Preface

This volume contains the papers presented at the 10th annual conference on New Developments in International Commercial Arbitration, organised by the CEMAJ (Research Center on Alternative and Judicial Dispute Resolution Methods) of the University of Neuchâtel on 13 November 2015.

Both the conference and this book are meant to provide practitioners, academics and students with an in-depth analysis of the latest and most topical developments in international commercial arbitration. For this reason, the *New Developments* conferences are not and never have been devoted to any given overall theme. The sole common denominator between the contributions gathered in these pages is the novelty and significance of their subject matters in the fast-evolving field of international commercial arbitration.

KAJ HOBÉR's contribution analyses the tactics and difficulties that may be encountered with Russian parties in international arbitration. He examines, in particular, the notion of apparent authority, the validity and arbitrability of shareholders' agreements and the risks related to court proceedings before Russian courts dealing with the invalidity of international arbitration agreements. This article is an excellent illustration of the diversity of international arbitration laws and practice.

MANUEL ARROYO examines the new LCIA Rules that entered into force on 1 October 2014. He underlines the key changes in the 2014 Rules such as, among others, the – controversial – provisions on counsel conduct, the inclusion of a mechanism of emergency arbitrator and the rules on multi-

party arbitration. He also provides a useful table comparing the 2014 and the 1998 Rules.

ANDREA MEIER's contribution develops an important and delicate question, namely whether the substantive law applied by arbitrators and courts is the same. He starts with the conflict of law rules and then analyses some selected issues, including the greater focus placed by arbitrators on the contract, transnational rules, a business-oriented approach and comparative law. He concludes that the law applied by arbitrators and courts is not necessarily the same.

CLARISSE VON WUNSCHHEIM deals with opportunities and challenges in China for the Swiss arbitration community. Based on detailed statistical data, she helps us understand the market of international arbitration in China, the "timid presence" of Chinese players on the international arbitration scene and the challenges for the Swiss arbitration community. She notes that Switzerland has advantages but that China is not fully aware of them and that there is a risk of a decline of the Swiss positioning. She concludes with a call for an "action plan with regard to the Chinese market".

LUCA BEFFA presents the now classic "review of recent case law" of the Swiss Federal Tribunal between August 2014 and August 2015. This survey is particularly helpful for practitioners who wish to bring themselves up-to-date on the most recent developments of Swiss case law. Luca Beffa's contribution is very rich and detailed, and is not limited to the officially published decisions. In addition, the author expresses personal opinions on the rulings and reasoning of the Swiss Federal Tribunal.

XAVIER FAVRE-BULLE provides a thorough analysis of the legal implications of the *Pechstein* "saga". He describes the Swiss and the German proceedings and identifies the "sources of divergence" between the views adopted in the two countries, in particular in relation to the forced consent of athletes to

arbitration before the CAS, the independence of the CAS and the impact of competition law in arbitral proceedings. He concludes that the *Pechstein* proceedings have notably affected the credibility of the CAS and have resulted in legal uncertainty and he hopes that the upcoming decisions by the BGH and by the European Court of Human Rights will bring more clarity to the present legal situation.

We are grateful to the authors, not only for the quality of their contributions, but also for providing their papers ahead of the conference, enabling us to present participants with the book on the day itself – a brand label of this arbitration event.

The organization of the conference and the timely publication of this book would not have been possible without the precious administrative support of Anouk Gillabert and Stella Sager, of the University of Neuchâtel School of Law's Secretariat.

Neuchâtel, October 2015

Christoph Müller Antonio Rigozzi Sébastien Besson

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Principal Abbreviations

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

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

The Russian Doll Syndrome: Russian Tactics in international Arbitration

KAJ HOBÉR

Contents

I. Introduction

International arbitration has a long history in the Russian Federation and in the former Soviet Union. In the previously existing Soviet foreign trade system, international arbitration was the preferred dispute settlement mechanism. The Foreign Trade Arbitration Commission in Moscow – the predecessor to the International Commercial Arbitration Court – was established in 1932. The Maritime Arbitration Commission was established in 1930. Many generations of

Russian lawyers are well acquainted with international arbitration, its rules and principles. During the Soviet era, there were, however, very few – indeed, surprisingly few – actual arbitrations. This situation changed dramatically at the beginning of the 1990's, following the disintegration of the Soviet Union.

Many Russian companies and businessmen nowadays have extensive experience of international arbitration. Over the years, certain distinctive features have crystallized with respect to the way in which many Russian parties conduct their arbitrations. It is probably fair to assume that their approach is coloured and influenced by their experiences in Russian courts.

Three such distinctive features will be discussed below, *viz*., (i) apparent authority; (ii) validity and arbitrability of shareholders' agreements, and (iii) decisions by the Russian Courts invalidating international arbitration agreements. This list does not pretend to be exhaustive, but it is representative of some of the most common jurisdictional objections raised by Russian respondents in international arbitration.

II. Apparent authority

A. Introduction

One of the most frequent objections raised by Russian respondents is that the disputed contract was signed by an unauthorized person. Therefore, it is argued, the contract, including the arbitration clause, is not valid and binding. Consequently, there can be no arbitration.

It is generally accepted that issues concerning the right to represent juridical persons are determined by the *lex corporationis*, which in most jurisdictions means that the law

of the country where the juridical person in question has been created, registered, or otherwise established. Consequently, as far as Russian juridical persons are concerned, the *lex corporationis* is Russian law. In other words, to determine whether someone has properly represented a Russian juridical person on the basis of apparent authority, Russian law is applied.

Under Russian law, the right to represent juridical persons is, generally speaking, subject to strict formalities, often to an extent which is unusual in Western Europe and North America. A Russian joint stock company, for example – unless otherwise laid down in the charter of the company – is represented by its General Director, or by someone who has been authorized by the General Director to represent the company. Consequently, it is only the General Director, or persons authorized by him, who can legally bind the company, for example, by entering into contracts. This, in turn leads to a certain "bureaucracy" and inertia in commercial transactions because the General Director must sign all the contracts. Needless to say, this fact tends to slow down commercial transactions and to complicate, rather than, to facilitate them.

Experience shows, however, that at least in international transactions involving Russian entities, sometimes agreements are entered into, and commitments made, without the involvement of the General Director. In such situations, and if the commercial transaction in question ends up in a dispute, usually to be resolved through arbitration, the issue often arises whether the juridical person in question is bound by an agreement not entered into by the General Director, or by a person authorized by him.[1]

[1] The following draws on HOBÉR, Apparent Authority po-russkij, in Liber Amicorum in Honor of Professor WILLIAM BUTLER, 2014, p. 200 *et seq.*

In Russian law there is – primarily – one provision in the Civil Code which is sometimes viewed as a codification of the doctrine of apparent authority: Article 182(1) of the Russian Civil Code. It reads as follows:

> *"A transaction concluded by one person (representative) in the name of another person (person represented) by virtue of a power based on a power of attorney, specification of a law, or act of an empowered State agency or agency of local self-government shall directly create, change, and terminate civil rights and duties of the person represented.*
>
> *A power also may be manifest from a situation in which the representative acts (seller in retail trade, cashier, and others)".* [2]

On 21 October 1994, the State Duma of the Russian Federation adopted Part One of the Civil Code of the Russian Federation (hereinafter: Civil Code). With certain exceptions, it entered into force on 1 January 1995.

The Civil Code is the third Russian civil law codification, its predecessors being the Civil Code of 1922, adopted during the NEP-period, and the late Khrushchev-era Civil Code of 1964. Notwithstanding the fact that the 1964 Civil Code was subsequently supplemented by the 1991 Fundamental Principles of Civil Legislation of the USSR and Republics, and by a large number of legislative acts on specific issues, these were not sufficient to satisfy the requirements of the emerging market economy in Russia in the early 1990s. New legislation was required.

The Civil Code was drafted under considerable time pressure by some of the most distinguished Russian lawyers. European and American experts were consulted to a certain

[2] See BUTLER (transl. & ed), Civil Code of the Russian Federation 2010, p. 74.

extent. As a consequence, the Civil Code bears witness to some inspiration primarily from continental European civil law. Overall, however, the Civil Code must be characterized as a truly Russian product, built predominantly on the traditions of previous Russian and Soviet legislation. While the Civil Code does have drafting, conceptual, and structural shortcomings, it unquestionably represents one of the highest achievements of Russian legal reform during the post-Soviet period.

The Civil Code not only applies to domestic transactions and legal subjects, but also to international business transactions, when Russian substantive law is applicable by virtue of the relevant conflict of laws rules.

When Part One of the Civil Code was adopted in 1994, the wording of Article 182(1) was carried over almost verbatim from Article 62(2) of the 1964 Civil Code of the Russian Soviet Federative Socialist Republic ("RSFSR"), the RSFSR being one of the republics of the former Soviet Union.

The most comprehensive treatment of representation and agency in Soviet and Russian law is to be found in Professor RIASENTSEV'S treatise on representation and transactions in contemporary civil law (1948). It was republished in 2006 with a biographical note on Professor RIASENTSEV, but without amendments, changes, updates or comments.[3] Even though Professor RIASENTEV'S dissertation is a thorough theoretical analysis of the concept of representation, it goes without saying that caution is called for when seeking guidance from a publication that is almost 70 years old. This is particularly the case, given that legal regulation of the planned economy did not allow for private commercial transactions.

[3] V.A. RIASENTSEV, Representation and Transactions in Contemporary Civil Law (1948; reprint ed., 2006).

Some of the examples provided by RIASENTSEV clearly show that they contemplate a different economic and social structure. He refers to individuals who perform specific functions in the socialist economy and for the public good, such as cashiers, sales persons, waiters, and librarians.[4] He also mentions individuals who perform mass transactions of an identical nature in relation to unspecified third persons.[5]

The situation in the Russian economy and industry today is radically different, following the collapse of the planned economy and the privatisation of the Russian economy during the early 1990s and its further development and internationalization. Against the background of these fundamental changes in Russia, and given the fact that the statutory text now found in Article 182(1) has remained unchanged since 1964, one would perhaps have expected commentaries to the Civil Code to discuss the application of the provision in these new circumstances. Surprisingly, however, most commentaries to the Civil Code say very little about this. They usually confine themselves to stating that the enumeration in the provision – *i.e.* "seller in retail trade, cashier, and others" – is not exhaustive. Arguably, this follows directly from the text, which refers, to "and others". Such comments therefore add little to our understanding of the provision.

To have a better understanding of how Article 182(1) works in real life, it is necessary to look at judgments rendered by Russian courts.

Based on a comprehensive review of court decisions over the last eight years, it is clear that Russian courts apply Article 182(1) to many situations which are not covered by the

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[4] *Ibid.* p. 95. A 2004 arbitral award rendered by the International Commercial Arbitration Court attached to the Russian Chamber of Commerce and Industry rejected the application of Article 182(1), using almost identical language.

[5] RIASENTSEV, note 3 above, pp. 96-98.

examples given in the statutory text. Even though many Russian court decisions do not describe the underlying facts in detail, it is equally clear that cases involving Article 182 are very fact specific. In other words, the outcome of a particular case is dependent on the facts and circumstances of the individual case.

The language of Article 182(1) suggests that the provision is meant to deal with actions, or a single action, performed under circumstances that clearly show that the person was authorized to take the action in question. It must be clear to the other party, based on the activity in question and on the position of the person performing it, that he or she has the authority to do so. The formula suggested by the language of Article 182(1) is illustrated by two specific examples, *viz*., "seller in retail trade" and "cashier".

Based on the aforementioned review of Russian court decisions, it is possible to group the factual situations not covered by the examples in Article 182(1) in three broad categories, *viz*., (i) possession of, or access to, the corporate seal; (ii) repeated performance of activities of a commercial nature and significance; and (iii) the person in question holds a specific position within an entity.

B. Possession of, or access to, the corporate seal

The corporate seal in Russian commercial life is almost a religious object. From a strictly legal point of view, it has no significance at all. In practice, however, it plays a central role. In fact, few contracts are signed in Russia without affixing the corporate seal to them.[6] There are several

[6] Under Russian law, joint stock companies and limited liability companies are required to have corporate seals. This follows from Article 2:7 of the Joint Stock Companies' Act, and Article 2:5 of the Limited Responsibility Companies' Act respectively. Both provisions provide that the seal must be round and indicate

decisions from the Supreme Arbitrazh Court confirming the importance of the corporate seal with respect to apparent authority. In a decision dated 18 February 2008,[7] the court stated that entrusting the corporate seal to a representative of the juridical person in question confirmed that the representative had the authority to accept deliveries to the juridical person. In a similar case the following year[8] the court explained that acceptance of goods by a person not having a power of attorney did not, in and of itself, mean that delivery had been made to a non-authorized person. In that case, documents confirming delivery had been signed by a person using the corporate seal of the entity in question.

In summary, possession of, or access to, the corporate seal seems to be treated by Russian courts as a *presumption* that the person in question has apparent authority based on Article 182(1). This presumption can be rebutted, however, if it is established that the corporate seal has been withdrawn, forged, falsified, or otherwise tampered with. This presumption seems to include a presumption of good faith on the part of the third person relying on the representations, or actions, of the other party. This statement is based on the fact that in the cases dealing with the significance of the corporate seal there is no discussion by the courts of the issue of good faith.

the name of the company in Russian, as well as the place of business of the company. These statutory acts do not say anything about whether, when and how the corporate seal may, must or should be used.

7 Judgment No. 1186/08 in matter No. A65-11973-2006 – SG 333.

8 Judgment dated 27 November 2009, No. 6386/11 in matter No. A 51 3799/2010.

C. Repeated performance of activities of a commercial nature and significance

Even though the decisions referred to above do not always describe the factual circumstances in detail, insofar as the potential application of Article 182(1) is concerned, it would seem that repeated performance of activities of a commercial nature and significance as a rule leads to the conclusion that there is apparent authority, at least if the other party is in good faith. It does not seem to be a *requirement* that the person in question is an employee of the juridical person. Employment, however, is usually one factual circumstance which courts take into account in evaluating the surrounding factual circumstances.

D. The person in question holds a specific position within an entity

Other decisions of cassation courts, as well as appellate courts, have focused on the position in the company held by the individual in question, and concluded that if the person acts within the typical sphere of activities following from the position, there is apparent authority based on Article 182(1) of the Civil Code.[9] Examples include the head of a technical department,[10] head of quality control department,[11] office manager,[12] geology engineer,[13] and chief energy specialist.[14]

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[9] Cf. Decision of the Federal Arbitrazh Court of the Volga Circuit, dated 2 May 2007, Re: No. A55-18476/05-33, which concerned a director of finances who was found to have been authorized to sign documents accepting performed works and serving as the basis for payments for such works.

[10] Decision dated 2 October 2013 of Federal Arbitrazh Court of the West-Siberian Circuit, Re: No. A45-16/73/2012.

[11] Decision dated 18 November 2013 of Federal Arbitrazh Court of the Volga Circuit, Re: No. A65-313 23/2012.

[12] Decision dated 25 December 2013 of the Tenth Arbitrazh Appellate Court, Re: No. A41-2640/13.

Even though this is not discussed in the decisions referred to above, it would seem reasonable to assume that it must have been clear to the other party that the representative of the juridical person held the position in question and that his activities were typical of someone holding that position.

E. Concluding remarks

The wording of Article 182(1), taken together with the examples mentioned therein, suggests a rather narrow field of application for the concept of apparent authority under Russian law. This impression is reinforced by the fact that the language of the provision has been taken over more or less *verbatim* from the 1964 Civil Code of the RSFSR, adopted at a time when the planned economy reigned supreme and there was no room for private, *i.e.* non-state, commercial transactions.

The practice of Russian courts, clearly shows, however, that the Russian arbitrazh courts have developed and expanded the application of the provision. In addition to the factual situations illustrated by the examples in the statutory text, the Russian courts apply the provision to other situations as well. In other words, Russian courts have found that the three categories of additional factual situations herein identified – *i.e.* possession of, or access to the corporate seal; repeated performance of activities of a commercial nature and significance; and holding a specific position within an entity – create a situation where it is manifest that the person in question has the authority to act on behalf of the entity. Stated in general terms, the three categories seem to correspond, by and large, to how the concept of

[13] Decision dated 24 February 2012 of Federal Arbitrazh Court of the Rostov Circuit, Re: No. A53-1946/11.

[14] Decision dated 24 October 2012 of the Thirteenth Arbitrazh Appellate Court, Re: No. A26-7523/2011.

apparent authority is applied in other jurisdictions in Europe and North America. The decisions of the Russian Arbitrazh courts have thus served as a bridge between the planned economy provision in Article 182(1) and the reality of the Russian market economy.

III. Validity and arbitrability of shareholders' agreements[15]

A. Introduction

Shareholders' agreements are widely used today with respect to shares in Russian companies. It is reasonable to assume that most major corporate transactions involving Russian companies result in some form of shareholders' agreement. In fact, shareholders' agreements concerning Russian companies have been used since the early 1990s. For more than a decade, however, they were not visible on the legal radar screen. There were no statutory provisions. There was no judicial practice. Yet, shareholders' agreements were entered into, the parties thereto presumably hoping for the best, but ultimately relying on the principle of freedom of contract laid down in the Civil Code. This principle, absent during the era of planned economy, figures prominently in of the Civil Code (Article 1(1) and Article 421).

Since Russian law lacked provisions on shareholders' agreements, and since the precise meaning of freedom of contract under Russian law was not clear, parties often subjected such agreements to foreign, *i.e.* non-Russian, law.

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[15] The following draws on HOBÉR, Russian Shareholders' Agreements and International Arbitration, in The American Review of International Arbitration (2012) 493 *et seq*.

In fact, many of the major disputes involving Russian parties during recent years have concerned such shareholders' agreements.

It was not until 2005 that shareholders' agreements surfaced on the Russian legal radar screen. In that year Russian courts dealt with the so-called *Megafon* case.[16] The *Megafon* case eventually resulted in certain amendments to the Russian Joint Stock Companies Act. Several central questions remained open, however, after the amendments, and still seem to remain open. Subsequent to the *Megafon* case, another issue concerning shareholders' agreements has come to the forefront – the arbitrability of disputes under shareholders' agreements. Interesting decisions on this question have been issued in a dispute between Mr. Maximov and Novolipetskiy Metallurgicheskiy Kombinat.[17]

B. Background

On January 1, 1996, the first proper law on Russian joint stock companies (the "JSC Act") entered into force. Together with the newly adopted Civil Code, the JSC Act set out a new

[16] Ruling of the Arbitrazh Court Khanty-Mansiyskiy Autonomous District of December 29, 2004, No. A75-3725/04-860-2005; Ruling of the Eight Appeal Arbitrazh Court of June 8, 2005, No. A75-3725/04-860/2005; Ruling of the Federal Arbitrazh Court of West-Siberian District of March 31, 2006; No. 04-2109/2005. The Megafon case was followed by the *Russkij Standard* case in which Russian courts took a very similar approach. See Ruling of the Arbitrazh Court of Moscow of December 26, 2006, No. A40-62048/06-81-343.

[17] Decision of the Arbitrazh Court of Moscow of June 28, 2011, No. A40-35844/11-69-311; Ruling of the Federal Arbitrazh Court of Moscow District of October 10, 2011, No. A40-35844/11-69-311; Decision of the RF Supreme Arbitrazh Court "On refusal to transfer the case for consideration of the Presidium of the RF Supreme Arbitrazh Court" of January 30, 2012, No. BAC-15384/11; and Decision of the Constitutional Court of the Russian Federation of July 17, 2012, No. 1488-O "On refusal of taking into consideration of the complaint of Maksimov Nikolay Victorivich for violation of his constitutional rights by section 6 article 4, subsection 2, section 1 article 22, section 2 article 225.1 of the RF Procedural Arbitrazh Code, section 2 article 28 and section 2 article 29 of the Federal Act On Securities Market."

regime and legal framework for joint stock companies in the Russian Federation. The new law replaced the outdated, and in some respects contradictory, Decree 601, which had been adopted on December 25, 1990, *i.e.* while Soviet Union was still in existence. Decree 601 was approved by the Russian Soviet Federative Socialist Republic ("RSFSR") Council of Ministers as a provisional regulation until a law on joint stock companies had been adopted. It took five years.

During the era of planned economy there was no need to regulate commercial enterprises. With one owner – the state – controlling and regulating the entire Soviet economy, traditional, Western style, company legislation was unnecessary. In the wake of Gorbachev's initial reform, it gradually became evident that general commercial and company legislation was needed for the transformation of the Soviet economy into a market economy. By the time the privatization process started in 1991, Decree 601 was the only statute dealing with joint stock companies. It was very basic and rudimentary in nature. That is why joint stock companies created in the privatization process were also regulated by a rather detailed Edict of the President of the Russian Federation No. 721, adopted on July 1, 1992 "On Organizational Measures for Transforming State Enterprises into Joint-Stock Companies". The primary purpose of the Edict was to corporatize state-owned enterprises, *i.e.* transform them into joint-stock companies, the shares of which were to be sold during the privatization process. In addition, the Edict contained provisions on the organization and structure of the joint stock companies. One of the attachments to the Edict was a standard charter for newly formed joint stock companies with detailed provisions not found in Decree 601. Many of the provisions in the standard charter were subsequently incorporated in the JSC Act.

C. The *Megafon* case

In a ruling dated March 31, 2006, the Federal Arbitrazh Court of Western Siberia found that a shareholders' agreement concerning the Russian Joint Stock Company OAO Megafon, which the parties thereto had subjected to Swedish substantive law, was invalid under Russian law. The claim was brought by several Russian shareholders of the company and was in essence directed against the foreign shareholders of the company. In addition to the choice-of-law clause, the shareholders' agreement provided for arbitration in Stockholm.

In short, the reasoning of the court[18] – which was confirmed by appellate and cassation courts[19] – was based on the idea that since some provisions of the shareholders' agreement were in conflict with certain statutory provisions, which in view of the court were mandatory under Russian law, the shareholders' agreement violated Russian public policy and therefore was invalid. In its reasoning the court referred to Article 1206 of the Civil Code which deals with the law applicable to the origin and termination of property rights. Rights and obligations derived from property in Russia – shares in a Russian company – are governed by Russian law pursuant to this provision. In the view of the court, Article 1206 is a mandatory provision of Russian law. The court went on to state that an agreement which violated a mandatory norm in Russian law is contrary to Russian public policy as such concept is defined in Article 1193 of the Civil Code.[20]

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[18] See note 16 supra, Ruling of the Arbitrazh Court Khanty-Mansiyskiy Autonomous District of December 29, 2004, No. A75-3725/04-860/2005.

[19] Id., Ruling of the Eight Appeal Arbitrazh Court of June 8, 2005, No. A75-3725-/04-860/2005; Ruling of the Federal Arbitrazh Court of West-Siberian District of March 31, 2006, No. 4-2109/2005.

[20] Article 1193 reads: "*A norm of a foreign law subject to application in keeping with the rules of the present section shall not be applicable in exceptional cases*

It is not an exaggeration to say that the *Megafon* decision raised many eyebrows both in Russia and outside of Russia. It catapulted the Russian legal community into a heated and prolonged debate about the status of shareholders' agreements in the Russian legal system, particularly in relation to Russian joint stock companies and limited liability companies. This debate eventually led to amendments of the JSC Act and the Act on Limited Liability Companies.

The amendment of the JSC Act introduced for the first time in Russian legislation the concept of "shareholders' agreements". Whilst confirming the acceptance of shareholders' agreements, and clarifying several aspects of them, Article 32(1) did leave important questions unanswered. For example, nothing is said about the relationship between freedom of contract and those provisions of Russian company legislation which are said to be mandatory. Nor was anything said about the relationship between provisions in a shareholders' agreement and corporate documents, such as the charter of a joint stock company, or the foundation agreement. A crucial question was how inconsistencies between corporate documents and a shareholders' agreement would affect the validity and effect of the shareholders' agreement.

Another issue left open was the question of applicable law to shareholders' agreements. It is neither addressed in Article 32(1), nor in any other Russian legislative act.

In addition, Article 32(1) does not state whether the company itself may be a party to the shareholders' agreement.

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when the consequences of its application would have obviously been in conflict with the fundamentals of law and order (public order) of the Russian Federation. In such a case a relevant norm Russian law shall be applied if necessary." A refusal to apply a norm of a foreign law shall not be based exclusively on a difference of the legal, political or economic systems of a relevant foreign state from the legal, political or economic system of the Russian Federation".

Subsequent to the *Megafon* case, and subsequent to the introduction of Article 32(1), there seems to have been a few cases where Russian courts have addressed the validity of shareholders' agreements. In these cases, the agreements were governed by Russian law.

One case is the so-called *Agro* case decided in September of 2010.[21] The case concerned a shareholders' agreement with respect to the closed joint stock company Agro. The shareholders were the Swedish joint stock company Agro Progressia AB and the Russian closed joint stock company Gord. The court found that the shareholders' agreement was invalid, *inter alia*, because it violated Article 32(1) of the JSC Act – *i.e.* the amendment to the JSC Act – in that the agreement apparently stipulated that its provisions were also binding on the company. This is in violation of paragraph 4 of Article 32(1), which stipulates that the shareholders' agreement is binding only on the parties to it. This violation would presumably have been sufficient to invalidate the agreement.

It is interesting to note that the court went on, however, to identify a number of provisions of the agreement, which deviated from corresponding provisions in the JSC Act. Even though this is not explicitly articulated by the court, the impression is conveyed that in its view such deviation would have led to the invalidity of the agreement, even if paragraph 4 of Article 32(1) of the JSC Act had not been violated.

[21] Ruling of the Arbitrazh Court of Samarskaya Oblast of September 7, 2010, No. A57-7487/2010; Ruling of the Ninth Appeal Arbitrazh Court of November 16, 2010, No. A57-7487/2010; Ruling of the Federal Arbitrazh Court of Povolzhskiy District of May 25, 2011, No. A57-7487/2010; Decision of the RF Supreme Arbitrazh Court "On Refusal to transfer the case for consideration of the Presidium of the RF Supreme Arbitrazh Court" of October 4, 2010, No. BAC-12320/11.

Similar conclusions seem to have been drawn by the courts in another case – The *Vernij Znak* case.[22] It deals with an agreement between the owners of a limited liability company.

The case was reportedly brought by two lawyers for the specific purpose of testing provisions in their shareholders' agreement which were deliberately made to deviate from provisions in the Act on Limited Liability Companies and in the Civil Code. The court came to the conclusion that those provisions of the agreement that were not in conformity with relevant statutory provisions were invalid.

Based on the *Agro* case and the *Vernij Znak* case, it would thus seem that unless the provisions in a shareholders' agreement comply with Russian company legislation, such provisions are deemed invalid. There is, however, no discussion in these two cases of whether or not the deviations in question – resulting in the invalidity of the contractual provisions – are from mandatory or non-mandatory provisions. The approach taken by the courts in these two cases raises the question of what is left of the principle of freedom of contract if deviations from statutory provisions lead to the invalidity of contracts.

As far as the question of applicable law to shareholders' agreements is concerned, it has not been addressed by any Russian court since the *Megafon* case and the *Russkij Standard* case. The *Russkij Standard* case was decided in December 2006, just a few months after the *Megafon* case.[23]

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[22] Ruling of the Arbitrazh Court of Moscow of November 24, 2010, No. A40-140918/09-132-894; Ruling of the Ninth Appeal Arbitrazh Court of February 17, 2011, No. A40-140918/09-132-894; Ruling of the Federal Arbitrazh Court of Moscow District of May 30, 2011, No. A40-140918/09-132-894; Decision of the Supreme Arbitrazh Court "On Refusal to transfer the case for consideration of the Presidium of the RF Supreme Arbitrazh Court" of September 12, 2011, No. BAC-110364/11.

[23] Ruling of the Arbitrazh Court of Moscow of 26 December 2006, No. A40-62048/06-81-343.

