, even though such a flaw would lead to the setting aside of an #award rendered in Switzerland. There must be a violation of fundamental principles of the Swiss legal system which shocks in an unbearable way the #sense of justice.

FSCD 116 II 625 [630], FSCD 101 Ia 521 [526], FSCD 101 Ia 154 [156], FSCD 93 I 265 [272], FSCD 93 I 49 [58], FSCD 4A_374/2014 c. 4.2.2, FSCD 4A_124/2010 c. 5.1, FSCD 4A_233/2010 c. 3.2.1, FSCD 4P.173/2003 c. 4.1, FSCD 08.02.1978 [(1980) SJ p. 71], FR 28.02.2018 c. 3.3.5, TI 19.06.1990 [(1991) Rep p. 500]

The more a treaty details the formal requirements for the #enforcement of foreign #awards, the smaller the scope of application of the express or tacit #public policy defence is. This #public policy defence shall not lead to excluding indirectly the application of international treaties signed by Switzerland and which are part of Swiss law, thus finally excluding the application of Swiss law. It should not lead to a violation of the very treaty whose purpose is precisely to recognise the existence of different legal systems and to coordinate them.

FSCD 101 Ia 521 [526], TI 19.06.1990 [(1991) Rep p. 500]

As an exception clause, the #public policy defence is interpreted restrictively in particular in the area of the #recognition and #enforcement of foreign judgments.

FSCD 4A_374/2014 c. 4.2.2, GE 16.10.2015 c. 3.1.5, VD 24.12.2014 p.12

As an exception clause, the #public policy defence is interpreted restrictively in particular in the area of the #recognition and #enforcement of foreign judgments, where its scope is narrower than for the direct application of foreign law.

FSCD 116 II 625 [630], FSCD 5A_165/2014 c. 5, FSCD 5A_409/2014 c. 7.2.1, FSCD 5A_427/2011 c. 7.1, VD 30.10.2018 c. VI.b.aa, FR 28.02.2018 c. 3.3.5, VD 24.12.2014 c. 4.a.bb, VD 19.12.2014 c. IV.e.bb, VD 11.11.2014 c. II.c.cc, GE 11.04.2014 c. 4.5.1

This exception must be applied with even more reserve the more that the link with Switzerland is small or by chance.

VD 30.10.2018 c. VI.b.aa, VD 24.12.2014 p.12

In other words, #recognition is the rule from which there must be good reason not to deviate.

VD 30.10.2018 c. VI.b.aa, VD 24.12.2014 c. 4.a.bb, VD 19.12.2014 c. IV.e.bb, VD 11.11.2014 c. II.c.cc

The related #case law principles also apply to the #recognition and #enforcement of foreign arbitral #awards.

GE 11.04.2014 c. 4.5.1

In accordance with settled #case law, when examined in the context of a decision or an #award made abroad, #public policy intervenes in a “mitigated” manner. This means that in the #recognition and #enforcement of foreign decisions or #awards, the #public policy of the requested State must be observed with some restraint, insofar as account must be taken of the effects that the decision or #award has already produced or is likely to produce abroad. The fact that subjective rights enjoy a certain effectiveness abroad, in particular in the State of origin of the decision or of the #award, is likely to limit the recourse to Swiss #public policy, since, even from this point of view, it is advisable to avoid, as far as possible, flawed legal situations.

GE 22.03.2013 c. 6.1

2b.3 Substantive Public Policy

An award is contrary to substantive #public policy when it violates fundamental principles of substantive law to the extent that it is no longer compatible with the legal order and the determining values in this system: included among these principles are notably, *#pacta sunt servanda*, the respect of the rules of #good faith, the prohibition of an #abuse of right, the prohibition of discriminatory or confiscatory measures as well as the protection of incapable persons.

FSCD 5A_409/2014 c. 7.2.1, VD 30.10.2018 c. VI.b.aa, FR 28.02.2018 c. 3.3.5, VD 24.12.2014 c. 4.a.bb, VD 19.12.2014 c. IV.e.bb, GE 11.04.2014 c. 4.5.1

The fact that a foreign provision is contrary to a mandatory provision of Swiss law is not as such a violation of substantive #public policy.

FSCD 09.01.1995 [(2001) ASA p. 303]

As the adverb “notably” clearly shows, the list of examples set forth by the Federal Supreme Court to describe the contents of substantive #public policy is not exhaustive. It would be tricky to try to list all the fundamental principles which undoubtedly have a place in such a list.

VD 30.10.2018 c. VI.b.aa

It is not easy to define substantive #public policy positively or to determine its scope precisely. It is easier to exclude some elements from it.

VD 30.10.2018 c. VI.b.aa

This exclusion concerns, in particular, the entirety of the process of #interpretation of a contract, and the legal conclusions logically drawn from it.

VD 30.10.2018 c. VI.b.aa

Whilst the principle that agreements must be kept (*#pacta sunt servanda*) is part of #public policy, almost all disputes arising from a breach of contract are excluded from the scope of this principle; in other words, when the contractual liability of a party is at stake, the Federal Supreme Court, which has to examine whether there has been a breach of #public policy, does not examine the way in which the #arbitral tribunal has applied the notion of damage as it results from the rules of law or the relevant principles.

VD 30.10.2018 c. VI.b.aa

Similarly, for there to be an incompatibility with #public policy, a concept more restrictive than that of #arbitrariness, it is not sufficient that the #evidence has been misjudged, that a #fact-finding is manifestly false, that a contractual clause has not been properly interpreted or applied or that a rule of law has clearly been violated.

VD 30.10.2018 c. VI.b.aa

The list of examples given is not exhaustive. The Federal Supreme Court has already integrated other fundamental principles that are not included in it, such as the prohibition of forced labour, and it would not hesitate to sanction, under the violation of substantive #public policy, an #award that would infringe the cardinal principle of the respect of human dignity.

GE 11.04.2014 c. 4.5.1

It does not suffice that a contractual clause was not correctly interpreted or applied or that a rule of law was clearly violated.

VD 24.12.2014 c. 4.a.bb, VD 19.12.2014 c. IV.e.bb, VD 11.11.2014 c. II.c.cc

2b.4 Procedural Public Policy

According to the well-established #case law of the Federal Supreme Court, it is contrary to Article 2 CC (or Art. 52 CCP, as the case may be) to bring formal #grievances, which could have been raised at an earlier stage of the proceedings, at a later date if the outcome was unfavourable. For example, a #challenge must be made immediately after knowledge of the #ground for challenge, with the consequence that otherwise it is forfeited. The principle of #good faith and the prohibition of #abuse of right shall also apply in cross-border relationships. They are also important in the context of the international #recognition of State court judgments and arbitral #awards: In particular, they must be observed when asserting procedural #grounds for refusal under the NYC. Even if the latter does not require the exhaustion of the possibilities for challenging the arbitral #award at the #seat of the #arbitral tribunal, the parties are nevertheless obliged, pursuant to the requirement of #good faith, to raise their objections in good time in the #arbitral proceedings, otherwise they can no longer invoke them in the #enforcement proceedings. In FSCD 4A_374/2014, the Federal Supreme Court left open the issue of whether or not this also applies to errors concerning procedural #public policy. In a further judgment (4A_305/2009 of 05.10.2009), the Federal Supreme Court ruled on the analogous issue in connection with the

#recognition of foreign court decisions. In this case, a decision had to be made on the declaration of enforceability of a judgment of the Regional Court of Bonn. As a violation of procedural #public policy within the meaning of Article 27(1) Lugano Convention, the opponent of the #enforcement had complained that a biased judge had participated in the proceedings before the Higher Regional Court of Cologne, which had dismissed its #appeal against the first instance judgment. With reference to its published #case law on the assertion of grounds for #challenge, the Federal Supreme Court held that the party holding the grounds for refusal in "reserve", so to speak, "in order to push them forward in the event of an unfavourable course of proceedings and foreseeable loss of proceedings" acted contrary to #good faith and abusively. The opponent of the #enforcement could easily have taken note of the circumstances invoked (to substantiate the #public policy violation) in order to assert any ground for #challenge in good time in the pending proceedings before the Higher Regional Court. By waiting until after their conclusion, it had forfeited the possibility of challenging the higher regional court judge.

FSCD 141 III 210 [216-217]

With respect to procedural issues, Swiss #public policy requires the respect of the fundamental procedural rules based on the Constitution, such as the right to #fair proceedings and the #right to be heard. These principles apply also for the #recognition and #enforcement of foreign arbitral #awards.

FSCD 101 Ia 521 [526], FSCD 4A_374/2014 c. 4.2.2, 4.3.2.3, FSCD 5A_68/2013 c. 4.2.1, FSCD 5A_427/2011 c. 7.1, FSCD 4A_124/2010 c. 5.1, FSCD 4A_233/2010 c. 3.2.1, FSCD 4P.173/2003 c. 4.1, VD 30.10.2018 c. VI.b.aa & VII.b, SZ 27.02.2013 c. 5c

Procedural #public policy is violated if there is a violation of fundamental and general procedural principles, the non-observance of which is an intolerable contradiction to the #sense of justice, so that the decision appears to be utterly incompatible with the legal system and values applicable in a State based on the rule of law (FSCD 136 III 345 c. 3.1).

ZH 05.11.2018 c. 5.1.2

Procedural #public policy also includes the #independence and #impartiality of #arbitrators, which must be comparable to that of State judges (FSCD 142 III 521 c. 2.3.4 & 3.1.1). It is sufficient for a #challenge if there are circumstances which suggest that the #arbitrator is biased. However, only objective #facts are decisive, and not the subjective feelings of the parties to the proceedings (FSCD 142 III 521 c. 3.1.1).

ZH 05.11.2018 c. 5.1.2

However, the control of the State judge in international arbitration generally is less extensive than the control of domestic #arbitral tribunals or that of State courts of lower instances (FSCD 142 III 521 c. 2.3.4, FSCD 141 III 144 c. 2.2.4.2). International arbitral #awards can therefore only be denied #recognition and #enforcement with a certain reluctance pursuant to Article V(2)(b) NYC, on the basis of Swiss procedural #public policy.

ZH 05.11.2018 c. 5.1.2

When lawyers from large law firms act as #arbitrators, conflicts of interest can easily lead to the appearance of bias. The Federal Supreme Court has developed

its #case-law in this regard using the example of lawyers who perform part-time judicial functions at commercial courts or at the Federal Patent Court. According to this #case law, a lawyer acting as judge or #arbitrator appears to be biased not only if it represents one of the parties to the proceedings in another case or has previously represented one of the parties to the proceedings, but also if such a representation relationship exists or has existed in other proceedings with the counterparty to one of the parties to the proceedings (FSCD 139 III 433 c. 2.1.4 & 2.1.5).

ZH 05.11.2018 c. 5.1.5

The rules on conflicts of interest apply in the same way when different lawyers working in the same law firm are, or have been, working in the same law firm, because a law firm is to be treated as a single lawyer. This is why one finds at Article 14 of the Code of Professional Conduct of the Swiss Bar Association of 10 June 2005 the provision that in the case of lawyers working together in a joint practice "the provisions on the avoidance of conflicts of interest apply to the joint practice and all its members". A lawyer - be it an attorney or an #arbitrator - will therefore not be able to avoid checking whether there is a #conflict of interests before accepting a mandate. This must therefore also be assumed, in particular, for a lawyer acting as #arbitrator.

ZH 05.11.2018 c. 5.1.5

According to FSCD 139 III 433, this also applies to mandates concerning a group company affiliated with the parties to the proceedings, although a "strictly schematic procedure" is not advisable. If an open mandate relationship exists with a group company somehow affiliated with the party to the proceedings, this does not automatically lead to an appearance of partiality which excludes the #arbitrator from the office of judge. Nor is it appropriate from an objective point of view with regard to the decisive aspect of the appearance of bias to focus exclusively on the legal #independence of the party to the proceedings, irrespective of the reality of the group. Rather, it depends on the specific circumstances. The decisive factor is whether the open mandate relationship between the part-time judge or its law firm and a group company is accompanied by a comparable proximity to the party to the proceedings associated with the latter. In such cases, the part-time judge is required by the Federal Supreme Court decision mentioned above - at least in the light of Article 48 CCP - to "consistently" disclose its special relationship to a legal entity associated with one of the parties to the proceedings. In international circumstances, such a disclosure corresponds to the procedure according to the orange list of the IBA Rules on Conflicts of Interest. In the view of the Federal Supreme Court, such investigations by part-time judges with regard to possible conflicts of interest are customary in everyday professional life. This is to be assumed.

ZH 05.11.2018 c. 5.1.5

According to the Federal Supreme Court's #case law, procedural #public policy is violated in particular if the #arbitral tribunal wrongly rejected the objection of *res judicata* (FSCD 136 III 345).

ZH 20.03.2018 c. III/3.5, ZH 29.09.2017 c. 4.5

Procedural [#]public policy concerns the manner in which the foreign decision was rendered, requiring compliance with the fundamental rules of procedure derived from the FC, such as the right to a fair trial and the [#]right to be heard.

VD 19.12.2014 c. IV.e.bb, VD 11.11.2014 c. II.c.cc

According to the wording of Article V(1)(b) NYC, it is sufficient to notify the [#]respondent that [#]arbitral proceedings have been instituted against it. It must therefore have been served with the document commencing the proceedings. If this is not done, procedural [#]public policy is also violated.

SZ 27.02.2013 c. 5c/bb

2b.5 Violation by Result of the Award

➤ See Article 190(2)(e) PILA, section 2e.6

Incidentally, that the reason relied on by the [#]arbitral tribunal violated [#]public policy is not sufficient; it is the result that the [#]award led to which must be incompatible with [#]public policy.

FR 28.02.2018 c. 3.3.5

[#]Public policy is assessed in light of the outcome of the decision or [#]award, and not on the basis of the [#]reasons for it or the content of the foreign law applied.

GE 22.03.2012 c. 6.1

2b.6 Subsidiarity of the Grounds for Refusal of Article V(2) NYC

The links between the rules set out in Article V(1) and V(2) NYC are tenuous given that a violation of the first can constitute at the same time, a violation of the second.

FSCD 5A_68/2013 c. 4.2.1, VD 30.10.2018 c. VI.b.aa

According to the general principles governing the relation between *lex specialis* and *lex generalis*, the examination based on [#]public policy is excluded to the extent that the law of the international treaty contains precise and specific provisions on the specific [#]grounds for refusal of [#]recognition or [#]enforcement, which is generally the case in international treaties. This is why the [#]public policy defence has in general a clearly subsidiary character.

FSCD 5A_68/2013 c. 4.2.1, FSCD 08.02.1978 [(1980) SJ p. 71], VD 30.10.2018 c. VI.b.aa, VD 25.01.2001 p. 14

This is the case in the NYC, in which the respect of [#]due process has first to be examined under Article V(1) NYC, and only subsidiarily from the point of view of [#]public policy. The subsidiarity of [#]public policy is all the more justified because, even though well-established [#]case law has recognised that it does not only apply to the content of the [#]award but also to the proceedings and the [#]composition of the [#]arbitral tribunal, the Federal Supreme Court has held, with respect to the proceedings, that not every irregularity must lead to the refusal of the [#]enforcement of the foreign [#]award, even though such an irregularity would lead to the setting aside of an [#]award rendered in Switzerland. There has to be a

violation of fundamental principles of the Swiss legal system which shocks in an unbearable way the #sense of justice.

FSCD 5A_68/2013 c. 4.2.1, FSCD 08.02.1978 [(1980) SJ p. 71], VD 30.10.2018 c. VI.b.aa

The defence based on #public policy can only be invoked against the #recognition of a foreign arbitral #award in Switzerland if the concrete result to which the #recognition leads is contrary to the fundamental principles of the Swiss legal regime.

VD 25.01.2001 p. 14

If an international treaty contains specific provisions on the #grounds for refusal, in particular procedural ones, for the #recognition and #enforcement, as is the case in Article V(1) NYC, the #public policy defence is of a subsidiary nature in this context.

VD 25.01.2001 p. 14, VD 28.05.1998 p. 11, BL 03.06.1971 [(1973) BJM p. 200]

This defence is clearly subsidiary and only applies in the presence of a violation of fundamental principles of the Swiss legal system, which is contrary, in an unbearable way, to the #sense of justice.

GE 11.12.1997 [(1997) ASA p. 673]

2b.7 No New Examination of the Merits

The court deciding on the #recognition and #enforcement is not an appeals instance against the foreign #award and it cannot review the #award on the #merits, on the pretext of #public policy.

FSCD 63 I 297 [302-304], FSCD 09.01.1995 [(2001) ASA p. 302], VD 11.12.2014 p.12

It is not sufficient that the solution reached in the foreign #award departs from Swiss law or is unknown in Switzerland. The control of the respect of #public policy must not lead to the re-examination of the #merits of this #award, but to an assessment of its result by comparison. This exception must be applied with even more reservation when the link of the case at hand with Switzerland is tenuous or fortuitous.

FSCD 5A_409/2014 c. 7.2.1, VD 30.10.2018 c. VI.b.aa, GE 16.10.2015 c. 3.1.5, VD 24.12.2014 c. 4.a.bb, VD 19.12.2014 c. IV.e.bb

The issue of whether the foreign law, on the basis on which the arbitral decision was rendered, authorises a certain practice, is not pertinent in #enforcement proceedings as the legality of the foreign decision is not the object of these proceedings. Only the respect of Swiss #public policy is. If a party wishes to challenge the #merits of the arbitral #award that a contract is in conformity with the law chosen to govern it, it must appeal against the arbitral #award.

GE 16.10.2015 c. 3.1.5

2b.8 Independence and Impartiality of the Arbitral Tribunal

- For the #independence and #impartiality of the #arbitral tribunal according to the PILA, see Article 180(1) PILA

The #independence and #impartiality of the #arbitrator are certainly among these rules [*forming part of Swiss #public policy*], and an #arbitral tribunal must, like a State court, provide sufficient guarantees of #independence and #impartiality. Failure to comply with this rule constitutes not only a violation of Swiss #public policy, but also an irregular #composition in accordance with Article V(1)(d) NYC. To determine whether it offers such guarantees, reference should be made to the constitutional principles developed with regard to State courts. However, the specificities of arbitration, and in particular international arbitration, must be taken into account when examining the circumstances of the specific case.

VD 30.10.2018 c. VII.b

In particular, the party intending to challenge an #arbitrator must invoke the ground for #challenge as soon as it becomes aware of it. This #case law rule covers both the grounds for #challenge that the interested party actually knew and those that it could have known with due attention, it being specified that choosing to remain in ignorance may be regarded, depending on the case, as an abusive tactic comparable to postponing the announcement of a challenge request. The rule in question is an application, in the field of #arbitral proceedings, of the principle of #good faith. Pursuant to this principle, the right to invoke the plea alleging the irregular #composition of the #arbitral tribunal expires if the party does not invoke it immediately, since the party cannot keep it in reserve to invoke it only in the event of an unfavourable outcome of the #arbitral proceedings. However, it is not clear that the effect of #waiver also applies to a defect of procedural #public policy, such as failure to respect the #right to be heard, which is both a #ground for refusal to be invoked by the parties (Art. V(1)(b) NYC) and a ground for refusal to be examined *ex officio*. The Federal Supreme Court has thus opted for a concrete approach to the question, based on an analysis of the respective conduct of the parties from the point of view of the rules of #good faith.

VD 30.10.2018 c. VII.b

The application of the #public policy clause presupposes that the #recognition and #enforcement of the foreign #award would lead, in the case at hand, to an unbearably inequitable result. The #independence and the #impartiality of the judiciary are part of the fundamental legal principles of Switzerland.

ZH 30.05.2005 c. 2c/aa, ZH 04.07.1995 [(1997) ASA p. 274]

In principle, violations of the rules on the withdrawal of #arbitrators lead to a dismissal of the #enforcement.

ZH 30.05.2005 c. 2c/aa

The principle of #independence and #impartiality of the judge is part of the fundamental requirements of the #administration of justice, i.e. of #public policy. #Arbitrators (even party-appointed #arbitrators in a three-member tribunal) have to be independent in the same way as State judges.

ZH 26.05.1994 [(1997) ASA p. 269]

An #arbitrator who lacks #impartiality because of a special relationship with one of the parties does not guarantee #independence.

ZH 26.05.1994 [(1997) ASA p. 269]

However, the specificities of #arbitral proceedings should be taken into account. An #arbitration agreement which provides for the designation by each party of an #arbitrator and for the payment of the #arbitrator by the party which appointed it, has always been and is still regarded as valid.

ZH 26.05.1994 [(1997) ASA p. 269]

Lack of #impartiality is not compensated by the fact that the #arbitrator has a special relationship to both parties.

ZH 26.05.1994 [(1997) ASA p. 270]

The prerequisites of #impartiality and #independence are not fulfilled when a sole #arbitrator who was for a long time the attorney-at-law of one of the parties drafted the disputed contract on behalf of both parties, advised them on its content and designated itself as #arbitrator in the #arbitration agreement, when the #arbitrator provided for a prohibition for both parties to refuse it as #arbitrator and attached a #contractual penalty of CHF 1,000,000, payable to the other party, to a possible request for refusal.

ZH 26.05.1994 [(1997) ASA p. 262 et seq.]

The #enforcement of an #award is only refused, on the ground of lack of #independence of an #arbitrator, if the dependence of the #arbitrator is established in the case at hand.

BL 03.06.1971 [(1973) BJM p. 199]

The fact that the #arbitrators belong to a specific economic group does not entail that they lack, *a priori* and in a general way, #independence to render an #award.

BL 03.06.1971 [(1973) BJM p. 199]

2b.9 Equal Treatment of the Parties

Swiss #public policy also applies to the situation where the parties are treated unequally during the #composition of an #arbitral tribunal, which situation does not guarantee the #independence of decision-making, because judicial #independence and #impartiality are part of the fundamental prerequisites of the #administration of justice, according to the Swiss #sense of justice.

*FSCD 93 I 265 [272-273], FSCD 4A_233/2010 c. 3.2.1

The mere fact that the #arbitrators belong to the #association [in casu *the Grain and Feed Trade Association (GAFTA)*] does not suffice, in a dispute between a member and a non-member, to prejudice the #equal treatment of the parties as far as the #composition of the tribunal is concerned. It does not suffice either, by itself, to justify the refusal of #enforcement of the #award for reasons of #public policy. This is all the more true if the #appellant could have chosen the party-appointed #arbitrator from the list of #arbitrators of the #association but voluntarily did not do so and if it wrote to the #arbitrator appointed *ex officio* thanking it for having accepted the appointment and offering to pay #fees and expenses.

FSCD 12.01.1989 [(1990) Yearbook p. 513-514]

The nomination of #arbitrators according to the Arbitration Rules of the *Nederlands Huiden- & Lederbeurzen* does not violate Swiss #public policy.

BL 03.06.1971 [(1973) BJM p. 199]

2b.10 Right to Be Heard

- See also Article 182(3) PILA, section 3.3; and Article 190(2)(d) PILA, section 2d.3

The #right to be heard, which is also applicable to arbitration, assumes that each party has the right to state its views on the essential #facts for the #award to be issued, to present its legal arguments, to present #evidence on pertinent #facts and to attend the #hearings of the #arbitral tribunal.

FSCD 4A_374/2014 c. 4.3.2.3, FSCD 4A_606/2013 c. 4.1

The #right to be heard does not have in principle a different content than the one set out in constitutional law. Therefore, it has been admitted in the field of arbitration, that every party has the right to take a position on the #facts which are essential for the decision, to present its legal arguments, to offer #evidence pertaining to relevant #facts, and to participate in the meetings with the #arbitral tribunal.

VD 30.10.2018 c. VI.b.aa

#Case law has also deduced from this a minimal duty for the #arbitral tribunal to examine and deal with the relevant issues. This duty is violated if the #arbitral tribunal, by oversight or misunderstanding, does not take into consideration #claims, arguments, #evidence and #offers of evidence submitted by one of the parties which are material for the decision to be rendered.

VD 30.10.2018 c. VI.b.aa

A party which considers itself to be a victim of a violation of the #right to be heard or of another procedural defect must invoke it from the outset in the #arbitral proceedings, under penalty of foreclosure. It is contrary to #good faith to invoke a procedural defect only in the context of an #appeal against the arbitral #award, when the defect could have been reported during the proceedings.

VD 30.10.2018 c. VII.b.

The violation of the #right to be heard within the meaning of Article V(1)(b) NYC very often constitutes a violation of #public policy. In this case, the #enforcement of the foreign #award also violates Article V(2)(b) NYC which the court applies *ex officio*. These two grounds for rejection are not mutually exclusive, to the extent that the ground of a violation of #public policy remains applicable in the alternative.

GE 22.03.2013 c. 4.1

The question whether Swiss #public policy and Article II(1)(b) NYC protect to the same extent the #right to be heard to the same extent has been left open.

BL 03.06.1971 [(1973) BJM p. 197]

2b.11 Fraudulently Obtained Award

The #recognition and #enforcement of a fraudulently obtained arbitral #award may violate procedural #public policy. However, the ground for non-enforcement of Article V(2)(b) NYC does not apply if the arbitral #award has not been influenced by the procedural offence of one of the parties. The opinion of the complainant that a causal link between the deceptive act of a party and the outcome of the proceedings was not relevant at all is not to be accepted. Article 328(1)(b) CCP, cited by the complainant, whose interpretation it would like to use by analogy in order to concretize Swiss #public policy, does not provide otherwise. In accordance with the prevailing doctrine and #case law, a crime or misdemeanour does not constitute #grounds for appeal at least if it is established that it did not influence the outcome of the proceedings.

FSCD 5A_165/2014 c. 6.2

Moreover, the allegedly procedurally deceived party bears the #burden of proving the claim of having been defrauded by fraudulent litigation (such as false testimony or the production of forged documents).

FSCD 5A_165/2014 c. 6.2

2b.12 Absence of Judicial Control of the Award

There is no ground for refusing the #enforcement of an #award in Switzerland, on the basis of Swiss #public policy, if an arbitral #award is not subject to review under the applicable procedural rules. Neither the Geneva Protocol on Arbitration Agreements (Art. 1(2)) nor the NYC, which does not differ from the Geneva Protocol in this respect (Art. V(1)(e) NYC), require that an #award be subject to judicial control.

FSCD 108 Ib 85 [89] FSCD 101 Ia 154 [157], BS 05.11.2003 c. 3c

Mandatory judicial control is not necessary from a substantive point of view. It is sufficient that the party resisting #enforcement can invoke the grounds for refusal listed in Article V(1)(a-g) NYC, to the extent that the NYC is applicable.

FSCD 108 Ib 85 [89]

2b.13 Party Autonomy

Within the limits of #party autonomy, the parties can freely determine their procedure. It results from Article V(1)(d) NYC that the #arbitral proceedings are in the first place governed by the parties' agreement respectively, in the absence of such an agreement, by the law of the State in which the arbitration took place. By giving preference to the intent of the parties, the NYC gives them the possibility of either agreeing on their own procedural rules or of choosing already existing private or State procedural rules.

FSCD 108 Ib 85 [88-89], GE 13.03.1986 [(1987) Yearbook p. 522]

#Party autonomy is not without limits. It is subject to State control to the extent that the parties are in any case bound by the #public policy principles of the State of enforcement (Art. V(2)(b) NYC).

FSCD 108 Ib 85 [89]

2b.14 Burden of Proof

In principle, the violation of procedural #public policy must be invoked and established by the #respondent.

VD 19.12.2014 c. IV.e.bb, VD 11.11.2014 c. II.c.cc

2b.15 Individual Cases

There is **no violation** of #public policy in the following cases:

- if the #award had been handed down without #reasons [in casu *an #award pursuant to the Grain and Feed Trade Association (GAFTA) arbitration rules*] and had been confirmed by the appellate board of #arbitrators.
FSCD 101 Ia 521 [525-530], *FSCD 62 I 143
- if the #award contains no or an insufficient indication with respect to the means for #setting aside of the #award.
FSCD 101 Ia 154 [157-158]
- for an #award made under the arbitration rules of the *Marché du Coton de Gand*, albeit the list of #arbitrators had been drawn up by a committee in which only members of the #association were represented.
*FSCD 93 I 49 [58-60]

- if the #award had been made pursuant to the rules of a foreign #chamber of commerce sitting in an Eastern European country in the socialist era, despite the fact that foreign chambers of commerce were State-controlled bodies set up by the State pursuant to the State monopoly over foreign trade, that the list of #arbitrators contained only names of citizens of that State and were open only to such citizens and despite the fact that the party to the arbitration from that State could therefore be said to have had a predominant, albeit indirect, influence on the #constitution of the #arbitral tribunal, because it was held that there was no reason to believe that such a permanent #arbitral institution would not be independent and impartial.
*FSCD 93 I 265 [274-278]
- if an #award had been made pursuant to the arbitration rules of a trade #association which did not offer sufficient guarantees of arbitral #independence according to Swiss standards, but in which the party which lost the case and was not a member of the #association had elected to bring an #appeal before the appellate board of #arbitrators.
*FSCD 84 I 56 [61-62]
- if another foreign law is applied to the #merits than the one which would be applicable according to Swiss private international law.
*FSCD 78 II 251, BL 03.06.1971 [(1973) BJM p. 200]
- if the #award had ordered the buyer of foodstuffs to pay the purchase price, despite the fact that said foodstuffs sold to the buyer abroad did not comply with the requirements of Swiss food regulations.
FSCD 76 I 121 [128-129]
- for an #award made pursuant to the arbitration rules of *Kjøbenhavn's Bedømmelses- og Voldgifts-Udvalg for Kolonialvarenhandelen*, despite the fact that all members were Danes domiciled in Denmark.
*FSCD 76 I 121 [128]
- if there was no remedy available, under the law of the country in which the #award was made, to have the #award set aside on the ground that it was arbitrary or based on factual findings which were manifestly contrary to the #facts in the file.
*FSCD 63 I 297 [301-302]
- if the attorneys' #fees amount to USD 1,837,500, corresponding to about 2% of the trial win for which the attorney had been retained, which led to the conclusion of a #settlement agreement concerning an amount of USD 80,000,000.
FSCD 5A_409/2014 c. 7.2.1
- if the attorneys' #fees are fixed on the basis of a *pactum de palmario* amount to 30% of the #amount in dispute.
FSCD 5A_409/2014 [5A_409/2014] c. 7.2.1, FSCD 09.01.1995 [5P.201/1994] [(2001) ASA p. 303]

- if a #default interest of a #default interest (#anatocism) is granted.
FSCD 09.01.1995 [(2001) ASA p. 303]
- if the #arbitrators belong to the #association [in casu *the Grain and Feed Trade Association (GAFTA)*], in a dispute between a member and a non-member. This is all the more true if the #appellant could have chosen the party-appointed #arbitrator from the list of #arbitrators of the #association but voluntarily did not do so and if it wrote to the #arbitrator appointed *ex officio* thanking it for having accepted the appointment and offering to pay #fees and expenses.
FSCD 12.01.1989 [(1990) Yearbook p. 513-514]
- if the #respondent is ordered to pay an amount in euros in addition to interest at a rate fixed by reference to the annual discount rate of a national bank, when that interest rate did not exceed 15%.
VD 24.12.2014 c. 4.b.aa
- where #recognition and #enforcement proceedings are brought in another country which is different from the country of both parties.
VD 24.12.2014 c. 4.b.bb
- if the #award is incompatible with the #public policy of another State, be it one with which the case has a closer connection.
VD 19.12.2014 c. IV.e.bb
- if the #arbitral tribunal's #reasons lack clarity, except if one of the parties is thereby deprived of its rights in an unacceptable way.
BL 03.06.1971 [(1973) BJM p. 201]
- if the #arbitral tribunal made an error of 10% in the calculation of the market price of the disputed goods.
BL 03.06.1971 [(1973) BJM p. 201]
- if the #arbitral tribunal grants a broker's commission of 9% (whereas it has to be noted that, according to the Federal Supreme Court, only a broker's commission exceeding 18% is immoral).
BL 03.06.1971 [(1973) BJM p. 202-203]
- if the #arbitral tribunal did not correctly assess the #evidence, except if it is completely unjustified.
BL 03.06.1971 [(1973) BJM p. 201]
- if the #respondent is ordered to pay a debt stemming from an aleatory contract when the prerequisites of Article 513 CO are not fulfilled.
GE 21.05.1987 [(1987) Yearbook p. 521]

There is a **violation** of #public policy in the following cases:

- if a party had been ordered to pay a debt which had arisen out of gaming or gambling and in which the requirements of Article 513 CO (non-actionability

of claims derived from wagers and gambling) were held by the #arbitrators not to have been met.

*FSCD 61 I 271 [275-276], GE 21.05.1987 [(1987) Yearbook p. 521]

- when the Conciliation and Conflict Resolution Committee of the Mexican Football Federation issued a decision on the basis of a report of the #secretary of the #arbitral tribunal when it was neither established nor claimed that the parties were called to this #hearing or that they were even informed that it was held.

FSCD 4A_374/2014 c. 4.3.2.3

- if a sole #arbitrator who was for a long time the attorney-at-law of one of the parties drafted the disputed contract on behalf of both parties, advised them on its content and designated itself as #arbitrator in the #arbitration agreement, when the arbitrator provided for a prohibition for both parties to refuse it as #arbitrator and attached a #contractual penalty of CHF 1,000,000 payable to the other party to a possible request for refusal.

ZH 26.05.1994 [(1997) ASA p. 262 et seq.]

Article VI

If an application for the setting aside or suspension of the award has been made to a competent authority referred to in article V(1)(e), the authority before which the award is sought to be relied upon may, if it considers it proper, adjourn the decision on the enforcement of the award and may also, on the application of the party claiming enforcement of the award, order the other party to give suitable security.

1 *In General*

Article VI NYC gives the judge in the enforcing State wide discretion. This refers firstly to whether the proceedings are suspended at all and secondly to whether the suspension is only granted against the provision of security by the #respondent. The circumstances of the specific individual case must be taken into account, in particular the prospects of success of the #setting aside proceedings. It would be inadmissible to refuse #enforcement of a "binding" arbitral #award solely on the basis of a #setting aside procedure still pending in the State where the arbitral #award has been rendered.

FSCD 5A_165/2014 c. 7.1

An #award may be "binding" within the meaning of Article V(1)(e) NYC without being enforceable in the country in which it was made. Therefore, it is of no importance whether the #award has been converted into an enforceable judgment.

FSCD 108 Ib 85 [91], FSCD 09.01.1995 [(2001) ASA p. 301]

Nor is it decisive whether a #motion to set aside or a suspension, even with #suspensive effect, has been filed against the #award in the country in which the #award was made. In such a case, Article VI NYC provides that the authority before which the #award is sought to be relied upon may, if it considers it proper, adjourn the decision on #enforcement of the #award.

FSCD 09.01.1995 [(2001) ASA p. 301]

It is clear from the text that this provision only applies if an application for the #setting aside or suspension of the #award is filed in the country of origin. If the #award is effectively set aside or suspended, #enforcement may be refused on the basis of Article V(1)(e) NYC. In addition, the terms "may adjourn the decision" and "if it considers it proper" indicate that the #enforcement judge has discretionary power to stay the enforcement order and to order the #respondent to provide security. This is an unfettered discretionary power. In addition, the Convention does not indicate the circumstances which must be taken into consideration in order to assess the issue of suspension.

GE 04.03.2010 c. 3.1

Article VI NYC applies when the #appeal brought in the country of origin has no #suspensive effect either automatically or by virtue of a decision of the #appeal authority and confers on the #enforcement judge a wide discretionary power to decide the question of the suspension of the proceedings without necessarily having to make a prognosis as to the chances of success of the #appeal brought in the country of origin.

GE 04.03.2010 c. 3.1

Article VII

- 1. The provisions of the present Convention shall not affect the validity of multilateral or bilateral agreements concerning the recognition and enforcement of the arbitral awards entered into by the Contracting States nor deprive any interested party of any right he may have to avail himself of an arbitral award in the manner and to the extent allowed by the law or the treaties of the country where such award is sought to be relied upon.**
- 2. The Geneva Protocol on Arbitration Agreements of 1923 and the Geneva Convention on the Execution of Foreign Arbitral Awards of 1927 shall cease to have effect between Contracting States on their becoming bound and to the extent they become bound, by this Convention.**

1 *No Effect on the Validity of Other International Treaties (1)*

1.1 Principle

It is true that Article VII(1) NYC reserves, in particular with regard to the form of the #arbitration agreement, the application of a more favourable national law, and that Swiss law has a simplified written form in Article 178(1) PILA.

VD 05.03.2015 c. VI.b.bb

It clearly results from Article VII(1) NYC that the NYC reserves to member States the possibility to derogate from the rules of the NYC. They can do this by adopting stricter or more liberal rules.

FSCD 110 Ib 191 [193]

Whether two (or more) States have derogated from the NYC is a matter of #interpretation of their bilateral (or multilateral) law but not of the NYC.

FSCD 110 Ib 191 [193]

1.2 Purpose: *In Favorem Validitatis*

The maximal efficiency rule provides that, in case of a concurring application of international treaty provisions on the #recognition and #enforcement of arbitral #awards, priority must be given to the provision enabling or facilitating the #recognition or #enforcement, either because it provides for less strict substantive prerequisites or because it provides for simpler proceedings. This is in line with the purpose of bilateral and multilateral treaties in this matter, whose purpose consists in facilitating by all possible means the #recognition and #enforcement of arbitral #awards. Therefore, a party should not be deprived of the possibility of obtaining #recognition and #enforcement of an #award if this possibility is provided by an international treaty which is in force.

FSCD 110 Ib 191 [194]

Foreign arbitral #awards are recognised and enforced according to Article 194 PILA. The provisions of the NYC apply exclusively. In Article VII, the NYC refers to other legal sources. Neither Article 25 et seq. PILA nor the Hague Convention relating to Civil Procedure of 1 March 1954 are part of them.

AR 05.08.1994 p. 4-5

This provision contains an exception in favour of the rule most favourable to #recognition, in the sense that the national law or treaty which is more favourable towards #recognition has priority over the NYC.

ZH 20.04.1990 [(1990) ASA p. 184]

An #award made by the *Chambre Arbitrale Maritime de Paris* can be recognised if its formal #legal force and its enforceability are not disputed by the parties as long as no #grounds for refusal according to Article 17 of the Treaty between Switzerland and France or Article V NYC are invoked or result from the file, even though the formal requirements for #recognition of a foreign #award according to

the NYC and the Treaty between Switzerland and France on Judicial Jurisdiction and the Execution of Judgments in Civil Matters of 15 June 1869 are not fulfilled.

ZH 20.04.1990 [(1990) ASA p. 185]

1.3 NYC and the Treaty between Switzerland and France of 1869

The NYC is (about one century) posterior to the Treaty between Switzerland and France on Judicial Jurisdiction and the Enforcement of Judgments in Civil Matters of 15 June 1869. The NYC has been concluded in order to facilitate the #recognition and #enforcement of arbitral #awards. When signing and ratifying the NYC, the representatives of France and Switzerland did not express the will or the desire that the #recognition and #enforcement of arbitral #awards shall be governed by the stricter provisions of the Switzerland-France treaty in bilateral relations between the two States. On the contrary, in its Message to the Parliament with respect to acceding to the NYC, the #Federal Council has expressed the opinion that the requesting party can base its request on the most favourable applicable provisions, as it can under the Geneva Convention on the Execution of Foreign Arbitral Awards of 1927.

FSCD 110 Ib 191 [193-194]

2 *Replacement of the Geneva Protocol of 1923 and the Geneva Convention of 1927 (2)*

The NYC has been developed to replace the Geneva Protocol on Arbitration Agreements of 24 September 1923 and the Geneva Convention on the Execution of Foreign Arbitral Awards of 26 September 1927. The NYC differs from these two texts mainly by significantly improving the position of the party requesting the #recognition and #enforcement of the arbitral #award.

GE 15.04.1999 [(2000) ASA p. 789]

Article VIII

- 1. This Convention shall be open until 31 December 1958 for signature on behalf of any Member of the United Nations and also on behalf of any other State which is or hereafter becomes a member of any specialized agency of the United Nations, or which is or hereafter becomes a party to the Statute of the International Court of Justice, or any other State to which an invitation has been addressed by the General Assembly of the United Nations.**
- 2. This Convention shall be ratified and the instrument of ratification shall be deposited with the Secretary-General of the United Nations.**

Article IX

- 1. This Convention shall be open for accession to all States referred to in article VIII.**
- 2. Accession shall be effected by the deposit of an instrument of accession with the Secretary-General of the United Nations.**

Article X

- 1. Any State may, at the time of signature, ratification or accession, declare that this Convention shall extend to all or any of the territories for the international relations of which it is responsible. Such a declaration shall take effect when the Convention enters into force for the State concerned.**
- 2. At any time thereafter any such extension shall be made by notification addressed to the Secretary-General of the United Nations and shall take effect as from the ninetieth day after the day of receipt by the Secretary-General of the United Nations of this notification, or as from the date of entry into force of the Convention for the State concerned, whichever is later.**
- 3. With respect to those territories to which this Convention is not extended at the time of signature, ratification or accession, each State concerned shall consider the possibility of taking the necessary steps in order to extend the application of this Convention to such territories, subject, where necessary for constitutional reasons, to the consent of the Governments of such territories.**

Article XI

In the case of a federal or non-unitary State, the following provisions shall apply:

- a. With respect to those articles of this Convention that come within the legislative jurisdiction of the federal authority, the obligations of the federal Government shall to this extent be the same as those of Contracting States which are not federal States;**
- b. With respect to those articles of this Convention that come within the legislative jurisdiction of constituent states or provinces which are not, under the constitutional system of the federation, bound to take legislative action, the federal Government shall bring such articles with a favourable recommendation to the notice of the appropriate authorities of constituent states or provinces at the earliest possible moment;**
- c. A federal State Party to this Convention shall, at the request of any other Contracting State transmitted through the Secretary-General of the United Nations, supply a statement of the law and practice of the federation and its constituent units in regard to any particular provision of this Convention, showing the extent to which effect has been given to that provision by legislative or other action.**

Article XII

- 1. This Convention shall come into force on the ninetieth day following the date of deposit of the third instrument of ratification or accession.**
- 2. For each State ratifying or acceding to this Convention after the deposit of the third instrument of ratification or accession, this Convention shall enter into force on the ninetieth day after the deposit by such State of its instrument of ratification or accession.**

Article XIII

- 1. Any Contracting State may denounce this Convention by a written notification to the Secretary-General of the United Nations. Denunciation shall take effect one year after the date of receipt of the notification by the Secretary-General.**
- 2. Any State which has made a declaration or notification under article X may, at any time thereafter, by notification to the Secretary-General of the United Nations, declare that this Convention shall cease to extend to the territory concerned one year after the date of the receipt of the notification by the Secretary-General.**
- 3. This Convention shall continue to be applicable to arbitral awards in respect of which recognition or enforcement proceedings have been instituted before the denunciation takes effect.**

Article XIV

A Contracting State shall not be entitled to avail itself of the present Convention against other Contracting States except to the extent that it is itself bound to apply the Convention.