Russkij Standard Insurance was a Russian closed joint stock company. A shareholders' agreement had been entered into between Russkij Standard Invest LLC, and the French Company Cardif S.A. and Mr. Tariko. The parties had agreed to apply English law to the agreement. The court came to the conclusion, however, that the agreement had to be governed by Russian law. In reaching this conclusion the court referred to Article 1202 of the Civil Code, which provides that Russian law is the *lex corporationis* with respect to legal entities established pursuant to Russian law. In the view of the court, the shareholders' agreement dealt with issues concerning, *inter alia*, the legal status of Russkij Standard Insurance. Therefore, the court concluded, the principle of party autonomy with respect to the choice of applicable law to contracts, enshrined in Article 1210 of the Civil Code, could not be applied.

The court declared invalid the choice of law made by the parties. Applying Russian law to the shareholders' agreement, the court found that several of the provisions were not in conformity with Russian law, including the JSC Act. It therefore declared the shareholders' agreement invalid.

It would thus seem that the position of Russian courts remains that a shareholders' agreement with respect to a Russian joint stock company must be governed by Russian law. It is also worth noting that in both the *Megafon* and the *Russkij Standard* cases the shareholders' agreements had arbitration clauses providing for arbitration outside Russia. This fact did not, however, stop Russian courts from ruling on the validity of the agreements.

It should be noted, however, that a revised Article 1214 of the Civil Code provides that a choice of law with respect to a shareholders' agreement shall not affect the application of the mandatory rules of the *lex corporationis*. Whilst it remains unclear how this provision will be understood and

applied in practice, it does indicate that there may be room for the application of foreign, i.e. non-Russian, law to shareholders' agreements concerning Russian companies.

D. Arbitrability and shareholders' agreements

As a result of the amendment of the JSC Act, shareholders' agreements are now recognized and accepted by Russian law, at least at the conceptual level. Most shareholders' agreements involving foreign shareholders in Russian companies have an arbitration clause, providing for arbitration outside Russia. Russian courts have recently rendered decisions which seem to cast doubt on the arbitrability of disputes arising out of shareholders' agreements.

By way of background, it should be noted that in Russian arbitration legislation there is no definition of the concept of arbitrability. Article 1(2) of the 1993 Russian Law on International Commercial Arbitration does, however, define the scope of application of the Law such that it applies to disputes resulting from contractual and other civil-law relationships arising in the course of foreign trade and other forms of international economic relations, provided that the place of business of at least one of the parties is situated abroad. This rather broad language has been inspired by the equally broad language in footnote 2 to Article 1 of the UNCITRAL Model Law on International Commercial Arbitration.

Article 1(4) of the 1993 Russian Law on International Commercial Arbitration stipulates, however, that the Law does not affect any other law of the Russian Federation by virtue of which certain disputes may not be submitted to arbitration, or may be submitted to arbitration only

according to provisions other than those found in the 1993 Law.

In December 2011, the Constitutional Court of the Russian Federation issued a decision concerning a challenge to the constitutionality of provisions of the Arbitrazh Procedural Code stipulating that so-called corporate disputes are not arbitrable. The constitutional challenge was rejected.

Approximately a month later the Supreme Arbitrazh Court of the Russian Federation refused to refer to its presidium a decision by the Arbitrazh Court of the City of Moscow in a case dealing with the arbitrability of so-called corporate disputes.

The background to these two cases is the following. In an arbitration before the International Commercial Arbitration Court of the Russian Chamber of Commerce and Industry, Mr. Maximov had requested payment from JSC Novolipetskiy Metallurgicheskiy Kombinat of an amount under a share purchase agreement. The arbitral tribunal granted his request and ordered payment to be made to him. Novolipetskiy challenged the award before the Arbitrazh Court of the City of Moscow. The award was set aside by the court in a decision on June 28, 2011.

The Federal Arbitrazh Court of the Moscow District affirmed this decision on October 10, 2011. One of the grounds relied on by the Federal Arbitrazh Court was that the dispute was not arbitrable. In reaching its conclusion the court referred to Article 33 and Article 225(1) of the Arbitrazh Procedural Code.[24] It noted that corporate disputes were in the special, or exclusive, jurisdiction of the arbitrazh (commercial) courts and therefore not arbitrable. Elaborating on this view, the

[24] Article 33 outlines the jurisdiction – the special competence – of the arbitrazh (commercial) courts. Article 33 refers to Article 225.1 which defines so-called corporate disputes. Article 225.1 in turn lists a large number of issues which may arise with respect to the activities of a legal entity.

court stated that the dispute was not only related to the payment for the shares, but also dealt with conditions precedent for the transaction and related to the question of the title to the shares. In the view of the court, this took the dispute out of the realm of private law arbitrable disputes and made it inseparable from a public law dispute concerning the transfer of the title to the shares.

As mentioned above, Mr. Maximov appealed this decision to the Supreme Arbitrazh Court which denied his request to have the case referred to the Presidium of the Supreme Arbitrazh Court. In so doing, the court agreed with the lower courts' conclusion that corporate disputes envisaged by Article 33 and 225(1) of the Arbitrazh Procedural Code are not arbitrable. The Supreme Arbitrazh Court did not, however, explain why and how it came to this conclusion.

The logic seems to have been that all disputes which fall under the special/exclusive jurisdiction of the arbitrazh courts are non-arbitrable. This is the same approach taken by the arbitrazh courts in the past with respect to disputes concerning real estate in the Russian Federation. Pursuant to Article 248 of the Arbitrazh Procedural Code such disputes fall under the exclusive jurisdiction of the arbitrazh courts. The arbitrazh courts therefore treated such disputes as non-arbitrable.

In 2011, however, the Constitutional Court confirmed that Article 248 does not deal with the jurisdiction of arbitral tribunals, *i.e.* – arbitrability of disputes – but rather delineates the jurisdictional boundaries between Russian courts and foreign courts in international disputes.[25]

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[25] Ruling of the Constitutional Court of the Russian Federation of May 26, 2006, No. 10 "On the case on examination of the constitutionality of section 1 article 11 of the Civil Code of the Russian Federation, section 2 article 1 of the Federal Act "On Arbitrazh Courts", article 28 of the Federal Act "On State Registration of Rights for Real Estate and Transactions Therewith", section 1 article 33 and

As mentioned above, Mr. Maximov also filed a complaint with the Constitutional Court challenging the constitutionality of Article 33 of the Arbitrazh Procedural Code, basically arguing that it violated his constitutional right to judicial protection as stipulated in Article 46 of the Russian Constitution.

His complaint was rejected by the court. The Constitutional Court explained that the legislature has the right to establish specific procedures through which certain categories of disputes are to be heard. Thus, the Constitutional Court did not address – let alone rule on – the issue of the arbitrability of corporate disputes.[26]

Mr. Maximov's dispute was based on a share purchase agreement, and not on a shareholders' agreement. It would seem reasonable to assume, however, that Russian courts will take the same approach with respect to shareholders' agreements, since disputes under such agreements would in all likelihood fall under the definition of "corporate disputes" in Article 225(1) of the Arbitrazh Procedural Code.

E. Concluding remarks

The *Megafon* case gave rise to an intensive debate about the status of shareholders' agreements under Russian law. The amendment of the Joint Stock Companies Act, resulting in the introduction of Article 32(1), made clear that shareholders' agreements are recognized by Russian law, at least at the conceptual level. Judging from the few cases rendered subsequent to the introduction of Article 32(1), it would seem that in the view of Russian courts the principle of freedom of contract plays a limited role with respect to shareholders' agreements: unless the provisions in the

article 51 of the Federal Act "On Russian Federation" (on file with author in Russian only).

[26] See note 17 *supra*.

agreement conform to Russian company legislation, they, or maybe the entire agreement, are invalid. This approach is possibly explained by a different view taken by Russian courts with respect to the relationship between horizontal and vertical legal relationships. A contractual relationship is a typical horizontal relationship. In many jurisdictions such a relationship can exist even if some of the contractual provisions do not conform to relevant legislation. The typical vertical relationship is legislation, *i.e.* the relationship between the legislation/the legislator and those bound by the legislation in question. In many legal systems, horizontal and vertical relationships are allowed to exist in parallel. This does not mean that the horizontal relationship – the shareholders' agreements – can change or affect the vertical relationship – relevant company legislation – but the contractual provisions are still enforceable *as between the parties*. The view taken by Russian courts, however, seems to be that there must be complete harmony between the horizontal and vertical relationships.

It should be noted, however, that in 2014 a new provision – Article 67.2 – was introduced in the Civil Code which seems to accept that there may be differences between a shareholders' agreement and relevant legislation which will not automatically lead to the invalidity of the shareholders' agreement. It remains to be seen, however, how this provision will be interpreted and applied by Russian Courts.

Most shareholders' agreements involving foreign investors have arbitration clauses providing for international arbitration. Against this background, the decision by the Supreme Arbitrazh Court in *Maximov v. Novolipetskiy Metallurgicheskiy Kombinat* raises concerns. If this view were to prevail, it would become very difficult, if not impossible, to enforce foreign arbitral awards in Russia resulting from shareholders' agreements, since one of the grounds for refusing enforcement under the 1958 New York

Convention on the Recognition and Enforcement of Foreign Arbitral Awards, as well as under the 1993 Russian Law on International Commercial Arbitration, is the non-arbitrability of the dispute in question. There may, however, be a silver lining to this cloud in that the Constitutional Court has not yet ruled on the issue of arbitrability of corporate disputes.

IV. Decisions by Russian Courts invalidating international arbitration agreements

Another measure frequently used in an attempt to stop, or at least complicate, the arbitration, is to go to court in Russia and ask the court to declare the arbitration agreement in question invalid.

The different ways in which a Russian party – again, almost without exception the respondent – can achieve this are briefly described below. At the outset it should be noted, however, that even if the Russian party is successful – i.e. the arbitration agreement is declared invalid by the Russian court – in most jurisdictions this will not have any impact on the arbitration, at least in the sense that the arbitration will not be discontinued, or suspended. It is possible, however, that the arbitration might be slowed down because of the need to deal with the issue, either in writing, or at a hearing, or both.

The more serious consequence is that problems are likely to arise at the enforcement stage, i.e. if enforcement is attempted in Russia. It will be very difficult, if not impossible, to enforce a foreign arbitral award in Russia if a Russian court has declared that the arbitration agreement is invalid. This follows from Article V (1) (a) NYC, as well as from Section 36 (I)(i) of the 1993 Russian Law On International Commercial Arbitration.

The practical consequence of this situation is that winning parties are increasingly seeking enforcement outside Russia, to the extent that the Russian party has assets abroad.

As mentioned above, there are several ways in which a Russian court may be requested to declare an arbitration agreement invalid. One way – and perhaps the most frequently used – is that the Russian respondent simply ignores the arbitration agreement and files a petition with the Russian court that it declare the arbitration agreement, and/or the contract invalid. Under Russian law, like in most jurisdictions, an arbitration agreement is a bar to court proceedings. Article 148, section, 5 of the Arbitrazh Procedural Code, stipulates that the court must dismiss a claim which is covered by an arbitration agreement, unless it finds that the arbitration agreement is invalid. There are many examples of Russian courts having invalidated arbitration agreements providing for arbitration outside Russia.

Another possibility is for the shareholders of the Russian party to go to the court, in their capacity as interested parties, and ask the court to declare the contract and/or the arbitration agreement invalid, because it is detrimental to their interests. There are also cases where shareholders have argued that the transaction in question, which is encapsulated in the disputed contract, violates provisions in the JSC Act and that therefore the contract is invalid. Since the shareholders are not parties to the arbitration agreement, Russian courts cannot dismiss such cases on the ground that the claims are covered by an arbitration agreement.

A further way in which Russian courts may come to rule on the validity of an arbitration agreement is if the general procurator, i.e. the prosecutor's office, files a claim for the protection of public interests. Under Article 5 of the Arbitrazh Procedural Code and Article 45 of the Civil Procedural Code,

the prosecutor has the right to go to court to protect the public interest. It should be emphasized, however, that the prosecutor must prove that a public interest is violated by the transaction in question. If not, his motion must be denied.

As discussed above, decisions by Russian courts declaring arbitration agreements invalid do not as a rule create problems for the actual conduct of the arbitration. The problems arise at the enforcement stage. To the extent that the winning party is prepared to pursue enforcement in Russia, the best counter-argument to claims that the arbitration agreement is invalid, is to rely on the doctrine of separability. This principle is enshrined in Article 16(1) of the 1993 Russian Law On International Commercial Arbitration. The doctrine of separability may help since most court decisions do not specifically invalidate the arbitration agreement, but rather the contract as such. Therefore, it could be argued that the arbitration agreement survives.

The New LCIA Rules

MANUEL ARROYO

Contents

I. Introduction

Over the past decade, the global economy and business community have faced many challenges. Since it is the purpose of arbitral institutions to serve that community whenever disputes arise, their arbitration rules required adjustments and amendments.

As a result, a whole series of arbitral institutions revised their rules of arbitration and enacted new sets of rules.[1] Given the LCIA's history and pre-eminent role in international arbitration, its rules also underwent modification in the framework of this *global revision trend*, so to speak, which is still ongoing.[2]

The LCIA Rules of 1998 were revised to serve the new needs of the legal and business communities in an effective way, and we will now turn to the main modifications of the new LCIA Rules, in force since 1 October 2014. It would go beyond the scope of this article to address all changes. For those interested, any and all changes, even of an insignificant or only semantic nature, are reflected in the appended *Table of Comparison* between the 2014 and 1998 LCIA Rules.[3]

II. History of the LCIA

The LCIA was founded in 1892[4] and is thus considered the world's oldest (continuously established) international arbitration institution.[5]

In 1883, the Court of Common Council of the City of London set up a committee charged with establishing a tribunal to

[1] For example, ACICA in 2005 (expedited rules in 2011), DIAC in 2007, SCC in 2010, CAM in 2010, CRCICA in 2011, ICC in 2012, the Swiss Chambers' Arbitration Institution in 2012, SIAC in 2013, KLRCA in 2013, HKIAC in 2013, CAS in 2013, VIAC in 2013, AAA in 2013, CEPANI in 2013, ICDR in 2014, WIPO in 2014, JAMS in 2014, LCIA in 2014, JCAA in 2014, and both NAI and CIETAC in 2015 (all dates refer to the coming into effect of the rules).

[2] For instance, SIAC recently announced that it is currently reviewing its rules, which are to be released in mid-2016 (cf. GAR news of 20 August 2015); likewise, CIArb launched its new Arbitration Rules 2015, which will take effect on 1 December 2015 (cf. CIArb news of 8 September 2015).

[3] This comprehensive table, in which all provisions of both sets of rules are compared one by one, can be found at the end of this publication.

[4] As shown below, its original name was *City of London Chamber of Arbitration*.

[5] TRIEBEL/HUNTER, p. 346; TURNER/MONTASHAMI, p. 1.

adjudicate both domestic and, in particular, transnational commercial disputes. As *The Law Quarterly Review* (LQR) reported at the inauguration of the tribunal a few years later:[6]

> "*This Chamber is to have all the virtues which the law lacks. It is to be expeditious where the law is slow, cheap where the law is costly, simple where the law is technical, a peacemaker instead of a stirrer-up of strife*."[7]

On 23 November 1892, the *City of London Chamber of Arbitration* was formally inaugurated, to be renamed the *London Court of Arbitration* in 1903, and to finally become the *London Court of International Arbitration* (LCIA) in 1981 so as to better reflect the nature of its work, which by then was predominantly international.[8]

For several reasons, the 1980s were a key period in the LCIA's history. To begin with, the arbitration rules were revised twice (in 1981 and 1985). These revisions forged the modern framework of the current LCIA Rules. Further, the *LCIA Court* was established as the supervisory body for the application of the rules, along with the Secretariat.[9] In addition, the LCIA's corporate structure changed in 1986, as it was registered as a fully independent, private and not-for-profit company, limited by guarantee.[10]

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6 Cf. 1893 IX LQR 86.

7 See *LCIA, History*: http://www.lcia.org//LCIA/history.aspx.

8 See *LCIA, History*: http://www.lcia.org//LCIA/history.aspx.

9 As to the organization and the structure of the LCIA under the new 2014 Rules, especially the Registrar and the Court, cf. SCHERER/RICHMAN/GERBAY, pp. 4-10.

10 SCHERER/RICHMAN/GERBAY, p. 3, para. 5; see also *LCIA, History*: http://www.lcia.org//LCIA/ history.aspx.

III. The Revision of the 1998 Rules

The aforementioned changes in the 1980s are deemed to be the cornerstone of the *world class institution* the LCIA is today.[11]

However, the last two decades must also be considered as key, since they led to a significant increase in the overall number of new cases (including arbitrations, mediations and other forms of alternative dispute resolution), which doubled in number between 1997 and 2007. The figure doubled again between early 2008 and the end of 2009 due to the global financial crisis. According to the latest available statistics, 290 arbitrations were referred to the LCIA in 2013, i.e. almost 10% more than the previous year.[12] Therefore, over 450 arbitrations are pending at the LCIA at any given time with a total amount in dispute of several billion US dollars. As a matter of fact, almost 20% of the claims handled by the LCIA in 2013 were for sums in excess of USD 20 million.[13]

While London, Paris, New York, Geneva and Zurich have always been seen as leading international arbitration venues, Singapore and Hong Kong quickly emerged as viable alternatives.[14] To remain modern and flexible in this competitive environment, the LCIA pushed for a revision of the 1998 Rules. As a result, a drafting committee, chaired by Jonny Veeder QC, started working on the revision in early 2010 and concluded its work in June 2014, whereupon the new Rules were adopted by the LCIA Court on 25 July 2014.

The new Rules came into effect on 1 October 2014 and apply to all arbitrations initiated at the LCIA after that date, unless

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11 DELVOLVÉ, p. 603.
12 See *Registrar's Report 2013*: http://www.lcia.org/LCIA/reports.aspx.
13 See *Registrar's Report 2013*: http://www.lcia.org/LCIA/reports.aspx.
14 SCHERER/RICHMAN/GERBAY, p. 4, para. 8.

the parties agree to either the 1998 LCIA Rules or another set of arbitration rules.[15] Underscoring the institution's international nature, the LCIA administers cases arising under any system of law in any venue worldwide. The parties are thus free to agree on a seat other than London.[16]

To promote its internationalization, the LCIA stresses: *"The LCIA arbitration rules are universally applicable, being suitable for all types of arbitrable disputes. They offer a combination of the best features of the civil and common law systems, including in particular:*

- *maximum flexibility for parties and tribunals to agree on procedural matters;*
- *speed and efficiency in the appointment of arbitrators, including expedited procedures;*
- *means of reducing delays and counteracting delaying tactics;*
- *emergency arbitrator provisions;*
- *Tribunals' power to decide on their own jurisdiction;*
- *a range of interim and conservatory measures;*
- *Tribunals' power to order security for claims and for costs;*
- *special powers for joinder of third parties and consolidation;*
- *waiver of right of appeal;*

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[15] SCHERER/RICHMAN/GERBAY, p. 4, para. 8; *LCIA*, News July 2014, LCIA Arbitration Rules - effective 1 October 2014: http://www.lcia.org//News/lcia-arbitration-rules-effective-1-october-2014.aspx.

[16] See *LCIA*, *Introduction*: http://www.lcia.org/Dispute_Resolution_Services/LCIA_Arbitration.aspx.

- *costs computed without regard to the amounts in dispute;*
- *staged deposits - parties are not required to pay for the whole arbitration in advance."*[17]

The LCIA's charges (and the fees charged by the arbitral tribunals it appoints) are not based on the sum in dispute as the LCIA *"is of the view that a very substantial monetary claim (and/or counterclaim) does not necessarily mean a technically or legally complex case and that arbitration costs should be based on time actually spent by administrator and arbitrators alike."*[18]

Needless to stay, this commendable policy is in stark contrast to that of other international arbitration institutions, which base the (advance on) costs and fees on the amount in dispute.

IV. Key Changes in the 2014 Rules

A. Preliminary Remarks

When looking at the aforementioned *Table of Comparison* between the 2014 and the 1998 LCIA Rules, it is striking to the eye that each of the 32 provisions of the 1998 Rules, including their preamble, have been amended.[19] Yet on closer examination it turns out that a whole series of changes are simply of a cosmetic nature. As the LCIA's

[17] *LCIA, Arbitration – LCIA Arbitration*: http://www.lcia.org/Dispute_Resolution_Services/LCIA_Arbitration.aspx.

[18] *LCIA, Arbitration – LCIA Arbitration*: http://www.lcia.org/Dispute_Resolution_Services/ LCIA_Arbitration.aspx.

[19] The Table of Comparison is reproduced in the Appendix at the end of this publication.

former Director General put it, the new rules are *"more about evolution than revolution"*.[20]

Nonetheless, the new 2014 Rules do contain truly innovative amendments, which mostly correspond to similar modifications of other rules frequently used in international arbitration. The key changes concern (i) counsel conduct; (ii) the emergency arbitrator; (iii) multi-party arbitration; (iv) the default seat of the arbitration; and (v) efficiency and expeditious dispute resolution.

B. Counsel Conduct

This is the most visible and also probably the most ambitious change in the new LCIA Rules. Article 18 (in conjunction with Annex 1) introduces a novel mechanism aimed, *inter alia*, at providing the arbitral tribunal with the power and tools to sanction poor conduct by a party's legal counsel.

These provisions bear some similarity to the *IBA Guidelines on Party Representation in International Arbitration*,[21] and the LCIA is the first international arbitral institution to take specific action in this matter.

The main features of Article 18 include:

> (i) the requirement for each party to ensure that all its legal representatives have agreed *"as a condition [to their] representation"* to comply with the general guidelines contained in the Annex to the LCIA Rules;[22] and

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[20] ADRIAN WINSTANLEY, cited by KATE BEIOLEY, in: *The LCIA - New Rules and New Frontiers*, The Lawyer, 19 March 2014.

[21] The IBA Guidelines were approved in May 2013. They are available at: http://www.ibanet.org/Publications/publications_IBA_guides_and_free_materials.aspx.

[22] Art. 18.5 LCIA Rules 2014.

> (ii) the power of arbitral tribunals both to decide whether a legal representative has violated the guidelines, and, if so, to order sanctions against the legal representative (which sanctions range from a simple reprimand to *"any other measure"* necessary for the tribunal to fulfil its general duties under the Rules, including that of providing a fair, efficient and expeditious process).[23]

Even though the combination of ethical guidelines with the power of the arbitral tribunal to order sanctions in case of their infringement has been characterized as a *remarkable innovation*, this novel approach is expected to raise difficulties in practice.[24]

For instance, if the *last resort measure*, i.e. the exclusion of a party's counsel from the arbitration, is ordered, this might render the award unenforceable – especially, but not only, in jurisdictions that are known for easily refusing enforcement against their home companies. This is so, because the party whose counsel was excluded will, most likely, argue before the enforcement judge that it was not able to present its case fully, or that it could not present it in an equally effective way as the opposing party who was represented by professional counsel during the entire arbitration.

This example also shows that a respondent party, knowing full well that it has no case, might (in agreement with its counsel) torpedo the arbitral proceedings to provoke the exclusion of its counsel so as to create a ground for refusing enforcement (e.g., within the meaning of Article V(1)(b) NYC.

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[23] Art. 18.6 LCIA Rules 2014.

[24] SCHERER/RICHMAN/GERBAY, p. 12, para. 4 (for detail, cf. Chapter 18); for a critical analysis of the *IBA Guidelines on Party Representation*, cf. DASSER, pp. 99-101; see also the critical comments and conclusions of GEISINGER/SCHNEIDER/DASSER, pp. 4-5.

C. Emergency Arbitrator

The newly established emergency arbitrator enables the parties to request interim measures prior to the constitution of the arbitral tribunal.[25] A party needing urgent interim or conservatory measures that cannot wait until the arbitral tribunal is constituted (i.e. emergency relief) may submit an application for such measures under Article 9B LCIA Rules.[26]

The application must be filed with the LCIA's Registrar in writing (preferably by electronic means) and must include, *inter alia*, a reasoned application for the relief sought.[27]

The emergency arbitrator will have to render a decision on the application as soon as possible, but no later than 14 days following his appointment.[28] This deadline may only be extended by the LCIA Court in exceptional circumstances[29] or by a written agreement of all parties.[30]

The emergency arbitrator's decision does not bind the (subsequently constituted) arbitral tribunal. The tribunal may thus modify or even annul the measure ordered.[31]

It is worth recalling that Article 9 of the former LCIA Rules[32] already permitted the expedited formation of the arbitral tribunal in cases of exceptional urgency. This provision – which has been kept in the new Rules as Article 9A[33] –

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25 HODGES/AMBROSE/NAISH, sect. 5.
26 Art. 9B (9.4-9.14) LCIA Rules 2014.
27 For detail, see Art. 9.5 LCIA Rules 2014.
28 Art. 9B (9.8) LCIA Rules 2014.
29 Art. 22.5 in conj. with Art. 9B (9.8) LCIA Rules 2014.
30 Art. 9B (9.8) LCIA Rules 2014.
31 Art. 9B (9.11) LCIA Rules: *"Any order or award of the Emergency Arbitrator (apart from any order adjourning to the Arbitral Tribunal, when formed, any part of the claim for emergency relief) may be confirmed, varied, discharged or revoked, in whole or in part, by order or award made by the Arbitral Tribunal upon application by any party or upon its own initiative."*
32 Cf. Art. 9 (9.1-9.3) LCIA Rules 1998.
33 Art. 9A (9.1-9.3) LCIA Rules 2014.

rendered the question of the emergency arbitrator largely moot and offered an extremely effective tool for parties needing emergency relief in cases of exceptional urgency. However, mainly for marketing reasons, the LCIA decided to introduce in the 2014 Rules the emergency arbitrator provisions, i.e. to be in line with the rules of other international institutions.[34]

As mentioned, the new Rules have maintained the classical mechanism for the expedited formation of the arbitral tribunal, with both systems (Art. 9A and Art. 9B) now being available and combinable in LCIA arbitrations.[35]

For the sake of completeness, it should be noted that the parties may agree in writing to *opt out* of Article 9B.[36] Conversely, if the arbitration agreement in question was concluded before 1 October 2014, the parties may *opt in* to Article 9B, failing which the emergency arbitrator provisions will not apply.[37]

In addition, the parties' rights to apply to a state court for interim or conservatory relief are preserved.[38] However, any such application made during emergency proceedings must be notified to the emergency arbitrator, the LCIA's Registrar and all other parties.[39]

D. Multi-Party Arbitration

The 1998 LCIA Rules introduced a provision on joinder, which allowed arbitral tribunals to join a third party even

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[34] Such as the ICC (Appendix V to the ICC Rules), SIAC (Art. 26.2 in conj. with Schedule 1), HKIAC (Schedule 4), or the Swiss Chambers' Arbitration Institution (Art. 43 Swiss Rules).

[35] SCHERER/RICHMAN/GERBAY, p. 14, para. 10.

[36] Art. 9B (9.14(ii)) LCIA Rules 2014.

[37] Art. 9B (9.14(i)) LCIA Rules 2014.

[38] Art. 9.12 and Art. 25.3 LCIA Rules 2014.

[39] Art. 9.12 LCIA Rules 2014; HODGES/AMBROSE/NAISH, sect. 5.

over the objection of one of the parties to the proceedings.[40] By contrast, the 1998 Rules lacked express provisions on consolidation. Given that by the year 2013 all other major institutions[41] had incorporated rules on consolidation, it was clear for the drafters of the new LCIA Rules that express provisions had to be introduced.[42]

The new provisions on consolidation contemplate three scenarios:

> (i) the arbitral tribunal may order consolidation with the approval of the LCIA Court, where the parties agree to this in writing;[43]
>
> (ii) prior to the appointment of the arbitral tribunal, the LCIA Court may consolidate two (or more) arbitrations if the two arbitrations were initiated under the same arbitration agreement between the same parties;[44] thus, the new Rules empower the LCIA Court to consolidate two sets of proceedings without the agreement of all parties;[45]
>
> (iii) the arbitral tribunal may also order consolidation without the parties' agreement, where there are multiple arbitrations involving the same parties and only one tribunal has been appointed (or the tribunal appointed in the different arbitrations is the same); yet such consolidation can only be ordered with the approval of the LCIA Court; in addition, this third option

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40 Cf. Art. 22.1(h) LCIA Rules 1998, which can now be found in Art. 22.1(viii) LCIA Rules 2014.

41 To be precise, all except SIAC.

42 The new provisions have been included in Art. 22 LCIA Rules 2014, which is entitled *"Additional Powers"*.

43 It is worth noting that Art. 22.1(ix) LCIA Rules 2014 simply confirms the existing practice of the LCIA under the 1998 Rules (SCHERER/RICHMAN/GERBAY, p. 13, para. 7).

44 Art. 22.6 LCIA Rules 2014.

45 SCHERER/RICHMAN/GERBAY, p. 13, para. 8.

is limited to cases where the various proceedings are initiated under the same arbitration agreement (or under compatible arbitration agreements between the same parties).[46]

Despite the restrictive requirements of the aforementioned third option, it has rightly been considered as *"a welcome addition which brings the LCIA Rules in line with modern practice."*[47]

Nevertheless, the new Rules have not expanded the potential for joinder of parties compared with the former Rules. Nor do the new Rules allow for disputes under multiple related contracts containing compatible arbitration agreements to be brought in a single arbitration from the outset.[48]

E. Default Seat of Arbitration

Under the former Rules of 1998, if the parties had failed to agree on a seat of arbitration, London was the default seat (unless the LCIA Court determined that another seat was more appropriate in light of the circumstances of the case).[49]

Establishing London as the default seat has often been criticized and is deemed to be one of the main reasons why the institution still has, to some extent, a reputation of being Anglo-centric.[50] For this reason, many practitioners were

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[46] Art. 22.1(x) LCIA Rules 2014.

[47] SCHERER/RICHMAN/GERBAY, p. 13, para. 8.

[48] HODGES/AMBROSE/NAISH, sect. 7.

[49] Art. 16.1 LCIA Rules 1998 provided: *"The parties may agree in writing the seat (or legal place) of their arbitration. Failing such a choice, the seat of arbitration shall be London, unless and until the LCIA Court determines in view of all the circumstances, and after having given the parties an opportunity to make written comments, that another seat is more appropriate."*

[50] TURNER/MONTASHAMI, p. 115.

impatient to see whether the LCIA would finally get rid of London as its default seat. *"Sadly, it has not."*[51]

Nonetheless, the new provisions concerning the seat have evolved in a quite significant manner. The new 2014 Rules provide that the parties may not only agree in writing on the seat of arbitration before the formation of the arbitral tribunal, but even after such formation, such agreement however being subject to the tribunal's prior consent.[52]

Moreover, absent a party agreement on the seat, the seat is by default London, unless the arbitral tribunal (and *not the LCIA Court* as under the 1998 Rules) decides that another seat is more appropriate in view of the circumstances.[53] This modification has been welcomed, because the arbitral tribunal is better placed than the LCIA Court to make this decision due to its deeper knowledge of the case.[54]

Finally, it is worth mentioning that both under the 1998 and the 2014 Rules, the parties must be given a reasonable opportunity to submit written comments prior to the arbitral tribunal[55] determining that another arbitral seat is more appropriate than London.[56]

F. Efficiency and Expeditious Dispute Resolution

To reduce dissatisfaction of the users about costs and delays, several arbitral institutions have addressed this issue in recent years. In particular, the ICC Commission on

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51 SCHERER/RICHMAN/GERBAY, p. 14, para. 12.
52 Art. 16.1 LCIA Rules 2014.
53 Art. 16.2 LCIA Rules 2014.
54 SCHERER/RICHMAN/GERBAY, p. 14, para. 13, stressing that the number of cases where the LCIA Court was asked to decide on the seat under the 1998 Rules was negligible.
55 Or the LCIA Court under the former Rules of 1998.
56 Cf. Art. 16.1 LCIA Rules 1998 and Art. 16.2 LCIA Rules 2014.

Arbitration published guidelines for controlling time and costs in arbitration in 2007,[57] and the revised 2012 ICC Rules subsequently incorporated a number of amendments aimed at reducing time and costs.[58] Similarly, several amendments of the 2014 LCIA Rules aim at dealing with unnecessary delays and expenses.[59]

For instance, candidate arbitrators are now required to specify at the outset whether they are *"ready, willing and able to devote sufficient time, diligence and industry to ensure the expeditious and efficient conduct of the arbitration"*, and such declaration must be furnished to the LCIA's Registrar *promptly.*[60] Contrary to the recently established practice of the ICC, the new LCIA Rules fall short of requesting candidates to indicate the exact number of cases in which they are currently involved as counsel and arbitrators, which has been considered as *unfortunate*.[61]

The 1998 Rules already placed on arbitral tribunals the duty to avoid unnecessary delay and expense, so as to provide for the fair and efficient resolution of disputes.[62] The former Rules also provided that the parties could agree on the conduct of the proceedings *consistent with the arbitral tribunal's general duties*.[63] The new Rules not only reiterate the foregoing, but reinforce this by adding the tribunal's duty to provide *"expeditious"* dispute resolution.[64]

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57 Cf. ICC Publication no. 843, *Techniques for Controlling Time and Costs in Arbitration* (2007): http://www.iccgermany.de/fileadmin/ICC_Dokumente/ICC_arbitration_TimeCost_E.pdf.

58 Cf. Appendix IV (ICC Rules 2012) on *Case Management Techniques*, which in closing expressly refers to ICC Publication no. 843; for a commentary, see BEYELER/MEIER, pp. 790-795.

59 HODGES/AMBROSE/NAISH, sect. 3.

60 Art. 5.4 LCIA Rules 2014.

61 SCHERER/RICHMAN/GERBAY, p. 16, para. 18.

62 Cf. Art. 14.1(ii) LCIA Rules 1998.

63 Cf. Art. 14.1(intro) LCIA Rules 1998.

64 Art. 14.4(ii) LCIA Rules 2014.

Further, the revised Rules place an express obligation to *"act at all times in good faith"* on the parties,[65] the arbitral tribunal[66] as well as the LCIA.[67] These new provisions on the duty to act in good faith bear a glaring resemblance to Article 15(7) Swiss Rules, according to which *"all participants in the arbitral proceedings shall act in good faith"*.

Yet another measure to speed up the resolution of disputes is the requirement of the parties and the tribunal *to make contact* as soon as practicable but *no later than 21 days* after notification that the tribunal has been constituted.[68] No such rule could be found in the former Rules. Contact can either be made at a hearing in person, a telephone conference-call, a video conference or an exchange of correspondence.[69] Even though meeting the parties at an early stage of the proceedings was already the practice of some tribunals under the former Rules, *"this new provision should give the institution the necessary tools to push slower Tribunals into action"*.[70]

To expedite the proceedings, the tribunal is now required to issue its final award as soon as reasonably possible following the last submission of the parties (whether made orally or in writing). The tribunal must set aside adequate time for deliberations as soon as possible after the anticipated date of the last submission. In addition, the tribunal is required to notify the parties and the LCIA's Registrar of the timetable

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65 Art. 14.5 LCIA Rules 2014; Art. 32.2 LCIA Rules 2014.

66 Art. 32.2 LCIA Rules 2014.

67 I.e. the LCIA, the LCIA Court and the Registrar (cf. Art. 32.2 LCIA Rules 2014).

68 To be precise, at the latest 21 days from receipt of the Registrar's written notification of the formation of the arbitral tribunal (Art. 14.1 LCIA Rules 2014).

69 Art. 14.1 LCIA Rules 2014.

70 SCHERER/RICHMAN/GERBAY, p. 16, para. 20, noting that *"one point of uncertainty which remains is how this 21-day deadline will work with the requirement under Article 24.3 that the Arbitral Tribunal should not normally proceed with the arbitration until at least one share of the initial deposits has been paid."*

for making the award and must notify the parties of the time it has set aside for its deliberations.[71]

However, the new Rules do not empower the LCIA Court to sanction the tribunal for failure to meet its duties under this provision (the ultimate sanction would be removal of the tribunal). Nonetheless, it remains *"to be seen whether the fees of the tribunal may be affected by failure to meet its requirements under Article 15.10 by virtue of the LCIA's assessment of the Arbitration Costs."*[72]

In addition to the provisions for expedited formation of the tribunal,[73] a corresponding provision has been included to avoid delay in replacing an arbitrator.[74]

A further innovation that deserves attention concerns the tribunal's discretion to allocate the parties' legal costs and the arbitration costs.[75] While the LCIA Rules have always provided that the *costs follow the event* rule should normally be the basis for that decision,[76] arbitral tribunals are now expressly entitled to take into account the parties' conduct in the arbitration, including any cooperation in facilitating the proceedings as to time and costs (and any non-cooperation resulting in undue delay and unnecessary expense).[77] *"This should allow Tribunals to sanction bad faith manoeuvres, which in the longer term should allow them to curb such behaviour."*[78]

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71 Art. 15.10 LCIA Rules 2014.
72 HODGES/AMBROSE/NAISH, sect. 2.
73 Art. 9A LCIA Rules.
74 Art. 9C (9.15-9.17) LCIA Rules 2014.
75 Art. 28.4 LCIA Rules 2014.
76 Art. 28.4 LCIA Rules 1998, mentioning the *"general principle that costs should reflect the parties' relative success and failure in the award or arbitration, except where it appears to the Arbitral Tribunal that in the particular circumstances this general approach is inappropriate."*
77 Art. 28.4 LCIA Rules 2014.
78 SCHERER/RICHMAN/GERBAY, p. 17, para. 22; HODGES/AMBROSE/NAISH, sect. 1.

V. Further Modifications

A. Preliminary Remarks

The new LCIA Rules also contain some minor modifications that will, most certainly, hardly alter the overall conduct of the proceedings. Nevertheless, they deserve to be mentioned.

B. Online Filing

To begin with, the new LCIA Rules have introduced the possibility of filing submissions electronically. A whole series of submissions can thus be filed directly on the website of the LCIA. To that end, the LCIA offers on its website standard forms for the parties to use.[79]

This online system allows the parties to file in electronic form (i) the Request for Arbitration as well as the Response to it; (ii) applications for expedited formation of the tribunal; (iii) applications for expedited appointment of a replacement arbitrator; (iv) applications for the appointment of an emergency arbitrator; and (v) any supporting documentation.[80]

The parties may also pay any filing fees online. They can further generate a pdf document at the conclusion of the process (and following payment of any fee), which they can print or save to their computer. In addition, the parties have – through their own account – access to all their filings made online, including payment history.[81]

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[79] See *LCIA, Online Filing*: http://onlinefiling.lcia.org/.

[80] See *LCIA, Online Filing*: http://onlinefiling.lcia.org/. The forms are reproduced in the *User's Guide* of SCHERER/RICHMAN/GERBAY, pp. 421-455.

[81] See *LCIA, Online Filing*: http://onlinefiling.lcia.org/.

C. Shorter Deadlines

In any area of law, the meeting of deadlines is essential. Even though the procedural deadlines mentioned below have been shortened by only a few days, in particular, whowere especially practitioners used to the longer deadlines under the former LCIA Rules should pay close regard to these new deadlines.

In particular, the deadline for the Respondent to submit a Response to the Request for Arbitration has been reduced from 30[82] to 28 days.[83]

Equally, a party's challenge to an arbitrator must now be raised within 14 days[84] (of becoming aware of grounds giving rise to justifiable doubts as to the arbitrator's impartiality or independence) instead of 15 days under the 1998 Rules.[85]

Lastly, the deadline for a request for correction of the award – or for an additional award – has been shortened from 30[86] to 28 days upon receipt of the award.[87]

VI. Conclusions

As stated initially, the revision of the LCIA Rules is part of an international trend to modernize arbitration rules. All in all, the new LCIA Rules retain the essential features of LCIA arbitration. At the same time, new provisions have been included to address, amongst others, disputes involving multiple parties, more efficient case management

82 Cf. Art. 2.1 LCIA Rules 1998.
83 Art. 2.1 LCIA Rules 2014.
84 Art. 10.3 LCIA Rules 2014.
85 Cf. Art. 10.4 LCIA Rules 1998.
86 Cf. Art. 27.1 LCIA Rules 1998.
87 Art. 27.1 LCIA Rules 2014.

procedures as well as interim relief available from the newly established emergency arbitrator.

Given their aim to provide guidance in complex matters on the one hand, and to reduce time and costs on the other, it can be expected that the revised LCIA Rules will be welcomed by both arbitration practitioners and the users of international arbitration. At any rate, by enacting the new Rules, the LCIA has definitely kept pace with the latest developments in international arbitration. The rules on counsel conduct are unique and the LCIA is the first major institution to provide arbitral tribunals with powers in this respect, although it remains to be seen to what extent arbitrators will actually make use of these powers.

In closing, attention is drawn to the aforementioned table of comparison that reflects any and all changes introduced by the new Rules.[88]

[88] Appendix: Table of Comparison between the 2014 and 1998 LCIA Rules. The author is most grateful to Ms. MLaw Andrea Gloor for her invaluable support in connection with creating this comprehensive table.

Bibliography

BEIOLEY, KATE, in: The LCIA - New Rules and New Frontiers, The Lawyer, 19 March 2014

BEYELER, KARIN/MEIER, ANDREA, Commentary on Appendix IV ICC Rules, in: M. Arroyo (ed.), Arbitration in Switzerland – The Practitioner's Guide, Kluwer Law International, 2013

CIArb, 8 September 2015, International Arbitration Rules launched: https://www.ciarb.org/news-views-events/ciarb-news

DASSER, FELIX, A Critical Analysis of the IBA Guidelines on Party Representation, in: Müller/Rigozzi/Besson (eds.), New Developments in International Commercial Arbitration 2014, Zurich/Basel/Geneva, 2014

DELVOLVÉ, JEAN-LOUIS, Le centenaire de la LCIA (London Court of International Arbitration), Revue de l'arbitrage, Paris, 1993

GAR, New rules for SIAC, 20 August 2015: http://global-arbitrationreview.com/news/article/34079/new-rules-siac/

GEISINGER, ELLIOTT/SCHNEIDER, MICHAEL E./DASSER, FELIX, IBA Guidelines on Party Representation in International Arbitration – Comments and Recommendations by the Board of the Swiss Arbitration Association (ASA), issued on 4 April 2014: http://www.arbitration-ch.org/pages/en/publications/conference-and-position-papers/index.html

HODGES, PAULA/AMBROSE, HANNAH/NAISH, VANESSA, The new LCIA Rules, Lexology, 28 July 2014: http://www.lexology.com/library/detail.aspx?g=d3c2456c-46f3-4fd6-b84b-b35371686152

SCHERER, MAXI/RICHMAN, LISA/GERBAY, RÉMY, Arbitrating under the 2014 LCIA Rules: A User's Guide, Kluwer Law International, 2015

TRIEBEL, VOLKER/HUNTER, ROBERT, LCIA-Schiedsregeln, in: R.A. Schütze (ed.), Institutionelle Schiedsgerichtsbarkeit, Cologne/Berlin/Munich, 2006

TURNER, PETER/MONTASHAMI REZA, A Guide to the LCIA Arbitration Rules, Oxford University Press, 2009

IBA Guidelines on Party Representation in International Arbitration, 2013: http://www.ibanet.org/Publications/publications_IBA_guides_and_free_materials.aspx

ICC Publication no. 843, Techniques for Controlling Time and Costs in Arbitration, 2007: http://www.iccgermany.de/fileadmin/ICC_Dokumente/ICC_arbitration_TimeCost_E.pdf

LCIA, Arbitration – LCIA Arbitration: http://www.lcia.org/Dispute_Resolution_Services/LCIA_Arbitration.aspx

LCIA, History: http://www.lcia.org//LCIA/history.aspx

LCIA, Introduction: http://www.lcia.org/Dispute_Resolution_Services/ LCIA_Arbitration.aspx

LCIA, News July 2014, LCIA Arbitration Rules - effective 1 October 2014: http://www.lcia.org//News/lcia-arbitration-rules-effective-1-october-2014.aspx

LCIA, Online Filing: http://onlinefiling.lcia.org/

LCIA, Registrar's Report 2013: http://www.lcia.org/LCIA/reports.aspx

Appendix: Table of Comparison between the 2014 and 1998 LCIA Rules

LCIA Rules 2014	LCIA Rules 1998
Preamble Where any agreement, submission or reference howsoever made or evidenced in writing (whether signed or not) provides in whatsoever manner for arbitration under the rules of or by the LCIA, the London Court of International Arbitration, the London Court of Arbitration or the London Court, the parties thereto shall be taken to have agreed in writing that any arbitration between them shall be conducted in accordance with the LCIA Rules or such amended rules as the LCIA may have adopted hereafter to take effect before the commencement of the arbitration and that such LCIA Rules form part of their agreement (collectively, the "Arbitration Agreement"). These LCIA Rules comprise this Preamble, the Articles and the Index, together with the Annex to the LCIA Rules and the Schedule of Costs as both from time to time may be separately amended by the LCIA (the "LCIA Rules").	Where any agreement, submission or reference ~~provides~~ in writing ~~and~~ in whatsoever manner for arbitration under the rules of the LCIA or by the ~~Court of the LCIA ("the LCIA Court")~~, the parties shall be taken to have agreed in writing that ~~the~~ arbitration shall be conducted in accordance with the ~~following~~ rules ~~("the Rules")~~ or such amended rules as the LCIA may have adopted hereafter to take effect before the commencement of the arbitration. ~~The Rules include the Schedule of Costs in effect at the commencement of the arbitration, as separately amended from time to time by the LCIA Court.~~
Article 1 Request for Arbitration 1.1 Any party wishing to commence an arbitration under the LCIA Rules (the "Claimant") shall deliver to the Registrar of the LCIA Court (the "Registrar") a written request for arbitration (the "Request"), containing or accompanied by:	*Article 1 Request for Arbitration* 1.1 Any party wishing to commence an arbitration under ~~these~~ Rules ("the Claimant") shall ~~send~~ to the Registrar of the LCIA Court ("the Registrar") a written request for arbitration ("the Request"), containing or accompanied by:

(i) the full name and all contact details (including postal address, e-mail address, telephone and facsimile numbers) of the Claimant for the purpose of receiving delivery of all documentation in the arbitration; and the same particulars of the Claimant's legal representatives (if any) and of all other parties to the arbitration;	(a) the name~~s~~, ~~addresses~~, telephone, facsimile, ~~telex and e-mail numbers (if known)~~ of ~~the~~ parties to the arbitration ~~and of their legal representatives;~~
(ii) the full terms of the Arbitration Agreement (excepting the LCIA Rules) invoked by the Claimant to support its claim, together with a copy of any contractual or other documentation in which those terms are contained and to which the Claimant's claim relates;	(b) ~~a copy of the written arbitration clause or separate written arbitration agreement~~ invoked by the Claimant ~~("the Arbitration Agreement"),~~ together with a copy of the contractual documentation in which~~ the arbitration clause is contained or in respect of which the arbitration arises;~~
(iii) a statement briefly summarising the nature and circumstances of the dispute, its estimated monetary amount or value, the transaction(s) at issue and the claim advanced by the Claimant against any other party to the arbitration (each such other party being here separately described as a "Respondent");	~~(c) a brief~~ statement describing the nature and circumstances of the dispute, and ~~specifying~~ the claim~~s~~ advanced by the Claimant against ~~another~~ party to the arbitration ~~("the~~ Res pondent");
(iv) a statement of any procedural matters for the arbitration (such as the arbitral seat, the language(s) of the arbitration, the number of arbitrators, their qualifications and identities) upon which the parties have already agreed in writing or in respect of which the Claimant makes any proposal under the Arbitration Agreement;	(d) a statement of any matters (such as the seat ~~or~~ language(s) of the arbitration, ~~or~~ the numb er of arbitrators, ~~or~~ their qualifications ~~or~~ identities) ~~on~~ which the parties have already agreed in writing ~~for the arbitration~~ or in respect of which the Claimant ~~wishes to make a~~ proposal;

(v) if the Arbitration Agreement (or any other written agreement) howsoever calls for any form of party nomination of arbitrators, the full name, postal address, e-mail address, telephone and facsimile numbers of the Claimant's nominee;	(e) if the Arbitration Agreement calls for party nomination of arbitrators, the name, address, telephone, facsimile, telex and e-mail numbers (if known) of the Claimant's nominee;
(vi) confirmation that the registration fee prescribed in the Schedule of Costs has been or is being paid to the LCIA, without which actual receipt of such payment the Request shall be treated by the Registrar as not having been delivered and the arbitration as not having been commenced under the Arbitration Agreement; and	(f) the fee prescribed in the Schedule of Costs ~~(~~without which the Request shall be treated as not having been ~~received by the Registrar~~ and the arbitration as not having been commenced~~)~~;
(vii) confirmation that copies of the Request (including all accompanying documents) have been or are being delivered to all other parties to the arbitration by one or more means to be identified specifically in such confirmation, to be supported then or as soon as possible thereafter by documentary proof satisfactory to the LCIA Court of actual delivery (including the date of delivery) or, if actual delivery is demonstrated to be impossible to the LCIA Court's satisfaction, sufficient inf ormation as to any other effective form of notification.	(g) confirmation ~~to the Registrar~~ that copies of the Request (including all accompanying documents) have been or are being ~~served simultaneously on~~ all other parties to the arbitration by one or more means ~~of service~~ to be identified in such confirmation.

1.2 The Request (including all accompanying documents) may be submitted to the Registrar in electronic form (as e-mail attachments) or in paper form or in both forms. If submitted in paper form, the Request shall be submitted in two copies where a sole arbitrator is to be appointed, or, if the parties have agreed or the Claimant proposes that three arbitrators are to be appointed, in four copies.	1.2 ~~The date of receipt by the Registrar of the Request shall be treated as the date on which the arbitration has commenced for all purposes. The Request (including all accompanying documents) should~~ be submitted to the Registrar in two copies where a sole arbitrator ~~should~~ be app ointed, or, if the parties have agreed or the Claimant ~~considers~~ that three arbitrators ~~should~~ be appointed, in four copies.
1.3 The Claimant may use, but is not required to do so, the standard electronic form available on-line from the LCIA's website for LCIA Requests.	
1.4 The date of receipt by the Registrar of the Request shall be treated as the date upon which the arbitration has commenced for all purposes (the "Commencement Date"), subject to the LCIA's actual receipt of the registration fee.	
1.5 There may be one or more Claimants (whether or not jointly represented); and in such event, where appropriate, the term "Claimant" shall be so interpreted under the Arbitration Agreement.	

Article 2 Response 2.1 Within 28 days of the Commencement Date, or such lesser or greater period to be determined by the LCIA Court upon application by any party or upon its own initiative (pursuant to Article 22.5), the Respondent shall deliver to the Registrar a written response to the Request (the "Response"), containing or accompanied by:	*Article 2 The Response* 2.1 Within ~~30~~ days ~~of service of the Request on the Respondent, (or such lesser period fixed by the LCIA Court), the Respondent shall send~~ to the Registrar a written response to the Request ("~~t~~the Response"), containing or accompanied by:
(i) the Respondent's full name and all contact details (including postal address, e-mail address, telephone and facsimile numbers) for the purpose of receiving delivery of all documentation in the arbitration and the same particulars of its legal representatives (if any);	
(ii) confirmation or denial of all or part of the claim advanced by the Claimant in the Request, including the Claimant's invocation of the Arbitration Agreement in support of its claim;	(a) confirmation or denial of all or part of the ~~claims~~ advanced by the Claimant in the Request;
(iii) if not full confirmation, a statement briefly summarising the nature and circumstances of the dispute, its estimated monetary amount or value, the transaction(s) at issue and the defence advanced by the Respondent, and also indicating whether any cross-claim will be advanced by the Respondent against any other party to the arbitration (such cross-claim to include any counterclaim against any Claimant and any other cross-claim against any Respondent);	(b) ~~brief statement describing~~ the nature and circumstances of ~~any counterclaims~~ advanced by the Respondent against ~~the~~ Claimant;

(iv) a response to any procedural statement for the arbitration contained in the Request under Article 1.1(iv), including the Respondent's own statement relating to the arbitral seat, the language(s) of the arbitration, the number of arbitrators, their qualifications and identities and any other procedural matter upon which the parties have already agreed in writing or in respect of which the Respondent makes any proposal under the Arbitration Agreement;	(c) ~~comment in~~ response to any ~~statements~~ contained in the Request, ~~as called for~~ under Article ~~1.1(d), on matters~~ relating to ~~the conduct of the arbitration~~;
(v) if the Arbitration Agreement (or any other written agreement) howsoever calls for party nomination of arbitrators, the full name, postal address, e-mail address, telephone and facsimile numbers of the Respondent's nominee; and	(d) if the Arbitration Agreement calls for party nomination of arbitrators, the name, address, telephone, facsimile, ~~telex~~ and e-mail ~~numbers (if known)~~ of the Respondent's nominee; and
(vi) confirmation that copies of the Response (including all accompanying documents) have been or are being delivered to all other parties to the arbitration by one or more means of delivery to be identified specifically in such confirmation, to be supported then or as soon as possible thereafter by documentary proof satisfactory to the LCIA Court of actual delivery (including the date of delivery) or, if actual delivery is demonstrated to be impossible to the LCIA Court's satisfaction, sufficient information as to any other effective form of notification.	(e) confirmation ~~to the Registrar~~ that copies of the Response (including all accompanying documents) have been or are being ~~served simultaneously on~~ all other parties to the arbitration by one or more means of ~~service~~ to be identified in such confirmation.

2.2 The Response (including all accompanying documents) may be submitted to the Registrar in electronic form (as e-mail attachments) or in paper form or in both forms. If submitted in paper form, the Response shall be submitted in two copies where a sole arbitrator is to be appointed, or, if the parties have agreed or the Respondent proposes that three arbitrators are to be appointed, in four copies.	2.2 The Response (including all accompanying documents) ~~should~~ be submitted to the Registrar in ~~two copies~~, or if the parties have agreed or the Respondent ~~considers~~ that three arbitrators ~~should~~ be appointed, in four copies.
2.3 The Respondent may use, but is not required to do so, the standard electronic form available on-line from the LCIA's website for LCIA Responses.	
2.4 Failure to deliver a Response within time shall constitute an irrevocable waiver of that party's opportunity to nominate or propose any arbitral candidate. Failure to deliver any or any part of a Response within time or at all shall not (by itself) preclude the Respondent from denying any claim or from advancing any defence or cross-claim in the arbitration.	2.3 Failure to ~~send~~ a Response ~~shall not preclude the Respondent from denying any claim or from advancing a counterclaim in the arbitration. However, if the Arbitration Agreement calls for party nomination of arbitrators, failure to send a Response or to nominate an arbitrator~~ within time ~~or at all~~ shall constitute an irrevocable waiver of that party's opportunity to nominate an arbitrator.
2.5 There may be one or more Respondents (whether or not jointly represented); and in such event, where appropriate, the term "Respondent" shall be so interpreted under the Arbitration Agreement.	