Article XV

The Secretary-General of the United Nations shall notify the States contemplated in article VIII of the following:

- a. Signatures and ratifications in accordance with article VIII;**
- b. Accessions in accordance with article IX;**
- c. Declarations and notifications under articles I, X and XI;**
- d. The date upon which this Convention enters into force in accordance with article XII;**
- e. Denunciations and notifications in accordance with article XIII.**

Article XVI

- 1. This Convention, of which the Chinese, English, French, Russian and Spanish texts shall be equally authentic, shall be deposited in the archives of the United Nations.**
- 2. The Secretary-General of the United Nations shall transmit a certified copy of this Convention to the States contemplated in Article VIII.**

Annexes

1 Federal Decisions

Date	Parties	Publications and Reports
19.12.2018	A. SA vs/ La République française et Le Royaume d'Espagne	FSCD 4A_394/2017
11.12.2018	République de l'Inde vs/ X. AG	FSCD 4A_65/2018
28.11.2018	FIFA vs/ A. AG	FSCD 4A_338/2018
27.11.2018	X. vs/ FIFA	FSCD 4A_474/2018
23.11.2018	Company A. vs/ Corporation B.	FSCD 4A_308/2018
19.11.2018	A. S.A. vs/ B.	FSCD 4A_301/2018
16.11.2018	FIFA vs/ X, AMA	FSCD 4A_560/2018
12.11.2018	X. SA vs/ A., B., M. Sàrl	FSCD 4A_642/2017
17.10.2018	A. vs/ 1. International Federation of American Football (IFAF), 2. USA Football, 3. Football Canada, 4. Japanese American Football Association, 5. Panamanian Federation of American Football, 6. B.,	FSCD 4A_284/2018
16.10.2018	Russische Föderation vs/ A. LLC, B. LLC, C. LLC, D. LLC, E. LLC, F. LLC, G. LLC, H. LLC, I. LLC, J. LLC, K. LLC	FSCD 144 III 559, 4A_398/2017, 4A_396/2017
11.10.2018	A., B., C., D. vs/ E., F., G., H., I.	FSCD 4A_438/2017
08.10.2018	A. SA vs/ Z.	FSCD 4A_76/2018
01.10.2018	A. Ltd vs/ M. (SAM), B.	FSCD 4A_550/2017
27.09.2018	A. A.S., B., C., D., E., vs/ L. A.S., M. B.V, N. Limited, O. GmbH, P.	FSCD 4A_266/2018
27.09.2018	X. SA vs/ Z. SA	FSCD 4A_371/2018
26.09.2018	X. Sàrl vs/ Z. Limited	FSCD 4A_40/2018
25.09.2018	X. vs/ Z.	FSCD 4A_294/2017
12.09.2018	Club A. vs/ B.	FSCD 4A_238/2018
07.09.2018	A. Limited vs/ Republik Usbekistan	FSCD 144 III 411, 5A_942/2017
03.09.2018	A., B. SA vs/ Comitato direttivo dell'OAD-FCT, Organismo di autodisciplina dei fiduciari del Cantone Ticino	FSCD 5A_163/2018

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31.08.2018	A. GmbH vs/ B. AB	FSCD 4F_16/2018
22.08.2018	Club B. vs/ X., Y., Z.	FSCD 4A_298/2018
22.08.2018	Club B. vs/ M.	FSCD 4A_300/2018
14.08.2018	A. vs/ FC B.	FSCD 4A_114/2018
09.08.2018	X. Inc. vs/ Z.	FSCD 4A_525/2017
26.07.2018	X. vs/ Y.	FSCD 4A_404/2017
26.07.2018	A. SA vs/ B. AG	FSCD 4A_125/2018
20.07.2018	X. vs/ Z.	FSCD 4A_578/2017
04.07.2018	X. S.P.A., vs/ Z. GmbH & Co.	FSCD 4A_505/2017
04.07.2018	A., B., C., H. s.r.l. vs/ D., E. s.r.l	FSCD 4A_345/2017
27.06.2018	A., B., C., vs/ D.	FSCD 4A_60/2018
25.06.2018	X. Club vs/ A., Z. Club	FSCD 4A_502/2017
13.06.2018	A. vs/ B.	FSCD 144 III 360, 5A_375/2017
31.05.2018	A. SA vs/ B., Group C.	FSCD 4A_292/2018
30.05.2018	A. SA vs/ Commissione Paritetica Cantonale nel ramo della pittura e gessatura	FSCD 4A_117/2018
28.05.2018	Fédération Internationale de Motocyclisme vs/ Kuwait Motor Sports Club	FSCD 4A_314/2017
24.05.2018	A. vs/ B.	FSCD 4A_491/2017
22.05.2018	Club L. vs/ Fédération Camerounaise de Football	FSCD 4A_170/2017
03.05.2018	A. LP, B. GP Limited vs/ C. SA	FSCD 4A_640/2017
02.05.2018	A. SA, B. S.r.L., vs/ C.	FSCD 4A_153/2018
02.05.2018	X. vs/ Agence Mondiale Antidopage (AMA), Fédération biélorusse de taekwondo	FSCD 4A_478/2017
01.05.2018	A. vs/ Stiftung B.	FSCD 4A_583/2017
30.04.2018	X. Sàrl vs/ Commission professionnelle paritaire du second œuvre vaudois	FSCD 4A_61/2018
30.04.2018	A. GmbH vs/ B. AB	FSCD 4A_136/2018
18.04.2018	K. Limited, L., vs/ M. Limited, N. Limited	FSCD 4A_247/2017
18.04.2018	FC A. vs/ B.	FSCD 144 III 235, 4A_7/2018
17.04.2018	L. vs/ FIFA	FSCD 4A_426/2017
11.04.2018	A. vs/ B. S.p.A	FSCD 5A_1056/2017
09.04.2018	A. Sàrl vs/ B. Ltd	FSCD 5A_862/2017
04.04.2018	A. vs/ B. GmbH	FSCD 4A_580/2017

04.04.2018	A. vs/ B. SA, C. & Co, D.	FSCD 5A_907/2017
04.04.2018	X. vs/ Z. AG	FSCD 4A_143/2018
14.03.2018	A. vs/ club B.	FSCD 4F_8/2018
12.03.2018	A., B., vs/ Z.	FSCD 4A_450/2017
21.02.2018	X. vs/ Z. Limited	FSCD 4A_518/2017
20.02.2018	X. vs/ FIFA	FSCD 144 III 120, 4A_260/2017
15.02.2018	Republik A. vs/ B. SA	FSCD 4A_507/2017
08.02.2018	A. vs/ B.	FSCD 4A_30/2018
02.02.2018	A. vs/ International Association of Athletics Federations	FSCD 4A_490/2017
29.01.2018	Club A. vs/ B.	FSCD 4A_508/2017
22.01.2018	A. vs/ B.	FSCD 4A_432/2017
11.01.2018	X. Holding SAS vs/ Z. Holding AG in Liquidation	FSCD 4A_56/2017
08.01.2018	A. Inc., vs/ B. SA	FSCD 4A_220/2017
03.01.2018	A. GmbH vs/ B. SA	FSCD 4A_356/2017
21.12.2017	A. vs/ B.	FSCD 4A_344/2017
14.12.2017	République de X. vs/ A., B., C.	FSCD 4A_157/2017
05.12.2017	A. vs/ club B.	FSCD 4A_592/2017
30.11.2017	A. GmbH, B. GmbH, C. GmbH vs/ Verlassenschaft nach D., E. GmbH, F. GmbH & Co Vermögensverwaltung KG, G. GmbH & Co. KG, H. GmbH	FSCD 4A_430/2017
27.11.2017	Club X. vs/ A.	FSCD 4A_312/2017
24.11.2017	A. SA vs/ B. Ltd	FSCD 4A_236/2017
23.11.2017	Staat X. vs/ A.	FSCD 4A_396/2017
20.11.2017	X. vs/ Z.	FSCD 4A_407/2017
20.11.2017	A. vs/ B.	FSCD 4A_436/2017
09.11.2017	A. et al., vs/ B.	FSCD 4A_510/2017
08.11.2017	A. vs/ B.	FSCD 4A_466/2017
31.10.2017	X. vs/ Z. S.p.A, Fédération Internationale de Football Association	FSCD 4A_480/2015
23.10.2017	X. vs/ Agence Mondiale Antidopage, Fédération Internationale de Squash	FSCD 4A_424/2017
18.10.2017	X., Y. Limited vs/ B., A. SA	FSCD 4A_117/2017
17.10.2017	République X. vs/ Z. Plc	FSCD 143 III 589, 4A_53/2017
06.10.2017	A., X. National Olympic Committee vs/ United World	FSCD 4A_206/2017

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04.10.2017	X. vs/ Fédération A., Association B.	FSCD 4A_384/2017
04.10.2017	A. Ltd. Vs/ B. AG	FSCD 4A_150/2017
03.10.2017	X. SA vs/ Z.	FSCD 4A_506/2017
19.09.2017	X. Inc. Vs/ Z. Ltd	FSCD 143 III 578, 4A_12/2017
28.08.2017	A. Club vs/ B.	FSCD 4A_318/2017
28.08.2017	Société X. vs/ Z.	FSCD 4A_277/2017
02.08.2017	FC X. vs/ Z.	FSCD 4A_316/2017
25.07.2017	A. vs/ International Weightlifting Federation	FSCD 4A_80/2017
24.07.2017	X. vs/ Z.	FSCD 4A_668/2016
20.07.2017	Fédération X. vs/ Z. Sàrl	FSCD 143 III 462, 4A_98/2017
11.07.2017	X1. Ltd, X2. SA vs/ Z. Ltd	FSCD 4A_50/2017
29.06.2017	Michel Platini vs/ Fédération Internationale de Football Association	FSCD 4A_600/2016
19.06.2017	X. SA vs/ Commission professionnelle paritaire du gros œuvre vaudois	FSCD 4A_22/2017
14.06.2017	Fédération A., B., vs/ Club X., Fédération A.	FSCD 4A_172/2017
30.05.2017	A. AG vs/ State of Palestine (alias Palestinian Authority, B. Company	FSCD 4A_532/2016
03.05.2017	A. LLC vs/ B. LLC	FSCD 4A_38/2017
25.04.2017	A. Corporation, B. Company vs/ X., Y. Corporation Ltd	FSCD 4A_34/2016
20.04.2017	Agence Mondiale Antidopage vs/ X., United States Anti-Doping Agency	FSCD 4A_692/2016
03.04.2017	Russian Paralympic Committee vs/ International Paralympic Committee	FSCD 4A_470/2016
28.03.2017	A. SA, B. SA vs/ C. SA, D. SA	FSCD 4A_621/2015
08.03.2017	Club X. vs/ Z.	FSCD 4A_40/2017
07.03.2017	A. A G vs/ B. AG	FSCD 4A_570/2016
06.03.2017	A., B. vs/ C.	FSCD 4A_490/2016
02.03.2017	A. vs/ Verein B.	FSCD 4A_405/2016
17.02.2017	A., B., vs/ Association Internationale des Fédérations d'Athlétisme (IAAF), Comité Olympique Russe (ROC), Comité International	FSCD 4A_444/2016

	Olympique (CIO),	
16.02.2017	X., vs/ Z. SA	FSCD 4A_473/2016
16.02.2017	X. SA vs/ Y. Inc., Z.,	FSCD 4A_704/2015
16.02.2017	X. SA vs/ Commission paritaire genevoise pour le gros oeuvre	FSCD 4A_512/2016
15.02.2017	A., vs/ Ente Ospedaliero Cantonale	FSCD 4A_587/2015
09.02.2017	X., vs/ A., B., C., Fédération Internationale de Football Association (FIFA),	FSCD 4A_690/2016
07.02.2017	A. GmbH vs/ X., B. Srl	FSCD 4A_478/2016
07.02.2017	FC A., vs/ B., Fédération Internationale de Football Association (FIFA),	FSCD 4A_492/2016
27.01.2017	A. AG vs/ B. AG	FSCD 4A_546/2016
26.01.2017	X. S.p.A vs/ Club Y., Z.	FSCD 4A_716/2016
24.01.2017	A. GmbH vs/ B. Inc.,	FSCD 4A_672/2016
19.01.2017	A. AG vs/ B. AG	FSCD 4A_459/2016
18.01.2017	X. Inc. vs/ Z. Corporation	FSCD 143 III 55, 4A_500/2015
11.01.2017	X. Ltd vs/ Z. Ltd,	FSCD 4A_188/2016
20.12.2016	Club X. vs/ Club Y., Fédération Internationale de Football Association (FIFA),	FSCD 4A_32/2016
13.12.2016	X. Club vs/ Z. Limited	FSCD 4A_116/2016
02.12.2016	X. vs/ Les héritiers de feu Z. (A.Z., B.Z., C.Z, D.Z.)	FSCD 4A_522/2016
24.11.2016	A. LLC vs/ B. SA	FSCD 4A_497/2015
21.11.2016	A. SE vs/ B., Inc.	FSCD 4A_412/2016
03.11.2016	A.X. SA, B.X. Ltd vs/ Z. Ltd	FSCD 4A_136/2016
02.11.2016	A. SA vs/ Comitato direttivo dell'OAD-FCT, Organismo di autodisciplina dei fiduciari del Cantone Ticino	FSCD 5A_294/2016
26.10.2016	A. vs/ B.	FSCD 4A_536/2016
10.10.2016	X. vs/ Z.	FSCD 4A_555/2016
06.10.2016	A. A.S. vs/ B. Co. Ltd.	FSCD 4A_310/2016
20.09.2016	A. Ltd vs/ B. S.p.A	FSCD 4A_524/2016
20.09.2016	X. SA vs/ La République socialiste du Vietnam	FSCD 4A_616/2015
07.09.2016	X. S.p.A. vs/ Y. B.V.,	FSCD 142 III 521, 4A_386/2015
23.08.2016	A. vs/ B. AG	FSCD 4A_156/2016

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15.08.2016	A., B. SA vs/ C.	FSCD 5A_507/2016
05.08.2016	X. vs/ Z. SA	FSCD 4A_355/2016
03.08.2016	A. SA vs/ B., C. Sàrl	FSCD 4A_202/2016
03.08.2016	A. AG vs/ B. Holding AG	FSCD 4A_110/2016
08.07.2016	A. S.p.A vs/ B. AG	FSCD 4A_259/2015
30.06.2016	A. vs/ B. FC	FSCD 4A_132/2016
27.06.2016	X. SA vs/ Y., Z. Company	FSCD 4A_322/2015
20.06.2016	A. vs/ B., C.	FSCD 4A_173/2016
06.06.2016	A. AG vs/ B. AG	FSCD 4A_82/2016
20.05.2016	A. vs/ B. SA	FSCD 4A_206/2016
04.05.2016	X. SA vs/ Z.	FSCD 4A_214/2016
03.05.2016	A.X. Sàrl vs/ Y., Z.	FSCD 4A_42/2016
26.04.2016	X1., X2., X3., X4. Vs/ Z. GmbH	FSCD 142 III 360, 4A_342/2015
11.04.2016	B. AG vs/ A. AG	FSCD 4A_426/2015
01.04.2016	X. vs/ FIFA	FSCD 4A_620/2015
22.03.2016	A. vs/ B.	FSCD 4A_678/2015
16.03.2016	A. AG, B. AG vs/ X. SA, Y. SA	FSCD 142 III 284, 4A_422/2015
16.03.2016	X. Ltd vs/ Y. S.p.A.	FSCD 142 III 296, 4A_628/2015
09.03.2016	A. AG vs/ B., C.	FSCD 4A_618/2015, 4A_634/2015
08.03.2016	X. vs/ Y.	FSCD 4A_510/2015
25.02.2016	A. vs/ B. AG	FSCD 142 III 220, 4A_492/2015
25.02.2016	A. vs/ B. AG	FSCD 142 III 230, 4A_490/2015
18.02.2016	X. Co. vs/ Z. Limited	FSCD 142 III 239, 4A_84/2015
04.02.2016	A. SA vs/ B. Ltd	FSCD 5A_441/2015
04.02.2016	A. AG, B. AG vs/ C. AG, D. AG	FSCD 4A_356/2015
01.02.2016	A. vs/ B.	FSCD 4A_428/2015
28.01.2016	X. vs/ United States Anti-Doping Agency, Agence Mondiale Antidopage	FSCD 4A_222/2015
19.01.2016	A. (PTY) Limited, B. (PTY) Limited vs/ C. LLC	FSCD 4A_502/2015
06.01.2016	A. vs/ B. SA	FSCD 4A_572/2015
05.01.2016	A. SA vs/ B. SA	FSCD 4A_319/2015
16.12.2015	A. Bank vs/ B. SA	FSCD 4A_520/2015
10.12.2015	A. vs/ B.	FSCD 4A_392/2015
10.12.2015	A. vs/ B., C.	FSCD 4A_568/2015
09.12.2015	A.A., B. Srl vs/ C.A., D.A., E.A.	FSCD 4A_562/2014
09.12.2015	A. vs/ B.	FSCD 4A_596/2015

09.11.2015	Club A. vs/ B.	FSCD 4A_176/2015
28.10.2015	A., B., C., D. vs/ X.	FSCD 4A_218/2015
26.10.2015	A. mbH vs/ B. Ltd	FSCD 4A_69/2015
06.10.2015	République A. vs/ B. International	FSCD 141 III 495, 4A_34/2015
29.09.2015	A., B. AG, vs/ C.	FSCD 4A_172/2015
28.09.2015	A.B. & B.B., C., A.D. & B.D., E. & F., A.G. & B.G., A.H. & B.H., I. & J., K. & L., M., N. & O., P. & Q., R., S., A.T. & B.T., P., U., V. SA	FSCD 141 III 444, 4A_65/2015
22.09.2015	A. SA, B. Limited vs/ C. Sagl, D. Srl	FSCD 4A_378/2015
15.09.2015	Laboratoire A. vs/ B. Ltd, C.	FSCD 4A_136/2015
17.08.2015	A. AS vs/ B. SAL	FSCD 4A_54/2015
27.07.2015	A. Ltd vs/ OAO B.	FSCD 4F_9/2015
15.07.2015	A. SA vs/ B., C., D., E., F., G., H., I., J., Association K, Fédération L.	FSCD 4A_246/2014
14.07.2015	A. A. vs/ B. SA	FSCD 4A_143/2015
02.07.2015	Club A. vs/ B.	FSCD 4A_684/2014
17.06.2015	Club A. vs/ Club B., C.	FSCD 4A_124/2015
03.06.2015	A. vs/ B., C.	FSCD 4A_676/2014
29.05.2015	A. LLP vs B.	FSCD 141 III 229, 4A_633/2014
21.05.2015	A. S.p.A. vs/ B. Ltd.	FSCD 4A_634/2014
21.05.2015	A. SA vs/ B. Srl	FSCD 4A_709/2014
18.05.2015	A. vs/ B.	FSCD 141 III 201, 4A_92/2015
06.05.2015	Club A. vs/ Club B.	FSCD 4A_426/2014
30.04.2015	A. AG vs/ B.	FSCD 4A_623/2014
29.04.2015	A. Sport Club vs/ B.	FSCD 4A_70/2015
15.04.2015	A. vs/ B.	FSCD 4A_554/2014
14.04.2015	A. vs/ Comité International Olympique	FSCD 4A_126/2015
09.04.2015	A. Ltd vs OAO B.	FSCD 141 III 210, 4A_203/2014
01.04.2015	D. vs/ A., B., C.	FSCD 4A_599/2014
16.03.2015	A. Corporation vs/ B. SA	FSCD 4A_636/2014
05.03.2015	A. SA vs/ B. GmbH in Liquidation	FSCD 4A_698/2014
26.02.2015	Club A. vs/ B., C.	FSCD 4A_374/2014
25.02.2015	A. vs/ X. B.	FSCD 4A_486/2014
24.02.2015	A. vs/ FIFA	FSCD 4A_544/2014
20.02.2015	A. AG vs/ B. AG	FSCD 4A_390/2014
20.02.2015	A. S.p.A vs/ B.	FSCD 4A_645/2014

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20.02.2015	A. S.p.A vs/ B.	FSCD 4A_609/2014
29.01.2015	Y. SA, Z. SA vs/ B. B.V. & V. Ltd, W. SA vs/ B. B.V.	FSCD 4A_532/2014, 4A_534/2014
26.01.2015	Football Club A. vs/ B.	FSCD 4A_36/2015
14.01.2015	A. vs/ B.	FSCD 4A_598/2014
05.01.2015	A. vs/ B.	FSCD 4A_504/2014
18.12.2014	A. vs/ Bank B.B	FSCD 5A_467/2014
18.12.2014	A. SA vs/ B. SA	FSCD 4A_335/2014
28.11.2014	A. Sàrl vs/ Commission paritaire des métiers du bâtiment	FSCD 4A_622/2014
25.11.2014	A. vs/ Internationales Olympiques Komitee (IOK)	FSCD 4A_586/2014
24.11.2014	A. Sàrl vs/ B. International SA	FSCD 4A_378/2014
04.11.2014	A. SA vs/ B., C. Limited, D.	FSCD 4A_446/2014
29.10.2014	A vs/ B., C., D., E., F.	FSCD 4A_253/2014
16.10.2014	Fenerbahçe Spor Kulübü vs/ Union des Associations Européennes de Football (UEFA)	FSCD 4A_324/2014
08.10.2014	A. Inc. Vs/ B. SA	FSCD 4A_199/2014
30.09.2014	Fondation pour l'animation socioculturelle (FASL) vs/ X. lausannoise	FSCD 4A_274/2014
25.09.2014	X. SA vs/ Y. GmbH	FSCD 5A_165/2014
23.09.2014	Y. SA vs/ B.	FSCD 4A_231/2014
23.09.2014	Y. SA vs/ B.	FSCD 4A_247/2014
15.09.2014	A. vs/ B.	FSCD 5A_409/2014
02.09.2014	Sàrl X. vs/ Y. AG	FSCD 4A_606/2013
28.08.2014	A. vs/ Club B.	FSCD 140 III 520, 4A_6/2014
28.08.2014	A. SA vs/ B	FSCD 140 III 477, 4A_74/2014
27.08.2014	A. SA vs/ B. Limited	FSCD 4A_441/2014
14.08.2014	A. SA, B. BV vs/ C. SA	FSCD 4A_334/2014
23.07.2014	A. vs/ B.	FSCD 4A_117/2014
23.07.2014	X. Ltd vs/ Y. Ltd	FSCD 4A_118/2014
09.07.2014	Club A. vs/ B.	FSCD 4A_90/2014
07.07.2014	A. SA vs/ B. SA	FSCD 4A_124/2014
30.06.2014	A. vs/ B.	FSCD 5A_22/2013
30.06.2014	A. vs/ B. AG, C. , D. AG, E. AG	FSCD 140 III 367, 4A_560/2013
30.06.2014	A. vs/ B., C., D. AG, E. AG	FSCD 4A_562/2013
19.06.2014	A. Kft vs/ B. GmbH	FSCD 4A_597/2013