Article 3 LCIA Court and Registrar 3.1 The functions of the LCIA Court under the Arbitration Agreement shall be performed in its name by the President of the LCIA Court (or any of its Vice-Presidents, Honorary Vice-Presidents or former Vice-Presidents) or by a division of three or more members of the LCIA Court appointed by its President or any Vice-President (the "LCIA Court").	*Article 3 ~~The~~ LCIA Court and Registrar* 3.1 The functions of the LCIA Court under ~~these Rules~~ shall be performed in its name by the President ~~or a Vice-President~~ of the LCIA Court or by a division of three or ~~five~~ members of the LCIA Court appointed by ~~the~~ President or ~~a~~ Vice-President ~~of~~ the LCIA Court~~, as determined by the President.~~
3.2 The functions of the Registrar under the Arbitration Agreement shall be performed under the supervision of the LCIA Court by the Registrar or any deputy Registrar.	3.2 The functions of the Registrar under ~~these Rules~~ shall be performed by the Registrar or any deputy Registrar of the LCIA Court under the supervision of the LCIA Court.
3.3 All communications in the arbitration to the LCIA Court from any party, arbitrator or expert to the Arbitral Tribunal shall be addressed to the Registrar.	3.3 All communications ~~from any party or arbitrator~~ to the LCIA Court shall be addressed to the Registrar.
Article 4 Written Communications and Periods of Time 4.1 Any written communication by the LCIA Court, the Registrar or any party may be delivered personally or by registered postal or courier service or (subject to Article 4.3) by facsimile, e-mail or any other electronic means of telecommunication that provides a record of its transmission, or in any other manner ordered by the Arbitral Tribunal.	*Article 4 ~~Notices~~ and Periods of Time* 4.1 Any ~~notice or other~~ communication ~~that may be or is required to be given by a party under these Rules shall~~ be in writing and shall be delivered by registered postal or courier service or ~~transmitted~~ by facsimile, ~~telex~~, e-mail or any other means of telecommunication that ~~provide~~ a record of its transmission.

4.2 Unless otherwise ordered by the Arbitral Tribunal, if an address has been agreed or designated by a party for the purpose of receiving any communication in regard to the Arbitration Agreement or (in the absence of such agreement or designation) has been regularly used in the parties' previous dealings, any written communication (including the Request and Response) may be delivered to such party at that address, and if so delivered, shall be treated as having been received by such party.	~~4.2 A party's last-known residence or place of business during the arbitration shall be a valid address for the purpose of any notice or other communication in the absence of any notification of a change to such address by that party to the other parties, the Arbitral Tribunal and the Registrar.~~
4.3 Delivery by electronic means (including e-mail and facsimile) may only be effected to an address agreed or designated by the receiving party for that purpose or ordered by the Arbitral Tribunal.	
4.4 For the purpose of determining the commencement of any time-limit, a written communication shall be treated as having been received by a party on the day it is delivered or, in the case of electronic means, transmitted in accordance with Articles 4.1 to 4.3 (such time to be determined by reference to the recipient's time-zone).	4.3 For the purpose of determining the ~~date of~~ commencement of ~~a~~ time limit, a ~~notice or other~~ communication shall be treated as having been received on the day it is delivered or, in the case of ~~telecommunications~~, transmitted in accordance with Articles 4.1 ~~and 4.2~~.
4.5 For the purpose of determining compliance with a time-limit, a written communication shall be treated as having been sent by a party if made or transmitted in accordance with Articles 4.1 to 4.3 prior to or on the date of the expiration of the time-limit.	4.4 For the purpose of determining compliance with a time limit, a ~~notice or other~~ communication shall be treated as having been sent~~,~~ made or transmitted ~~if it is dispatched~~ in accordance with Articles 4.1 ~~and 4.2~~ prior to or on the date of the expiration of the time-limit.

	~~4.5 Notwithstanding the above, any notice or communication by one party may be addressed to another party in the manner agreed in writing between them or, failing such agreement, according to the practice followed in the course of their previous dealings or in whatever manner ordered by the Arbitral Tribunal.~~
4.6 For the purpose of calculating a period of time, such period shall begin to run on the day following the day when a written communication is received by the addressee. If the last day of such period is an official holiday or non-business day at the place of that addressee (or the place of the party against whom the calculation of time applies), the period shall be extended until the first business day which follows that last day. Official holidays and non-business days occurring during the running of the period of time shall be included in calculating that period.	4.6 For the purpose of calculating a period of time ~~under these Rules~~, such period shall begin to run on the day following the day when a ~~notice or other~~ communication is received. If the last day of such period is an official holiday or a non-business day at the ~~residence or~~ place of ~~business~~ of ~~the~~ addressee, the period ~~is~~ extended until the first business day which follows. Official holidays or non-business days occurring during the running of the period of time ~~are~~ included in calculating that period.
	4.7 ~~The Arbitral Tribunal may at any time extend (even where the period of time has expired) or abridge any period of time prescribed under these Rules or under the Arbitration Agreement for the conduct of the arbitration, including any notice or communication to be served by one party on any other party.~~

Article 5 Formation of Arbitral Tribunal 5.1 The formation of the Arbitral Tribunal by the LCIA Court shall not be impeded by any controversy between the parties relating to the sufficiency of the Request or the Response. The LCIA Court may also proceed with the arbitration notwithstanding that the Request is incomplete or the Response is missing, late or incomplete.	*Article 5 Formation of the Arbitral Tribunal*
5.2 The expression the "Arbitral Tribunal" includes a sole arbitrator or all the arbitrators where more than one.	5.1 The expression ~~"~~the Arbitral Tribunal" ~~in these Rules~~ includes a sole arbitrator or all the arbitrators where more than one. ~~All references to an arbitrator shall include the masculine and feminine. (References to the President, Vice-President and members of the LCIA Court, the Registrar or deputy Registrar, expert, witness, party and legal representative shall be similarly understood).~~
5.3 All arbitrators shall be and remain at all times impartial and independent of the parties; and none shall act in the arbitration as advocate for or representative of any party. No arbitrator shall advise any party on the parties' dispute or the outcome of the arbitration.	5.2 All arbitrators ~~conducting an arbitration under these Rules~~ shall be and remain at all times impartial and independent of the parties; and none shall act in the arbitration as advocate~~s~~ for any party. No arbitrator~~, whether before or after appointment,~~ shall advise any ~~party on the merits or outcome of the dispute.~~

5.4 Before appointment by the LCIA Court, each arbitral candidate shall furnish to the Registrar (upon the latter's request) a brief written summary of his or her qualifications and professional positions (past and present); the candidate shall also agree in writing fee-rates conforming to the Schedule of Costs; the candidate shall sign a written declaration stating: (i) whether there are any circumstances currently known to the candidate which are likely to give rise in the mind of any party to any justifiable doubts as to his or her impartiality or independence and, if so, specifying in full such circumstances in the declaration; and (ii) whether the candidate is ready, willing and able to devote sufficient time, diligence and industry to ensure the expeditious and efficient conduct of the arbitration. The candidate shall furnish promptly such agreement and declaration to the Registrar. 5.5 If appointed, each arbitral candidate shall thereby assume a continuing duty as an arbitrator, until the arbitration is finally concluded, forthwith to disclose in writing any circumstances becoming known to that arbitrator after the date of his or her written declaration (under Article 5.4) which are likely to give rise in the mind of any party to any justifiable doubts as to his or her impartiality or independence, to be delivered to the LCIA Court, any other members of the Arbitral Tribunal and all parties in the arbitration.	5.3 Before appointment by the LCIA Court, each ~~arbitrator~~ shall furnish to the Registrar a written ~~resume~~ of his ~~past and present~~ professional positions; ~~he~~ shall agree in writing upon fee rates conforming to the Schedule of Costs; ~~and he~~ shall sign a declaration ~~to the effect that there are no~~ circumstances known to ~~him~~ likely to give rise to any justified doubts as to his impartiality or independence, other than any circumstances ~~disclosed by him~~ in the declaration. Each arbitrator shall thereby also assume a continuing duty forthwith to disclose any ~~such~~ circumstances ~~to the LCIA Court, to any other members of the Arbitral Tribunal and to all the parties if such circumstances should arise~~ after the date of ~~such~~ declaration and before the arbitration is concluded.

5.6 The LCIA Court shall appoint the Arbitral Tribunal promptly after receipt by the Registrar of the Response or, if no Response is received, after 35 days from the Commencement Date (or such other lesser or greater period to be determined by the LCIA Court pursuant to Article 22.5). 5.8 A sole arbitrator shall be appointed unless the parties have agreed in writing otherwise or if the LCIA Court determines that in the circumstances a three-member tribunal is appropriate (or, exceptionally, more than three).	5.4 The LCIA Court shall appoint the Arbitral Tribunal ~~as soon as practicable~~ after receipt by the Registrar of the Response ~~or after the expiry of 30 days following service of the Request upon the Respondent if no Response is received by the Registrar (or such lesser period fixed by the LCIA Court). The LCIA Court may proceed with the formation of the Arbitral Tribunal notwithstanding that the Request is incomplete or the Response is missing, late or incomplete.~~ A sole arbitrator shall be appointed unless the parties have agreed in writing otherwise, or ~~unless~~ the LCIA Court determines that ~~in view of all~~ the circumstances ~~of the case~~ a three-member tribunal is appropriate.
5.7 No party or third person may appoint any arbitrator under the Arbitration Agreement: the LCIA Court alone is empowered to appoint arbitrators (albeit taking into account any written agreement or joint nomination by the parties). 5.9 The LCIA Court shall appoint arbitrators with due regard for any particular method or criteria of selection agreed in writing by the parties. The LCIA Court shall also take into account the transaction(s) at issue, the nature and circumstances of the dispute, its monetary amount or value, the location and languages of the parties, the number of parties and all other factors which it may consider relevant in the circumstances.	5.5 The LCIA Court alone is empowered to appoint arbitrators. The LCIA Court ~~will~~ appoint arbitrators with due regard for any particular method or criteria of selection agreed in writing by the parties. ~~In selecting arbitrators consideration will be given to the nature of~~ the transaction, the nature and circumstances of the dispute~~, the nationality~~, location and languages of the parties ~~and (if more than two~~) the number of parties.

5.10 The President of the LCIA Court shall only be eligible to be appointed as an arbitrator if the parties agree in writing to nominate him or her as the sole or presiding arbitrator; and the Vice Presidents of the LCIA Court and the Chairman of the LCIA Board of Directors (the latter being ex officio a member of the LCIA Court) shall only be eligible to be appointed as arbitrators if nominated in writing by a party or parties – provided that no such nominee shall have taken or shall take thereafter any part in any function of the LCIA Court or LCIA relating to such arbitration.	5.6 ~~In the case of a three-member Arbitral Tribunal, the chairman (who will not be a party-nominated arbitrator) shall be appointed by the LCIA Court~~.
Article 6 Nationality of Arbitrators 6.1 Where the parties are of different nationalities, a sole arbitrator or the presiding arbitrator shall not have the same nationality as any party unless the parties who are not of the same nationality as the arbitral candidate all agree in writing otherwise.	*Article 6 Nationality of Arbitrators* 6.1 Where the parties are of different nationalities, a sole arbitrator or ~~chairman of the Arbitral Tribunal~~ shall not have the same nationality as any party unless the parties who are not of the same nationality as the ~~proposed appointee~~ all agree in writing otherwise.
6.2 The nationality of a party shall be understood to include those of its controlling shareholders or interests.	6.2 The nationality of ~~parties~~ shall be understood to include that of controlling shareholders or interests.
6.3 A person who is a citizen of two or more States shall be treated as a national of each State; citizens of the European Union shall be treated as nationals of its different Member States and shall not be treated as having the same nationality; a citizen of a State's overseas territory shall be treated as a national of that territory and not of that State; and a legal person incorporated in a State's overseas territory shall be treated as such and not (by such fact alone) as a national of or a legal person incorporated in that State.	6.3 ~~For the purpose of this Article,~~ a person who is a citizen of two or more states shall be treated as a national of each state; ~~and~~ citizens of the European Union shall be treated as nationals of its different Member States and shall not be treated as having the same nationality.

Article 7 Party and Other Nominations 7.1 If the parties have agreed howsoever that any arbitrator is to be appointed by one or more of them or by any third person (other than the LCIA Court), that agreement shall be treated under the Arbitration Agreement as an agreement to nominate an arbitrator for all purposes. Such nominee may only be appointed by the LCIA Court as arbitrator subject to that nominee's compliance with Articles 5.3 to 5.5; and the LCIA Court shall refuse to appoint any nominee if it determines that the nominee is not so compliant or is otherwise unsuitable.	*Article 7 Party and Other Nominations* 7.1 If the parties have agreed that any arbitrator is to be appointed by one or more of them or by any third person, that agreement shall be treated as an agreement to nominate an arbitrator for all purposes. Such nominee may only be appointed by the LCIA Court as arbitrator subject to ~~his prior~~ compliance with Article 5.3. The LCIA Court ~~may~~ refuse to appoint any ~~such~~ nominee if it determines that ~~he~~ is not ~~suitable or independent or impartial.~~
7.2 Where the parties have howsoever agreed that the Claimant or the Respondent or any third person (other than the LCIA Court) is to nominate an arbitrator and such nomination is not made within time or at all (in the Request, Response or otherwise), the LCIA Court may appoint an arbitrator notwithstanding any absent or late nomination.	7.2 Where the parties have howsoever agreed that the Respondent or any third person is to nominate an arbitrator and such nomination is not made within time or at all, the LCIA Court may appoint an arbitrator notwithstanding the absence of the nomination ~~and without regard to any late nomination. Likewise, if the Request for Arbitration does not contain a nomination by the Claimant where the parties have howsoever agreed that the Claimant or a third person is to nominate an arbitrator, the LCIA Court may appoint an arbitrator notwithstanding the absence of the nomination and without regard to any late nomination.~~
7.3 In the absence of written agreement between the Parties, no party may unilaterally nominate a sole arbitrator or presiding arbitrator.	

Article 8 Three or More Parties 8.1 Where the Arbitration Agreement entitles each party howsoever to nominate an arbitrator, the parties to the dispute number more than two and such parties have not all agreed in writing that the disputant parties represent collectively two separate "sides" for the formation of the Arbitral Tribunal (as Claimants on one side and Respondents on the other side, each side nominating a single arbitrator), the LCIA Court shall appoint the Arbitral Tribunal without regard to any party's entitlement or nomination.	*Article 8 Three or More Parties* 8.1 Where the Arbitration Agreement entitles each party howsoever to nominate an arbitrator, the parties to the dispute number more than two and such parties have not all agreed in writing that the disputant parties represent two separate sides for the formation of the Arbitral Tribunal as Claimant and Respondent ~~respectively~~, the LCIA Court shall appoint the Arbitral Tribunal without regard to any party's nomination.
8.2 In such circumstances, the Arbitration Agreement shall be treated for all purposes as a written agreement by the parties for the nomination and appointment of the Arbitral Tribunal by the LCIA Court alone.	8.2 In such circumstances, the Arbitration Agreement shall be treated for all purposes as a written agreement by the parties for the appointment of the Arbitral Tribunal by the LCIA Court.
Article 9A Expedited Formation of Arbitral Tribunal 9.1 In the case of exceptional urgency, any party may apply to the LCIA Court for the expedited formation of the Arbitral Tribunal under Article 5.	*Article 9 Expedited Formation* 9.1 In exceptional urgency, ~~on or after the commencement of the arbitration,~~ any party may apply to the LCIA Court for the expedited formation of the Arbitral Tribunal, ~~including the appointment of any replacement arbitrator~~ under Article~~s 10 and 11 of these Rules~~.

9.2 Such an application shall be made to the Registrar in writing (preferably by electronic means), together with a copy of the Request (if made by a Claimant) or a copy of the Response (if made by a Respondent), delivered or notified to all other parties to the arbitration. The application shall set out the specific grounds for exceptional urgency requiring the expedited formation of the Arbitral Tribunal.	9.2 Such an application shall be made in writing ~~to the LCIA Court~~, ~~copied~~ to all other parties to the arbitration; ~~and it~~ shall set out the specific grounds for exceptional urgency ~~in the~~ formation of the Arbitral Tribunal.
9.3 The LCIA Court shall determine the application as expeditiously as possible in the circumstances. If the application is granted, for the purpose of forming the Arbitral Tribunal the LCIA Court may abridge any period of time under the Arbitration Agreement or other agreement of the parties (pursuant to Article 22.5).	~~9.3 The LCIA Court may, in its complete discretion, abridge or curtail any time limit under these Rules for the formation of the Arbitral Tribunal, including service of the Response and of any matters or documents adjudged to be missing from the Request. The LCIA Court shall not be entitled to abridge or curtail any other time limit.~~
Article 9B Emergency Arbitrator 9.4 Subject always to Article 9.14 below, in the case of emergency at any time prior to the formation or expedited formation of the Arbitral Tribunal (under Articles 5 or 9A), any party may apply to the LCIA Court for the immediate appointment of a temporary sole arbitrator to conduct emergency proceedings pending the formation or expedited formation of the Arbitral Tribunal (the "Emergency Arbitrator").	

9.5 Such an application shall be made to the Registrar in writing (preferably by electronic means), together with a copy of the Request (if made by a Claimant) or a copy of the Response (if made by a Respondent), delivered or notified to all other parties to the arbitration. The application shall set out, together with all relevant documentation: (i) the specific grounds for requiring, as an emergency, the appointment of an Emergency Arbitrator; and (ii) the specific claim, with reasons, for emergency relief. The application shall be accompanied by the applicant's written confirmation that the applicant has paid or is paying to the LCIA the Special Fee under Article 9B, without which actual receipt of such payment the application shall be dismissed by the LCIA Court. The Special Fee shall be subject to the terms of the Schedule of Costs. Its amount is prescribed in the Schedule, covering the fees and expenses of the Emergency Arbitrator and the administrative fees and expenses of the LCIA, with additional charges (if any) of the LCIA Court. After the appointment of the Emergency Arbitrator, the amount of the Special Fee payable by the applicant may be increased by the LCIA Court in accordance with the Schedule. Article 24 shall not apply to any Special Fee paid to the LCIA.	

9.6 The LCIA Court shall determine the application as soon as possible in the circumstances. If the application is granted, an Emergency Arbitrator shall be appointed by the LCIA Court within three days of the Registrar's receipt of the application (or as soon as possible thereafter). Articles 5.1, 5.7, 5.9, 5.10, 6, 9C, 10 and 16.2 (last sentence) shall apply to such appointment. The Emergency Arbitrator shall comply with the requirements of Articles 5.3, 5.4 and (until the emergency proceedings are finally concluded) Article 5.5.	
9.7 The Emergency Arbitrator may conduct the emergency proceedings in any manner determined by the Emergency Arbitrator to be appropriate in the circumstances, taking account of the nature of such emergency proceedings, the need to afford to each party, if possible, an opportunity to be consulted on the claim for emergency relief (whether or not it avails itself of such opportunity), the claim and reasons for emergency relief and the parties' further submissions (if any). The Emergency Arbitrator is not required to hold any hearing with the parties (whether in person, by telephone or otherwise) and may decide the claim for emergency relief on available documentation. In the event of a hearing, Articles 16.3, 19.2, 19.3 and 19.4 shall apply.	

9.8 The Emergency Arbitrator shall decide the claim for emergency relief as soon as possible, but no later than 14 days following the Emergency Arbitrator's appointment. This deadline may only be extended by the LCIA Court in exceptional circumstances (pursuant to Article 22.5) or by the written agreement of all parties to the emergency proceedings. The Emergency Arbitrator may make any order or award which the Arbitral Tribunal could make under the Arbitration Agreement (excepting Arbitration and Legal Costs under Articles 28.2 and 28.3); and, in addition, make any order adjourning the consideration of all or any part of the claim for emergency relief to the proceedings conducted by the Arbitral Tribunal (when formed).	
9.9 An order of the Emergency Arbitrator shall be made in writing, with reasons. An award of the Emergency Arbitrator shall comply with Article 26.2 and, when made, take effect as an award under Article 26.8 (subject to Article 9.11). The Emergency Arbitrator shall be responsible for delivering any order or award to the Registrar, who shall transmit the same promptly to the parties by electronic means, in addition to paper form (if so requested by any party). In the event of any disparity between electronic and paper forms, the electronic form shall prevail.	
9.10 The Special Fee paid shall form a part of the Arbitration Costs under Article 28.2 determined by the LCIA Court (as to the amount of Arbitration Costs) and decided by the Arbitral Tribunal (as to the proportions in which the parties shall bear Arbitration Costs). Any legal or other expenses incurred by any party during the emergency proceedings shall form a part of the Legal Costs under Article 28.3 decided	

by the Arbitral Tribunal (as to amount and as to payment between the parties of Legal Costs).	
9.11 Any order or award of the Emergency Arbitrator (apart from any order adjourning to the Arbitral Tribunal, when formed, any part of the claim for emergency relief) may be confirmed, varied, discharged or revoked, in whole or in part, by order or award made by the Arbitral Tribunal upon application by any party or upon its own initiative.	
9.12 Article 9B shall not prejudice any party's right to apply to a state court or other legal authority for any interim or conservatory measures before the formation of the Arbitration Tribunal; and it shall not be treated as an alternative to or substitute for the exercise of such right. During the emergency proceedings, any application to and any order by such court or authority shall be communicated promptly in writing to the Emergency Arbitrator, the Registrar and all other parties.	

9.13 Articles 3.3, 13.1-13.4, 14.4, 14.5, 16, 17, 18, 22.3, 22.4, 23, 28, 29, 30, 31 and 32 and the Annex shall apply to emergency proceedings. In addition to the provisions expressly set out there and in Article 9B above, the Emergency Arbitrator and the parties to the emergency proceedings shall also be guided by other provisions of the Arbitration Agreement, whilst recognising that several such provisions may not be fully applicable or appropriate to emergency proceedings. Wherever relevant, the LCIA Court may abridge under any such provisions any period of time (pursuant to Article 22.5).	
9.14 Article 9B shall not apply if either: (i) the parties have concluded their arbitration agreement before 1 October 2014 and the parties have not agreed in writing to 'opt in' to Article 9B; or (ii) the parties have agreed in writing at any time to 'opt out' of Article 9B.	
Article 9C Expedited Appointment of Replacement Arbitrator 9.15 Any party may apply to the LCIA Court for the expedited appointment of a replacement arbitrator under Article 11.	
9.16 Such an application shall be made in writing to the Registrar (preferably by electronic means), delivered (or notified) to all other parties to the arbitration; and it shall set out the specific grounds requiring the expedited appointment of the replacement arbitrator.	

9.17 The LCIA Court shall determine the application as expeditiously as possible in the circumstances. If the application is granted, for the purpose of expediting the appointment of the replacement arbitrator the LCIA Court may abridge any period of time in the Arbitration Agreement or any other agreement of the parties (pursuant to Article 22.5).	
Article 10 Revocation and Challenges 10.1 The LCIA Court may revoke any arbitrator's appointment upon its own initiative, at the written request of all other members of the Arbitral Tribunal or upon a written challenge by any party if: (i) that arbitrator gives written notice to the LCIA Court of his or her intent to resign as arbitrator, to be copied to all parties and all other members of the Arbitral Tribunal (if any); (ii) that arbitrator falls seriously ill, refuses or becomes unable or unfit to act; or (iii) circumstances exist that give rise to justifiable doubts as to that arbitrator's impartiality or independence.	*Article 10 Revocation ~~of Arbitrator's Appointment~~* 10.1 ~~If either (a) any~~ arbitrator gives written notice of his ~~desire~~ to resign as arbitrator ~~to the LCIA Court,~~ to be copied to ~~the~~ parties and ~~the~~ other arbitrators (if any) ~~or (b) any~~ arbitrator ~~dies~~, falls seriously ill, refuses, or becomes unable or unfit to act, ~~either upon challenge by a party or at the request of the remaining arbitrators, the LCIA Court may revoke that arbitrator's appointment and appoint another arbitrator. The LCIA Court shall decide upon the amount of fees and expenses to be paid for the former arbitrator's services (if any) as it may consider appropriate in all the circumstances.~~
10.2 The LCIA Court may determine that an arbitrator is unfit to act under Article 10.1 if that arbitrator: (i) acts in deliberate violation of the Arbitration Agreement; (ii) does not act fairly or impartially as between the parties; or (iii) does not conduct or participate in the arbitration with reasonable efficiency, diligence and industry.	10.2 ~~If any arbitrator~~ acts in deliberate violation of the Arbitration Agreement ~~(including these Rules) or~~ does not act fairly and impartially as between the parties or does not conduct or participate in the arbitration proceedings with reasonable diligence, ~~avoiding unnecessary delay or expense, that arbitrator may be considered unfit in the opinion of the LCIA Court.~~

10.3 A party challenging an arbitrator under Article 10.1 shall, within 14 days of the formation of the Arbitral Tribunal or (if later) within 14 days of becoming aware of any grounds described in Article 10.1 or 10.2, deliver a written statement of the reasons for its challenge to the LCIA Court, the Arbitral Tribunal and all other parties. A party may challenge an arbitrator whom it has nominated, or in whose appointment it has participated, only for reasons of which it becomes aware after the appointment has been made by the LCIA Court.	10.3 ~~An arbitrator may also be challenged by any party if circumstances exist that give rise to justifiable doubts as to his impartiality or independence. A party may challenge an arbitrator~~ it has nominated, or in whose appointment it has participated, only for reasons of which it becomes aware after the appointment has been made.
10.4 The LCIA Court shall provide to those other parties and the challenged arbitrator a reasonable opportunity to comment on the challenging party's written statement. The LCIA Court may require at any time further information and materials from the challenging party, the challenged arbitrator, other parties and other members of the Arbitral Tribunal (if any).	~~10.4 A party who intends to challenge an arbitrator shall, within 15 days of the formation of the Arbitral Tribunal or (if later) after becoming aware of any circumstances referred to in Article 10.1, 10.2 or 10.3, send a written statement of the reasons for its challenge to the LCIA Court, the Arbitral Tribunal and all other parties. Unless the challenged arbitrator withdraws or all other parties agree to the challenge within 15 days of receipt of the written statement, the LCIA Court shall decide on the challenge.~~
10.5 If all other parties agree in writing to the challenge within 14 days of receipt of the written statement, the LCIA Court shall revoke that arbitrator's appointment (without reasons).	

10.6 Unless the parties so agree or the challenged arbitrator resigns in writing within 14 days of receipt of the written statement, the LCIA Court shall decide the challenge and, if upheld, shall revoke that arbitrator's appointment. The LCIA Court's decision shall be made in writing, with reasons; and a copy shall be transmitted by the Registrar to the parties, the challenged arbitrator and other members of the Arbitral Tribunal (if any). A challenged arbitrator who resigns in writing prior to the LCIA Court's decision shall not be considered as having admitted any part of the written statement.	
10.7 The LCIA Court shall determine the amount of fees and expenses (if any) to be paid for the former arbitrator's services, as it may consider appropriate in the circumstances. The LCIA Court may also determine whether, in what amount and to whom any party should pay forthwith the costs of the challenge; and the LCIA Court may also refer all or any part of such costs to the later decision of the Arbitral Tribunal and/or the LCIA Court under Article 28.	
Article 11 Nomination and Replacement 11.1 In the event that the LCIA Court determines that justifiable doubts exist as to any arbitral candidate's suitability, independence or impartiality, or if a nominee declines appointment as arbitrator, or if an arbitrator is to be replaced for any reason, the LCIA Court may determine whether or not to follow the original nominating process for such arbitral appointment.	*Article 11 Nomination and Replacement of Arbitrators* 11.1 In the event that the LCIA Court determines that ~~any nominee is not suitable or independent or impartial or if an appointed~~ arbitrator is to be replaced for any reason, the LCIA Court ~~shall have a complete discretion to decide whether or not to follow the original nominating process.~~

11.2 The LCIA Court may determine that any opportunity given to a party to make any re-nomination (under the Arbitration Agreement or otherwise) shall be waived if not exercised within 14 days (or such lesser or greater time as the LCIA Court may determine), after which the LCIA Court shall appoint the replacement arbitrator without such re-nomination.	11.2 If the LCIA Court ~~should so decide~~, any opportunity given to a party to make ~~a~~ renomination shall be waived if not exercised within ~~15~~ days (or such lesser time as the LCIA Court may ~~fix~~), after which the LCIA Court shall appoint the replacement arbitrator.
Article 12 Majority Power to Continue Deliberations 12.1 In exceptional circumstances, where an arbitrator without good cause refuses or persistently fails to participate in the deliberations of an Arbitral Tribunal, the remaining arbitrators jointly may decide (after their written notice of such refusal or failure to the LCIA Court, the parties and the absent arbitrator) to continue the arbitration (including the making of any award) notwithstanding the absence of that other arbitrator, subject to the written approval of the LCIA Court.	*Article 12 Majority Power to Continue Proceedings* 12.1 If any arbitrator ~~on a three-member Arbitral Tribunal~~ refuses or persistently fails to participate in ~~its~~ deliberations, the ~~two other~~ arbitrators ~~shall have the power, upon~~ their written notice of such refusal or failure to the LCIA Court, the parties and the ~~third~~ arbitrator, to continue the arbitration (including the making of any ~~decision, ruling or~~ award), notwithstanding the absence of ~~the third~~ arbitrator.
12.2 In deciding whether to continue the arbitration, the remaining arbitrators shall take into account the stage of the arbitration, any explanation made by or on behalf of the absent arbitrator for his or her refusal or non-participation, the likely effect upon the legal recognition or enforceability of any award at the seat of the arbitration and such other matters as they consider appropriate in the circumstances. The reasons for such decision shall be stated in any award made by the remaining arbitrators without the participation of the absent arbitrator.	12.2 In ~~determining~~ whether to continue the arbitration, the ~~two other~~ arbitrators shall take into account the stage of the arbitration, any explanation made by the ~~third~~ arbitrator for his non-participation and such other matters as they consider appropriate in the circumstances ~~of the case~~. The reasons for such ~~determination~~ shall be stated in any award~~, order or other decision~~ made by the ~~two~~ arbitrators without the participation of the ~~third~~ arbitrator.