11.06.2014	A. vs/ Nationale Anti-Doping Agentur Deutschland	FSCD 4A_178/2014
05.06.2014	A. SA vs/ B. SA	FSCD 4A_302/2013
27.05.2014	A. vs/ B	FSCD 140 III 278, 4A_508/2013
26.05.2014	A. SpA vs/ B. Asociación Civil	FSCD 4A_544/2013
02.05.2014	A. , B. vs/ C. SA	FSCD 4A_530/2013
28.04.2014	A. Sàrl vs/ B., C.	FSCD 4A_112/2014
24.04.2014	A. SA vs/ Commission B.	FSCD 4A_43/2014
07.04.2014	X. SA vs/ Y., Fédération Z	FSCD 4A_564/2013
07.04.2014	X. vs/ Y. Engineering SpA, Y SpA	FSCD 4A_450/2013
03.04.2014	X. GmbH vs/ Y. Ltd	FSCD 4A_577/2013
27.03.2014	X. vs/ The Football Federation of Ukraine	FSCD 4A_362/2013
27.03.2014	A. vs/ The Football Federation of Ukraine	FSCD 4A_448/2013
05.03.2014	A. vs/ B., C. Corp	FSCD 4A_563/2013
03.03.2014	A. vs/ Z., Fédération Internationale de Football Association	FSCD 4A_304/2013
27.02.2014	X. vs/ A.Y. AG, B.Y. Inc.	FSCD 140 III 134, 4A_438/2013
27.02.2014	A. AG vs/ Y.	FSCD 4A_511/2013
10.02.2014	A. SA vs/ X., Commune de Y., Commune de Z	FSCD 4A_451/2013
05.02.2014	X. A.S. vs/ Z. S.A.	FSCD 4A_446/2013
04.02.2014	X. Oy vs/ Y. EAD	FSCD 4A_460/2013
28.01.2014	X. AG vs/ Z.	FSCD 140 III 75, 4A_490/2013
27.01.2014	X. SA vs/ Z.	FSCD 4A_509/2013
21.01.2014	X. Ltd vs Société Z	FSCD 4A_250/2013
13.01.2014	X. vs/ Z.	FSCD 4F_2/2014
10.01.2014	X. AG vs/ Y.	FSCD 4A_398/2013
06.01.2014	Z. vs/ Fédération Internationale de Football Association (FIFA)	FSCD 4A_476/2013
10.12.2013	Y. Limited vs/ X. Limited	FSCD 4F_8/2013
19.11.2013	A. vs/ B.	FSCD 4A_254/2013
13.11.2013	Club X. SA vs/ Z.	FSCD 139 III 511, 4A_282/2013
05.11.2013	X. vs/ Z.	FSCD 4A_540/2013
29.10.2013	A. Limited, B. Sàrl, C. Ltd vs/ D. Limited	FSCD 4A_93/2013
21.10.2013	A. vs/ X., Y., Z.	FSCD 4A_468/2013
11.10.2013	A. vs/ X.	FSCD 4A_333/2013

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09.10.2013	A.K. LDA, La Masse en faillite de B.K. SA, C.K. SA, D. SA, E. Ltd, X., Y., Z., vs/ V., W. Company	FSCD 4A_688/2012
02.10.2013	X. AG, X. Technologies SAE vs/ Y.	FSCD 4A_305/2013
02.10.2013	A. vs/ B.	FSCD 4A_50/2013
30.09.2013	X. SA vs/ Z. Ltd	FSCD 4A_232/2013
17.09.2013	X. Corp. vs/ Y. Ltd	FSCD 4A_330/2013
20.08.2013	X. Ltd vs/ Y. GmbH	FSCD 4A_322/2013
05.08.2013	FC X. vs/ FC Z., Fédération Internationale de Football Association (FIFA)	FSCD 4A_274/2013
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26.07.2013	X. SA vs/ Y.	FSCD 5A_68/2013
15.07.2013	X. SA vs/ A., B., C., D., E., F., G., H., I.	FSCD 4A_188/2013
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27.06.2013	X. Incorporation vs/ Y. AG	FSCD 4A_95/2013
20.06.2013	Egyptian Football Association vs/ Al-Masry Sporting Club	FSCD 4A_682/2012
17.06.2013	X. vs/ Y. AG	FSCD 4A_205/2013
03.06.2013	X. Ltd vs/ Y. AG, A.	FSCD 4A_133/2013
03.06.2013	X. vs/ Y. SNC	FSCD 4A_666/2012
29.05.2013	X. SAD vs/ Fédération Internationale de Football Association (FIFA)	FSCD 4A_620/2012
24.05.2013	X. SA de CV vs/ A.	FSCD 4A_476/2012
08.05.2013	X. SA vs/ Y. SA Y. SA vs/ X. SA	FSCD 4A_439/2012 FSCD 4A_457/2012
03.05.2013	A. SA vs/ B. Ltd	FSCD 4A_41/2013
29.04.2013	X. vs/ Z. Ltd	FSCD 4A_512/2011
29.04.2013	X. vs/ The International Association of Athletics Federations, Z.	FSCD 4A_730/2012
23.04.2013	X. Ltd vs/ Y. GmbH	FSCD 4A_672/2012
18.04.2013	Y. GmbH vs/ X. SpA	FSCD 4A_660/2012
18.04.2013	X. SpA vs/ Y. GmbH	FSCD 4A_524/2012
17.04.2013	Fondation pour l'animation socioculturelle lausannoise vs/ X.	FSCD 4A_515/2013
17.04.2013	X. Limited vs/ Y. Limited	FSCD 4A_669/2012
15.04.2013	X. vs/ Y.	FSCD 4A_14/2013
15.04.2013	X. (International) AG vs/ A.	FSCD 4A_596/2012

21.03.2013	A. vs/ UEFA	FSCD 4A_522/2012
18.03.2013	A. vs/ Bulgarische Fussballunion	FSCD 4A_388/2012
28.02.2013	X. vs/ Fédération Internationale d'Haltérophilie	FSCD 4A_576/2012
21.02.2013	X. SA vs/ A.Y. Holdings SA, B.Y. SpA, C.Y. SpA, D.Y. Holdings Inc.	FSCD 4A_552/2012
20.02.2013	X. SE, Y. GmbH vs/ Z. BV.	FSCD 4A_407/2012
19.02.2013	X. SA vs/ Y.	FSCD 4A_550/2012
30.01.2013	A. vs/ B., C.	FSCD 4A_335/2012
17.01.2013	X. vs/ Y. Ltd.	FSCD 4A_538/2012
17.01.2013	FC X. vs/ Y.	FSCD 4A_244/2012
10.01.2013	Etat X. Ltd vs/ Société Z.	FSCD 4A_146/2012
08.01.2013	X. SA vs/ Z.	FSCD 4A_537/2012
07.01.2013	A., B., C. vs/ X.	FSCD 4A_325/2012
21.12.2012	A. vs/ B., C.	FSCD 139 III 135, 5A_355/2012
14.12.2012	A. vs/ X.	FSCD 4A_198/2012
11.12.2012	X. vs/ Z.	FSCD 4A_414/2012
10.12.2012	A. SpA vs/ B.	FSCD 4A_635/2012
06.12.2012	X. Club vs/ Z. Club, Fédération Internationale de Football Association (FIFA)	FSCD 4A_276/2012
16.10.2012	X SA vs/ Commission professionnelle paritaire du second oeuvre vaudois	FSCD 4A_299/2012
16.10.2012	Fédération X. vs/ Club A., Club B., Confédération C.	FSCD 4A_314/2012
16.10.2012	X. SA vs/ Y.	FSCD 4A_395/2012
16.10.2012	X. Lda. vs/ Y. Ltd	FSCD 138 III 714, 4A_50/2012
11.10.2012	X. Ltd vs/ Y. GmbH	FSCD 4A_76/2012
09.10.2012	X. vs/ Union Cycliste Internationale (UCI), Fédération Z.	FSCD 4A_110/2012
01.10.2012	Club X. Ltd. Vs/ Club Y.	FSCD 4A_312/2012
19.09.2012	Fédération X. vs/ European Chess Union (ECU)	FSCD 4A_274/2012
21.08.2012	A. SpA vs/ B.	FSCD 4A_750/2011
20.08.2012	X. SA, Y. BV vs/ Y. SA	FSCD 4A_240/2012
06.08.2012	X. AG vs/ Y.	FSCD 138 III 681, 4A_119/2012
26.07.2012	X vs/ Y. SA, Z. SA	FSCD 4A_318/2012
23.07.2012	Etat X. vs/ Y. AG	FSCD 4A_570/2011
16.07.2012	Olympique des Alpes SA vs/ Union des Associations	FSCD 4A_134/2012

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	Européennes de Football (UEFA), Atlético de Madrid SAD, Stade Rennais Football Club, Celtic PLC, Udinese Calcio SpA	
12.07.2012	X. vs/ Y.	FSCD 4A_150/2012
03.07.2012	X. AG, Y. AG vs/ Z. AG, L. AG, M. AG, N. AG, O. AG, P. SA	FSCD 4A_122/2012
02.07.2012	X. SA vs/ Z. LLC	FSCD 138 III 520, 5A_754/2011
28.06.2012	X. vs/ Y.	FSCD 138 III 542, 4A_105/2012
27.06.2012	X. vs/ Y. Inc.	FSCD 4A_54/2012
18.06.2012	A vs/ UCI, CONI, FCI	FSCD 4A_488/2011
18.06.2012	A. vs/ Fédération X.	FSCD 4A_636/2011
31.05.2012	Club X. vs/ Club Y.	FSCD 4A_682/2012
29.05.2012	Club de basketball X. vs/ Y.	FSCD 4A_232/2012
23.05.2012	Serbischer Fussballverband vs/ M.	FSCD 4A_654/2011
02.05.2012	X. GmbH vs/ Y. Sàrl	FSCD 138 III 270, 4A_14/2012
02.05.2012	X. SA vs/ Y. SPRL	FSCD 4A_16/2012
05.04.2012	Swatch AG vs/ X. SA	FSCD 138 III 304, 4A_589/2011
28.03.2012	X. vs/ Y.	FSCD 4A_24/2011
27.03.2012	Francelino da Silva Matuzalem vs/ Fédération Internationale de Football Association (FIFA)	FSCD 138 III 322, 4A_558/2011
08.03.2012	International Ice Hockey Federation (IIHF) vs/ SCB Eishockey AG	FSCD 4A_627/2011
07.03.2012	Club X. vs/ Club Y. SA	FSCD 4A_652/2011
13.02.2012	A., B., vs/ Agence Mondiale Antidopage (AMA), Fédération flamande de tennis (VTV)	FSCD 4A_428/2011
08.02.2012	X. GmbH vs/ Y. GmbH	FSCD 4A_711/2011
31.01.2012	X. vs/ Z. Inc	FSCD 4A_360/2011
23.01.2012	U., V., W., X SA vs/ Y., Z.	FSCD 4A_528/2011
23.01.2012	U., V., W., X SA vs/ Y., Z.	FSCD 4A_526/2011
20.01.2012	X. SA vs/ Commission paritaire professionnelle du second œuvre neuchâteloise	FSCD 4A_634/2011
16.01.2012	X. AG in liquidation, Z. vs/ Verein. Y.	FSCD 5A_634/2011
04.01.2012	X. vs/ Z. SA	FSCD 4A_238/2011
09.12.2011	A. Xa vs/ B.Y.	FSCD 4A_631/2011
06.12.2011	A. vs/ B.	FSCD 4A_602/2011

07.11.2011	X. vs/ Y. Sàrl	FSCD 138 III 29, 4A_246/2011
02.11.2011	X. SA vs/ Y. AG	FSCD 4A_424/2011
27.10.2011	X. vs/ Les hoirs de feu Y., A.Y., B.Y.,	FSCD 4A_454/2011
18.10.2011	B. Ltd, D. Trust, C. Ltd, B. vs/ A.	FSCD 4A_214/2011
10.10.2011	A. vs/ B	FSCD 5A_427/2011
03.10.2011	X. vs/ Z.	FSCD 4A_530/2011
20.09.2011	Association X. vs/ Y. Limited	FSCD 4A_103/2011
13.09.2011	X. Limited vs/ Y. SA	FSCD 4A_98/2011
01.09.2011	X. Architektur AG vs/ A., B. Y.	FSCD 4A_374/2011
23.08.2011	X. vs/ Fédération Y., Z.	FSCD 4A_426/2011
22.08.2011	X. vs/ Club Y.	FSCD 4A_222/2011
02.08.2011	X. SA vs/ Société Y.	FSCD 4A_500/2010
20.07.2011	X. vs/ Jamaican Football Federation, FIFA	FSCD 4A_162/2011
05.07.2011	X. SA vs/ Y. Sàrl	FSCD 4A_254/2011
14.06.2011	X. vs/ Y.	FSCD 4A_617/2010
16.05.2011	X. GmbH vs/ Y. Sàrl	FSCD 4A_46/2011
19.04.2011	A.X. vs/ B.X., C.X., D.X., V.X. BV	FSCD 4A_44/2011
19.04.2011	A vs/ Trabzonspor Kulübü Derneği, Turkish Football Federation	FSCD 4A_404/2010
18.04.2011	A. vs/ WADA, FIFA, CFA	FSCD 4A_640/2010
11.04.2011	Luis Fernandez vs/ Fédération Internationale de Football Association (FIFA)	FSCD 4A_604/2010
06.04.2011	X. vs/ Y. SA	FSCD 4A_614/2010
21.03.2011	X. vs/ Y. SA	FSCD 4A_486/2010
17.03.2011	Fédération X. vs/ Fédération A., Fédération B., Fédération C., Fédération D., Fédération E., F. Inc.	FSCD 4A_600/2010
15.03.2011	X. Inc. Vs/ Y. Limited	FSCD 4A_481/2010
01.03.2011	A.X. vs/ B.X, Y.	FSCD 4A_514/2010
23.02.2011	X. vs FIFA	FSCD 4A_326/2010
17.02.2011	X. vs A, FIFA	FSCD 4A_402/2010
15.02.2011	X. vs/ Y.	FSCD 4A_642/2010
14.02.2011	X. SA vs/ Z. Sàrl	FSCD 4A_602/2010
14.02.2011	X. BV vs/ A.	FSCD 4A_508/2010
10.02.2011	A. SpA vs/ B. Inc.	FSCD 4A_212/2010

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07.02.2011	X. SA vs/ A.Y. SA, B.Y. SA, C.Y. SA, D.Y. SA	FSCD 4A_482/2010
12.01.2011	FC Sion Association vs/ Fédération Internationale de Football Association (FIFA), Al-Ahly Sporting Club	FSCD 4A_392/2010
12.01.2011	Essam El Hadary vs/ Fédération Internationale de Football Association (FIFA), Al-Ahly Sporting Club	FSCD 4A_394/2010
11.01.2011	X. SA vs/ Comité International Olympique	FSCD 4A_579/2010
07.01.2011	X. SA vs/ Y. BV	FSCD 137 III 85, 4A_440/2010
03.01.2011	Alejandro Valverde Belmonte vs/ Agence Mondiale Antidopage (AMA), Union Cycliste Internationale (UCI), Real Federación Española de Ciclismo (RFEC)	FSCD 4A_386/2010
03.01.2011	Alejandro Valverde Belmonte vs/ Agence Mondiale Antidopage (AMA), Union Cycliste Internationale (UCI), Real Federación Española de Ciclismo (RFEC)	FSCD 4A_420/2010
03.01.2011	A., X. AG vs/ Y.	FSCD 4A_345/2010
20.12.2010	X. vs/ FC Y.	FSCD 4A_10/2010
01.12.2010	SIX Swiss Exchange AG vs/ A.	FSCD 137 III 37, 4A_533/2010
10.11.2010	A. SA, Mitb vs/ L., M. LLC	FSCD 136 III 597; 4A_391/2010, 4A_399/2010
09.11.2010	X. GmbH vs/ Y. GmbH & Co. KG	FSCD 4A_428/2010
02.11.2010	X. SA vs/ Y. BV	FSCD 136 III 583, 5A_225/2010
29.10.2010	Alejandro Valverde Belmonte vs/ Comitato Olimpico Nazionale Italiano (CONI), Agence Mondiale Antidopage (AMA), Union Cycliste Internationale (UCI)	FSCD 136 III 605, 4A_234/2010
27.10.2010	X. Bank vs/ Y	FSCD 4A_414/2010
25.10.2010	X. Holding AG, X Management SA, A., B. vs/ Y. Investments NV	FSCD 4A_279/2010
13.10.2010	X. vs/ Y. Srl, Z. Srl	FSCD 4A_362/2010
06.10.2010	X. vs/ UCI	FSCD 4A_237/2010
04.10.2010	X. vs/ Y.	FSCD 4A_124/2010
28.09.2010	Claudia Pechstein vs/ International Skating Union	FSCD 4A_144/2010
23.08.2010	A. vs/ B., C.	FSCD 4A_126/2010
03.08.2010	X. SA vs/ Y. SA	FSCD 4A_254/2010

29.07.2010	X. vs/ Fédération equestre internationale	FSCD 4A_43/2010
28.07.2010	X. SA vs/ Y.	FSCD 4A_233/2010
28.06.2010	X. SA vs/ Y.	FSCD 136 III 467, 4A_71/2010
22.06.2010	X. vs/ Y. SRL	FSCD 4A_338/2010
22.06.2010	A. X vs/ B. Y	FSCD 4A_162/2010
14.06.2010	X. vs/ Y., Z.	FSCD 4A_510/2009
10.06.2010	Adrian Mutu vs/ Chelsea Football Club Limited	FSCD 4A_458/2009
02.06.2010	X., FC A. vs/ FC B.	FSCD 4A_320/2009
26.05.2010	X. vs/ Y.	FSCD 4A_433/2009
07.05.2010	A., B. vs/ International Biathlon Union (IBU)	FSCD 4A_620/2009
03.05.2010	X. vs/ Y.	FSCD 4A_456/2009
30.04.2012	X vs. Y.	FSCD 4A_763/2011
26.04.2010	X. vs/ Y.	FSCD 4A_80/2010
20.04.2010	X. AG vs/ Z.	FSCD 5A_682/2009
13.04.2010	A. vs/ X., Y., Z.	FSCD 4A_644/2009
13.04.2010	X. SA vs/ Y. BV	FSCD 136 III 200, 4A_582/2009
13.04.2010	Club Atlético de Madrid SAD vs/ Sport Lisboa E Benfica – Futebol SAD, Fédération Internationale de Football Association (FIFA)	FSCD 136 III 345, 4A_490/2009
12.04.2010	X., vs/ Association Y., Fédération Z.	FSCD 4A_624/2009
22.03.2010	X. Federation vs/ A., Y.	FSCD 4A_566/2009
18.03.2010	X. SA vs/ Y. SpA	FSCD 4A_584/2009
10.03.2010	A. vs/ B.	FSCD 4A_4/2010
08.03.2010	A., B. vs/ WADA	FSCD 4A_102/2009
05.03.2010	X. vs/ Association Internationale Y.	FSCD 4A_524/2009
17.02.2010	X. vs/ Y.	FSCD 4A_628/2009
15.02.2010	X. vs/ Ministère Y.	FSCD 4A_464/2009
15.02.2010	X. SA vs/ Y.	FSCD 4A_488/2009
11.02.2010	X. Ltd vs/ Y. AG	FSCD 4A_444/2009
10.02.2010	Claudia Pechstein vs/ International Skating Union, Deutsche Eisschnelllauf Gemeinschaft e.V.	FSCD 4A_612/2009
04.02.2010	A. vs/ Agenia X	FSCD 4A_574/2009
29.01.2010	A. GmbH vs/ B. SA	FSCD 4A_550/2009