12.3 In the event that the remaining arbitrators decide at any time thereafter not to continue the arbitration without the participation of the absent arbitrator, the remaining arbitrators shall notify in writing the parties and the LCIA Court of such decision; and, in that event, the remaining arbitrators or any party may refer the matter to the LCIA Court for the revocation of the absent arbitrator's appointment and the appointment of a replacement arbitrator under Articles 10 and 11.	12.3 In the event that the ~~two other~~ arbitrators ~~determine~~ at any time not to continue the arbitration without ~~the participation of the third arbitrator missing from their deliberations, the two~~ arbitrators shall notify in writing the parties and the LCIA Court of such ~~determination~~; and in that event, the ~~two~~ arbitrators or any party may refer the matter to the LCIA Court for the revocation of ~~that third~~ arbitrator's appointment and ~~his~~ replacement under Article 10.
Article 13 Communications between Parties and Arbitral Tribunal	*Article 13 Communications between Parties and ~~the~~ Arbitral Tribunal* 13.1 ~~Until the Arbitral Tribunal is formed, all communications between parties and arbitrators shall be made through the Registrar.~~
13.1 Following the formation of the Arbitral Tribunal, all communications shall take place directly between the Arbitral Tribunal and the parties (to be copied to the Registrar), unless the Arbitral Tribunal decides that communications should continue to be made through the Registrar.	13.2 ~~Thereafter, unless and until~~ the Arbitral Tribunal ~~directs that~~ communications shall take place directly between the Arbitral Tribunal and the parties (~~with simultaneous copies~~ to the Registrar), ~~all written communications between the parties and~~ the Arbitral Tribunal ~~shall~~ continue to be made through the Registrar.

13.2 Where the Registrar sends any written communication to one party on behalf of the Arbitral Tribunal or the LCIA Court, he or she shall send a copy to each of the other parties. 13.3 Where any party delivers to the Arbitral Tribunal any communication (including statements and documents under Article 15), whether by electronic means or otherwise, it shall deliver a copy to each arbitrator, all other parties and the Registrar; and it shall confirm to the Arbitral Tribunal in writing that it has done or is doing so.	13.3 Where the Registrar sends any written communication to one party on behalf of the Arbitral Tribunal, he shall send a copy to each of the other parties. Where any party ~~sends~~ to the ~~Registrar~~ any communication (including ~~Written~~ Statements and Documents under Article 15), it shall ~~include~~ a copy for each arbitrator; and it shall ~~also send copies direct to all other parties and~~ confirm to the ~~Registrar~~ in writing that it has done or is doing so.
13.4 During the arbitration from the Arbitral Tribunal's formation onwards, no party shall deliberately initiate or attempt to initiate any unilateral contact relating to the arbitration or the parties' dispute with any member of the Arbitral Tribunal or any member of the LCIA Court exercising any function in regard to the arbitration (but not including the Registrar), which has not been disclosed in writing prior to or shortly after the time of such contact to all other parties, all members of the Arbitral Tribunal (if comprised of more than one arbitrator) and the Registrar.	
13.5 Prior to the Arbitral Tribunal's formation, unless the parties agree otherwise in writing, any arbitrator, candidate or nominee who is required to participate in the selection of a presiding arbitrator may consult any party in order to obtain the views of that party as to the suitability of any candidate or nominee as presiding arbitrator, provided that such arbitrator, candid ate or nominee informs the Registrar of such consultation.	

Article 14 Conduct of Proceedings 14.1 The parties and the Arbitral Tribunal are encouraged to make contact (whether by a hearing in person, telephone conference-call, video conference or exchange of correspondence) as soon as practicable but no later than 21 days from receipt of the Registrar's written notification of the formation of the Arbitral Tribunal. 14.2 The parties may agree on joint proposals for the conduct of their arbitration for consideration by the Arbitral Tribunal. They are encouraged to do so in consultation with the Arbitral Tribunal and consistent with the Arbitral Tribunal's general duties under the Arbitration Agreement. 14.3 Such agreed proposals shall be made by the parties in writing or recorded in writing by the Arbitral Tribunal at the parties' request and with their authority.	*Article 14 Conduct of ~~the~~ Proceedings*
14.4 Under the Arbitration Agreement, the Arbitral Tribunal's general duties at all times during the arbitration shall include: (i) a duty to act fairly and impartially as between all parties, giving each a reasonable opportunity of putting its case and dealing with that of its opponent(s); and (ii) a duty to adopt procedures suitable to the circumstances of the arbitration, avoiding unnecessary delay and expense, so as to provide a fair, efficient and expeditious means for the final resolution of the parties' dispute.	14.1 ~~The parties may agree on the conduct of their arbitral proceedings and they are encouraged to do so, consistent with~~ the Arbitral Tribunal's general duties at all times: (i) to act fairly and impartially as between all parties, giving each a reasonable opportunity of putting its case and dealing with that of its opponent; and (ii) to adopt procedures suitable to the circumstances of the arbitration, avoiding unnecessary delay ~~or~~ expense, so as to provide a fair ~~and~~ efficient means for the final resolution of the parties' dispute~~. Such agreements shall~~

	~~be made by the parties in writing or recorded in writing by the Arbitral Tribunal at the request of and with the authority of the parties~~
14.5 The Arbitral Tribunal shall have the widest discretion to discharge these general duties, subject to such mandatory law(s) or rules of law as the Arbitral Tribunal may decide to be applicable; and at all times the parties shall do everything necessary in good faith for the fair, efficient and expeditious conduct of the arbitration, including the Arbitral Tribunal's discharge of its general duties.	14.2 ~~Unless otherwise agreed by the parties under Article 14.1,~~ the Arbitral Tribunal shall have the widest discretion to discharge ~~its~~ duties ~~allowed~~ ~~under~~ such law(s) or rules of law as the Arbitral Tribunal may ~~determine~~ to be applicable; and at all times the parties shall do everything necessary for the fair, efficient and expeditious conduct of the arbitration.
14.6 In the case of an Arbitral Tribunal other than a sole arbitrator, the presiding arbitrator, with the prior agreement of its other members and all parties, may make procedural orders alone.	14.3 In the case of ~~a three-member~~ Arbitral Tribunal ~~the chairman may~~, with the prior ~~consent~~ of ~~the~~ other ~~two arbitrators~~, make procedural ~~rulings~~ alone.
Article 15 Written Statements 15.1 Unless the parties have agreed or jointly proposed in writing otherwise or the Arbitral Tribunal should decide differently, the written stage of the arbitration and its procedural time-table shall be as set out in this Article 15.	*Article 15 ~~Submission of~~ Written Statements ~~and Documents~~* 15.1 Unless the parties have agreed otherwise ~~under Article 14.1~~ or the Arbitral Tribunal should ~~determine~~ differently, the written stage of the ~~proceedings~~ shall be as set out below.
15.2 Within 28 days of receipt of the Registrar's written notification of the Arbitral Tribunal's formation, the Claimant shall deliver to the Arbitral Tribunal and all other parties either: (i) its written election to have its Request treated as its Statement of Case complying with this Article 15.2; or (ii) its written Statement of Case setting out in sufficient detail the relevant facts and	15.2 Within ~~30~~ days of receipt of written notification ~~from the Registrar of the formation~~ of the Arbitral Tribunal, ~~the Claimant shall send to the Registrar a~~ Statement of Case setting out in sufficient detail the facts and any ~~contentions of law~~ on which it relies, together with the relief claimed against all other parties, ~~save and insofar as such matters have not been set out in~~

legal submissions on which it relies, together with the relief claimed against all other parties, and all essential documents.	~~its Request.~~
15.3 Within 28 days of receipt of the Claimant's Statement of Case or the Claimant's election to treat the Request as its Statement of Case, the Respondent shall deliver to the Arbitral Tribunal and all other parties either: (i) its written election to have its Response treated as its Statement of Defence and (if applicable) Cross-claim complying with this Article 15.3; or (ii) its written Statement of Defence and (if applicable) Statement of Cross-claim setting out in sufficient detail the relevant facts and legal submissions on which it relies, together with the relief claimed against all other parties, and all essential documents.	15.3 Within ~~30~~ days of receipt of the Statement of Case ~~or written notice from the Claimant that it elects~~ to treat the Request as its Statement of Case, the Respondent shall ~~send~~ to the ~~Registrar a~~ Statement of Defence setting out in sufficient detail which of the facts and contentions of law in the Statement of Case ~~or Request (as the case may be) it admits or denies, on what grounds and on what other facts and contentions of law it relies. Any counterclaims shall be submitted with the Statement of Defence in the same manner as claims are to be set out in the Statement of Case.~~
15.4 Within 28 days of receipt of the Respondent's Statement of Defence and (if applicable) Statement of Cross-claim or the Respondent's election to treat the Response as its Statement of Defence and (if applicable) Cross-claim, the Claimant shall deliver to the Arbitral Tribunal and all other parties a written Statement of Reply which, where there are any cross-claims, shall also include a Statement of Defence to Cross-claim in the same manner required for a Statement of Defence, together with all essential documents.	15.4 Within ~~30~~ days of receipt of the Statement of Defence, the Claimant shall send to the ~~Registrar~~ a Statement of Reply which, where there are any ~~counterclaims~~, shall include a Defence to ~~Counterclaim~~ in the same manner ~~as a defence is to be set out in the~~ Statement of Defence.
15.5 If the Statement of Reply contains a Statement of Defence to Cross-claim, within 28 days of its receipt the Respondent shall deliver to the Arbitral Tribunal and all other parties its written Statement of Reply to the Defence to Cross-claim, together with all essential documents.	15.5 If the Statement of Reply contains a Defence to ~~Counterclaim~~, within ~~30~~ days of its receipt the Respondent shall ~~send to the Registrar a~~ Statement of Reply to ~~Counterclaim~~.

15.6 The Arbitral Tribunal may provide additional directions as to any part of the written stage of the arbitration (including witness statements, submissions and evidence), particularly where there are multiple claimants, multiple respondents or any cross-claim between two or more respondents or between two or more claimants.	~~15.6 All Statements referred to in this Article shall be accompanied by copies (or, if they are especially voluminous, lists) of all essential documents on which the party concerned relies and which have not previously been submitted by any party, and (where appropriate) by any relevant samples and exhibits.~~
15.7 No party may submit any further written statement following the last of these Statements, unless otherwise ordered by the Arbitral Tribunal.	
15.8 If the Respondent fails to submit a Statement of Defence or the Claimant a Statement of Defence to Cross-claim, or if at any time any party fails to avail itself of the opportunity to present its written case in the manner required under this Article 15 or otherwise by order of the Arbitral Tribunal, the Arbitral Tribunal may nevertheless proceed with the arbitration (with or without a hearing) and make one or more awards.	15.8 If the Respondent fails to submit a Statement of Defence or the Claimant a Statement of Defence to ~~Counterclaim~~, or if at any point any party fails to avail itself of the opportunity to present its case in the manner ~~determined by Article 15.2 to 15.6~~ or ~~directed~~ by the Arbitral Tribunal, the Arbitral Tribunal may nevertheless proceed with the arbitration and make ~~an award~~.
15.9 As soon as practicable following this written stage of the arbitration, the Arbitral Tribunal shall proceed in such manner as has been agreed in writing by the parties or pursuant to its authority under the Arbitration Agreement.	15.7 As soon as practicable following ~~receipt of the Statements specified in this Article~~, the Arbitral Tribunal ~~shall~~ proceed in such manner as has been agreed in writing by the parties or pursuant to its authority under ~~these Rules~~.

15.10 In any event, the Arbitral Tribunal shall seek to make its final award as soon as reasonably possible following the last submission from the parties (whether made orally or in writing), in accordance with a timetable notified to the parties and the Registrar as soon as practicable (if necessary, as revised and re-notified from time to time). When the Arbitral Tribunal (not being a sole arbitrator) establishes a time for what it contemplates shall be the last submission from the parties (whether written or oral), it shall set aside adequate time for deliberations as soon as possible after that last submission and notify the parties of the time it has set aside.	
Article 16 Seat(s) of Arbitration and Place(s) of Hearing 16.1 The parties may agree in writing the seat (or legal place) of their arbitration at any time before the formation of the Arbitral Tribunal and, after such formation, with the prior written consent of the Arbitral Tribunal. 16.2 In default of any such agreement, the seat of the arbitration shall be London (England), unless and until the Arbitral Tribunal orders, in view of the circumstances and after having given the parties a reasonable opportunity to make written comments to the Arbitral Tribunal, that another arbitral seat is more appropriate. Such default seat shall not be considered as a relevant circumstance by the LCIA Court in appointing any arbitrators under Articles 5, 9A, 9B, 9C and 11.	*Article 16 Seat of Arbitration and Place of Hearings* 16.1 The parties may agree in writing the seat (or legal place) of their arbitration. ~~Failing such a choice~~, the seat of arbitration shall be London, unless and until the ~~LCIA Court determines~~ in view of all the circumstances, and after having given the parties a~~n~~ opportunity to make written comment, that another seat is more appropriate.

16.3 The Arbitral Tribunal may hold any hearing at any convenient geographical place in consultation with the parties and hold its deliberations at any geographical place of its own choice; and if such place(s) should be elsewhere than the seat of the arbitration, the arbitration shall nonetheless be treated for all purposes as an arbitration conducted at the arbitral seat and any order or award as having been made at that seat.	16.2 The Arbitral Tribunal may hold hearing~~s~~, ~~meetings and deliberations~~ at any convenient geographical place in ~~its discretion~~; and if elsewhere than the seat of the arbitration, the arbitration shall be treated as an arbitration conducted at the seat ~~of the arbitration~~ and any award as ~~an award~~ made at ~~the~~ seat ~~of the arbitration for all purposes.~~
16.4 The law applicable to the Arbitration Agreement and the arbitration shall be the law applicable at the seat of the arbitration, unless and to the extent that the parties have agreed in writing on the application of other laws or rules of law and such agreement is not prohibited by the law applicable at the arbitral seat.	16.3 The law applicable to the arbitration ~~(if any)~~ shall be the arbitration law ~~of~~ the seat of arbitration, unless and to the extent that the parties have ~~expressly~~ agreed in writing on the application of ~~another arbitration law~~ and such agreement is not prohibited by the law ~~of~~ the arbitral seat.
Article 17 Language(s) of Arbitration 17.1 The initial language of the arbitration (until the formation of the Arbitral Tribunal) shall be the language or prevailing language of the Arbitration Agreement, unless the parties have agreed in writing otherwise.	*Article 17 Language of Arbitration* 17.1 The initial language of the arbitration shall be the language of the Arbitration Agreement, unless the parties have agreed in writing otherwise ~~and providing always that a nonparticipating or defaulting party shall have no cause for complaint if communications to and from the Registrar and the arbitration proceedings are conducted in English~~.

17.2 In the event that the Arbitration Agreement is written in more than one language of equal standing, the LCIA Court may, unless the Arbitration Agreement provides that the arbitration proceedings shall be conducted from the outset in more than one language, determine which of those languages shall be the initial language of the arbitration.	17.2 In the event that the Arbitration Agreement is written in more than one language, the LCIA Court may, unless the Arbitration Agreement provides that the arbitration proceedings shall be conducted in more than one language, ~~decide~~ which of those languages shall be the initial language of the arbitration.
17.3 A non-participating or defaulting party shall have no cause for complaint if communications to and from the LCIA Court and Registrar are conducted in the initial language(s) of the arbitration or of the arbitral seat.	
17.4 Following the formation of the Arbitral Tribunal, unless the parties have agreed upon the language or languages of the arbitration, the Arbitral Tribunal shall decide upon the language(s) of the arbitration after giving the parties a reasonable opportunity to make written comments and taking into account the initial language(s) of the arbitration and any other matter it may consider appropriate in the circumstances.	17.3 ~~Upon~~ the formation of the Arbitral Tribunal ~~and~~ unless the parties have agreed upon the language or languages of the arbitration, the Arbitration Tribunal shall decide upon the language(s) of the arbitration, after giving the parties a~~n~~ opportunity to make written comment and taking into account the initial language of the arbitration and any other matter it may consider appropriate in ~~all~~ the circumstances ~~of the case~~.
17.5 If any document is expressed in a language other than the language(s) of the arbitration and no translation of such document is submitted by the party relying upon the document, the Arbitral Tribunal may order or (if the Arbitral Tribunal has not been formed) the Registrar may request that party to submit a translation of all or any part of that document in any language(s) of the arbitration or of the arbitral seat.	17.4 If any document is expressed in a language other than the language(s) of the arbitration and no translation of such document is submitted by the party relying upon the document, the Arbitral Tribunal or (if the Arbitral Tribunal has not been formed) the ~~LCIA Court~~ may ~~order~~ that party to submit a translation ~~in a form to be determined by the Arbitral Tribunal or the LCIA Court, as the case may be.~~

Article 18 Legal Representatives 18.1 Any party may be represented in the arbitration by one or more authorised legal representatives appearing by name before the Arbitral Tribunal.	*Article 18 Party Representation* 18.1 Any party may be represented by legal ~~practitioners or any other~~ representatives.
18.2 Until the Arbitral Tribunal's formation, the Registrar may request from any party: (i) written proof of the authority granted by that party to any legal representative designated in its Request or Response; and (ii) written confirmation of the names and addresses of all such party's legal representatives in the arbitration. After its formation, at any time, the Arbitral Tribunal may order any party to provide similar proof or confirmation in any form it considers appropriate.	18.2 ~~At any time~~ the Arbitral Tribunal may ~~require~~ from any party proof of authority granted to its representative~~(s) in such form as the Arbitral Tribunal may determine.~~
18.3 Following the Arbitral Tribunal's formation, any intended change or addition by a party to its legal representatives shall be notified promptly in writing to all other parties, the Arbitral Tribunal and the Registrar; and any such intended change or addition shall only take effect in the arbitration subject to the approval of the Arbitral Tribunal.	
18.4 The Arbitral Tribunal may withhold approval of any intended change or addition to a party's legal representatives where such change or addition could compromise the composition of the Arbitral Tribunal or the finality of any award (on the grounds of possible conflict or other like impediment). In deciding whether to grant or withhold such approval, the Arbitral Tribunal shall have regard to the circumstances, including: the general principle that a party may be	

represented by a legal representative chosen by that party, the stage which the arbitration has reached, the efficiency resulting from maintaining the composition of the Arbitral Tribunal (as constituted throughout the arbitration) and any likely wasted costs or loss of time resulting from such change or addition.	
18.5 Each party shall ensure that all its legal representatives appearing by name before the Arbitral Tribunal have agreed to comply with the general guidelines contained in the Annex to the LCIA Rules, as a condition of such representation. In permitting any legal representative so to appear, a party shall thereby represent that the legal representative has agreed to such compliance.	
18.6 In the event of a complaint by one party against another party's legal representative appearing by name before the Arbitral Tribunal (or of such complaint by the Arbitral Tribunal upon its own initiative), the Arbitral Tribunal may decide, after consulting the parties and granting that legal representative a reasonable opportunity to answer the complaint, whether or not the legal representative has violated the general guidelines. If such violation is found by the Arbitral Tribunal, the Arbitral Tribunal may order any or all of the following sanctions against the legal representative: (i) a written reprimand; (ii) a written caution as to future conduct in the arbitration; and (iii) any other measure necessary to fulfil within the arbitration the general duties required of the Arbitral Tribunal under Articles 14.4(i) and (ii).	

Article 19 Oral Hearing(s) 19.1 Any party has the right to a hearing before the Arbitral Tribunal on the parties' dispute at any appropriate stage of the arbitration (as decided by the Arbitral Tribunal), unless the parties have agreed in writing upon a documents-only arbitration. For this purpose, a hearing may consist of several part-hearings (as decided by the Arbitral Tribunal).	*Article 19 Hearings* 19.1 ~~Any party which expresses a desire to that effect has the right to be heard orally~~ before the Arbitral Tribunal on the ~~merits of the~~ dispute, unless the parties have agreed in writing ~~on~~ documents-only arbitration.
19.2 The Arbitral Tribunal shall organise the conduct of any hearing in advance, in consultation with the parties. The Arbitral Tribunal shall have the fullest authority under the Arbitration Agreement to establish the conduct of a hearing, including its date, form, content, procedure, time-limits and geographical place. As to form, a hearing may take place by video or telephone conference or in person (or a combination of all three). As to content, the Arbitral Tribunal may require the parties to address a list of specific questions or issues arising from the parties' dispute.	19.2 The Arbitral Tribunal shall ~~fix the date, time and physical place of any meetings and hearings in the arbitration, and~~ shall give the parties reasonable notice ~~thereof~~.
19.3 The Arbitral Tribunal shall give to the parties reasonable notice in writing of any hearing.	19.3 The Arbitral Tribunal may in advance of any hearing submit to the parties a list of questions which it wishes them to answer with special attention.
19.4 All hearings shall be held in private, unless the parties agree otherwise in writing.	19.4 All ~~meetings and~~ hearings shall be in private unless the parties agree otherwise in ~~writing or the Arbitral Tribunal directs otherwise.~~

	~~19.5 The Arbitral Tribunal shall have the fullest authority to establish time-limits for meetings and hearings, or for any parts thereof.~~
Article 20 Witness(es) 20.1 Before any hearing, the Arbitral Tribunal may order any party to give written notice of the identity of each witness that party wishes to call (including rebuttal witnesses), as well as the subject-matter of that witness's testimony, its content and its relevance to the issues in the arbitration.	*Article 20 Witnesses* 20.1 Before any hearing, the Arbitral Tribunal may ~~require~~ any party to give notice of the identity of each witness that party wishes to call (including rebuttal witnesses), as well as the subject matter of that witness's testimony, its content and its relevance to the issues in the arbitration.
20.2 Subject to any order otherwise by the Arbitral Tribunal, the testimony of a witness may be presented by a party in written form, either as a signed statement or like document.	20.3 Subject to any order otherwise by the Arbitral Tribunal, the testimony of a witness may be presented by a party in written form, either as a signed statement or ~~as a sworn affidavit~~.
20.3 The Arbitral Tribunal may decide the time, manner and form in which these written materials shall be exchanged between the parties and presented to the Arbitral Tribunal; and it may allow, refuse or limit the written and oral testimony of witnesses (whether witnesses of fact or expert witnesses).	20.2 The Arbitral Tribunal may ~~also determine~~ the time, manner and form in which ~~such~~ materials ~~should~~ be exchanged between the parties and presented to the Arbitral Tribunal; and it ~~has a discretion to~~ allow, refuse, or limit the ~~appearance~~ of witnesses (whether witness of fact or expert witness).

20.4 The Arbitral Tribunal and any party may request that a witness, on whose written testimony another party relies, should attend for oral questioning at a hearing before the Arbitral Tribunal. If the Arbitral Tribunal orders that other party to secure the attendance of that witness and the witness refuses or fails to attend the hearing without good cause, the Arbitral Tribunal may place such weight on the written testimony or exclude all or any part thereof altogether as it considers appropriate in the circumstances.	20.4 ~~Subject to Article 14.1 and 14.2,~~ any party may request that a witness, on whose testimony another party ~~seeks to rely~~, should attend for oral questioning at a hearing before the Arbitral Tribunal. If the Arbitral Tribunal orders that other party to ~~produce the~~ witness and the witness fails to attend the ~~oral~~ hearing without good cause, the Arbitral Tribunal may place such weight on the written testimony ~~(~~or ~~exclude the same~~ altogether~~)~~ as it considers appropriate in the circumstances ~~of the case.~~
20.5 Subject to the mandatory provisions of any applicable law, rules of law and any order of the Arbitral Tribunal otherwise, it shall not be improper for any party or its legal representatives to interview any potential witness for the purpose of presenting his or her testimony in written form to the Arbitral Tribunal or producing such person as an oral witness at any hearing.	20.6 Subject to the mandatory provisions of any applicable law, it shall not be improper for any party or its legal representatives to interview any witness or potential witness for the purpose of presenting his testimony in written form or producing ~~him~~ as an oral witness.
20.6 Subject to any order by the Arbitral Tribunal otherwise, any individual intending to testify to the Arbitral Tribunal may be treated as a witness notwithstanding that the individual is a party to the arbitration or was, remains or has become an officer, employee, owner or shareholder of any party or is otherwise identified with any party.	20.7 Any individual intending to testify to the Arbitral Tribunal ~~on any issue of fact or expertise shall~~ be treated as a witness ~~under these Rules~~ notwithstanding that the individual is a party to the arbitration or was ~~or is~~ an officer, employee or shareholder of any party.
20.7 Subject to the mandatory provisions of any applicable law, the Arbitral Tribunal shall be entitled (but not required) to administer any appropriate oath to any witness at any hearing, prior to the oral testimony of that witness.	