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27.01.2010	A., B., C., D. SA vs/ X., Y.	FSCD 4A_562/2009
20.01.2010	X. vs/ Y., Fédération Internationale de Football Association (FIFA)	FSCD 4A_548/2009
11.01.2010	X. vs Y.	FSCD 4A_258/2009
11.01.2010	X. vs/ AY Holding BV	FSCD 4A_256/2009
06.01.2010	X. SA, Y. SA vs/ V. Limited, W. GmbH	FSCD 4A_348/2009
06.01.2010	X. vs/ Y.	FSCD 4A_260/2009
16.12.2009	X., Y. vs/ Z.	FSCD 4A_240/2009
08.12.2009	X. SA vs A.	FSCD 136 III 107, 4A_446/2009
26.10.2009	X. SA vs/ Y. Limited	FSCD 4A_428/2009
13.10.2009	X. Srl vs/ Y.	FSCD 4A_368/2009
13.10.2009	X. Srl vs/ Y.	FSCD 4A_352/2009
06.10.2009	X. (anciennement A.) vs/ la société Y. en liquidation, Z. Limitada	FSCD 4A_596/2008
25.08.2009	A. vs/ B.	FSCD 4A_160/2009
23.06.2009	X. vs/ Y.	FSCD 4A_62/2009
12.06.2009	X. SA vs/ Y.	*FSCD 4A_586/2008
09.06.2009	Federation Y. vs/ X. AG	FSCD 4A_96/2009, 4A_94/2009
31.03.2009	Vivendi S.A., Vivendi Telecom International S.A., Elektrim Telekomunikacja Sp. z o.o., Carcom Warszawa Sp. z o.o., Elektrim SA vs/ Deutsche Telekom AG, T-Mobile International AG & Co. KG, T-Mobile Deutschland GmbH, T-Mobile Poland Holding No. 1 BV, Polpager S.p. z o.o., Elektrim SA, Mega Investments Sp. z o.o., Elektrim Finance B.V., Polska Telefonii Cyfrowa Sp. z o.o.	FSCD 4A_428/2008
20.03.2009	X. vs/ Y.	*FSCD 4A_3/2009
17.03.2009	A., Azerbaijan Wrestling Federation (AWF) vs/ World Anti-Doping Agency (WADA), International Federation of Associated Wrestling Styles (FILA)	FSCD 4A_416/2008
20.02.2009	X. vs/ Y.	FSCD 4A_600/2008
19.02.2009	X. SpA en liquidation vs/ Y. B.V.	FSCD 4A_539/2008
09.02.2009	X. vs/ Y.	FSCD 4A_400/2008
22.01.2009	X. vs/ Fédération Internationale	FSCD 4A_424/2008

	de Hockey (FIH)	
09.01.2009	A. vs/ Fédération Internationale de Football Association (FIFA), World Anti-Doping Agency (WADA)	FSCD 4A_460/2008
22.12.2008	Union des Associations Européennes de Football (UEFA) vs/ Association Z.	FSCD 4A_392/2008
09.12.2008	X. SA vs/ Fédération Y.	FSCD 135 III 136, 4A_403/2008
05.12.2008	A. vs/ B. Ltd.	FSCD 4A_376/2008
01.12.2008	X. SA vs/ Y. Limited	FSCD 4A_456/2008
17.11.2008	X. AG, Y. SA vs/ A.	FSCD 4A_438/2008
29.10.2008	X. SA vs/ Y. Limited	FSCD 4A_210/2008
28.10.2008	X. vs/ Y.	FSCD 4A_294/2008
07.10.2008	X. vs/ Y., Z.	FSCD 4A_258/2008
06.10.2008	X. vs/ Y.	*FSCD 135 I 14, 5A_201/2008
23.09.2008	X., Y. vs/ A.	FSCD 4A_176/2008
23.09.2008	X., in liquidation vs/ Y.	FSCD 4A_215/2008
21.08.2008	X. vs/ Y. Srl, Z. SpA	FSCD 4A_194/2008
19.08.2008	X. Ltd. vs/ Y., Z. S.p.A.	FSCD 134 III 565, 4A_128/2008
14.08.2008	X. vs/ Y.	FSCD 4A_234/2008
20.06.2008	X. vs/ Y. SAD	FSCD 4A_18/2008
09.05.2008	X. vs/ A.	FSCD 4A_126/2008
04.04.2008	Club X. vs/ Y. S/A	FSCD 4A_528/2007
02.04.2008	FC X. vs/ Swiss Football League (SFL), FC Y.	*FSCD 4A_60/2008
26.03.2008	X. SA vs/ Y. Ltd.	*FSCD 4A_435/2007
20.03.2008	X. vs/ Association Y.	FSCD 4A_506/2007
14.03.2008	X. AG vs/ Y. Corporation	FSCD 134 III 286, 4A_42/2008
06.03.2008	X. SpA vs/ Y.	FSCD 134 III 260, 4A_500/2007
29.02.2008	X. GmbH vs/ Y. Corporation	FSCD 4A_452/2007
21.02.2008	X. vs/ Association A., SASP B.	FSCD 4A_370/2007
22.01.2008	AC. SE, A.D. Ltd., A.E. Ltd., J. Ltd. vs/ K. SAS	FSCD 4A_244/2007
22.01.2008	A.C. SE, A.D. Ltd., A.E. Ltd., J. Ltd. vs/ K. SAS	FSCD 134 III 186, 4A_468/2007
09.01.2008	X. SA vs/ Y. Inc.	FSCD 4A_450/2007
09.01.2008	X. vs/ H.Y.	FSCD 4A_436/2007
10.12.2007	X. SA vs/ Y., Inc.	FSCD 4A_352/2007
14.11.2007	X. vs/ Y.	FSCD 4A_268/2007

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05.11.2007	X. vs/ Y.	FSCD 4A_204/2007
26.09.2007	Sàrl X. vs/ Y. AG	FSCD 4P.4/2007
21.09.2007	Dame Y. vs/ Z.	FSCD 4A_220/2007
28.08.2007	X. vs/ Y.	FSCD 4A_160/2007
20.07.2007	X. vs/ Y.	FSCD 4A_137/2007
07.08.2007	X. SA vs/ VQF Verein zur Qualitätssicherung Finanzleistungen von	FSCD 5A_260/2007
13.07.2007	X. vs/ A., B., C., D	FSCD 4A_42/2007
08.06.2007	A. vs/ Agence Mondiale Antidopage (World Anti-doping Agency)	FSCD 4A_17/2007
06.06.2007	X. Ltd. vs/ Y.	FSCD 4A_18/2007
11.04.2007	X. vs/ Y.	FSCD 4P.32/2007
30.03.2007	X. Ltd., Y. Corps, Z. vs/ A.	FSCD 4P.206/2006
28.03.2007	X. GmbH vs/ A.	FSCD 4A_2/2007
22.03.2007	X. vs/ ATP Tour	FSCD 133 III 235, 4P.172/2006
27.02.2007	A. Srl vs/ B. Ltd.	FSCD 4P.304/2006
19.02.2007	B. vs/ A.	FSCD 133 III 139, 4P.168/2006
14.02.2007	X. vs/ Y.	FSCD 4P.298/2006
10.01.2007	X. vs/ Agence Mondiale Antidopage (AMA), Union Cycliste Internationale (UCI), Swiss Cycling Federation, Swiss Olympic Association	*FSCD 4P.148/2006
09.01.2007	X. Sàrl vs/ Masse en faillite de Y. SA	FSCD 4P.96/2002
05.01.2007	X. S.A.D. vs/ Fédération Internationale de Football Association (FIFA)	FSCD 4P.240/2006
14.12.2006	Garage A. et fils vs/ Z. AG	*FSCD 4P.299/2006
13.11.2006	A., B. vs/ C. SA	FSCD 4P.154/2006
07.11.2006	Swiss International Air Lines AG vs/ Swiss Pilots Association	*FSCD 133 I 89, 4P.247/2006
21.09.2006	Fédération de Russie, soit pour elle le Gouvernement de la Fédération de Russie vs/ Commission de surveillance des offices des poursuites et faillites du canton de Genève	*FSCD 7B.55/2006
07.09.2006	X. vs/ Y. Holding Ltd.	FSCD 4P.134/2006
07.09.2006	Tschechische Republik vs/ X.	FSCD 4P.114/2006
29.08.2006	A. vs/ B.	FSCD 4P.102/2006

04.08.2006	X. vs/ Y., Fédération Française d'Equitation, Emirates International Endurance Racing, the Organising Committee of the FEI Endurance World Championship 2005, Fédération Equestre Internationale	FSCD 4P.105/2006
17.07.2006	A. B. A.S. vs/ C. SA	*FSCD 4P.110/2006
17.07.2006	A. B.V., B. A.S. vs/ C. SA	*FSCD 4C.202/2005
10.07.2006	X. AG vs/ Y.	FSCD 4P.88/2006
19.06.2006	X. Gesellschaft, Y. Gesellschaft vs/ Z. Gesellschaft	FSCD 4P.74/2006
19.05.2006	X. AG vs/ Verein Y.	*FSCD 5P.362/2005
11.05.2006	A. vs/ B.	FSCD 4P.54/2006
27.03.2006	Rückversicherungs-Gesellschaft X. AG vs/ Versicherungs-Gesellschaft Y.	FSCD 4P.23/2006
08.03.2006	X. S.p.A. vs/ Y. S.r.l.	FSCD 132 III 389, 4P.278/2005
21.02.2006	A. vs/ X.	FSCD 4P.314/2005
02.02.2006	X. GmbH vs/ Y. Ltd.	FSCD 4P.237/2005
19.01.2006	A. vs/ B.	FSCD 4P.298/2005
09.01.2006	X. vs/ Y.	FSCD 4P.280/2005
03.01.2006	Y. vs/ X.	FSCD 5P.292/2005
10.11.2005	La République X. vs/ Y. and Z.	FSCD 4P.98/2005
10.11.2005	La République X. vs/ Y. and Z.	FSCD 4P.154/2005
31.10.2005	X. AS vs/ Y. Corporation	FSCD 4P.198/2005
10.10.2005	A. Srl vs/ B. Ltd.	FSCD 4P.146/2005
20.09.2005	X. SA vs/ 1. Y. Banka, 2. Z.	FSCD 4P.48/2005
03.05.2005	X.	*FSCD 131 I 113, 1P.115/2005
27.04.2005	D. d.O.o. vs/ Bank C.	FSCD 4P.242/2004
08.04.2005	X. Ltd. vs/ Y. SA	FSCD 4P.253/2004
29.03.2005	T. Ltd. vs/A. Ltd.	FSCD 4P.295/2004
23.03.2005	X. vs/ A., B.	FSCD 4P.26/2005
09.03.2005	A. vs/ B.	FSCD 4P.226/2004
04.02.2005	A. vs/ B., C.	FSCD 131 III 173, 4P.236/2004
12.01.2005	A. vs/ B.	FSCD 131 III 164, 4P.219/2004
14.12.2004	A. Ltd. vs/ B. Ltd.	FSCD 4P. 208/2004
06.12.2004	A. SA vs/ B. SA (Switzerland), D. SA	FSCD 4P.115/2004
01.12.2004	Federación costarricense de triatlón (FECOTRI) vs/ Internatio-	FSCD 4P.62/2004

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	nal Triathlon Union (ITU), Comité Olímpico de Costa Rica (CNOC)	
18.11.2004	A. SA vs/ B. Inc.	FSCD 4P.140/2004
18.11.2004	Z. jun. vs/ Y.	*FSCD 5P.232/2004
20.10.2004	T. SA vs/ H. Ltd., S. SA	FSCD 4P.168/2004
18.10.2004	A. Ltd. vs/ Republic of Turkey, Ministry of Energy and Natural Resources	FSCD 4P.104/2004
06.10.2004	A. B.V. vs/ B.	FSCD 130 III 755, FSCD 4P.117/2004
28.09.2004	A. A.S. vs/ B. SpA	FSCD 4P.146/2004
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25.03.2004	A. vs/ B.	FSCD 4P.253/2003
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30.01.2002	X. S.A. vs/ Y. S.A.	FSCD 4P.222/2001, ASA 2002 p. 328, RSDIE 2002 p. 549
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30.06.1994	Hitachi Ltd. vs/ SMS Schloemann Siemens AG	FSCD 4P.292/1993, ASA 1997 p. 99, RSDIE 1997 p. 587, JDI 1996 p. 734
26.04.1994	X. Ltd. (Great Britain) vs/ A. S.A. (Grece) and B.&C. AG (Germany)	FSCD 4P.319/1993
19.04.1994	Emirats Arabes Unis et consorts vs/ Westland Helicopters Limited	FSCD 120 II 155, JT 1995 I 218, ASA 1994 p. 404, RSDIE 1995 p. 564, SJ 1995 p. 113, JDI 1996 p. 741/742/746
19.04.1994	Westland Helicopters Limited vs/ The Arab British Helicopter Company (ABH)	FSCD 120 II 172, FSCD 4P.245/1993, Pra 1995 p. 572, JT 1995 I 220, ASA 1995 p. 186, RSDIE 1995 p. 574, JDI 1996 p. 743
08.02.1994	X. S.r.l. (Italy) vs/ Les Montres Y. S.A.	FSCD 4P.253/1993
17.12.1993	F. SA vs/ H. B.V.	FSCD 119 Ia 421, JT 1994 I 625, Pra 1995 p. 52, RSDIE 1995 p. 563
14.12.1993	Emirats Arabes Unis et cons. vs/ Westland Helicopters Limited	ASA 1994 p. 52, RSDIE 1995 p. 561, JDI 1996 p. 738
25.11.1993	République du Transkei vs/ Ferdinand J. Berger, Steyr-Daimler-Puch A.G.	ASA 1994 p. 251, RSDIE 1995 p. 558, JDI 1996 p. 749
15.11.1993	P. vs/ F.	FSCD 4P.99/1993
30.09.1993	Banque A. vs/ Banque B.,- Banque C., Banque D. and Banque E.	FSCD 5P.215/1993, ASA 1994 p. 46, RSDIE 1995 p. 555

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07.09.1993	Fincantieri - Cantieri Navali Italiani S.p.A and Oto Melara S.p.A. vs/ M.	FSCD 119 II 386, FSCD 4P.105/1993, Pra 1994 p. 764, JT 1995 I 30, ASA 1994 p. 248, RSDIE 1994 p. 162, JDI 1996 p. 745
02.09.1993	National Power Corporation (Philippines) vs/ Westinghouse International Projects Company, Westinghouse Electric S.A., Westinghouse Electric Corporation (USA) and Burns & Roe, Enterprises Inc. (USA)	FSCD 119 II 380, Pra 1994 p. 756, JT 1995 I 29, ASA 1994 p. 244, RSDIE 1994 p. 159, JDI 1996 p. 733
01.09.1993	China National Machinery & Equipment Import & Export vs/ Leobersdorfer Maschinenfabrik AG	FSCD 4P.73/1993, ASA 1996 p. 623
18.05.1993	A. Ltd. (Japan) vs/ B. AG (Germany)	FSCD 4P.20/1993
17.05.1993	The Arab British Helicopters Company vs/ Westland Helicopters Company Ltd.	Pra 1994 p. 462, ASA 1993 France, RSDIE 1994 p. 136, Rivista dell'Arbitrato 1994 p. 753
07.04.1993	Sociétés ENS (Algérie) vs/ Société L (France)	FSCD 4P.275/1992, ASA 1993 p. 413 and 525, RSDIE 1995 p. 552, RSDIE 1994 p. 154
15.03.1993	Elmar Gundel vs/ Fédération Equestre Internationale (FEI)	FSCD 119 II 271, FSCD 4P.217/1992, Pra 1995 p. 753, JT 1994 I 384, ASA 1993 p. 398, RSDIE 1994 p. 149, Digest CAS 1986-1998 p. 561 (English translation), SJ 1993 p. 621, JDI 1996 p. 735, Int'l Aeb Rep 1993/10 p. 12 and F-1
08.02.1993	Società X. (Jersey) vs/ dott. D.	FSCD 4P.230/1992, FSCD 4P.248/1992
22.12.1992	Laboratorios Byly S.A. (Spain) vs/ Mibelle AG Cosmetics S.A.	ASA 1996 p. 646, Rivista dell'Arbitrato 1995 p. 773
21.12.1992	Groupeement d'Entreprises Fougerolle & consorts vs/ CERN	FSCD 118 Ib 562, FSCD 4P.34/1992, JT 1994 I 126, ASA 1993 p. 259, RSDIE 1994 p. 143, SJ 1993 p. Franceevue de l'arbitrage 1994 p. 175, JDI 1996 p. 730
15.12.1992	Entreprise X. (Algeria) vs/ Compagnie A., B. S.A. (France)	FSCD 4P.219/1992
04.11.1992	X. Company (USA) vs/ Y. Ltd.	FSCD 118 II 508, JT 1994 I 47, RSDIE 1994 p. 139
13.10.1992	Republic of Transkei vs/ F.J. Berger, Steyr-Daimler-Puch AG	FSCD 4P.126/1992, 4P.128/1992, ASA 1993 p. 68, RSDIE 1994 p. 131, Rivista dell'Arbitrato 1995 p. 475, JDI 1996 p. 731 and 740
18.08.1992	K. vs/ X.	FSCD 118 II 359, FSCD 4P.48/1992, JT 1994 I 63, ASA

		1993 p. 255, RSDIE 1994 p. 127
08.07.1992	Società A. (Iran) vs/ società B.	FSCD 4P.87/1992
23.06.1992	Fincantieri-Cantieri Navali Italiani S.p.A. and OTO Melara S.p.A. vs/ M.	FSCD 118 II 353, JT 1994 I 125, ASA 1993 p. 58, RSDIE 1994 p. 111, SJ 1993 p. 2, Revue de l'arbitrage 1993 p. 691, Rivista dell'Arbitrato 1995 p. 103, JDI 1996 p. 732, Yearbook 1995 p. 766, ICA Part V.386
25.05.1992	E. (Yougoslavia) vs/ G. (France)	FSCD 4P.23/1991
11.05.1992	D. vs/ A.	ASA 1992 p. 381, RSDIE 1994 p. 117, JDI 1996 p. 739
30.04.1992	O., A, M. v. T.	FSCD 4P.273/1991
28.04.1992	Glaverbel S.A. (Belgium) vs/ Società Italiana Vetro-SIV S.p.A. (Italy)	FSCD 118 II 193, JT 1993 I 564, Pra 1993 p. 853, ASA 1992 p. 368, RSDIE 1994 p. 108, Rivista dell'Arbitrato 1995 p. 93, Revue de l'arbitrage 1993 p. 124, JDI 1996 p. 732/736/742, Yearbook 1993 p. 143
24.04.1992	M. vs/ hoirs S.	FSCD 118 Ia 118, Pra 1993 p. 857, JT 1994 II 148
25.03.1992	Kindle vs/ Fédération Motocycliste Suisse	FSCD 118 II 12, Pra 1993 p. 845, JT 1995 I 547
13.03.1992	Société X vs/ Société Y	FSCD 4P.221/1991, ASA 1992 p. 365, RSDIE 1994 p. 106
11.03.1992	Société P. vs/ Société S. Ltd	FSCD 118 II 199, Pra 1993 p. 444, JT 1993 I 563, ASA 1992 p. 356, RSDIE 1993 p. 209, SJ 1992 p. 453, Revue de l'arbitrage 1993 p. 115, JDI 1996 p. 749, ICA Part V.385
27.02.1992	F. Anstalt vs/ T. Company Ltd.	FSCD 118 Ia 20, JT 1993 I 544, ASA 1992 p. 347, Zeitschrift des Bernischen JuristenvFrance (BJV) 1992 p. 490, RSDIE 1993 p. 202, JDI 1996 p. 734
06.02.1992	Les sociétés yougoslaves A., B. et C. vs/ X. S.A. (France)	FSCD 4P.7/1991
31.01.1992	O., T. v. E.	FSCD 4P.114/1991
11.12.1991	G. v. Seehotel Schwert AG	*FSCD 117 III 57, JT 1994 II 34
26.11.1991	X. and Y. vs/ Z.	*FSCD 117 Ia 365, Pra 1992 p. 561, JT 1993 I 91, ASA 1992 p. 268, RSDIE 1993 p. 199, SJ 1992 p. 329
12.11.1991	B. Moser vs/ BMY, Division of Arscos Corporation	FSCD 4P.61/1991, ASA 1992 p. 264, RSDIE 1993 p. 214, JDI 1996 p. 741

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05.11.1991	V. SA vs/ E. B.V.	FSCD 117 II 604, JT 1992 I 400, ASA 1993 p. 54, RSDIE 1994 p. 103
17.10.1991	F. L. vs/ Dame N. B.	*SJ 1992 p. 177 [Convention between Switzerland and France on jurisdiction and the execution of judgments in civil matters of 15 June 1869]
15.10.1991	A. vs/ W.	FSCD 4P.208/1991
30.09.1991	P. vs/ S.	FSCD 4P.126/1991
22.07.1991	Unternehmen X. (YU) vs/ Y. Ltd. (CSFR)	FSCD 4P.84/1991
01.07.1991	U. vs/ Epoux G.	FSCD 117 II 346, Pra 1993 p. 373, ASA 1991 p. 415, JT 1992 I 577, RSDIE 1993 p. 196
25.06.1991	Baytur SA vs/ Sodechanges SA	SJ 1991 p. 611, JT 1993 II 123, RSDIE 1993 p. 192
30.04.1991	Gesellschaft X. vs/ Y. AG	FSCD 117 Ia 166, JT 1992 I 313, Pra 1993 p. 85, ASA 1992 p. 259, RSDIE 1993 p. 187
09.04.1991	Clear Star Ltd. vs/ Centrala Morska Importowo-Eksportowa "Centromor" and Centromor SA	FSCD 117 II 94, JT 1992 I 57, Pra 1993 p. 31, ASA 1991 p. 160, RSDIE 1991 p. 374, Revue de l'arbitrage 1991 p. 709
20.12.1990	G.Z. and others vs/ Stadt Zürich, R., J.	*FSCD 116 Ia 485, JT 1992 I 116
19.12.1990	Sonatrach vs/ K.C.A. Drilling Ltd.	FSCD 116 II 639, FSCD 4P.143/1990, JT 1991 I 376, Pra 1992 p. 144, ASA 1991 p. 262, RSDIE 1991 p. 365, JDI 1996 p. 736, Int'l Arb Rep 1991/ 4 p. 16 and B-9
19.12.1990	R. vs/ P.	FSCD 116 II 625, JT 1992 II 182, SJ 1991 p. 236
14.11.1990	E.-U. AG (Austria) vs/ K. Ltd. (UK)	FSCD 116 II 634, JT 1992 I 63, Pra 1992 p. 141, ASA 1991 p. 268, RSDIE 1991 p. 360, SJ 1991 p. 225, JDI 1996 p. 746, Yearbook 1992 p. 279
09.11.1990	S. AG vs/ H. Ltd.	FSCD 116 II 721, JT 1992 I 46, ASA 1991 p. 421, RSDIE 1991 p. 351 [<i>on appeal against ZH 22.05.1990</i>]
03.10.1990	M. vs/ G. and L.	FSCD 116 Ia 394
29.08.1990	E. vs/ K.	ASA 1991 p. 29, RSDIE 1991 p. 374
28.08.1990	Société X. (France) vs/ Société Y. (Yugoslavia)	FSCD 4P.159/1990