20.8 Any witness who gives oral testimony at a hearing before the Arbitral Tribunal may be questioned by each of the parties under the control of the Arbitral Tribunal. The Arbitral Tribunal may put questions at any stage of such testimony.	20.5 Any witness who gives oral evidence at a hearing before the Arbitral Tribunal may be questioned by each of the parties under the control of the Arbitral Tribunal. The Arbitral Tribunal may put questions at any stage of ~~his evidence~~.
Article 21 Expert(s) to Arbitral Tribunal 21.1 The Arbitral Tribunal, after consultation with the parties, may appoint one or more experts to report in writing to the Arbitral Tribunal and the parties on specific issues in the arbitration, as identified by the Arbitral Tribunal. 21.2 Any such expert shall be and remain impartial and independent of the parties; and he or she shall sign a written declaration to such effect, delivered to the Arbitral Tribunal and copied to all parties. 21.3 The Arbitral Tribunal may require any party at any time to give to such expert any relevant information or to provide access to any relevant documents, goods, samples, property, site or thing for inspection under that party's control on such terms as the Arbitral Tribunal thinks appropriate in the circumstances.	*Article 21 Experts to the Arbitral Tribunal* 21.1 ~~Unless otherwise agreed by the parties in writing,~~ the Arbitral Tribunal: ~~(a)~~ may appoint one or more experts to report to the Arbitral Tribunal on specific issues, ~~who~~ shall be and remain impartial and independent of the parties ~~throughout the arbitration proceedings; and~~ (b) may require ~~a~~ party to give any such expert any relevant information or to provide access to any relevant documents, goods, samples, property ~~or~~ site ~~for inspection by the expert.~~

21.4 If any party so requests or the Arbitral Tribunal considers it necessary, the Arbitral Tribunal may order the expert, after delivery of the expert's written report, to participate in a hearing at which the parties shall have a reasonable opportunity to question the expert on the report and to present witnesses in order to testify on relevant issues arising from the report.	21.2 ~~Unless otherwise agreed by the parties in writing,~~ if a party so requests or if the Arbitral Tribunal considers it necessary, the expert ~~shall~~, after delivery of ~~his~~ written ~~or oral~~ report ~~to the Arbitral Tribunal and the parties,~~ participate in ~~one or more hearings~~ at which the parties shall have ~~the~~ opportunity to question the expert on ~~his~~ report and to present ~~expert~~ witnesses in order to testify on the points at issue.
21.5 The fees and expenses of any expert appointed by the Arbitral Tribunal under this Article 21 may be paid out of the deposits payable by the parties under Article 24 and shall form part of the Arbitration Costs under Article 28.	21.3 The fees and expenses of any expert appointed by the Arbitral Tribunal under this Article shall be paid out of the deposits payable by the parties under Article 24 and shall form part of the costs of the arbitration.
Article 22 Additional Powers 22.1 The Arbitral Tribunal shall have the power, upon the application of any party or (save for sub-paragraphs (viii), (ix) and (x) below) upon its own initiative, but in either case only after giving the parties a reasonable opportunity to state their views and upon such terms (as to costs and otherwise) as the Arbitral Tribunal may decide:	*Article 22 Additional Powers ~~of the Arbitral Tribunal~~* 22.1 ~~Unless the parties at any time agree otherwise in writing,~~ the Arbitral Tribunal shall have the power, ~~on~~ the application of any party or ~~of~~ its own ~~motion~~, but in either case only after giving the parties a reasonable opportunity to state their views:
(i) to allow a party to supplement, modify or amend any claim, defence, cross-claim, defence to cross-claim and reply, including a Request, Response and any other written statement, submitted by such party;	(a) to allow ~~any~~ party, ~~upon such terms (as to costs and otherwise) as it shall determine~~, to amend any claim, ~~counterclaim~~, defence and reply;

(ii) to abridge or extend (even where the period of time has expired) any period of time prescribed under the Arbitration Agreement, any other agreement of the parties or any order made by the Arbitral Tribunal;	(b) to extend ~~or abbreviate any time-limit provided by~~ the Arbitration Agreement ~~or these Rules for the conduct of the arbitration or by the Arbitral Tribunal's own orders;~~
(iii) to conduct such enquiries as may appear to the Arbitral Tribunal to be necessary or expedient, including whether and to what extent the Arbitral Tribunal should itself take the initiative in identifying relevant issues and ascertaining relevant facts and the law(s) or rules of law applicable to the Arbitration Agreement, the arbitration and the merits of the parties' dispute;	(c) to conduct such enquiries as may appear to the Arbitral Tribunal to be necessary or expedient, including whether and to what extent the Arbitral Tribunal should itself take the initiative in identifying the issues and ascertaining ~~the~~ relevant facts and the law(s) or rules of law applicable to the arbitration, the merits of the parties' dispute ~~and the Arbitration Agreement;~~
(iv) to order any party to make any documents, goods, samples, property, site or thing under its control available for inspection by the Arbitral Tribunal, any other party, any expert to such party and any expert to the Tribunal;	(d) to order any party to make any property, site or thing under its control ~~and relating to the subject matter of the arbitration~~ available for inspection by the Arbitral Tribunal, any other party, ~~its~~ expert ~~or~~ any expert to the ~~Arbitral~~ Tribunal;
(v) to order any party to produce to the Arbitral Tribunal and to other parties documents or copies of documents in their possession, custody or power which the Arbitral Tribunal decides to be relevant;	(e) to order any party to produce to the Arbitral Tribunal, and to ~~the~~ other parties ~~for inspection, and to supply copies of, any~~ documents or ~~classes~~ of documents in their possession, custody or power which the Arbitral Tribunal ~~determines~~ to be relevant;

(vi) to decide whether or not to apply any strict rules of evidence (or any other rules) as to the admissibility, relevance or weight of any material tendered by a party on any issue of fact or expert opinion; and to decide the time, manner and form in which such material should be exchanged between the parties and presented to the Arbitral Tribunal;	(f) to decide whether or not to apply any strict rules of evidence (or any other rules) as to the admissibility, relevance or weight of any material tendered by a party on any matter of fact or expert opinion; and to determine the time, manner and form in which such material should be exchanged between the parties and presented to the Arbitral Tribunal;
(vii) to order compliance with any legal obligation, payment of compensation for breach of any legal obligation and specific performance of any agreement (including any arbitration agreement or any contract relating to land);	~~(g) to order the correction of any contract between the parties or the Arbitration Agreement, but only to the extent required to rectify any mistake which the Arbitral Tribunal determines to be common to the parties and then only if and to the extent to which the law(s) or rules of law applicable to the contract or Arbitration Agreement permit such correction; and~~
(viii) to allow one or more third persons to be joined in the arbitration as a party provided any such third person and the applicant party have consented to such joinder in writing following the Commencement Date or (if earlier) in the Arbitration Agreement; and thereafter to make a single final award, or separate awards, in respect of all parties so implicated in the arbitration;	(h) to allow, ~~only upon the application of a party~~, one or more third persons to be joined in the arbitration as a party provided any such third person and the applicant party have consented ~~thereto~~ in writing~~, and~~ thereafter to make a single final award, or separate awards, in respect of all parties so implicated in the arbitration;
(ix) to order, with the approval of the LCIA Court, the consolidation of the arbitration with one or more other arbitrations into a single arbitration subject to the LCIA Rules where all the parties to the arbitrations to be consolidated so agree in writing;	

(x) to order, with the approval of the LCIA Court, the consolidation of the arbitration with one or more other arbitrations subject to the LCIA Rules commenced under the same arbitration agreement or any compatible arbitration agreement(s) between the same disputing parties, provided that no arbitral tribunal has yet been formed by the LCIA Court for such other arbitration(s) or, if already formed, that such tribunal(s) is(are) composed of the same arbitrators; and	
(xi) to order the discontinuance of the arbitration if it appears to the Arbitral Tribunal that the arbitration has been abandoned by the parties or all claims and any cross-claims withdrawn by the parties, provided that, after fixing a reasonable period of time within which the parties shall be invited to agree or to object to such discontinuance, no party has stated its written objection to the Arbitral Tribunal to such discontinuance upon the expiry of such period of time.	
22.2 By agreeing to arbitration under the Arbitration Agreement, the parties shall be treated as having agreed not to apply to any state court or other legal authority for any order available from the Arbitral Tribunal (if formed) under Article 22.1, except with the agreement in writing of all parties.	22.2 By agreeing to arbitration under ~~these Rules~~, the parties shall be treated as having agreed not to apply to any state court or other ~~judicial~~ authority for any order available from the Arbitral Tribunal under Article 22.1, except with the agreement in writing of all parties.

22.3 The Arbitral Tribunal shall decide the parties' dispute in accordance with the law(s) or rules of law chosen by the parties as applicable to the merits of their dispute. If and to the extent that the Arbitral Tribunal decides that the parties have made no such choice, the Arbitral Tribunal shall apply the law(s) or rules of law which it considers appropriate.	22.3 The Arbitral Tribunal shall decide the parties' dispute in accordance with the law(s) or rules of law chosen by the parties as applicable to the merits of their dispute. If and to the extent that the Arbitral Tribunal ~~determines~~ that the parties have made no such choice, the Arbitral Tribunal shall apply the law(s) or rules of law which it considers appropriate.
22.4 The Arbitral Tribunal shall only apply to the merits of the dispute principles deriving from "ex aequo et bono", "amiable composition" or "honourable engagement" where the parties have so agreed in writing.	22.4 The Arbitral Tribunal shall only apply to the merits of the dispute principles deriving from "ex aequo et bono", "amiable composition" or "honourable engagement" where the parties have so agreed ~~expressly~~ in writing.
22.5 Subject to any order of the Arbitral Tribunal under Article 22.1(ii), the LCIA Court may also abridge or extend any period of time under the Arbitration Agreement or other agreement of the parties (even where the period of time has expired).	
22.6 Without prejudice to the generality of Articles 22.1(ix) and (x), the LCIA Court may determine, after giving the parties a reasonable opportunity to state their views, that two or more arbitrations, subject to the LCIA Rules and commenced under the same arbitration agreement between the same disputing parties, shall be consolidated to form one single arbitration subject to the LCIA Rules, provided that no arbitral tribunal has yet been formed by the LCIA Court for any of the arbitrations to be consolidated.	

Article 23 Jurisdiction and Authority 23.1 The Arbitral Tribunal shall have the power to rule upon its own jurisdiction and authority, including any objection to the initial or continuing existence, validity, effectiveness or scope of the Arbitration Agreement. 23.2 For that purpose, an arbitration clause which forms or was intended to form part of another agreement shall be treated as an arbitration agreement independent of that other agreement. A decision by the Arbitral Tribunal that such other agreement is non-existent, invalid or ineffective shall not entail (of itself) the non-existence, invalidity or ineffectiveness of the arbitration clause.	*Article 23 Jurisdiction of the Arbitral Tribunal* 23.1 The Arbitral Tribunal shall have the power to rule ~~on~~ its own jurisdiction, including any objection to the initial or continuing existence, validity ~~or~~ effectiveness of the Arbitration Agreement. For that purpose, an arbitration clause which forms or was intended to form part of another agreement shall be treated as an arbitration agreement independent of that other agreement. A decision by the Arbitral Tribunal that such other agreement is non-existent, invalid or ineffective shall not entail ipso jure the non-existence, invalidity or ineffectiveness of the arbitration clause.
23.3 An objection by a Respondent that the Arbitral Tribunal does not have jurisdiction shall be raised as soon as possible but not later than the time for its Statement of Defence; and a like objection by any party responding to a cross-claiming party shall be raised as soon as possible but not later than the time for its Statement of Defence to Cross-claim. An objection that the Arbitral Tribunal is exceeding the scope of its authority shall be raised promptly after the Arbitral Tribunal has indicated its intention to act upon the matter alleged to lie beyond its authority. The Arbitral Tribunal may nevertheless admit an untimely objection as to its jurisdiction or authority if it considers the delay justified in the circumstances.	23.2 A ~~plea~~ by a Respondent that the Arbitral Tribunal does not have jurisdiction shall ~~be treated as having been irrevocably waived unless it is raised not later than the Statement of Defence; and a like plea by a Respondent to Counterclaim shall be similarly treated unless it is raised no later than the Statement of Defence to Counterclaim.~~ A ~~plea~~ that the Arbitral Tribunal is exceeding the scope of its authority shall be raised promptly after the Arbitral Tribunal has indicated its intention to ~~decide on~~ the matter alleged ~~by any party to be~~ beyond ~~the scope of~~ its authority, ~~failing which such plea shall also be treated as having been waived irrevocably. In any case,~~ the Arbitral Tribunal may nevertheless admit an untimely ~~plea~~ if it considers the delay justified in the ~~particular~~ circumstances.

23.4 The Arbitral Tribunal may decide the objection to its jurisdiction or authority in an award as to jurisdiction or authority or later in an award on the merits, as it considers appropriate in the circumstances.	23.3 The Arbitral Tribunal may determine the ~~plea~~ to its jurisdiction or authority in an award as to jurisdiction or later in an award on the merits, as it considers appropriate in the circumstances.
23.5 By agreeing to arbitration under the Arbitration Agreement, after the formation of the Arbitral Tribunal the parties shall be treated as having agreed not to apply to any state court or other legal authority for any relief regarding the Arbitral Tribunal's jurisdiction or authority, except (i) with the prior agreement in writing of all parties to the arbitration, or (ii) the prior authorisation of the Arbitral Tribunal, or (iii) following the latter's award on the objection to its jurisdiction or authority.	23.4 By agreeing to arbitration under ~~these Rules~~, the parties shall be treated as having agreed not to apply to any state court or other ~~judicial~~ authority for any relief regarding the Arbitral Tribunal's jurisdiction or authority, except with the agreement in writing of all parties to the arbitration or the prior authorisation of the Arbitral Tribunal or following the latter's award ~~ruling~~ on the objection to its jurisdiction or authority.
Article 24 Deposits 24.1 The LCIA Court may direct the parties, in such proportions and at such times as it thinks appropriate, to make one or more payments to the LCIA on account of the Arbitration Costs. Such payments deposited by the parties may be applied by the LCIA Court to pay any item of such Arbitration Costs (including the LCIA's own fees and expenses) in accordance with the LCIA Rules.	*Article 24 Deposits* 24.1 The LCIA Court may direct the parties, in such proportions as it thinks appropriate, to make one or ~~several interim or final~~ payments on account ~~of the costs of the arbitration~~. Such ~~deposits shall be made to and held~~ by the LCIA ~~and from time to time may be released by the LCIA Court to the arbitrator(s), any expert appointed by the Arbitral Tribunal and the LCIA itself as the arbitration progresses.~~
24.2 All payments made by parties on account of the Arbitration Costs shall be held by the LCIA in trust under English law in England, to be disbursed or otherwise applied by the LCIA in accordance with the LCIA Rules and invested having regard also to the interests of the LCIA. Each payment made by a party shall be credited by the LCIA with interest at the rate from time	

to time credited to an overnight deposit of that amount with the bank(s) engaged by the LCIA to manage deposits from time to time; and any surplus income (beyond such interest) shall accrue for the sole benefit of the LCIA. In the event that payments (with such interest) exceed the total amount of the Arbitration Costs at the conclusion of the arbitration, the excess amount shall be returned by the LCIA to the parties as the ultimate default beneficiaries of the trust.	
24.3 Save for exceptional circumstances, the Arbitral Tribunal should not proceed with the arbitration without having ascertained from the Registrar that the LCIA is or will be in requisite funds as regards outstanding and future Arbitration Costs.	24.2 The Arbitral Tribunal shall not proceed with the arbitration without ~~ascertaining at all times~~ from the Registrar ~~or any deputy Registrar~~ that the LCIA is in requisite funds.
24.4 In the event that a party fails or refuses to make any payment on account of the Arbitration Costs as directed by the LCIA Court, the LCIA Court may direct the other party or parties to effect a substitute payment to allow the arbitration to proceed (subject to any order or award on Arbitration Costs).	24.3 In the event that a party fails or refuses to ~~provide any deposit~~ as directed by the LCIA Court, the LCIA Court may direct the other party or parties to effect a substitute payment to allow the arbitration to proceed (subject to any award on costs). ~~In such circumstances, the party paying the substitute payment shall be entitled to recover that amount as a debt immediately due from the defaulting party~~.
24.5 In such circumstances, the party effecting the substitute payment may request the Arbitral Tribunal to make an order or award in order to recover that amount as a debt immediately due and payable to that party by the defaulting party, together with any interest.	

24.6 Failure by a claiming or cross-claiming party to make promptly and in full any required payment on account of Arbitration Costs may be treated by the Arbitral Tribunal as a withdrawal from the arbitration of the claim or cross-claim respectively, thereby removing such claim or cross-claim (as the case may be) from the scope of the Arbitral Tribunal's jurisdiction under the Arbitration Agreement, subject to any terms decided by the Arbitral Tribunal as to the reinstatement of the claim or cross-claim in the event of subsequent payment by the claiming or cross-claiming party. Such a withdrawal shall not preclude the claiming or cross-claiming party from defending as a respondent any claim or cross-claim made by another party.	24.4 Failure by a claimant or ~~counterclaiming~~ party to ~~provide~~ promptly and in full the required ~~deposit~~ may be treated by the ~~LCIA~~ Court and the Arbitral Tribunal as a withdrawal of the claim or ~~counterclaim~~ respectively.
Article 25 Interim and Conservatory Measures 25.1 The Arbitral Tribunal shall have the power upon the application of any party, after giving all other parties a reasonable opportunity to respond to such application and upon such terms as the Arbitral Tribunal considers appropriate in the circumstances:	*Article 25 Interim and Conservatory Measures* 25.1 The Arbitral Tribunal shall have the power~~, unless otherwise agreed by the parties in writing, on~~ the application of any party:
(i) to order any respondent party to a claim or cross-claim to provide security for all or part of the amount in dispute, by way of deposit or bank guarantee or in any other manner;	(a) to order any respondent party to a claim or ~~counterclaim~~ to provide security for all or part of the amount in dispute, by way of deposit or bank guarantee or in any other manner ~~and upon such terms as the Arbitral Tribunal considers appropriate. Such terms may include the provision by the claiming or counterclaiming party of a cross-indemnity, itself secured in such manner as the Arbitral Tribunal considers appropriate, for any costs or losses incurred by such respondent in providing security. The amount of any costs and losses payable under such~~

	~~cross-indemnity may be determined by the Arbitral Tribunal in one or more awards;~~
(ii) to order the preservation, storage, sale or other disposal of any documents, goods, samples, property, site or thing under the control of any party and relating to the subject-matter of the arbitration; and	(b) to order the preservation, storage, sale or other disposal of any property or thing under the control of any party and relating to the subject matter of the arbitration; and
(iii) to order on a provisional basis, subject to a final decision in an award, any relief which the Arbitral Tribunal would have power to grant in an award, including the payment of money or the disposition of property as between any parties. Such terms may include the provision by the applicant party of a cross-indemnity, secured in such manner as the Arbitral Tribunal considers appropriate, for any costs or losses incurred by the respondent party in complying with the Arbitral Tribunal's order. Any amount payable under such cross-indemnity and any consequential relief may be decided by the Arbitral Tribunal by one or more awards in the arbitration.	(c) to order on a provisional basis, subject to final ~~determination~~ in an award, any relief which the Arbitral Tribunal would have power to grant in an award, including ~~a provisional order for~~ the payment of money or the disposition of property as between any parties.
25.2 The Arbitral Tribunal shall have the power upon the application of a party, after giving all other parties a reasonable opportunity to respond to such application, to order any claiming or cross-claiming party to provide or procure security for Legal Costs and Arbitration Costs by way of deposit or bank guarantee or in any other manner and upon such terms as the Arbitral Tribunal considers appropriate in the circumstances. Such terms may include the provision by that other party of a cross-indemnity, itself secured in such manner as the Arbitral Tribunal	25.2 The Arbitral Tribunal shall have the power, upon the application of a party, to order any claiming or ~~counterclaiming~~ party to provide security for the ~~legal or other costs of any other party~~ by way of deposit or bank guarantee or in any other manner and upon such terms as the Arbitral Tribunal considers appropriate. Such terms may include the provision by that other party of a cross-indemnity, itself secured in such manner as the Arbitral Tribunal considers appropriate, for any costs and losses incurred by such claimant or ~~counterclaimant~~ in ~~providing~~

considers appropriate, for any costs and losses incurred by such claimant or cross-claimant in complying with the Arbitral Tribunal's order. Any amount payable under such cross-indemnity and any consequential relief may be decided by the Arbitral Tribunal by one or more awards in the arbitration. In the event that a claiming or cross-claiming party does not comply with any order to provide security, the Arbitral Tribunal may stay that party's claims or cross-claims or dismiss them by an award.	~~security.~~ ~~The~~ amount ~~of any costs and losses~~ payable under such cross-indemnity may be ~~determined~~ by the Arbitral Tribunal in one or more awards. In the event that a claiming or ~~counterclaiming~~ party does not comply with any order to provide security, the Arbitral Tribunal may stay that party's claims or ~~counterclaims~~ or dismiss them ~~in~~ an award.
25.3 The power of the Arbitral Tribunal under Article 25.1 shall not prejudice any party's right to apply to a state court or other legal authority for interim or conservatory measures to similar effect: (i) before the formation of the Arbitral Tribunal; and (ii) after the formation of the Arbitral Tribunal, in exceptional cases and with the Arbitral Tribunal's authorisation, until the final award. After the Commencement Date, any application and any order for such measures before the formation of the Arbitral Tribunal shall be communicated promptly in writing by the applicant party to the Registrar; after its formation, also to the Arbitral Tribunal; and in both cases also to all other parties. 25.4 By agreeing to arbitration under the Arbitration Agreement, the parties shall be taken to have agreed not to apply to any state court or other legal authority for any order for security for Legal Costs or Arbitration Costs.	25.3 The power of the Arbitral Tribunal under Article 25.1 shall not prejudice ~~howsoever~~ any party's right to apply to ~~any~~ state court or other ~~judicial~~ authority for interim or conservatory measures before the formation of the Arbitral Tribunal and, in exceptional cases, ~~thereafter~~. Any application and any order for such measures ~~after~~ the formation of the Arbitral Tribunal shall be ~~promptly~~ communicated by the applicant to the ~~Arbitral Tribunal~~ and all other parties. ~~However~~, by agreeing to arbitration under ~~these Rules,~~ the parties shall be taken to have agreed not to apply to any state court or other ~~judicial~~ authority for any order for security for ~~its~~ legal ~~or other~~ costs ~~available from the Arbitral Tribunal under Article 25.2.~~
Article 26 Award(s) 26.1 The Arbitral Tribunal may make separate awards on different issues at different times, including interim payments on account of any claim or cross-claim (including Legal and	*Article 26 The Award*

Arbitration Costs). Such awards shall have the same status as any other award made by the Arbitral Tribunal.	
26.2 The Arbitral Tribunal shall make any award in writing and, unless all parties agree in writing otherwise, shall state the reasons upon which such award is based. The award shall also state the date when the award is made and the seat of the arbitration; and it shall be signed by the Arbitral Tribunal or those of its members assenting to it.	26.1 The Arbitral Tribunal shall make ~~its~~ award in writing and, unless all parties agree in writing otherwise, shall state the reasons upon which ~~its~~ award is based. The award shall also state the date when the award is made and the seat of the arbitration; and it shall be signed by the Arbitral Tribunal or those of its members assenting to it.
26.3 An award may be expressed in any currency, unless the parties have agreed otherwise.	~~26.2 If any arbitrator fails to comply with the mandatory provisions of any applicable law relating to the making of the award, having been given a reasonable opportunity to do so, the remaining arbitrators may proceed in his absence and state in their award the circumstances of the other arbitrator's failure to participate in the making of the award.~~
26.4 Unless the parties have agreed otherwise, the Arbitral Tribunal may order that simple or compound interest shall be paid by any party on any sum awarded at such rates as the Arbitral Tribunal decides to be appropriate (without being bound by rates of interest practised by any state court or other legal authority) in respect of any period which the Arbitral Tribunal decides to be appropriate ending not later than the date upon which the award is complied with.	

26.5 Where there is more than one arbitrator and the Arbitral Tribunal fails to agree on any issue, the arbitrators shall decide that issue by a majority. Failing a majority decision on any issue, the presiding arbitrator shall decide that issue.	26.3 Where there ~~are three~~ arbitrator~~s~~ and the Arbitral Tribunal fails to agree on any issue, the arbitrators shall decide that issue by a majority. Failing a majority decision on any issue, the ~~chairman of the Arbitral Tribunal~~ shall decide that issue.
26.6 If any arbitrator refuses or fails to sign the award, the signatures of the majority or (failing a majority) of the presiding arbitrator shall be sufficient, provided that the reason for the omitted signature is stated in the award by the majority or by the presiding arbitrator.	26.4 If any arbitrator refuses or fails to sign the award, the signatures of the majority or (failing a majority) of the ~~chairman~~ shall be sufficient, provided that the reason for the omitted signature is stated in the award by the majority or ~~chairman~~.
26.7 The sole or presiding arbitrator shall be responsible for delivering the award to the LCIA Court, which shall transmit to the parties the award authenticated by the Registrar as an LCIA award, provided that all Arbitration Costs have been paid in full to the LCIA in accordance with Articles 24 and 28. Such transmission may be made by any electronic means, in addition to paper form (if so requested by any party). In the event of any disparity between electronic and paper forms, the paper form shall prevail.	26.5 The sole arbitrator or chairman shall be responsible for delivering the award to the LCIA Court, which shall transmit ~~certified copies~~ to the parties provided that ~~the~~ costs ~~of arbitration~~ have been paid to the LCIA in accordance with Article 28.
26.8 Every award (including reasons for such award) shall be final and binding on the parties. The parties undertake to carry out any award immediately and without any delay (subject only to Article 27); and the parties also waive irrevocably their right to any form of appeal, review or recourse to any state court or other legal authority, insofar as such waiver shall not be prohibited under any applicable law.	~~26.6 An award may be expressed in any currency. The Arbitral Tribunal may order that simple or compound interest shall be paid by any party on any sum awarded at such rates as the Arbitral Tribunal determines to be appropriate, without being bound by legal rates of interest imposed by any state court, in respect of any period which the Arbitral Tribunal determines to be appropriate ending not later than the date upon which the award is complied with.~~

	26.7 ~~The Arbitral Tribunal may make separate awards on different issues at different times. Such awards shall have the same status and effect as any other award made by the Arbitral Tribunal.~~
26.9 In the event of any final settlement of the parties' dispute, the Arbitral Tribunal may decide to make an award recording the settlement if the parties jointly so request in writing (a "Consent Award"), provided always that such Consent Award shall contain an express statement on its face that it is an award made at the parties' joint request and with their consent. A Consent Award need not contain reasons. If the parties do not jointly request a Consent Award, on written confirmation by the parties to the LCIA Court that a final settlement has been reached, the Arbitral Tribunal shall be discharged and the arbitration proceedings concluded by the LCIA Court, subject to payment by the parties of any outstanding Arbitration Costs in accordance with Articles 24 and 28.	26.8 In the event of ~~a~~ settlement of the parties' dispute, the Arbitral Tribunal may ~~render~~ an award recording the settlement if the parties so request in writing (a "Consent Award"), provided always that such award contain~~s~~ an express statement that it is an award made by the parties' consent. A Consent Award need not contain reasons. If the parties do not ~~require~~ a consent award, ~~then~~ on written confirmation by the parties to the LCIA Court that a settlement has been reached, the Arbitral Tribunal shall be discharged and the arbitration proceedings concluded, ~~subject to payment~~ by the parties of any outstanding costs ~~of the arbitration under~~ Article 28.
	~~26.9 All awards shall be final and binding on the parties. By agreeing to arbitration under these Rules, the parties undertake to carry out any award immediately and without any delay (subject only to Article 27); and the parties also waive irrevocably their right to any form of appeal, review or recourse to any state court or other judicial authority, insofar as such waiver may be validly made.~~

Article 27 Correction of Award(s) and Additional Award(s) 27.1 Within 28 days of receipt of any award, a party may by written notice to the Registrar (copied to all other parties) request the Arbitral Tribunal to correct in the award any error in computation, any clerical or typographical error, any ambiguity or any mistake of a similar nature. If the Arbitral Tribunal considers the request to be justified, after consulting the parties, it shall make the correction within 28 days of receipt of the request. Any correction shall take the form of a memorandum by the Arbitral Tribunal.	*Article 27 Correction of Awards and Additional Awards* 27.1 Within ~~30~~ days of receipt of any award, ~~or such lesser period as may be agreed in writing by the parties,~~ a party may by written notice to the Registrar (copied to all other parties) request the Arbitral Tribunal to correct in the award any errors in computation, clerical or typographical error~~s~~ or any errors of a similar nature. If the Arbitral Tribunal considers the request to be justified, it shall make the corrections within ~~30~~ days of receipt of the request. Any correction shall take the form of ~~separate~~ memorandum ~~dated and signed~~ by the Arbitral Tribunal ~~or (if three arbitrators) those of its members assenting to it; and such memorandum shall become part of the award for all purposes.~~
27.2 The Arbitral Tribunal may also correct any error (including any error in computation, any clerical or typographical error or any error of a similar nature) upon its own initiative in the form of a memorandum within 28 days of the date of the award, after consulting the parties.	27.2 The Arbitral Tribunal may ~~likewise~~ correct any error ~~of the nature described in Article 27.1 on~~ its own initiative within ~~30~~ days of the date of the award, ~~to the same effect.~~
27.3 Within 28 days of receipt of the final award, a party may by written notice to the Registrar (copied to all other parties), request the Arbitral Tribunal to make an additional award as to any claim or cross-claim presented in the arbitration but not decided in any award. If the Arbitral Tribunal considers the request to be justified, after consulting the parties, it shall make the additional award within 56 days of receipt of the request. 27.4 The provisions of Article 26.2 to 26.7 shall apply to any memorandum or	27.3 Within ~~30~~ days of receipt of the final award, a party may by written notice to the Registrar (copied to all other parties), request the Arbitral Tribunal to make an additional award as to claim~~s~~ or ~~counterclaims~~ presented in the arbitration but not ~~determined~~ in any award. If the Arbitral Tribunal considers the request to be justified, it shall make the additional award within ~~60~~ days of receipt of the request. The provisions of Article 26 shall apply to any additional award.

additional award made hereunder. A memorandum shall be treated as part of the award.	
27.5 As to any claim or cross-claim presented in the arbitration but not decided in any award, the Arbitral Tribunal may also make an additional award upon its own initiative within 28 days of the date of the award, after consulting the parties.	
Article 28 Arbitration Costs and Legal Costs 28.1 The costs of the arbitration other than the legal or other expenses incurred by the parties themselves (the "Arbitration Costs") shall be determined by the LCIA Court in accordance with the Schedule of Costs. The parties shall be jointly and severally liable to the LCIA and the Arbitral Tribunal for such Arbitration Costs.	*Article 28 Arbitration and Legal Costs* 28.1 The costs of the arbitration ~~(~~other than the legal or other costs incurred by the parties themselves~~)~~ shall be determined by the LCIA Court in accordance with the Schedule of Costs. The parties shall be jointly and severally liable to the Arbitral Tribunal and the LCIA for such arbitration costs.
28.2 The Arbitral Tribunal shall specify by an award the amount of the Arbitration Costs determined by the LCIA Court (in the absence of a final settlement of the parties' dispute regarding liability for such costs). The Arbitral Tribunal shall decide the proportions in which the parties shall bear such Arbitration Costs. If the Arbitral Tribunal has decided that all or any part of the Arbitration Costs shall be borne by a party other than a party which has already covered such costs by way of a payment to the LCIA under Article 24, the latter party shall have the right to recover the appropriate amount of Arbitration Costs from the former party.	28.2 The Arbitral Tribunal shall specify in the award the ~~total~~ amount of the costs ~~of the arbitration as~~ determined by the LCIA Court. ~~Unless the parties agree otherwise in writing~~, the Arbitral Tribunal shall determine the proportions in which the parties shall bear ~~all or part of~~ such arbitration costs. If the Arbitral Tribunal has ~~determined~~ that all or any part of the arbitration costs shall be borne by a party other than a party which has already ~~paid them~~ to the LCIA, the latter party shall have the right to recover the appropriate amount from the former party.