21.08.1990	INA (Yugoslavia) vs/ CLE SA (France)	FSCD 116 II 373, 4P.17/1990, JT 1991 I 186, ASA 1991 p. 30, SJ 1991 p. 14, RSDIE 1991 p. 350
25.07.1990	Valindo S.A. (Portugal) vs/ Ingetex S.A. (France)	FSCD 4P.52/1990, SJ 1991 p. 12, ASA 1991 p. 169, RSDIE 1991 p. 373
12.07.1990	T. AG vs/ SF Inc.	FSCD 116 II 376, JT 1990 I 616
06.07.1990	X. A.S. (Turkey) vs/ Y. Ltd. (Cyprus)	FSCD 4P.214/1989
14.06.1990	Komplex vs/ Voest-Alpine Stahl AG, Vogelbusch GmbH, Voest-Alpine AG and Dorr Oliver BV	FSCD 4P.244/1989, ASA 1994 p. 226, RSDIE 1995 p. 547, Rivista dell'Arbitrato 1991 p. 131, JDI 1996 p. 742
17.05.1990	Commissariat à l'énergie atomique vs/ Gouvernement de la République islamique d'Iran	*FSCD 116 Ia 154, Pra 1990 p. 650, JT 1990 I 567, ASA 1990 p. 286, SJ 1990 p. 566, Yearbook 1991 p. 182 [on appeal against GE 19.12.1989]
17.04.1990	Omnium de Traitement et de Valorisation (OTV) (France) vs/ Hilmarton Ltd (UK)	ASA 1993 p. 253, Revue de l'arbitrage 1993 p. 322, Rivista dell'Arbitrato 1992 p. 739, Yearbook 1994 p. 220 [on appeal against GE 17.11.1989]
15.03.1990	Sonatrach vs/ K.C.A. Drilling Ltd.	*FSCD 116 Ia 56, FSCD 4P.85/1989/cb, JT 1990 I 563, RSDIE 1993 p. 183, Revue de l'arbitrage 1990 p. 921, Int'l Arb Rep 1990/5 p. 9 and B-5
19.02.1990	Komgrap vs/ Sefri	ASA 1990 p. 171, RSDIE 1991 p. 346
06.02.1990	Deutsche Bank AG vs/ House of Trade and Contracting Co.	FSCD 116 II 80, Pra 1990 p. 531, JT 1990 I 380, ASA 1990 p. 71 and 163, RSDIE 1991 p. 340, JDI 1996 p. 737
20.12.1989	Firma B. vs/ Firma A.	*FSCD 115 Ia 400, JT 1990 I 559
20.11.1989	X. Company (USA) vs/ Y. Co. (Principauté du Liechtenstein)	FSCD 4P.141/1989
15.11.1989	K. S.A. vs/ T. S.A.	FSCD 115 II 390, FSCD 4P.150/1989, Pra 1990 p. 527, JT 1990 I 91, ASA 1990 p. 57, RSDIE 1991 p. 337, RSDIE 1990 p. 337, SJ 1990 p. 70
23.10.1989	SIK Jasen RO et consorts (Yugoslavia) vs/ Cifal SA (France)	ASA 1990 p. 51, RSDIE 1991 p. 335
03.10.1989	A. vs/ B.	FSCD 115 II 288, Pra 1990 p. 279, JT 1990 I 92, ASA 1990 p. 44, RSDIE 1991 p. 330, RSDIE 1990 p. 330, SJ 1990 p. 49, JDI 1996 p. 737
11.09.1989	X. vs/ Président de la Cour de	FSCD 115 II 294, Pra 1990 p. 225,

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	justice du canton de Genève	JT 1990 I 91, RSDIE 1991 p. 332
15.08.1989	K. vs/ Banque X.	FSCD 115 II 300, Pra 1990 p. 169, JT 1989 I 611, ASA 1990 p. 161
23.06.1989	F.S.A. vs/ G. B.	ASA 1989 p. 334, SJ 1989 p. 593
03.05.1989	A. N.V. vs/ B. SA (Paris)	ASA 1989 p. 183, RSDIE 1991 p. 373
20.04.1989	X. vs/ Y. Ltd.	FSCD 4P.32/1989
07.04.1989	Firma A. vs/ Firma B.	FSCD 115 II 97, FSCD 4P.10/1989, JT 1989 I 544, Pra 1989 p. 764, ASA 1989 p. 172, RSDIE 1991 p. 326, RSDIE 1990 p. 323, Int'l Arb Rep 1989/6 B1 and B5
07.04.1989	Société P. vs/ Sociétés C. and D.	FSCD 115 II 102, Pra 1989 p. 497, JT 1989 I 348, RSDIE 1991 p. 328, RSDIE 1990 p. 328, ASA 1989 p. 178, SJ 1989 p. 477
12.01.1989	G. SA (Switzerland) vs/ T. Ltd. (UK)	Yearbook 1990 p. 509
17.11.1987	Firma A. vs/ Firma B.	*FSCD 113 Ia 407, JT 1988 I 374
05.03.1987	S. S.A. vs/ M. et consorts	*FSCD 113 Ia 67, JT 1987 I 384
05.03.1987	S. S.A. vs/ M. et consorts	*FSCD 113 Ia 67, Pra 1988 p. 299, JT 1987 I 384, *FSCD 113 Ia 67
26.01.1987	Ali et Fahd Shobokshi et General Agencies Corporation (GAC) (Saudi Arabia) vs/ Saiecom SA et Nicola Rivelli (Switzerland)	*SJ 1987 p. 230, Yearbook 1990 p. 505
25.11.1986	B.W.M. Ltd.	*FSCD 112 III 120, JT 1989 II 90
24.09.1986	Westland Helicopters Ltd. (UK) vs/ Arab Republic of Egypt, Arab Organization for Industrialization, Arab British Helicopter Company (Egypt)	*FSCD 112 Ia 344, SJ 1987 p. 1, Yearbook 1987 p. 186
22.07.1986	R. vs/ A.	*FSCD 112 Ia 166, JT 1987 I 31
29.11.1985	M. vs/ B.	*FSCD P 2223/85
08.11.1985	Société S. vs/ G. SA	*FSCD 111 Ia 259, JT 1986 I 91
05.11.1985	Tracom S.A. (Switzerland) vs/ Sudan Oil Seeds Co Ltd. (UK)	*FSCD 111 Ib 253, JT 1987 I 128, Yearbook 1987 p. 511, ICA Part V.254
23.10.1985	S. vs/ société K.	*FSCD 111 Ia 336
22.05.1985	P. SA (Switzerland) vs/ F. Ltd. (UK)	FSCD 111 II 62, Pra 1985 p. 490, JT 1986 I 27, SJ 1985 p. 525, Yearbook 1987 p. 509, ICA Part V.253
14.03.1985	Société Z. vs/ L.	*FSCD 111 Ia 72, JT 1985 I 383
16.04.1984	Y. vs/ Société X.	*FSCD 110 Ia 59, JT 1985 I 156, SJ

		1985 p. 21
14.03.1984	Denysiana S.A. (Switzerland) vs/ Jassica S.A. (Switzerland)	FSCD 110 Ib 191 [194], ASA 1984 p. 206, SJ 1985 p. 73, Yearbook 1986 p. 536, ICA Part V.215
07.02.1984	Tradax Export S.A. vs/ Amoco Iran Oil Company	*FSCD 110 II 54, JT 1985 I 159, ICA Part V.252
03.01.1984	Otto Scerri S.A. vs/ Patriziato di Bedretto	*FSCD 110 Ia 56, Pra 1984 p. 650, JT 1985 I 157
18.02.1983	El Nasr Export Import & Co. vs/ Anglo French Steel Corporation S.A.	*FSCD 109 Ia 81, JT 1984 I 319, SJ 1983 p. 497, Yearbook 1985 p. 123
10.11.1982	X. S.A. vs/ Y.	*FSCD 108 Ia 308, JT 1983 I 284
10.05.1982	Edok SA and consorts vs/ Hydromechaniki Sàrl et Eupalinos SA	*FSCD 108 Ia 197, JT 1982 I 567
26.02.1982	Joseph Müller AG (Switzerland) vs/ Sigval Bergesen (Norway)	FSCD 108 Ib 85, JT 1982 I 367, Yearbook 1984 p. 437, ICA Part V.174
11.11.1981	Esrig vs/ Theatergenossenschaft Bern	*FSCD 107 Ia 155
14.10.1981	Firestone (Schweiz) AG vs/ Gewerkschaft Textil-Chemie-Papier and Schweiz. Metall- und Uhrenarbeitnehmerverband	*FSCD 107 Ia 152, JT 1982 I 364
30.09.1981	C. and W. vs/ B.	*FSCD 107 Ia 246, JT 1981 I 635
13.05.1981	Impresa Zanetta & Moretti vs/ Comune di Vacallo	*FSCD 107 Ia 318, JT 1982 I 359, SJ 1982 p. 501
08.04.1981	Bettydo S.A. vs/ Torriani	*FSCD 107 Ib 63, Pra 1981 p. 583, JT 1983 I 230
26.11.1980	Entrepose SA and Société tunisienne d'électricité et du gaz	*SJ 1982 p. 613
22.07.1980	Franc vs/ Wohnbau Süd AG	*FSCD 106 II 170, JT 1981 I 149
04.12.1979	A. vs/ R.	*FSCD 105 Ib 431
14.11.1979	République arabe de Lybie vs/ Wetco Ltd.	*SJ 1980 p. 443
08.02.1978	Chrome Resources SA (Switzerland) vs/ Leopold Lazarus Ltd. (UK)	SJ 1980 p. 65, Yearbook 1986 p. 538 [<i>on appeal against GE 17.09.1976</i>]
26.10.1977	Hockey-Club Ambri-Piotta vs/ Zürcher Schlittschuh-Club	*FSCD 103 Ia 410
25.01.1977	Müller vs/ Bossard	*FSCD 103 II 75, JT 1978 I 71
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17.03.1976	Bucher-Guyer A.G. vs/ Meikli Co. Ltd.	*FSCD 102 Ia 493, FSCD P 160/75, JT 1979 I 63
12.12.1975	Provenda S.A. vs/ Alimenta S.A.	FSCD 101 Ia 521, JT 1977 II 88, SJ 1976 p. 577
21.05.1975	Verband der Schlittschu- und Rollschuh-Sporte Jugoslawiens vs/ Gschwend	*FSCD 101 Ia 154, JT 1977 II 99 [Geneva Convention on the Execution of Foreign Arbitral Awards of 26 September 1927]
17.03.1975	Jugomineral vs/ Grillo Werke AG	*FSCD 101 II 168, JT 1975 I 629
26.02.1975	Libyan National Oil Corporation	*FSCD 101 III 58, JT 1976 II 47, SJ 1976 p. 91
10.08.1971	Komitee der Nationalliga des Schweiz. Fussballverbandes and Appellationshof des Kantons Bern	*FSCD 97 I 488, JT 1973 I 124
01.07.1970	Elan Hemijska Indutrija vs/ Tivoli-Werke	*FSCD 96 I 334, JT 1972 I 27
05.12.1969	Nowak vs/ Siccardi	FSCD 95 II 374, JT 1970 I 159, SJ 1970 p. 604
03.05.1967	Billerbeck & Cie vs/ Bergbau-Handel G.m.b.H.	*FSCD 93 I 265, JT 1968 I 217 [Geneva Convention on the Execution of Foreign Arbitral Awards of 26 September 1927]
25.01.1967	Egetran S.A. vs/ Utexbel S.A.	*FSCD 93 I 49, JT 1968 I 215, SJ 1967 p. 433 [Geneva Convention on the Execution of Foreign Arbitral Awards of 26 September 1927]
26.10.1966	Centrozap vs/ Orbis, Dr. X.	*FSCD 92 I 271, JT 1967 I 518
07.07.1962	Paperconsult AG vs/ Cepal and others	*FSCD 88 I 100, JT 1963 I 158
12.02.1958	Ligna, Aussenhandelsunternehmen vs/ Baumgartner & Co. AG	*FSCD 84 I 39, JT 1958 I 566 [Geneva Convention on the Execution of Foreign Arbitral Awards of 26 September 1927]
22.11.1950	Spuhler A.-G. vs/ The East Asiatic Company Ltd.	*FSCD 76 I 338, JT 1951 I 239 [Geneva Convention on the Execution of Foreign Arbitral Awards of 26 September 1927]
17.05.1950	Biedermann vs/ Brodr. Justesen	*FSCD 76 I 121, JT 1951 I 46, JT 1951 II 25 [Geneva Convention on the Execution of Foreign Arbitral Awards of 26 September 1927]
13.12.1945	Gutersohn vs/ Schweiz. National-Versicherungs-Gesellschaft	*FSCD 71 II 294, JT 1946 I 208
15.07.1941	Wolfensberger vs/ Reutimann & Co.	*FSCD 67 II 146
17.03.1939	Centrala Cooperativa de Import si Export vs/ Muret et Cie	*FSCD 65 I 19

22.10.1937	Stein vs/ Rieser & Co.	*FSCD 61 I 297 [Treaty with Austria of 15 March 1927]
09.10.1936	Roth & Cie vs/ Golodetz	*FSCD 62 I 143 [Geneva Convention on the Execution of Foreign Arbitral Awards of 26 September 1927]
15.11.1935	C. A. Erichsen S. A. vs/ B.	*FSCD 61 I 271 [Geneva Convention on the Execution of Foreign Arbitral Awards of 26 September 1927]
07.10.1933	Tobler vs/ Justizkommission des Kantons Schwyz	*FSCD 59 I 177
13.11.1930	Eheleute Moser-Briner vs/ Briner	*FSCD 56 III 233

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AG	Obergericht	04.05.1998		*ASA 2000 p. 779, RSDIE 2001 p. 570, Aargauische Gerichts- und Verwaltungsent-scheide (AGVE) 1998 p. 105
	Obergericht	23.07.1992		ASA 1995 p. 235, RSDIE 1996 p. 589
AI	None			
AR	Oberger- ichtspräsi- dent	05.08.1994		Nr. 03/94
BE	Obergericht	12.08.2016	A. vs/ Miteigentü- mergemeinschaft B., C., D., E., F., G. H.	ZK 15 528
	Obergericht	19.04.2012	Olympique des Alpes SA vs/ Schweizerischer Fussball-Verband (SFV)	
BL	Obergericht	05.07.1994	D.I.E.T.F. Ltd. vs/ R.F. AG	Yearbook 1996 p. 685, BJM 1995 p. 254
	Obergericht	03.06.1971	X. (Netherlands) vs/ Y. (Switzer- land)	Yearbook 1979 p. 309, BJM 1973 p. 193
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	tionsgericht		BIVAC BV vs/ Jean-Pierre Pastor	Kantons Basel Stadt AZ.2009.5
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	Appella- tionsgericht	06.09.1968	X. (Germany) vs/ Y. AG (Switzer- land)	RSJ 1968 (64) p. 378, Yearbook 1976 p. 200, ICA V.27
FR	Kantonsge- richt	28.02.2018	A. SA vs/ B.	102 2017 369
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	Kantonsge- richt	20.07.1994		CI 27/94
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	Cour de Justice	16.10.2015		C/18035/2014
	Cour de Justice	11.04.2014		C/17073/2012
	Cour de Justice	22.03.2013		C/11886/2011

	Cour de Justice	de	18.02.2011	X SA vs/ L'Organisme Y	C/18148/2010
	Cour de Justice	de	08.09.2010	A vs/ B	C/4769/2010
	Cour de Justice	de	04.03.2010		C/19989/2009
	Cour de Justice	de	18.04.2008		C/5783/2006
	Cour de Justice	de	14.09.2007		C/24853/2006
	Cour de Justice	de	14.09.2007		*C/28342/2006 [confirmed by *FSCD of 4A_435/2007 26.03.2008]
	Cour de Justice	de	23.02.2007		*C/556/2004
	Cour de Justice	de	15.09.2006		*C/19831/2003
	Cour de Justice	de	07.04.2006		*C/18269/2005
	Cour de Justice	de	17.02.2006		*C/20207/2005
	Cour de Justice	de	17.02.2006		C/10108/2004
	Cour de Justice	de	18.11.2005		*C/7724/2005
	Cour de Justice	de	13.05.2005		C/7584/2001 [confirmed by FSCD 4P.174/2005 of 27.10.2005]
	Tribunal de première instance	de	02.05.2005		C/1043/2005
	Cour de Justice	de	18.02.2005		*C/308/2004

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	Cour de Justice	12.11.2004		*C/17984/2004
	Cour de Justice	12.11.2004		C/25597/2003
	Cour de Justice	14.05.2004		*C/19874/2003
	Cour de Justice	15.10.1999	C. and K. vs/ S. S.A.	ASA 2000 p. 793, RSDIE 2001 p. 571
	Cour de Justice	15.04.1999	R. SA vs/ A. Ltd.	ASA 2000 p. 786, RSDIE 2000 p. 605, SJ 2000 I 310, Yearbook 2001 p. 863
	Tribunal de première instance	30.09.1998	AA vs/ AC	RSDIE 1999 p. 628
	Cour de Justice	11.12.1997	G. SA (Switzerland) vs/ Import and Export Company (China)	ASA 1997 p. 667, RSDIE 1998 p. 608, Yearbook 1998 p. 764
	Cour de Justice	03.03.1994	Chempetrol International Ltd. vs/ Mull Resources SA	SJ 1994 p. 446, RSDIE 1995 p. 584
	16 ^e Chambre du Tribunal de Première Instance de Genève	1993		ASA 1993 p. 79, RSDIE 1994 p. 170
	Cour de Justice	09.09.1992	The Arab British Helicopter Company vs/ Westland Helicopters Limited, Emirats Arabes Unis and cons.	Rivista dell'Arbitrato 1993 p. 481
	Cour de Justice	07.02.1991		ASA 1991 p. 155 and 269, RSDIE 1993 p. 215
	Tribunal de première instance de Genève	15.10.1990		ASA 1994 p. 306

	Président du Tribunal de 1 ^{ère} Instance	09.05.1990		ASA 1990 p. 283, RSDIE 1991 p. 375
	Cour de Justice	08.02.1990	J. & M. Communications Ltd. vs/ Seabay Corp. et autres	SJ 1990 p. 196
	Cour de Justice	19.12.1989	Gouvernement de la République islamique d'Iran vs/ Commissar-France l'énergie atomique (CEA)	*ASA 1990 p. 63
	Cour de Justice	17.11.1989	Hilmarton (UK) vs/ Omnium de Traitement et de Valorisation (OTV) (France)	ASA 1993 p. 250, Revue de l'arbitrage 1993 p. 316, Yearbook 1994 p. 216
	Cour de Justice	15.09.1989	Pil vs/ Verdonnet	ASA 1990 p. 41, SJ 1990 p. 31
	Cour de Justice	12.05.1989	S. S.R.L. vs/ H. AG	ASA 1989 p. 185, RSDIE 1991 p. 374
	Tribunal de Première Instance	21.05.1987	Continaf BV (Netherlands) vs/ Polycoton (Switzerland)	Yearbook 1987 p. 516
	Cour de Justice	16.12.1988	X. S.A. vs/ Y. Corporation	ASA 1989 p. 167, Yearbook 1991 p. 612
	Tribunal de Première Instance	13.03.1986	Maritime International Nominees Establishment (MINE) (Liechtenstein) vs/ The Republic of Guinea	Yearbook 1987 p. 514
	Cour de Justice	10.10.1985	Continaf B.V. (Netherlands) vs/ Polycoton S.A. (Switzerland)	Yearbook 1987 p. 505 [on appeal against Tribunal de Première Instance of 25.04.1985]
	Tribunal de Première Instance	25.04.1985	Continaf B.V. (Netherlands) vs/ Polycoton S.A. (Switzerland)	Yearbook 1987 p. 505
	Cour de Justice	10.02.1984	Coriman International SA en liquidation judiciaire vs/	*SJ 1984 p. 391

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			Batima SA and Auxiba SA	
	Cour de Justice	14.04.1983	Carbomin SA vs/ Ekton Corporation	SJ 1984 p. 33, Yearbook 1987 p. 502, ICA Part V.214
	Cour de Justice	26.11.1982	République Arabe d'Egypte vs/ Westland Helicopters Ltd. and others	*SJ 1984 p. 309
	Cour de Justice	17.09.1976	Léopold Lazarus Ltd. vs/ Chrome Ressources S.A.	Yearbook 1979 p. 311, ICA Part V.98
	Cour de Justice	08.06.1967	J.A. van Walsum N.V. vs/ Chevalines S.A.	RSJ 1968 (64) N 19 p. 56, ICA Part V.2
	Cour de Justice Civile	12.05.1967	Commoditex S.A. vs/ Alexandria Commercial Co and Union de Banques Suisses	SJ 1968 p. 633, ICA Part V.96
GL	None			
GR	Kan- tonsgericht	27.04.2011	A. AG, B. AG, C. AG, D. AG, E. AG vs/ G. AG, H. AG	ERZ 11 19
	Kan- tonsgericht sausschuss	30.01.1996		ASA 1996 p. 264, RSDIE 1997 p. 631, PKG 1996-22-98
JU	None			
LU	Obergericht	23.04.2008		11 07 130
NE	Tribunal cantonal	28.04.2016	X. vs/ A. SA et B.	RJN 2016 p. 247
	Tribunal cantonal	23.09.1999	M. vs/ C. S.A. (Switzerland) and C. (France)	ASA 1999 p. 565, RSDIE 2000 p. 610
	Tribunal cantonal, Chambre des affaires arbitrales	23.02.1999	R. vs/ Fédération des chasseurs neuchâtelois	*ASA 2000 p. 337, RSDIE 1999 p. 631

	Tribunal cantonal, Chambre des affaires arbitrales	26.05.1997	M. vs/ C. and B.	RSDIE 1997 p. 633
	Tribunal cantonal, Cour de cassation civile	15.01.1996	S. SA	RJN 1996 p. 60
	Tribunal civil du district de Neuchâtel	02.03.1995	LHM and LHI vs/ S.	D. 42/1994
	Tribunal cantonal, Chambre des affaires arbitrales	17.06.1994	AF 1, AF 2, AF 3 vs/ NA	*ASA 1995 p. 51
	Tribunal cantonal	01.02.1993	X. F.C. vs/ Y.	RJN 1993 p. 100
NW	None			
OW	None			
SG	Han-delsgericht	16.01.2007		HG.2006.74, SGGVP 2007 p. 221
	Kan-tonsggericht	19.06.2000		ASA 2000 p. 803, RSDIE 2001 p. 571, RSJ 2000 p. 453
SH	None			
SO	Obergericht	27.09.2001		ASA 2003 p. 421, SOG 2001 N 9 p. 24
	Obergericht	08.01.1996		ASA 1997 p. 285, SOG 1996 N 14 p. 33
SZ	Kan-tonsggericht	27.02.2013	A., vs/ B.	BEK 2012 202
	Kan-tonsggericht	16.01.2012	A. vs/ B.	ZK2 2011 32
	Kan-tonsggericht	19.07.2012	A. vs/ B.	BEK 2011 123

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	Kantonsgesicht	10.10.2011	A. vs/ B.	BEK 2011 55
	Kantonsgesicht	23.08.2010	A. vs/ B.	RK1 2009 100
	Kantonsgesicht	06.12.2004		RK2 2004 112
TG	Obergericht	23.04.2001		ASA 2003 p. 418, RSJ 2003 p. 40, Rechenschaftsbericht des Obergerichts des Kantons Thurgau an den Grossen Rat (RBOG) 2001 p. 136
TI	Tribunale d'appello	22.08.2012	CO 1 vs/ RE 1	14.2012.102
	Tribunale d'appello	09.12.2010	AO 1 vs/ AP 1	14.2010.98
	Tribunale d'appello	22.02.2010	AP 1 vs/ AO 1	14.2009.204
	Tribunale d'appello	10.11.2004		12.2004.181
	Tribunale d'appello	25.07.2003		13.2003.5
	Tribunale d'appello	08.02.2002		13.2001.00018
	Tribunale d'appello	24.09.2001		12.2001.00050
	Tribunale d'appello	21.07.1997	O.T.A/S vs/ C.H. SA	ASA 2000 p. 359, RSDIE 1999 p. 624, Rep 1997 p. 230
	Tribunale d'appello	26.11.1993	C. vs/ A. SA	ASA 1998 p. 149, RSDIE 1998 p. 603, Rep 1994 p. 405
	Tribunale di Appello	25.08.1993	T. AG vs/ S.M.G.B.	Rep 1994 p. 409
	Camera esecuzione e fallimenti	19.06.1990	K.S. AG vs/ C.C. SA	Rep 1991 p. 498, RSDIE 1994 p. 166, Yearbook 1995 p. 762
UR	None			
VD	Tribunal cantonal	30.10.2018	Z. & C. AG vs/ K. Corporation	ML / 2018 / 171
	Tribunal cantonal	30.01.2018	M., S., E., G., L., Q. vs/ H, CIO	MP/2018/2

	Tribunal cantonal	05.12.2017	I., L., V., B., G., D., T., S., A., X. et U., M., N., K., J., R. et Z., C. et F., W., Q. et H., vs/ E.	HC / 2017 / 1115
	Tribunal cantonal	29.02.2016	D. vs/ P.	Pron / 2016 / 2
	Tribunal cantonal	05.03.2015	I. SA vs/ Y. Ltd	ML/2015/40, ML/2015/41
	Tribunal cantonal	24.12.2014	F. vs/ H.	HC / 2014 / 1008
	Tribunal cantonal	19.12.2014	H. vs/ Q.	Séquestre / 2014 / 12
	Tribunal cantonal	11.12.2014	L. vs/ M.	Séquestre / 2014 / 11
	Tribunal cantonal	17.07.2014	F. vs/ G.	HC / 2014 / 612
	Tribunal cantonal	27.09.2013	A.D., B.D. vs/ B.L., C.L., D.L.	HC/2013/601
	Tribunal cantonal	25.09.2013	A. vs/ O.	CO10.042808- 131176473
	Tribunal cantonal	03.04.2013	S. vs/ O. SA	Séquestre/2013/4
	Tribunal cantonal	22.10.2012	J. SA vs/ M.	Pron/2012/237
	Tribunal cantonal	27.04.2012	S. SARL vs/ K. SA	Juge-inc/2012/15
	Tribunal cantonal	12.04.2012	Q. Technologies, Q.T. Ltd. Vs/ E.	Séquestre/2012/4
	Tribunal cantonal	01.02.2012	Y. SA vs/ UEFA	CO 11.033798
	Tribunal cantonal	01.06.2011	W. SA vs/ Z. SARL	HC/2011/424
	Tribunal cantonal	27.09.2011	Y. SA vs/ UEFA	CM11.033798 131/2011/DCA
	Tribunal cantonal	05.01.2011	O. vs/ K.	Pron/2011/6 & 7
	Tribunal cantonal	22.12.2010	Z. vs/ O. SA	Pron/2011/3
	Tribunal cantonal	19.05.2010	C. International SA Vs/ T. SARL	AP/2010/195
	Tribunal cantonal	04.02.2010	G. SA vs/ T. SA	Jug-inc/2010/12
	Tribunal cantonal	07./09.11. 2008		CM07.036746 4/2008/JCL

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	Tribunal cantonal	23.04.2008		*172/I
	Tribunal cantonal	18.10.2007		*511/I [confirmed by FSCD 4A_60/2008 of 02.04.2008]
	Tribunal cantonal	30.08.2007		314
	Tribunal cantonal	22.08.2007		*408/I
	Tribunal cantonal	22.08.2007		*408/I
	Tribunal cantonal	30.07.2007		*369/I
	Tribunal cantonal	18.04.2007		*CM07.008768 44/2007/PMR
	Tribunal cantonal	02.11.2006		*522
	Tribunal cantonal	16.05.2006		*393 [confirmed by FSCD 4P.148/2006 of 10.01.2007]
	Tribunal cantonal	02.05.2006		CO05.028899 57/2006/JCL
	Tribunal cantonal	19.10/17.11.2005		CO05.017716 200/2005/DCA
	Tribunal cantonal	16.03.2005		*113
	Tribunal cantonal	22.12.2004		817
	Tribunal cantonal	04.10.2004		*900
	Tribunal cantonal	31.08.2004		615
	Tribunal cantonal	25.03.2003		*396
	Tribunal cantonal	25.09.2002		514
	Tribunal cantonal	11.07.2001		287
	Tribunal cantonal	18.06.2001		CP01.004845 191/2001/DCR
	Tribunal cantonal	25.01.2001		11
	Tribunal cantonal	19.05.1999		CO98.004522

				186/99/PMU
	Tribunal cantonal	28.05.1998		304
	Tribunal cantonal	30.03.1993	Nokia-Maillefer vs/ Mazzer	ASA 1995 p. 64, Yearbook 1996 p. 681
	Tribunal cantonal	16.02.1993	Brega vs/ Techint	ASA 1995 p. 57
	Juge instructeur de la Cour civile du Tribunal cantonal	04.08.1989	Tracom SA vs/ Sudan Oils Seeds Ltd.	JT 1990 III 42, ASA 1990 p. 265, RSDIE 1991 p. 275
VS	Tribunal du district de Sion	08.05.2015	X vs/ Y	C1 15 83
	Tribunal cantonal	19.12.2007		*C2 07 44
	Tribunal cantonal	12.10.2006		*C2 06 29
	Tribunal cantonal	22.12.2005		*C2 05 20 [confirmed by FSCD 4P.26/2006 of 28.06.2006]
	Tribunal cantonal	02.12.2005		*C2 05 41
	Tribunal cantonal	04.11.2004		*C2 04 39
	Tribunal cantonal	02.08.2004		*C2 04 2
	Kantonsgericht	19.04.2004		*C2 03 17
	Tribunal cantonal	08.02.1995	Dame X. vs/ Y.	*ASA 1996 p. 695, RSDIE 1997 p. 627, RVJ 1995 p. 245
	Tribunal cantonal	09.07.1986	BCV et consorts vs/ Finadvisa SA	RVJ 1986 p. 406, ASA 1987 p. 203
	Kantonsgericht	20.01.1986	P. & S. vs/ M.	RVJ 1986 p. 254
ZG	Kantonsgericht	30.07.2013	XY vs/ Z	ER 2012 722
	Obergericht	07.02.2013		GVP 2013 p.194
	Kantonsgericht	09.09.2011	XY vs/ Z	ER 2011 334

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	Kantonsgesicht	18.10.2010	XY. Vs/ Z.	ER 2010 627
	Kantonsgesicht	16.08.2006		ZGGVP 2006 p. 179
	Obergericht (Justizkommission)	11.09.1998	S. vs/ Verein M.	ZGGVP 1997/98, p. 139
	Obergericht (Justizkommission)	27.02.1998	A. vs/ M. AG	ASA 2000 p. 363, RSDIE 2000 p. 599, RSJ 2000 p. 298, ZGGVP 1997/1998 p. 142
	Kantonsgesichtspräsidium	20.10.1989	A. Inc. v. M. AG	RSDIE 1991 p. 368, ZGGVP 1989/1990 p. 107
ZH	Obergericht	25.10.2018	A. S.A. vs/ B.	PG170001
	Obergericht	24.09.2018	A. Ag vs/ Regierung der Republik Äquatorialguinea	PG180001
	Obergericht	30.05.2018	A. S.A. vs/ B. L.P.	PG170009
	Obergericht	27.03.2018	A. Limited vs/ B. Limited, C.	PG170003
	Obergericht	21.03.2018	A. GmbH & Co. vs/ B. S.P.A.	PG170007
	Obergericht	07.03.2018	A. AG vs/ B. AG, C. AG	PG160004
	Obergericht	10.08.2017	A. AG vs/ B.	PG170005
	Obergericht	02.02.2017	A. vs/ B. Oy	PG160002
	Obergericht	06.01.2017	A. vs/ B.	PG160003
	Obergericht	21.04.2016	A. AG vs/ B. GmbH, C.	PG160001
	Obergericht	22.12.2015	A. AG vs/ B. Ltd	PG150003
	Obergericht	06.03.2015	A. AG vs/ B. AG	RT140097
	Obergericht	21.01.2015	A. S.A. vs/ B.	PG140001
	Obergericht	20.11.2014	A. S.A vs/ B., C.	PG130001
	Obergericht	11.06.2014	A. Corporation vs/ B.	NV130003
	Obergericht	06.06.2014	A. A.S. vs/ B. [Joint Venture]	PG120005
	Obergericht	14.03.2014	A. Ltd vs/ B. Srl	PS140031
	Obergericht	07.02.2014	A. S.A. vs/ B.	PG130012

	Obergericht	24.01.2014	A. vs/ B. AG	PG130002
	Obergericht	17.01.2014	A. AG vs/ B.	PG130004
	Obergericht	19.12.2013	A. AG vs/ B.	PG130010
	Obergericht	19.11.2013	A. SRL vs/ B. S.p.A	PG130011
	Obergericht	05.11.2013	A. GmbH vs/ B. SpA	PG130005
	Obergericht	11.09.2013	A. vs/ B.	PG120009
	Obergericht	25.07.2013	A. Gesellschaft mbH vs/ B. GmbH	PG130003
	Obergericht	05.12.2012	A. AG vs/ B. S.A.	PG120006
	Obergericht	27.08.2012	A. GmbH vs/ B.	PG120002
	Obergericht	18.06.2012	A. vs/ B.	PG110011
	Obergericht	12.06.2012	A. vs/ B.	PG120003
	Obergericht	23.02.2012	A. AG vs/ C. s.r.l.	PG110008
	Obergericht	22.02.2012	A. SA, B. Ltd vs/ C. S.p.A, D. Ltd.	VV090049
	Obergericht	11.01.2012	A. AG vs/ B. Ltd	
	Obergericht	14.11.2011	A. vs/ B. SA.	PG110002
	Obergericht	20.10.2009		PG090001
	Obergericht	04.11.2008		PG080001
	Obergericht	19.07.2008		PG080007
	Obergericht	15.03.2008		PG080004
	Obergericht	26.01.2008		PG070006
	Obergericht	30.10.2006		PG060001
	Obergericht	27.03.2006		PG060002
	Obergericht	20.12.2005		PG050008
	Obergericht	01.12.2005		PG050010
	Obergericht	12.07.2005		PG050006
	Kassationsgericht	30.05.2005	X. vs/ Y.	AA040103
	Obergericht	11.02.2005		ZR 2005 (104) N 45 p. 178
	Obergericht	05.01.2005		PG040010
	Obergericht	23.12.2004		PG040014
	Obergericht	19.11.2004		ZR 2005 (104) N 19 p. 71

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	Obergericht	25.08.2004		PG040005
	Obergericht	26.03.2004		PG040003
	Obergericht	26.02.2004		PG040001
	Obergericht	13.02.2004		PG040002
	Obergericht	30.06.2003		PN030117
	Kassationsgericht	13.06.2002		Kass.-Nr. 2002/032 Z
	Obergericht	16.04.2002		PG020002
	Obergericht	11.09.2001		ZR 2002 (101) N 21 p. 77, ASA 2002 p. 694
	Obergericht	05.07.2001		PG010009
	Obergericht	08.06.2001		U/O/PG010006
	Obergericht	31.05.2001		U/O/PG010003
	Obergericht	30.10.2000		U/O/PG000009
	Obergericht	22.09.2000		U/O/PN000129
	Obergericht (Aufsichtskommission über die Rechtsanwälte)	07.09.2000	Rechtsanwälte R., S. and B. vs/ Y.	ASA 2001 p. 322
	Obergericht (Aufsichtskommission über die Rechtsanwälte)	02.02.2000	Y. vs/ Rechtsanwalt B.	ASA 2001 p. 314
	Obergericht	13.09.1999		U/O/PG990004
	Kassationsgericht	25.05.1998	T. Inc. (Panama) vs/ X. S.p.A. (Italy) and Y. S.A. (Luxemburg)	ASA 1999 p. 363, RSDIE 2000 p. 601, Rivista dell'Arbitrato 1999 p. 93 and 97
	Obergericht	08.05.1998		U/O/PG970003
	Obergericht	02.05.1997		U/O/PG970002
	Obergericht	11.11.1996		U/PG950003
	Obergericht	02.08.1996		U/PG960006
	Obergericht	18.10.1995		U/PG950008
	Obergericht	04.07.1995		ASA 1997 p. 273 [on appeal against Bezirksgericht Affoltern am Albis 26.05.1994]

	Obergericht (Verwaltungs- kommission)	22.03.1995		RSJ 1995 p. 276
	Obergericht	28.02.1995		U/PG950001
	Kassationsgericht	09.01.1995		ZR 1996 (95) N 77 p. 239
	Bezirksgericht Affoltern am Albis	26.05.1994	X. vs/ Y.	ASA 1997 p. 262, RSJ 93 (1997) p. 223, RSDIE 1997 p. 617, Yearbook 1998 p. 754
	Kassationsgericht	28.03.1994		Kass.-Nr. 93/160 Z
	Handelsgericht	21.03.1994		ZR 1995 (94) N 66, p. 208
	Obergericht	11.03.1994		U/PG930001
	Obergericht	05.11.1993		ASA 1996 p. 99, RSDIE 1996 p. 591, ZR 1995 (94) N 100 p. 309
	Handelsgericht	30.08.1993		ASA 1993 p. 531
	Obergericht	08.04.1993		PG92016
	Handelsgericht	25.08.1992		ZR 1993 (92) N 23 p. 72
	Obergericht	02.06.1992		SG91004
	Obergericht	11.07.1991		SG90019
	Kassationsgericht	03.06.1991	F. vs/ T.	Kass.-Nr. 90/138 Z
	Obergericht	23.01.1991		RSDIE 1991 p. 368
	Obergericht	17.01.1991		SG90015
	Obergericht	13.08.1990		SG90013
	Obergericht	22.05.1990		ZN89322
	Handelsgericht	20.04.1990	SI vs/ N.	ASA 1990 p. 183, Yearbook 1992 p. 584
	President of the Commercial Court	03.04.1990		ASA 1992 p. 347 and 350
	Handelsgericht	14.12.1989		Yearbook 1993 p. 442, ZR 1990 (89) N 86 p. 193
	Obergericht	16.02.1987		ASA 1990 p. 248, ZR 1989 (88) N 75 p. 239

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	Obergericht	20.11.1981		ZR 1982 (81) N 95 p. 225

3 *Decisions of the European Court of Human Rights*

02.10.2018	Mutu Adrian, Pechstein Claudia v. Suisse	CEDH 40575/10
11.07.1989	R. v. Suisse	VPB 1989 N 576 p. 529, ASA 1990 p. 262 and 529, ASA 1991 p. 34, RSDIE 1991 p. 372
04.03.1987	R. v. Suisse	VPB 1987 N 72 p. 465, ASA 1990 p. 251, RSDIE 1991 p. 372

4 Glossary

The principal technical terms contained in this glossary are marked in the text by the sign “#”. Other technical terms can be found in the translated provisions of the PILA.

English	German	French	Italian
A			
Abuse of right - prohibition (Art. 2 CC)	Rechtsmissbrauch - ~sverbot	abus de droit - interdiction de l’~	abuso di diritto - divieto dell’~
Action - declaratory ~ - ~ for recognition of a debt (Art. 79 SDCB) - ~ for a declaration that the claim is unfounded (Art. 83(2) SDCB)	Klage Feststellungs~ - Schuldanerken- nungs~ - Aberkennungs~	action ~ en constatation de droit - ~ en reconnaissance de dette - ~ en libération de dette	azione - ~ d’accertamento - ~ di riconosci- mento del debito - ~ del discono- scimento del debito
Administration of justice	Rechtspflege	administration de la justice	amministrazione della giustizia
Admissibility (≠ inadmissibility)	Eintreten, Zulässigkeit	recevabilité	ricevibilità
Advance on costs	Kostenvorschuss	avance de frais	anticipo delle spese
Adversarial (=contentious) proceedings - non-~	Streitiges Verfahren - unstreitiges Verfahren	procédure conten- tieuse - procédure non- contentieuse, gracieuse	procedura contenziosa - procedura non contenziosa
Agreement on jurisdiction	Gerichtsstandsverein- barung, -klausel	convention/clause de prorogation de for	convenzione/claus- ola di proroga di foro
Amount in dispute	Streitwert	valeur litigieuse	valore litigioso
Anatocism (= compound interest)	Zinseszins	anatocisme	anatocismo
Ancillary right	Nebenrecht	droit accessoire	diritto accessorio
Apparent legal relationship	erweckter Rechtss- chein	apparence du droit	apparenza del diritto
Appeal	Beschwerde	recours	ricorso
Appeal in Civil Matters (Art. 77(1) FSCA)	Beschwerde in Zivilsachen	recours en matière civile	ricorso in materia civile
Appellant	Beschwerdeführer	recourant	ricorrente
Appointing authority	Ernennungsbehörde	autorité de nomination	autorità di nomina
Arbitrability	Schiedsfähigkeit	arbitrabilité	compromettibilità

Glossary

English	German	French	Italian
Arbital contract, <i>receptum arbitrii</i>	Schiedsrichtervertrag	contrat d'arbitrage	trattato d'arbitrato
Arbital expert	Schiedsgutachter	expert arbitral, arbitre-expert	arbitratore
Arbital institution	Schiedsinstitution	institution arbitrale	istituzione arbitrale
Arbital proceedings	Schiedsverfahren	procédure arbitrale	arbitrato, giudizio arbitrale, procedura arbitrale
Arbital tribunal	Schiedsgericht	tribunal arbitral	arbitrato, collegio d'arbitri, tribunale arbitrale
Arbitrariness	Willkür	arbitraire	arbitrio
Arbitration agree-ment/clause	Schiedsklausel	clause d'arbitrage, clause compromissoire	clausola arbitrale, clausola compromissoria
Arbitration defence (Art. II(3) NYC, Art. 7(b) PILA)	Einrede der Schiedsgerichtsbarkeit	exception d'arbitrage	eccezione di patto d'arbitrato
Arbitrator - Co-~ - Party-appointed ~ - Presiding ~ - Sole ~	Schiedsrichter/in - Mitschiedsrichter/in - Parteischiedsrichter - Obmann/Obfrau - Einzelschiedsrichter	arbitre - co-arbitre - arbitre désigné par une partie - président(e) - ~ unique	arbitro - coarbitro - arbitro di parte - presidente - ~ unico
Assignment - ~ of claim (Art. 164 et seq. CO)	Abtretung, Zession-Forderungsabtretung	cession - ~ de créance	cessione - ~ del credito
Association (Art. 60 et seq. CC)	Verein	association	associazione
Assumption of an obligation (Art. 175 et seq. CO)	Schuldübernahme	reprise de dette	assunzione di debito
Attachment of assets	Arrest	séquestre	sequestro
Autonomy (= Severability, Separability) of the arbitration agreement	Selbständigkeit der Schiedsklausel	autonomie de la clause arbitrale	autonomia della clausola arbitrale
Award - arbitral ~ - correcting ~ - final ~ - final partial ~ - interim ~ - partial ~ - preliminary ~	Entscheid - Schiedsspruch - korrigierender Schiedsspruch - End~ - Teilend~ - Zwischen~ - Teil~ - Vor~	sentence - ~ arbitrale - ~ rectificative - ~ finale - ~ finale partielle - ~ incidente - ~ partielle - ~ préjudicielle	lodo - ~ arbitrale - ~ correttivo - ~ finale - ~ finale parziale - incidentale - ~ parziale - pregiudiziale