28.3 The Arbitral Tribunal shall also have the power to decide by an award that all or part of the legal or other expenses incurred by a party (the "Legal Costs") be paid by another party. The Arbitral Tribunal shall decide the amount of such Legal Costs on such reasonable basis as it thinks appropriate. The Arbitral Tribunal shall not be required to apply the rates or procedures for assessing such costs practised by any state court or other legal authority.	28.3 The Arbitral Tribunal shall also have the power to ~~order in its~~ award that all or part of the legal or other ~~costs~~ incurred by ~~a~~ party be paid by another party, unless the parties agree ~~otherwise in writing~~. The Arbitral Tribunal shall ~~determine and fix~~ the amount of ~~each item comprising such costs~~ on such reasonable basis as it thinks ~~fit~~.
28.4 The Arbitral Tribunal shall make its decisions on both Arbitration Costs and Legal Costs on the general principle that costs should reflect the parties' relative success and failure in the award or arbitration or under different issues, except where it appears to the Arbitral Tribunal that in the circumstances the application of such a general principle would be inappropriate under the Arbitration Agreement or otherwise. The Arbitral Tribunal may also take into account the parties' conduct in the arbitration, including any co-operation in facilitating the proceedings as to time and cost and any non-co-operation resulting in undue delay and unnecessary expense. Any decision on costs by the Arbitral Tribunal shall be made with reasons in the award containing such decision.	28.4 Unless~~the parties otherwise agree in writing, the~~ Arbitral Tribunal shall make its ~~orders~~ on both arbitration and legal costs on the general principle that costs should reflect the parties' relative success and failure in the award or arbitration, except where it appears to the Arbitral Tribunal that in the ~~particular~~ circumstances ~~this~~ general ~~approach~~ is inappropriate. Any ~~order for~~ costs shall be made with reasons in the award containing such ~~order~~.
28.5 In the event that the parties have howsoever agreed before their dispute that one or more parties shall pay the whole or any part of the Arbitration Costs or Legal Costs whatever the result of any dispute, arbitration or award, such agreement (in order to be effective) shall be confirmed by the parties in writing after the Commencement Date.	

28.6 If the arbitration is abandoned, suspended, withdrawn or concluded, by agreement or otherwise, before the final award is made, the parties shall remain jointly and severally liable to pay to the LCIA and the Arbitral Tribunal the Arbitration Costs determined by the LCIA Court. 28.7 In the event that the Arbitration Costs are less than the deposits received by the LCIA under Article 24, there shall be a refund by the LCIA to the parties in such proportions as the parties may agree in writing, or failing such agreement, in the same proportions and to the same payers as the deposits were paid to the LCIA.	28.5 If the arbitration is abandoned, suspended or concluded, by agreement or otherwise, before the final award is made, the parties shall remain jointly and severally liable to pay to the LCIA and the Arbitral Tribunal ~~the~~ costs ~~of the arbitration as~~ determined by the LCIA Court ~~in accordance with the Schedule of Costs.~~ In the event that such arbitration costs are less than the deposits ~~made~~ by the ~~parties~~, there shall be a refund by the LCIA in such proportion as the parties may agree in writing, or failing such agreement, in the same proportions as the deposits were ~~made by the parties~~ to the LCIA.
Article 29 Determinations and Decisions by LCIA Court	*Article 29 Decisions by the LCIA Court*
29.1 The determinations of the LCIA Court with respect to all matters relating to the arbitration shall be conclusive and binding upon the parties and the Arbitral Tribunal, unless otherwise directed by the LCIA Court. Save for reasoned decisions on arbitral challenges under Article 10, such determinations are to be treated as administrative in nature; and the LCIA Court shall not be required to give reasons for any such determination.	29.1 The ~~decisions~~ of the LCIA Court with respect to all matters relating to the arbitration shall be conclusive and binding upon the parties and the Arbitral Tribunal. Such ~~decisions~~ are to be treated as administrative in nature and the LCIA Court shall not be required to give any ~~reasons~~.
29.2 To the extent permitted by any applicable law, the parties shall be taken to have waived any right of appeal or review in respect of any determination and decision of the LCIA Court to any state court or other legal authority. If such appeal or review takes place due to mandatory provisions of any applicable law or otherwise, the LCIA Court may determine whether or not the arbitration should continue,	29.2 To the extent permitted by the law of the seat of the arbitration, the parties shall be taken to have waived any right of appeal or review in respect of any ~~such~~ decisions of the LCIA Court to any state court or other ~~judicial~~ authority. If such appeal~~s~~ or review ~~remain possible~~ due to mandatory provisions of any applicable law, the LCIA Court ~~shall, subject to the provisions of that applicable law, decide~~

notwithstanding such appeal or review.	whether the arbitral proceedings are to continue, notwithstanding ~~an~~ appeal or review.
Article 30 Confidentiality 30.1 The parties undertake as a general principle to keep confidential all awards in the arbitration, together with all materials in the arbitration created for the purpose of the arbitration and all other documents produced by another party in the proceedings not otherwise in the public domain, save and to the extent that disclosure may be required of a party by legal duty, to protect or pursue a legal right, or to enforce or challenge an award in legal proceedings before a state court or other legal authority.	*Article 30 Confidentiality* 30.1 ~~Unless the parties expressly agree in writing to the contrary,~~ the parties undertake as a general principle to keep confidential all awards in ~~their~~ arbitration, together with all materials in the ~~proceedings~~ created for the purpose of the arbitration and all other documents produced by another party in the proceedings not otherwise in the public domain ~~—~~save and to the extent that disclosure may be required of a party by legal duty, to protect or pursue a legal right or to enforce or challenge an award in ~~bona fide~~ legal proceedings before a state court or other ~~judicial~~ authority.
30.2 The deliberations of the Arbitral Tribunal shall remain confidential to its members, save as required by any applicable law and to the extent that disclosure of an arbitrator's refusal to participate in the arbitration is required of the other members of the Arbitral Tribunal under Articles 10, 12, 26 and 27.	30.2 The deliberations of the Arbitral Tribunal ~~are likewise~~ confidential to its members, save and to the extent that disclosure of an arbitrator's refusal to participate in the arbitration is required of the other members of the Arbitral Tribunal under Articles 10, 12 and 26.
30.3 The LCIA does not publish any award or any part of an award without the prior written consent of all parties and the Arbitral Tribunal.	30.3 The LCIA Court does not publish any award or any part of an award without the prior written consent of all parties and the Arbitral Tribunal.
Article 31 Limitation of Liability 31.1 None of the LCIA (including its officers, members and employees), the LCIA Court (including its President, Vice-Presidents, Honourary Vice-Presidents and members), the Registrar (including	*Article 31 Exclusion of Liability* 31.1 None of the LCIA, the LCIA Court (including its President, Vice-Presidents and ~~individual~~ members), the Registrar, any deputy Registrar, any arbitrator and any expert to the Arbitral

any deputy Registrar), any arbitrator, any Emergency Arbitrator and any expert to the Arbitral Tribunal shall be liable to any party howsoever for any act or omission in connection with any arbitration, save: (i) where the act or omission is shown by that party to constitute conscious and deliberate wrongdoing committed by the body or person alleged to be liable to that party; or (ii) to the extent that any part of this provision is shown to be prohibited by any applicable law.	Tribunal shall be liable to any party howsoever for any act or omission in connection with any arbitration ~~conducted by reference to these Rules~~, save where the act or omission is shown by that party to constitute conscious and deliberate wrongdoing committed by the body or person alleged to be liable to that party.
31.2 After the award has been made and all possibilities of any memorandum or additional award under Article 27 have lapsed or been exhausted, neither the LCIA (including its officers, members and employees), the LCIA Court (including its President, Vice-Presidents, Honourary Vice-Presidents and members), the Registrar (including any deputy Registrar), any arbitrator, any Emergency Arbitrator or any expert to the Arbitral Tribunal shall be under any legal obligation to make any statement to any person about any matter concerning the arbitration; nor shall any party seek to make any of these bodies or persons a witness in any legal or other proceedings arising out of the arbitration.	31.2 After the award has been made and the possibilities of ~~correction and~~ additional award~~s~~ ~~referred to in~~ Article 27 have lapsed or been exhausted, neither the LCIA, the LCIA Court (including its President, Vice-Presidents and ~~individual~~ members), the Registrar, any deputy Registrar, any arbitrator or expert to the Arbitral Tribunal shall be under any legal obligation to make any statement to any person about any matter concerning the arbitration, nor shall any party seek to make any of these persons a witness in any legal or other proceedings arising out of the arbitration.
Article 32 General Rules 32.1 A party who knows that any provision of the Arbitration Agreement has not been complied with and yet proceeds with the arbitration without promptly stating its objection ~~as~~ to such non-compliance to the Registrar (before the formation of the Arbitral Tribunal) or the Arbitral Tribunal (after its formation), shall be treated as having irrevocably waived its right to object for all purposes.	*Article 32 General Rules* 32.1 A party who knows that any provision of the Arbitration Agreement ~~(including these Rules)~~ has not been complied with and yet proceeds with the arbitration without promptly stating its objection to such non-compliance, shall be treated as having irrevocably waived its right to object.

32.2 For all matters not expressly provided in the Arbitration Agreement, the LCIA Court, the LCIA, the Registrar, the Arbitral Tribunal and each of the parties shall act at all times in good faith, respecting the spirit of the Arbitration Agreement, and shall make every reasonable effort to ensure that any award is legally recognised and enforceable at the arbitral seat.	32.2 ~~In~~ all matters not expressly provided for in~~ these Rules~~, the LCIA Court, the Arbitral Tribunal and the parties shall act ~~in the spirit of these Rules~~ and shall make every reasonable effort to ensure that ~~an~~ award is legally enforceable.
32.3 If and to the extent that any part of the Arbitration Agreement is decided by the Arbitral Tribunal, the Emergency Arbitrator, or any court or other legal authority of competent jurisdiction to be invalid, ineffective or unenforceable, such decision shall not, of itself, adversely affect any order or award by the Arbitral Tribunal or the Emergency Arbitrator or any other part of the Arbitration Agreement which shall remain in full force and effect, unless prohibited by any applicable law.	

Substantive Law Applied by Arbitrators and Courts: Is It the Same?

ANDREA MEIER

Contents

I. Introduction

This paper explores whether the substantive law applied by arbitrators and courts is the same. In an international context, every analysis of the applicable law must start with choice of law considerations. Arbitrators and judges need to determine which law they will apply to the dispute. The

differences between arbitrators and courts start there already.

In a next step, arbitrators and courts will have to apply the law to the dispute at hand. Applying legal provisions to a set of facts is not a clear-cut process as it also requires interpretation of both facts and legal norms. The law-applying process is both analytical and intuitive and influenced by the background, knowledge, experience and conviction of the judge or arbitrator. Therefore, this paper does not aim at giving clear answers as to whether arbitrators and courts apply the law in the same way, but will explore certain aspects of the process where differences are likely to exist.

II. Conflict of law rules applied by tribunals and courts: Are they the same?

Parties using international arbitration are usually sophisticated. Thus, in many – but not in all – cases, they agree on a choice of law clause, thereby submitting their dispute to a substantive law of their choice.[1] The same possibility is generally available to parties in state court proceedings.[2]

A difference arises if the parties have not agreed on the rules of substantive law to be applied to their dispute. It is then for the arbitral tribunal and the court, respectively, to determine the applicable law. In doing so, a Swiss state court will be guided by the respective provisions of the PILA. More specifically, for the law applicable to a contract,

[1] BERGER & KELLERHALS, International and Domestic Arbitration in Switzerland, 3rd ed., 2015, para. 1386 *et seq.*; BORN, International Commercial Arbitration, 2nd ed., 2014, p. 2614 *et seq.*

[2] See, e.g., Art. 116 PILA for choice of law in contractual disputes.

Art. 117 PILA points to the law of the state with the closest connection to the contract.

In comparison, arbitral tribunals may have greater flexibility in determining the applicable law. In principle, an international arbitral tribunal sitting in Switzerland is subject to Art. 187 para. 1 PILA, which, similar to the conflict of law rule for Swiss state courts, provides for the application of the law with the closest connection with the dispute. However, this rule is not mandatory and does not apply if the parties have chosen arbitration rules which provide for a more flexible solution.[3]

For example, Art. 21(1) of the ICC Rules provides that in the absence of an agreement of the parties as to the rules of law to be applied to the merits of the dispute, the arbitral tribunal shall apply the rules of law which it determines to be appropriate. Thus, it is not bound to apply the law with the closest connection to the dispute and enjoys maximum flexibility. The Swiss Rules, in Art. 33(1), on the other hand, do not follow this approach but rather mirror the solution provided for by Art. 187 para. 1 PILA by pointing to the law with the closest connection to the dispute.

The ICC Rules approach stands for a modern approach to choice of law rules as it is independent of the seat and provides for maximum flexibility. However, the flexibility granted to the arbitral tribunal also comes with a greater degree of uncertainty as to which law the tribunal will eventually apply.[4]

Thus, if one compares the choice of law rules applied by courts and arbitral tribunals, depending on the chosen arbitration rules and seat of the arbitration, arbitral tribunals will often enjoy greater freedom in determining the

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[3] BERGER & KELLERHALS, *op. cit.*, para. 1407.

[4] See also BORN, *op. cit.*, p. 2646.

applicable rules of law. This may go as far as an application of transnational rules of law. The scope and limit of such transnational rules will be discussed in section III B below.

III. Application of the substantive law by arbitrators and courts: selected questions

A. Do arbitrators focus more on the contract itself?

It is not uncommon for arbitrators to have little or no connection with the applicable national law, unlike the national judges who normally apply the law they have been trained in for years.[5] I find it reasonable to assume that in such a situation, the focus of the arbitrators is on the terms of the contract itself, and that they show a greater restraint than judges trained in the applicable substantive law to interpret the contractual provisions in the light of existing case law and scholarly writing.

This assumption seems to correspond with the expectations of the users of international arbitration. According to the Queen Mary University & White & Case 2010 International Arbitration Survey, 53% of the respondents, who were corporate counsel at leading corporations, believe that the impact of governing law can be limited to some extent by an extensively drafted contract, while 29% believe it can be limited to a great extent.[6] This suggests that corporate counsel generally aim at governing at least some substantive legal issues in their contracts, whereas some parties will go

[5] LEW, MISTELIS ET AL., Comparative International Commercial Arbitration, 2003, para. 18-2.

[6] Queen Mary University & White & Case 2010 International Arbitration Survey, p. 2, p. 16.

a step further and draft extensive contracts intended to cover all eventualities and to minimize the exposure to the governing law.[7]

The result of the study also suggests that users of international arbitration give considerable weight to the contract itself, from which one may derive an expectation that the arbitrators will also focus on the terms of the contract in their analysis of the dispute without unnecessarily relying on the applicable substantive law. State judges, on the other hand, will of course also rely on the contract, but have, in many areas, their own established practice from which they will take additional guidance in their interpretation of the contractual provisions or in filling in any gaps.

Against this background, it is also not surprising that Art. 21(2) of the ICC Rules specifically requests that the arbitral tribunal shall take account of the provisions of the contract, if any, between the parties. This reiterates the key role of the contract in arbitral proceedings.

It should not be forgotten, however, that a contract, no matter how extensively it is drafted, may not fully eliminate the applicable substantive law. It has been argued that in the majority of cases arbitrators are able to resolve the dispute between the parties solely on the facts and the terms of the contract, and that there is no need for arbitrators to apply any law or rules to determine the issue.[8] I find that this is not entirely accurate. Rather, arbitrators regularly need to turn to the applicable law for fundamental issues such as the formation of a contract, capacity, authority and corporate powers, legal succession, the interpretation of the parties' declarations of intent, rules on

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[7] Queen Mary University & White & Case 2010 International Arbitration Survey, p. 16.

[8] LEW, MISTELIS ET AL., *op. cit.*, para. 18-6.

contract interpretation, and principles of good faith and abuse of rights.[9] It is an illusion in my view to think that a contract can replace an entire legal system, including its case law, and it can be highly impractical to negotiate contractual provisions covering all eventualities, although they may never arise.

Furthermore, the applicable law, and possibly other relevant laws, have to be considered if the application of mandatory rules of law is at issue. Mandatory rules of the applicable law are binding unless the parties have specifically excluded their application. If that is the case, the arbitral tribunal may nevertheless be required to apply certain mandatory rules. The standard should be the same as for the question whether mandatory rules of another law should prevail over the rules of the applicable law.[10] It is, however, a matter of debate what standard should apply.

The debate in Switzerland focuses on whether Art. 19 PILA should be applied directly, by analogy, or not at all.[11] Art. 19 PILA authorizes the court, in certain circumstances, to apply the rules of a law other than the proper law of the contract if such foreign law claims to be applied whatever the law applicable to the contract, provided that interests that are legitimate and clearly preponderant according to the Swiss conception of law so require, and that the situation dealt with has a close connection to such other law. The Swiss Federal Supreme Court held in a decision issued in 1994 that Art. 19 PILA does not bind an arbitral tribunal.[12] In a later decision, it held, without mentioning Art. 19 PILA, that a Swiss court, or an arbitral tribunal, when having to decide on the validity of a contractual agreement that affects the

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9 BERGER & KELLERHALS, *op. cit.*, para. 1452; see also BORN, *op. cit.*, p. 555.

10 BERGER & KELLERHALS, *op. cit.*, para. 1424.

11 For an overview of the discussion see Basel Commentary, Private International Law Act-Karrer, Art. 187 para. 261 *et seq.*

12 DSC 4P.115/1994 of 30 December 1994, consid. 2c, ASA Bull 2/1995, 225.

European Union market, will examine this question in light of EC Treaty Art. 85, i.e. by applying EC competition law.[13]The prevailing opinion to date is that arbitral tribunals must take into account "foreign" mandatory rules in certain circumstances, while it remains controversial what the analysis should be.[14] Ultimately, this remains a matter in which the arbitral tribunal has considerable discretion.[15]

There has been a debate on whether parties could go so far as to provide that their contract is self-sufficient and not governed by any rules of law.[16] However, since most modern arbitration statutes require the parties' contract to be governed by "rules of law", and contractual provisions do not qualify as "rules of law", I would share the view that parties may not exclude completely the application of any rules of law.[17]

Therefore, while arbitrators are likely to focus more than (some) state courts on the contractual provisions without relying too heavily on the applicable substantive law, the latter continues to play an important role also in international arbitration.

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[13] DSC 4P.119/1998 of 13 November 1998, consid. 1a, ASA Bull 4/1999, 529. In the case at issue, however, the Swiss Federal Supreme Court refused to annul the arbitral award because it found it doubtful that universal public policy within the meaning of Art. 190 para. 2 (e) PILA encompassed national or European competition laws and because the foreign rules of law at issue had not been pleaded by the parties. See also DSC 132 III 389.

[14] BURCKHARDT/GROZ, in: Geisinger/Voser (eds.), International Arbitration in Switzerland, A Handbook for Practitioners, 2nd ed., 2013, p. 164 *et seq.*

[15] BURCKHARDT/GROZ, *op. cit.*, p. 165; BERGER & KELLERHALS, *op. cit.*, para. 1429.

[16] GAILLARD & SAVAGE (eds.), in: Fouchard Gaillard Goldman on International Commercial Arbitration, 1999, para. 1440.

[17] See GAILLARD & SAVAGE, op.cit, para. 1441.

B. Do arbitrators focus more on transnational rules of law?

1. Overview

The international arbitration community has discussed the use of transnational rules of law and trade usages for many years. It is held by some that "*arbitrators can and should, wherever possible, internationalize or denationalize the dispute*" and "*accepted trade standards should be applied in preference to the rules of national law*".[18]

When one refers to transnational rules of law, what one usually means is parties or the arbitral tribunal applying a non-national legal standard instead of or in addition to a national law, i.e. legal rules of international commerce that are not based on a specific national or supra-national legal system. Such rules are also referred to as "*lex mercatoria*", which is commonly divided into trade usages on the one hand and general principles of law on the other hand.[19]

The concept of *lex mercatoria* dates back to the Middle Ages. It was rediscovered in the 1960s by BERTHOLD GOLDMAN, CLIVE SCHMITTHOFF and others[20]. Unlike the "top-down" approach of states as lawmakers, *lex mercatoria* is the result of private "bottom-up" rulemaking by non-governmental agencies such as the ICC and the international business community itself, by their use of standard forms and identical or similar contract clauses addressing the specific risks involved in cross-border transactions. The result is a global standardization and unification process.[21]

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[18] LEW, MISTELIS ET AL., *op. cit.*, para. 18-4.

[19] DASSER, Mouse or Monster? Some Facts and Figures on the *lex mercatoria*, in: Zimmermann (Hrsg.), Globalisierung und Entstaatlichung des Rechts, Teilband II, 2008, p. 132.

[20] See www.trans-lex.org (last visited 7 September 2015).

[21] See www.trans-lex.org.

The Translex website run by the CENTRAL Center for Transnational Law (Cologne) currently lists 130 principles and rules said to form an established part of the *lex mercatoria*. It adheres to the concept of "creeping codification" of transnational law, which means a non-exhaustive, open list of principles and rules that is constantly updated but never final.[22] Principles include *good faith and fair dealing in international* trade *pacta sunt servanda* and *piercing of the corporate veil*.[23]

2. Application of trade usages

Reliance on trade usages is uncontroversial. It is common both for arbitral tribunals and state courts to take into account trade usages.[24] Trade usages may be expressly agreed upon by the parties, in which case they form part of the contract. Courts and arbitral tribunals accept Incoterms and other pre-defined commercial terms which parties incorporate into their contracts.

Irrespective of an express agreement of the parties, courts and arbitral tribunals may take account of generally recognized trade usages in their interpretation of the contract if the rules of contract interpretation of the applicable law so provide.[25] This is, e.g., the case under Swiss law, which presumes that parties with industry knowledge have understood technical terms as it is customary in the trade concerned.[26] Furthermore, with regard to international sales transactions, Article 9(2) of the United Nations Convention on Contracts for the International

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22 See K.P. BERGER, The Creeping Codification of the New Lex Mercatoria, 2nd ed., 2010, p. 250 *et seq.*

23 See www.trans-lex.org/principles/ (last visited 7 September 2015).

24 DASSER, Lex Mercatoria – Critical Comments on a Tricky Topic, Jusletter, 6 January 2003, para. 4.

25 BERGER & KELLERHALS, *op. cit.*, para. 1453.

26 BSK, Code of Obligations-Wiegand, Art. 18 para. 31 with references.

Sale of Goods, CISG, presumes that parties have impliedly made applicable a usage they knew or ought to have known and which in international trade is widely known to, and regularly observed by, parties to contracts of the type involved in the particular trade concerned.[27] The CISG's fiction of an implied agreement on the application of internationally recognized trade usages[28] reflects the importance of trade usages in international commercial transactions.

In addition, in the field of international arbitration, many institutional rules specifically demand that the tribunal take account of the usages of the trade applicable to the transaction.[29]

As regards state court proceedings, specialized commercial courts may ensure that trade usages are taken into account. For example, the Zurich Commercial Court has a list of judges who work in various trade sectors. Out of a five-member tribunal, two of the judges will be selected from a trade sector of the business concerned. This ensures that the court has the necessary knowledge about existing trade usages in the industry in question.[30.]

3. Application of general principles of law

The controversies revolve around the application of the so-called general principles of law or transnational principles of law, i.e. the other sub-category of the *lex mercatoria*.

Modern arbitration laws and arbitration rules generally allow for an agreement of the parties on the application of

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[27] Article 9(2) CISG.

[28] See BRUNNER/HURNI, UN-Kaufrecht – CISG, 2nd ed., 2014, Art. 9 para. 4.

[29] See Art. 21 para. 2 ICC Rules, Art. 28(4) UNCITRAL Model Law, Art. 33(3) Swiss Rules.

[30] DASSER, Critical Comments, para. 4.

transnational rules. Both the UNCITRAL Model Law[31] and the PILA allow the parties to agree on "rules of law", which is commonly understood to include transnational rules of law. While the German text of Art. 187(1) PILA refers to the traditional term of "law", the French text uses the broader term "les règles de droit", i.e. "rules of law". The French version was soon accepted as the more accurate expression of the legislative intent.[32]

Interestingly, while the PILA allows both the parties and, in the absence of a party agreement, the arbitral tribunal to rely on "rules of law", the UNCITRAL Model Law is more restrictive. Under its Art. 28(2), the arbitral tribunal may only apply "the law", i.e. state law, in the absence of an agreement of the parties.[33]

Modern arbitration rules generally allow both the parties or, in the absence of a party agreement, the arbitral tribunal to apply "rules of law".[34]

Thus, parties to an arbitration agreement may submit their dispute to transnational rules of law if so desired, and the arbitral tribunal may apply such rules in the absence of a choice of law agreement of the parties.