English	German	French	Italian
B			
Bar to consider the case (= inadmissibility)	Unzulässigkeit	fin de non-recevoir	inammissibilità
Bill of exchange	Wechsel	lettre de change	cambiale
Bill of lading	Konnossement	connaissance	polizza di carico
<i>Bonos mores</i>	gute Sitten	bonnes mœurs	buoni costumi
Branch (= place of business)	Niederlassung	établissement (industriel ou commercial)	domicilio d'affari
Bribery	Bestechung	corruption	corruzione
Bribe	Schmiergeld	pot-de-vin	bustarelle
Brokerage - ~ contract	Maklergeschäft - Maklervertrag	courtage - contrat de ~	courtage - contratto di mediazione
Burden of claim	Behauptungslast	fardeau de l'allégation	onere dell'allegazione
Burden of proof	Beweislast	fardeau de la preuve	onere della prova
C			
Capacity - ~ to be a party - ~ to act - ~ to sue - ~ to be sued	- Parteifähigkeit - Handlungsfähigkeit - Aktivlegitimation - Passivlegitimation	- capacité d'ester en justice - capacité d'agir - légitimation active, qualité pour agir - légitimation passive, qualité pour défendre	- capacità d'essere parte in giudizio - capacità d'agire - legittimazione attiva - legittimazione passiva
Carrier	Beförderer, Spediteur, Frachtführer	transporteur	vettore
CAS (= Court of Arbitration for Sport)	Sportsschiedsgericht	Tribunal Arbitral du Sport (TAS)	Tribunale Arbitrale dello Sport (TAS)
Case law	Rechtsprechung	jurisprudence	giurisprudenza
Certainty - legal ~	Rechtssicherheit	sécurité du droit	sicurezza giuridica
Challenge - ground for ~ (= grievance)	Beschwerde, Rüge; Ablehnung - Beschwerdegrund, Rüge; Ablehnungsgrund	recours, grief; récusation - grief; cause de récusation	appello, gravame; ricusa - gravame; causa di ricusa
Chamber of commerce	Handelskammer	chambre de commerce	camera di commercio
Charter party	Frachtvertrag, Chartervertrag	charte-partie	contratto di noleggio
Choice of law	Rechtswahl	choix du droit applicable	scelta del diritto applicabile
Choice of jurisdiction	Prorogation	prorogation (de for)	proroga (di foro)
Circulation - proceedings by ~	Zirkulationsverfahren	procédure par voie de circulation	procedura per circolazione degli atti

Glossary

English	German	French	Italian
Claim prohibition to submit new ~s	Behauptung - Novenverbot	allégation - interdiction d'allégués nouveaux	allegazione - divieto di nuove allegazioni
Claimant	Kläger(in)	demandeur, demanderesse	attore
Competence-Competence	Kompetenzkompetenz	compétence de la compétence	competenza della competenza
Composition	zusammensetzung	composition	composizione
Compulsory enforcement	Zwangsvollstreckung	exécution forcée	esecuzione forzata
Confidentiality	Vertraulichkeit	confidentialité	riservatezza
Conflict of interest	Interessenkonflikt	conflit d'intérêt	conflitto di interessi
Conflict-of-laws rule	Kollisionsnorm	règle de conflit	norma di conflitto
Connecting factor	Anknüpfungstatbestand	critère de rattachment	criterio di collegamento
Conservatory measure	sichernde Massnahmen	mesure conservatoire	provvedimenti conservativi
Contract in favour of a third party	echter Vertrag zu Gunsten eines Dritten	stipulation pour autrui parfaite	contratto a favore di terzi
Cooperative	Genossenschaft	association coopérative	collaborativo
Consignee	Empfänger	destinataire	assegnatario, consegnatario
Consignor	Absender	expéditeur	mittente, speditore
Constitution	Konstituierung	constitution	costituzione
Contract for the performance of continuing obligations	Dauerschuldvertrag	contrat à durée indéterminée	contratto ad esecuzione permanente
Contractual penalty	Vertragsstrafe, Konventionalstrafe	peine conventionnelle, clause pénale	pena convenzionale
Correction (of the award)	Berichtigung	correction	correzione
Costs	Kosten	frais	spese
Court established by law (Art. 30 FC, Art. 6 ECHR)	verfassungsmässiger Richter - Garantie des ~	juge naturel - garantie du ~	giudice naturale - garanzia del ~
Crime Minor ~ Serious ~	Vergehen Verbrechen	délit crime	delitto crimine
Cross-motion to set aside	Anschlussbeschwerde	recours joint	ricorso adesivo
D			
Debt enforcement - ~ appeal (Art. 19 SDCB) - ~ proceedings	- Beschwerde in Schuldbetreibungs- und Konkursachen - Schuldbetreibung	- recours du droit des poursuites - poursuite pour dettes	- ricorso in materia d'esecuzione - esecuzione

English	German	French	Italian
Decision - final ~ - interim ~	Entscheid - End~ - Zwischen~	décision - ~ finale - ~ incidente, préjudicielle	decisione - finale - incidentale, pregiudiziale
Decision on the merits	Sachurteil, Sachentscheid	décision sur le fond	sentenza nel merito
Declaratory decision	Feststellungsentscheid	décision en constatation de droit	sentenza d'accertamento
Default interest	Verzugszinsen	intérêts moratoires	interessi di mora
Defect in consent (Art. 23 et seq. CO)	Willensmangel	vices du consentement	vizi del contratto
Deliberations	Beratungen	délibérations	deliberazione
Denial of justice - substantive ~ - procedural ~	Rechtsverweigerung - materielle ~ - formelle ~	déni de justice - ~ matériel - ~ formel	diniego di giustizia - ~ materiale - ~ formale
Disqualification	Ablehnung	récusation	ricusazione
Dissenting opinion	ablehnendes Sondervotum	opinion dissidente	opinione dissenziente
Doubly relevant facts	doppelrelevante Tatsachen	faits de double pertinence	fatti di doppia pertinenza
Due process	ordnungsgemässes Verfahren	procédure régulière	procedura regolare
Duress (Art. 29 CO)	Furchterregung	crainte fondée	timore
Duty of substantiation	Rügepflicht	principe d'allégation	principio dell'allegazione
E			
Enforcement	Vollstreckung	exécution	esecuzione
Equal treatment of the parties	Gleichbehandlung der Parteien	égalité entre les parties	parità di trattamento delle parti
Equity	Billigkeit	équité	equità
Evidence - assessment of ~ - taking of ~	Beweis - Beweiswürdigung - Beweisaufnahme, -erhebung, -führung	preuve - appréciation des preuves - administration des preuves	prova - valutazione della prova - audizione delle prove
Evidentiary proceedings	Beweisverfahren	procédure probatoire	istruzione probatoria
Exclusion (of an arbitrator)	Ausschluss	exclusion	esclusorio
Exclusion agreement	Ausschlussvereinbarung	convention d'exclusion	convenzione d'esclusione
Expert	Gutachter	expert, expert-arbitre	arbitratore
Expert determination Arbitral ~	Schiedsgutachten	expertise-arbitrage, avis d'un expert-arbitre, expertise arbitrale	referto d'arbitratore, perizia
Expert opinion	Gutachten, Expertise	rapport d'expertise, expertise	parere
Expression of intent	Willensäusserung	déclaration de volonté	dichiarazione di volontà

Glossary

English	German	French	Italian
Expropriation without compensation	Enteignung ohne Entschädigung	expropriation sans indemnisation	espropriazione senza indennità
F			
Facts - assessment of ~ - publicly known ~	Sachverhalt - ~swürdigung - notorische Tatsachen	faits - appréciation des ~ - - ~ notoires	fatti - valutazione dei ~ - ~ notorii
Fact-finding	Sachverhaltsfeststellung	constatation des faits	costatazione dei fatti
Federal Council	Bundesrat	Conseil fédéral	Consiglio federale
Federation	Dachverband	association faîtière	associazione dirigente
Fees	Honorare	honoraires	onorario
Formalism - excessive ~	Formalismus - überspitzter ~	formalisme - ~ excessif	formalismo - ~ esagerato
Forum	Gerichtsstand	for	foro
Foundation	Stiftung	fondation	fondazione
G			
General terms and conditions	Allgemeine Geschäftsbedingungen	conditions générales	condizioni generali
Good cause	gerechte Gründe	justes motifs	ragioni giuste
Good faith - principle of ~, principle of trust	Treu und Glauben - Vertrauensprinzip, Treueprinzip	bonne foi - principe de la ~, principe de la confiance	buona fede - principio dell'affidamento
Grievance (= ground for challenge)	Rüge, Beschwerde	grief	gravame
Grounds for appeal	Beschwerdegründe	motifs de recours	motivi di ricorso
Guarantee (Art. 492 et seq. CO)	Bürgschaft	cautionnement	fideiussione
Guarantee of Performance by a third party (Art. 111 CO)	Vertrag zu Lasten eines Dritten	porte-fort	promessa della prestazione di un terzo
H			
Hearing	Verhandlung	audience	audienza
Heir	Erbe	héritier	erede
Holder of the claim	Rechtsinhaber	titulaire du droit	titolare del diritto
I			
ICC International Court of Arbitration	IHK Internationaler Schiedsgerichtshof	Cour internationale d'arbitrage de la CCI	Corte Internazionale di Arbitrato della CCI
Impartiality	Unparteilichkeit	impartialité	imparzialità
Implied actions	Konkludentes Handeln	actes concluants	atti concludenti

English	German	French	Italian
Inadmissibility (≠ admissibility)	Nichteintreten, Unzulässigkeit	irrecevabilité	irricevibilità
Incorporation - ~ by global reference - ~ by specific reference	Verweisung - Einbeziehung durch Pauschal~ - Einbeziehung durch Spezial~	incorporation - ~ par référence globale - ~ par référence expresse	incorporazione - per rinvio globale - per rinvio speciale
Independence (Art. 180(1) PILA)	Unabhängigkeit	indépendance	indipendenza
Interpretation	Auslegung	interprétation	interpretazione
Invalidity	Ungültigkeit	invalidité	invalidità
Investment treaty	Investitionsschutzab- kommen	traité d'investissement	accordo di protezione degli investimenti
J			
Joinder of parties - compulsory ~ - optional ~	Streitgenossenschaft - notwendige ~ - uneigentliche ~	consortité - ~ nécessaire - ~ simple, facultative	litisconsorzio - necessario - facoltativo
Jurisdiction - lack of ~ - plea of ~	Zuständigkeit - Unzuständigkeit - Einrede der ~	compétence - incompétence - exception d'~	competenza - incompetenza - eccezione d'~
L			
Legal capacity	Rechtsfähigkeit	jouissance des droits civils	godimento dei diritti civili
Legal aid	Prozesskostenhilfe	aide juridique	sussidio per spese processuali
Legal force - substantive ~ - formal ~	Rechtskraft - materielle ~ - formelle ~	force de chose jugée - ~ matérielle - ~ formelle	forza di cosa giudicata - ~ materiale - ~ formale
Legal person	Juristische Person	personne morale	persona giuridica
Legal presumption	Rechtsvermutung	présomption légale	presunzione legale
Legal succession	Rechtsnachfolge	succession juridique	successione dei diritti
Letters rogatory	Rechtshilfersuchen	commission rogatoire	rogatoria
Liquidated damages (Art. 160 et seq. CO)	Konventionalstrafe	clause pénale	pena conven- zionale
<i>Lis pendens</i> (= <i>pendency</i>) (Art. 181, Art. 9 PILA)	Rechtshängigkeit	litispendance	litispendenza
M			
Mandatory norm	Eingriffsnorm	loi d'application directe, loi de police	norma d'intervento

Glossary

English	German	French	Italian
Matter in dispute (= subject of the dispute)	Streitgegenstand	objet du litige	materia del contendere
Maturity	Fälligkeit	exigibilité, échéance	esigibilità, data della scadenza
Member - original ~	Mitglied - Gründungs-~	membre - ~ fondateur	membro - ~ fondatore
Merits	Hauptsache	fond	merito
Mother company	Muttergesellschaft	société mère	casa madre
Motion for constitutional review (Art. 84 et seq. fSOFJ)	Staatsrechtliche Beschwerde	recours de droit public	ricorso di diritto pubblico
Motion to set aside (= appeal)	Beschwerde	recours	appello
Multi-party arbitration	Mehrpartei- entschiedsverfahren	arbitrage multipartite	arbitrato multiparti
N			
Novation (Art. 116 et seq. CO)	Neuerung	novation	novazione
O			
Obligee	Gläubiger	créancier	creditore
Obligor	Schuldner	débiteur	debitore
Offer of evidence	Beweisofferte	offre de preuve	offerta di produrre una prova
Open to Public	Öffentlichkeit	publicité	pubblicità
Operative part	Dispositiv	dispositif	dispositivo
P			
<i>Pacta sunt servanda</i>	Vertragstreue	fidélité contractuelle	lealtà contrattuale
Parity - principle of ~	Parität - Grundsatz der ~	parité - principe de la composition paritaire	parità - principio della composizione paritetica
Partner	Gesellschafter	associé	socio
Party autonomy - principle of ~	Parteiautonomie	autonomie des parties	autonomia delle parti
Party disposition - principle of ~	Dispositionsmaxime	maxime de disposition	massima dispositiva
Physical person	Natürliche Person	personne physique	persona fisica
Piercing of the corporate veil	Durchgriff	levée du voile social, principe de la transparence	ricorso a terzi garanti
Personal rights	Persönlichkeitsrechte	droits de la personnalité	diritti della personalità

English	German	French	Italian
Place of business (= branch)	Niederlassung	établissement (industriel ou commercial)	domicilio d'affari
Pleadings on the merits without reservation	vorbehaltlose Einlassung	entrée en matière sans réserve sur le fond	comparire in causa senza riserve sul merito
Power of attorney	Vollmacht	Procuration	procura
Power of representation - ~ by estoppel	Vertretungsbefugnis - Duldungsvollmacht	pouvoir de représentation - mandat implicite	potere di rappresentanza - procura tacita
Powers of review	Kognition	pouvoir de cognition, pouvoir d'examen	potere di cognizione, potere d'esame
Prayer for relief	Rechtsbegehren	conclusion	istanza
Precautionary taking of evidence	Vorsorgliche Beweisführung	preuve à futur	assunzione di prove a titolo cautelare
Preliminary issue/question	Vorfrage	question préjudicielle	questione pregiudiziale
Principal	Vertretene(r)	représenté(e)	rappresentato/a
Privity of contractual rights	Relativität schuldvertraglicher Rechte	relativité des engagements contractuels	relatività dei diritto contrattuali
Procedural economy	Prozessökonomie	économie de procédure	economia processuale
Proceedings - non-adversarial ~ - fair ~	Verfahren - unstreitiges ~ - gerechtes ~	procédure - ~ non contentieuse - procès équitable	procedura - non contenziosa - equa
Promise to pay bribe	Bestechungssprechen	promesse de verser un pot-de-vin	promettere di pagare la tangente
Provisional measure	Vorsorgliche Massnahme	mesure provisoire	provvedimento cautelaro
Public policy - substantive ~ - procedural ~	Ordre public - materieller ~ - formeller ~	ordre public - ~ matériel - ~ formel	ordine pubblico - ~ materiale - ~ formale
Punitive damages	Strafschadenersatz	dommages-intérêts punitifs	danni punitivi
R			
Reasons	Begründung	motivation	motivazione
Recognition	Anerkennung	reconnaissance	riconoscimento
Re-establishment (of a time limit)	Wiederherstellung (einer Frist)	restitution (d'un délai)	restituzione (di un termine)
Rejoinder	Duplik	duplique	duplica
(Legally) relevant	(rechts-)erheblich	(juridiquement) pertinent	(giuridicamente) rilevante
Removal (of an arbitrator)	Entfernung eines Schiedsrichters	révocation d'un arbitre	rimozione di un arbitro
Reply	Replik	réplique	replica

Glossary

English	German	French	Italian
Representation	Stellvertretung, Vertretung	représentation	rappresentanza
Representative authority (= power of representation)	Vertretungsmacht, Vertretungsbefugnis	pouvoirs de représentation	potere di rappresentazione
Request for arbitration	Schiedsklage	demande d'arbitrage	domanda di arbitrato
Resignation	Rücktritt	démission	dimissione
<i>Res judicata</i>	abgeurteilte Sache, Rechtskraft	(autorité de, effet de) chose jugée	(effetto di) cosa giudicata
Respondent	Beklagte(r)	défendeur, défender- esse	convenuto/a
Retroactivity - principle of Non-~	Rückwirkung - ~sverbot	rétroactivité - règle de la non-~	retroattività - divieto della ~
Revision (Art. 121 et seq. FSCA)	Revision	révision	revisione
Right to be heard	rechtliches Gehör, Gehörsanspruch	droit d'être entendu	diritto di essere sentito
Rule of the game	Spielregel	règle de jeu	regola di gioco
S			
Seat (of the arbitration)	Schiedsort	Lieu/siège de l'arbitrage	luogo del arbitrato
Secretary (of the arbitral tribunal)	Sekretär	Sécretaire du tribunal	Segretario
Security paper	Wertpapier	papier-valeur	titolo di credito
Sense of justice	Rechtsgefühl	sentiment de la justice	senso della giustizia
Set-off (Art. 120 et seq. CO)	Verrechnung	compensation	compensazione
Setting aside	kassatorische Natur	effet cassatoire	effetto cassatorio
Setting aside the debtor's opposition to a summons to pay [SADOSP] (Art. 79 et seq. SDCB)	Rechtsöffnung	mainlevée d'opposition	rigetto
Settlement agreement	Vergleich	transaction	transazione
Site visit	Ortsbesichtigung	Visite sur place	visita del sito
Standard-form contract	Formularvertrag	contrat préformé, contrat-type	contratto tipo
Standing to sue	Aktivlegitimation, Rechtsschutzinteresse, Klagebefugnis	légitimation active, qualité pour agir	legittimazione attiva
Statute of limitations	Verjährung	prescription	prescrizione
Statutes	Statuten	statuts	statuto

English	German	French	Italian
Stay	Aussetzung	suspension	sospensione
Subject-matter of the dispute	Streitgegenstand	objet du litige	materia del contendere
Submission agreement	Schiedsvereinbarung, Schiedsabrede	convention d'arbitrage, compromis	convenzione d'arbitrato, compromesso
Subsidiary company	Tochtergesellschaft	société fille	(società) affiliata
Subsidiary Constitutional Appeal (Art. 113 FSCA)	Subsidiäre Verfassungsbeschwerde	recours constitutionnel subsidiaire	ricorso sussidiario in materia costituzionale
Summary examination	summarische Prüfung	examen sommaire	esame sommario
Summary proceedings	summarisches Verfahren	procédure sommaire	procedimento sommario
Summons to pay (Art. 69 et seq. SDCB)	Zahlungsbefehl	commandement de payer	precetto esecutivo
Suspensive effect	aufschiebende Wirkung	effet suspensif	effetto sospensivo
T			
Termination agreement	Aufhebungsvertrag	contrat de résolution	contratto d'annullamento
Terms of reference	Schiedsauftrag	acte de mission	atto di missione
Time limit	Frist	délai	termine
Title to set aside the debtor's opposition to a summons to pay (Art. 80 & 82 SDCB)	Rechtsöffnungstitel	titre de mainlevée	titolo per il rigetto dell'opposizione
Trade usage	Handelsbrauch	usage commercial	usanza commerciale
Trust - principle of ~	Vertrauensprinzip, Treueprinzip	principe de la confiance	principio dell'affidamento
U			
Umbrella clause	Umbrella Klausel	Clause parapluie	Clausola ombrello
Uniform standard law	vereinheitlichtes Recht	loi uniforme	diritto unificato
Undefined legal notion	undefinierter Rechtsbegriff	notion juridique indéterminée	concetto giuridico non definito
Unjust enrichment (Art. 62 et seq. CO)	ungerechtfertigte Bereicherung	enrichissement illégitime	indebito arricchimento
Unusual - rule of the ~	- Ungewöhnlichkeitsregel	- règle de l'insolite	- regola dell'insolito

Glossary

English	German	French	Italian
Utility - principle of ~	- Utilitätsprinzip	- principe de l'effet utile	- principio d'utilità
V			
Validity	Gültigkeit	validité	validità
Verdict (judicial)	Richterspruch	verdict judiciaire	verdetto giudiziale
W			
Waiver	Verwirkung	péremption	decadenza
Waiver to file an appeal	Verzicht auf Rechtsmittel	renonciation au recours	rinuncia all'impugnazione
Witness	Zeuge	témoïn	testimonio
Witness statement	Zeugenaussage	déclaration de témoin	deposizione de testimonio

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