As a rule, the possibility to subject a dispute to transnational rules of law is more limited in state court proceedings. According to the traditional and still prevailing view, the conflict of law rules for state court proceedings restrict the

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31 See Art. 28(1) UNCITRAL Model Law.

32 DASSER, Mouse or Monster?, p. 138.

33 See also DASSER, Mouse or Monster?, p. 148.

34 See Art. 21(1) ICC Rules, Art. 22.3 LCIA Rules, Art. 33(1) Swiss Rules. However, Art. 35(1) 2010 UNCITRAL Rules, like the UNCITRAL Model Law, reserves the power to agree on an application of rules of law to the parties, whereas the arbitral tribunal has to apply a national law in the absence of such agreement.

choice of the law applicable to international contracts to the law of a state and exclude any transnational rules.[35]

The Swiss Federal Supreme Court confirmed in connection with a choice of law clause pursuant to Art. 116 PILA, i.e. relating to state court proceedings, that according to the practice of the Swiss Federal Supreme Court, sets of rules of private bodies do not have the quality of legal norms even if they are very detailed and comprehensive. It held that rules issued by private bodies were subordinate to legal provisions and could only apply to the extent that the national law left room for autonomous regulation. The parties had agreed on the FIFA Rules to govern their dispute, and the Swiss Federal Supreme Court found that parties may incorporate such rules into their contract only within the confines of mandatory national law.[36] It should be noted, however, that the reasoning of the Swiss Federal Supreme Court was made with regard to rules issued by private bodies such as FIFA. Arguably, it left open the question whether a choice of *lex mercatoria* instead of a national law would also be admissible also before state courts.[37]

Because state courts are traditionally still bound to apply a national law, it follows that parties to arbitral proceedings and arbitral tribunals enjoy greater freedom as regards the application of transnational rules of law. However, parties may validly agree that state courts apply rules issued by

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[35] See, e.g., the PILA, using expressions such as "the reference of this Act to foreign law" (Art. 13) and "In the absence of a choice of law, the contract is subject to the law of the state with the closest connection to the contract"; see also Rome I Regulation (EU Regulation 593/2008 on the law applicable to contractual obligations), referring to "law of a Member State" (Article 2), "application of provisions of the law of that other country" (Article 3(3)), or "law of the country where the seller has his habitual residence" (Article 4(1)(a)); Bonell, The UNIDROIT Principles and Transnational Law, Rev dr. unif. 2000-2, p. 201.

[36] DSC 132 III 285, 288 *et seq.*, consid. 1.3, 1.4; DASSER, Mouse or Monster?, p. 152.

[37] DASSER, Mouse or Monster?, p. 152.

private bodies and / or transnational rules to the extent that they do not affect the mandatory provisions of the proper law.

In the area of the validity and scope of an arbitration agreement, in particular the extension of such agreement to third parties, French (and other) state courts went even a step further and held that it was not necessary at all to determine an applicable national law. According to the established practice of French courts, international arbitration agreements are autonomous from any national legal system and directly governed by general principles of international law.[38] In the *Dalico* decision, the Cour de cassation held that the existence and validity of an international arbitration agreement "*depends only on the common intention of the parties, without it being necessary to make reference to a national law*". In the court's view, this follows from "*a substantive rule of international law*".[39] The same or similar reasoning was also applied by a number of arbitral tribunals, in particular if the seat was in France.[40]

In comparison, the Swiss Federal Supreme Court, in a decision dating from 2003, agreed with an arbitral tribunal that had based the extension of the arbitration clause on Lebanese law (as the law chosen by the Parties) as construed in the light of the *lex mercatoria*. The Parties had submitted their dispute to the ICC Rules 1998, whose Art. 17 requested the tribunal to take account of the relevant trade usages. The tribunal found that such trade usages, which were well illustrated in the French case law, provided that a non-signatory who had participated in the conclusion or

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[38] BORN, *op. cit.*, p. 549 *et seq.*

[39] Judgment of 20 December 1993, *Municipalité de Khoms El Mergeb v. Société Dalico*, 1994 Rev. arb. 116, 117 (French Cour de cassation civ. 1e).

[40] See the references in BORN, *op. cit.*, p. 551, fn 405; and *Dallah Real Estate & Tourism Holding Co. v. Ministry of Religious Affairs, Gov't of Pakistan*, Partial Award in ICC Case No. 9987, 2(4) Int'l J. Arab Arb. 337, 353 (2010).

performance of a contract was bound by it, and that it would also be against the rules of good faith in international commerce if a party who had constantly and repeatedly intervened in the performance of a contract could later argue that it was not bound by the contract and its arbitration clause.[41] Thus, contrary to the more radical approach in French case law, the arbitral tribunal had still determined that a national law (Lebanese law) the applicable law, but then construed it in the light of the *lex mercatoria*.

4. Use of transnational rules: mainly as a supplement to a national law

A question separate from the admissibility of transnational rules is how frequently parties or arbitral tribunals do rely on transnational rules. As noted in the preceding section, one area where both tribunals and courts, particularly in France, regularly rely on transnational principles is the validity and scope of the arbitration agreement. Outside of this very specific area, empirical studies show that an express reference to transnational rules is not as common as one may have expected:

An empirical study made by DASSER and updated as per 2008 covers published arbitral awards over a time-span of more than 50 years.[42] As for the choice of a non-national legal standard by the parties, the study identified a total of only 39 cases where the parties at least partly or implicitly chose a non-national legal standard that may qualify as a *lex mercatoria*. Out of the 39 cases, to the extent enough information was available to make such a distinction, only 15 concerned private contracts (as opposed to state

41 DSC 129 III 727, consids. 5.1.1, 5.3.2.

42 As DASSER notes, the total number of international commercial arbitration cases per year is difficult to guess, but is likely to be several thousand; see DASSER, Critical Comments, para. 11.

contracts).[43] The author concludes from this that parties very rarely expressly and exclusively chose a non-national legal standard, in fact in about one case every five years.

Furthermore, the *Dasser* study identified only 38 cases in over more than 50 years in which arbitral tribunals applied such a standard if the parties had failed to choose the applicable law or had chosen a national law. As the author notes, if one leaves aside the 10 state contracts, the result is less than one pertinent decision every other year.[44]

In the Queen Mary University & White & Case 2010 International Arbitration Survey, inhouse counsel participants were asked whether corporations use transnational laws or rules to govern their dispute. 58% have never used general principles of law while 26% said that they use them "sometimes" and 16% said they use them "often". 16% saying that they use general principles of law "often" is a surprisingly high number. However, the interviewers also included in their definition of general principles of law commercial practices of fairness and equity, i.e. they used a wider term than what *lex mercatoria* traditionally stands for. Furthermore, the interviewees said that transnational rules are often used as supplementary or definitional concepts alongside a governing national law, e.g. not as a substitute for a national law.[45]

Thus, while it seems that parties are still skeptical of expressly submitting their dispute to general principles of commercial law instead of a national law, general principles of commercial law are more widely used in addition to a national law as a supplemental or controlling factor.

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[43] DASSER, Mouse or Monster?, pp. 142, 144.
[44] DASSER, Mouse or Monster?, p. 145.
[45] DASSER, Mouse or Monster?, p. 145.

C. Are arbitrators more commercially-minded in their interpretation of the law?

International arbitration prides itself in being particularly well suited for the solution of commercial disputes. It is said that arbitrators generally have a good understanding of the economic background of a dispute, probably more so than state judges. According to the Queen Mary University & White & Case 2010 International Arbitration Survey, parties indeed have a preference for an arbitrator who focuses on the commercial aspects rather than the legal determination of disputes, and who has relevant industry experience.[46]

Authors emphasize the weight that arbitrators should give to international practice rather than to doctrinal formalism: "*While arbitrators should look at the methods of interpretation of the chosen substantive law, the process of interpretation should be free from doctrinal formalism. International tribunals should take account of the fact that they are dealing with an international dispute and should interpret national law rules to reflect international practice […].*"[47]

Thus, expectations certainly are that arbitrators should be commercially-minded in their analysis of the dispute. My presumption is that arbitrators are aware of this expectation and, therefore, are careful to also consider the commercial aspects of the dispute rather than applying the law in a formalistic manner.

As GAILLARD has pointed out in an article on the sociology of international arbitration, there are certain rituals in the arbitral process which reinforce the business-oriented approach of international arbitration. Arbitral hearings are

[46] Queen Mary University & White & Case 2010 International Arbitration Survey, p. 25.

[47] LEW, MISTELIS ET AL., *op. cit.*, para. 18-22.

held in conference rooms of law firms, business hotels or business centers. The parties and the arbitrators will usually sit around a U-shape table and the lawyers remain seated when they plead. Thus, the atmosphere is less formal than in a court room, underlining the business-like nature of the process.[48]

Furthermore, the fact that arbitrators, unlike state court judges, are appointed by the parties is likely to facilitate their understanding that they are not only decision makers, but also service providers vis-à-vis the parties. That, in turn, is likely to make them more susceptible to the expectations of the parties regarding the arbitration process, which includes taking into account the commercial aspects of a dispute.

These factors are not present in state court proceedings, which are characterized by formal proceedings. The formal atmosphere underlines the authoritative nature of the process, with the result that the judge may be more inclined to impose the law in its strict sense instead of (also) applying commercial considerations.

Admittedly, however, all these factors may only facilitate a commercial focus in the legal analysis of arbitrators. The most decisive element remains the person of the arbitrator himself or herself, with his or her professional and personal background, interests, and understanding of how the law should be applied to a dispute.

D. Do arbitrators take a more comparative approach?

A further presumption I dare make is that an international arbitral tribunal composed of arbitrators trained in different national laws will often take a comparative law approach in

[48] GAILLARD, Sociology of international arbitration, Arb. Int., 2015, 31, p. 11.

its analysis of an international commercial dispute. Quite naturally, an arbitrator trained in one national law will test the outcome of the legal analysis under another national law against the legal principles he or she is familiar with.

Depending on the circumstances and the background of the parties to the dispute, a comparative analysis in addition to an analysis under the applicable law may give an arbitral award increased comparative persuasiveness *vis-à-vis* the parties.[49] On the other hand, parties should be aware that an arbitral tribunal composed of arbitrators trained in laws other than the applicable law may include legal principles in their analysis which are no longer covered by the law applicable to the dispute.

In comparison, state court tribunals are normally composed of judges trained in the same national law. As a result, they are less likely to draw inspiration from a comparative law analysis, at least if courts of first instance are concerned. It should be mentioned that the Swiss Federal Supreme Court frequently engages in comparative law analyses.[50] A likely reason is the fact that Switzerland is a small country. Therefore, it cannot rely on the same pool of decisions that is available in larger countries, and will (also) look to foreign case law if a question arises that has not yet been decided under Swiss law.[51] Irrespective of this, however, the Swiss Federal Supreme Court has always, on its own initiative, cultivated a comparative law approach.[52]

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[49] See Art. 187 para. 2 PILA.

[50] WALTER, Die Rechtsvergleichung in der Rechtsprechung des Schweizer Bundesgerichts, recht 2004, p. 91.

[51] See e.g., the Federal Supreme Court's comparative law analysis with regard to an application of Art. 418u CO by analogy to exclusive distribution agreements in DSC 134 III 497 (= Pra 98 (2009) no. 19); see also Walter, *op. cit.*, p. 92 *et seq.*

[52] WALTER, *op. cit.*, p. 97 *et seq.*

E. Are arbitrators more amenable to general notions of fairness, equity and justice?

Finally, in international arbitration, parties may empower the arbitral tribunal to decide *ex aequo et bono* or as amiable compositeur, i.e. to decide the dispute in light of general notions of fairness, equity and justice.[53] This concept has a long history in both commercial arbitration[54] and the settlement of international disputes,[55] but is little known or unavailable in state court proceedings.[56]

It is disputed whether arbitrators, when deciding *ex aequo et bono*, are freed entirely from legal rules and left to decide according to their own sense of fairness and commercial practice, or whether they should first apply national law and then adjust the result.[57] The predominant Swiss view is that an arbitrator authorized to decide *ex aequo et bono* does not have to apply any law at all.[58] However, it is undisputed that arbitrators may only decide *ex aequo et bono* if expressly authorized by the parties. Such agreements are very rare.[59]

Outside of a specific agreement that the tribunal should act *ex aequo et bono*, arbitrator should, therefore, just like state courts, apply the law chosen by the parties or determined by the tribunal rather than substitute it with general notions of fairness, equity and justice.

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53 BORN, *op. cit.*, p. 2770 *et seq.*

54 See, e.g., Art. 28(3) UNCITRAL Model Law, Art. 21(3) ICC Rules, Art. 33(2) Swiss Rules.

55 See, e.g., Art. 28(2) of the Statute of the International Court of Justice of 26 June 1945 (SR 0.193.501).

56 BERGER & KELLERHALS, *op. cit.*, para. 1438. E.g., the Swiss Code of Civil Procedure does not provide for decisions *ex aequo et bono*.

57 BORN, *op. cit.*, p. 2771.

58 BERGER & KELLERHALS, *op. cit.*, para. 1440, with further references.

59 BORN, *op. cit.*, p. 2770.

A related question is whether arbitrators are reluctant to rule strongly in favor of one party. A common criticism is that they prefer to 'split the baby' whenever they can. A possible explanation is that arbitrators see themselves more in the role of facilitators than judges. In addition, some arbitrators may fear upsetting counsel and thereby jeopardizing their chances of a re-appointment in other cases.

According to the Queen Mary University & White & Case 2012 International Arbitration Survey, respondents (in-house counsel and private practitioners) believed that tribunals unnecessarily 'split the baby' in 18% and 20% of their arbitrations, respectively, i.e. courts in the same situation would not likely have done so according to the respondents. On the other hand, those making the decisions, i.e. the arbitrators, said this occurred in only 5% of their arbitrations.[60]

Thus, due to the different perception of parties and arbitrators, the Survey does not give a clear picture whether the criticism about a lack of strong ruling is justified. The Survey suggests, however, that parties do not prefer decisions awarding each party a share over a strong ruling. Therefore, if it comes to the ultimate task of issuing a ruling, the parties expect arbitrators to apply the law in a clear fashion and arrive at clear results, just like it is the expectation for state courts.

IV. Conclusions

The above analysis suggests that the law applied by arbitrators and courts is not necessarily the same:

[60] Queen Mary University & White & Case 2012 International Arbitration Survey, p. 3, 38.

- First, in the absence of a choice of law provision, arbitrators will often enjoy greater freedom in their determination of the applicable rules of law.
- Second, arbitrators are likely to have a greater focus than state courts on the contractual provisions without relying too heavily on the applicable substantive law.
- Third, arbitral tribunals generally enjoy greater freedom than state courts with respect to the application of transnational rules of law. Such transnational rules are more commonly used to supplement rather than to substitute a national law.
- Fourth, arbitrators are likely to be more commercial-minded than state court judges as this corresponds to the expectations of the parties. Specific rituals in the arbitral proceedings reinforce this business-minded approach.
- Fifth, an international arbitral tribunal composed of arbitrators trained in different national laws is more likely than a state court to take a comparative law approach in its legal analysis.
- Sixth, parties may empower an arbitral tribunal, but normally not a state court, to decide *ex aequo et bono*.

Irrespective of these differences, however, the parties expect both arbitrators and state courts to make strong and clear rulings.

As already noted, many of the differences pointed out above are only presumptions and tendencies. Given the many factors that influence the process of legal analysis, there are no ultimate answers as to whether the law applied by arbitrators and courts is the same or different. And,

ultimately, the real difference is made by the person who sits as arbitrator or judge.

Bibliography

BERGER & KELLERHALS, International and Domestic Arbitration in Switzerland, 3rd ed., 2015

BERGER, K.P., The Creeping Codification of the New Lex Mercatoria, 2nd ed., 2010

BONELL, The UNIDROIT Principles and Transnational Law, Oxford Journals, Rev dr. unif. 2000-2, pp. 199-217

BORN, International Commercial Arbitration, 2nd ed., 2014

BRUNNER, UN-Kaufrecht – CISG, 2nd ed., 2014

DASSER, Mouse or Monster? Some Facts and Figures on the *lex mercatoria*, in: Zimmermann (Hrsg.), Globalisierung und Entstaatlichung des Rechts, Teilband II, 2008

DASSER, Lex Mercatoria – Critical Comments on a Tricky Topic, Jusletter, 6 January 2003

GAILLARD, Sociology of international arbitration, Arb. Int., Volume 31, Issue 1, 2015, pp. 1-17

GAILLARD/SAVAGE (eds.), in: Fouchard Gaillard Goldman on International Commercial Arbitration, 1999

GEISINGER/VOSER (eds.), International Arbitration in Switzerland, A Handbook for Practitioners, 2nd ed., 2013

HONSELL/VOGT/WIEGAND (eds.), Basel Commentary, Code of Obligations I, Art. 1-529 CO, 5th ed., 2011

HONSELL/VOGT/SCHNYDER/BERTI (eds), Basel Commentary, Private International Law, 3rd ed., 2013

LEW/MISTELIS ET AL., Comparative International Commercial Arbitration, 2003

Queen Mary University & White & Case 2012 International Arbitration Survey

Queen Mary University & White & Case 2010 International Arbitration Survey

WALTER, Die Rechtsvergleichung in der Rechtsprechung des Schweizer Bundesgerichts, recht 2004, pp. 91 *et seq.*

China: Opportunities and Challenges for the Swiss Arbitration Community

CLARISSE VON WUNSCHHEIM

Contents

I. Introduction

Not a day passes by without some news heading concerning China and its economic or environmental impact on the rest of the world. Indeed, in recent years, the Chinese economy has become a daily topic of discussion and concern not only among western economists, but also among the European industry and more recently the legal community.

Whilst it may not seem obvious to the untrained eye, China's economic development has also an impact on us, Swiss legal practitioners, and in particular on us, members of the Swiss arbitration community.

The Swiss arbitration community has for many years now enjoyed a prime positioning among the international community. There are however clear signs that this preferential position may not last for ever. At the same time, on the other side of the globe - in China - there is an arbitration community of a tremendous size, yet almost unknown on the international scene.

This paper aims to analyse the impact that the increased involvement of Chinese players may have on the international arbitration scene, and how this may affect the Swiss positioning. To this purpose, the present paper will first describe the current situation in China, before addressing the challenges and opportunities that an increased involvement of Chinese players represent for the Swiss arbitration community.

II. What is Going on in China?

A. China: An Eldorado for Commercial Disputes

China's Economic Slow-Down

The Chinese market has enjoyed a reputation as a manufacturing heaven and an Eldorado for retail products. This is changing.

Whilst China remains a key market for European, including Swiss companies, it is no secret that the Chinese economy has been recently slowing down with a GDP growth down to "only" 7% compared to over 10% in the years prior to

2011.[1] Exports have decreased by over 8% compared to 2014 and the number of foreign enterprises settling down in China has also drastically decreased by more then 50% between 2005 and 2014.[2] The reasons are manifold and complex, and include – among others - the sharp rise in labour costs, harsh competition, IP infringements and a difficult legal and tax environment.[3] At the same time, the Chinese Yuan is being regularly depreciated, which favours the exports, but makes imports more costly. [4]

As such, China is not perceived anymore as the "manufacturer of the world" and many western companies choose to set up their manufacturing bases in other Asian countries such as Vietnam, Cambodia, Sri Lanka, etc.

Growing Number of Commercial Disputes

The logical result of these growing challenges affecting the Chinese economy is an increasing number of commercial disputes:

In 2014, the total number of civil and commercial disputes submitted before the Chinese courts was 9,068,011 (a 7.41% increase over 2013).[5]

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1 See http://data.stats.gov.cn/english/ks.htm?cn=B016c.

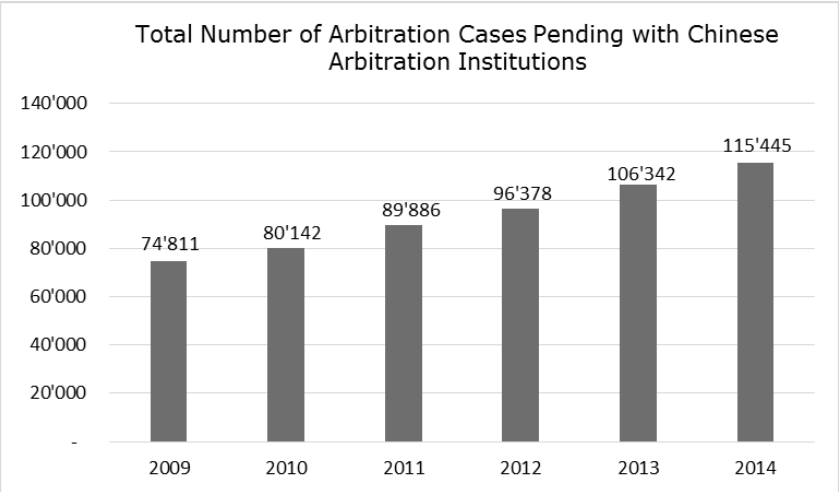
2 See http://data.stats.gov.cn/english/easyquery.htm?cn=C01; see also http://english.mofcom.gov.cn/article/statistic/foreigninvestment/201504/20150400942402.shtml.

3 See China Business Survey 2014, available at http://www.ch-ina.com/wp-content/uploads/2014/09/2014-CEIBS-Business-in-China-Survey.pdf.

4 See http://finance.yahoo.com/echarts?s=USDCNY%3DX+Interactive#6c.

5 2014 Annual Work Report of the People's Courts published by the PRC Supreme People's Court on 18 March 2015 (see: http://www.court.gov.cn/fabu-xiangqing-13848.html).

The same trend is visible when looking at other dispute resolution platforms, in particular arbitration: The total number of arbitration cases registered in China amounted to 115,445 in 2014[6] compared to 74,811 in 2009[7], i.e. an increase of 54%.



In conclusion, whilst it has become more and more difficult for European companies to make money in or with China, China has become an "Eldorado of commercial disputes" for us lawyers, in particular us arbitration practitioners.

Before assessing the challenges and opportunities arising out of such Eldorado, it is firstly necessary to better understand the Chinese arbitration market.

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[6] See http://epaper.legaldaily.com.cn/fzrb/content/20150613/Articel06004GN.htm.

[7] *Idem*.

B. A Domestic Arbitration Market Unable to Cope with International Disputes

Arbitration has always been a very popular dispute resolution mechanism in China. However, it is only since 1995 that it has developed into a truly "commercial arbitration" system. Prior to 1995, the Chinese arbitration system was managed by local administrative bodies as an administrative proceeding and not as a proceeding resulting out of the parties' agreement and subject to the parties' autonomy.

Since 1995, the number of arbitration institutions in China has grown to 235 in 2014. Whilst most of these arbitration institutions deal exclusively with domestic cases, it is only a matter of time until they are confronted with cases of an international nature.

Looking at two of the most famous arbitration institutions, the China International Economic Trade Arbitration Commission ("CIETAC") and the Beijing Arbitration Commission ("BAC"), the situation is as follows:

No. of arbitration cases by arbitration institution[8]								
	2000	**2005**	**2009**	**2010**	**2011**	**2012**	**2013**	**2014**
CIETAC[9]	623	979	1482	1352	1435	1060	1256	1610
BAC[10]	449	1979	1830	1566	1471	1473	1627	2041

In comparison, the ICC, the LCIA, the SCC and the Swiss Chambers Arbitration Institution ("Swiss Chambers"), some

[8] These figures include Chinese domestic cases and foreign related cases.
[9] http://cn.cietac.org/aboutus/AboutUS4Read.asp.
[10] http://www.bjac.org.cn/page/gybh/introduce_report.htmlf.

of the world's most renowned arbitration institutions – showed the following record:

	2013	**2014**
ICC[11]	767	791
LCIA[12]	290	n/a
SCC[13]	203	183
Swiss Chambers[14]	68	105

In other words, the CIETAC and BAC, just two out of the 235 existing Chinese arbitration institutions, have each caseloads which already exceed the caseload of the world's most renown arbitration institution, the ICC, and are 5 to 10 times higher then the caseload of other major European arbitration institutions.

Although the total volume of Chinese arbitration cases may be very impressive at first, it must be stressed that the vast majority of these cases are domestic cases and that the percentage of foreign-related remains very limited and did not exceed 1.55% in 2014. In other words, out of over 115,445 cases, only 1,785 concerned foreign-related ones. With the exception of CIETAC, which has a proportion of foreign-related cases of 24%,[15] all other arbitration institutions deal almost exclusively with domestic cases (e.g. the proportion of foreign-related cases at BAC in 2014 was 2.01%[16]). However, it should be noted that disputes

[11] ICC 2013 and 2014 statistical reports.
[12] http://www.lcia.org/LCIA/reports.aspx.
[13] http://www.sccinstitute.com/statistics/.
[14] https://www.swissarbitration.org/sa/download/statistics_2013.pdf and https://www.swissarbitration.org/sa/download/statistics_2014.pdf.
[15] http://cn.cietac.org/AboutUS/AboutUS4Read.asp.
[16] 2014 BAC Annual Report, available on http://arbitrator.bjac.org.cn/en/about_us/History.html.

involving Chinese subsidiaries of foreign companies are classified as "domestic". If such disputes were taken into account, it would drastically increase the percentage of foreign-related disputes.

In any event, the figure of 1,785 foreign-related cases in 2014 just for China is still higher then the total number of cases dealt with by the ICC, which covers disputes in over 140 countries.

Coping with this huge amount of arbitration cases also requires a wide pool of arbitration practitioners. Arbitrators in China are counted by thousands. As an example, at CIETA, the panel of arbitrators lists over 1,200 arbitrators of which 885 are Chinese and 330 are foreign.

Considering that a case requires more lawyers then arbitrators, one can imagine the number of lawyers in China involved in arbitration proceedings.

These figures leave no doubt that China is becoming a major player in the arbitration market and the key question is when will China have its international break-through.

C. Timid Presence of Chinese Players on the International Arbitration Scene

Predominance of Chinese parties in the Asia-Pacific Region

As mentioned above, the Chinese arbitration market is still very much a market focused on domestic disputes. However, in terms of absolute numbers, the volume of international disputes in China and the amount in disputes are already significant.

As a consequence, the percentage of Chinese parties involved in international arbitration is steadily increasing. In fact, looking at the Asia-Pacific region, Chinese parties already rank first:

- *In ICC arbitration*, the number of Chinese parties involved reached 62 in 2014, an all time high (compared to a low of 7 parties in 2001). Although this number only represents 2.79% of the total number of parties involved, **China is in pole position** among all Asia-Pacific parties, followed by India. [17]
- *In HKIAC arbitration*, the situation is the most striking. The number of Chinese parties involved reached an all time high of 140 in 2013 representing 53.85% of all parties involved in new cases. The figures for 2014 are slightly lower, with 123 Chinese parties representing 48.81% of all parties involved. Thus, not only are **Chinese parties in pole position at the HKIAC**, but the HKIAC actually makes its living with arbitrations involving Chinese parties.[18]
- *In SIAC arbitration*, the involvement of Chinese parties is also important although less steady. In 2014, **Chinese parties ranked first among foreign parties** with a total number in 2014 of 41 representing 18.47% of all parties involved in new cases. They were followed by parties from the US and India. [19]
- *In SCC arbitration*, Chinese parties are steadily **among the top 5** of foreign parties. [20]

Chinese parties have also made their first appearances in ICSID arbitrations, with two cases filed by mainland Chinese

[17] The number of Chinese parties (not including Hong Kong) was 62 compared to 60 for Indian parties, out of a total of 469 representing 21.1% of all parties in new cases.

[18] See PPT presentation "HKIAC Arbitration Cases Involving Mainland Parties (2012-2013)" on file with the author.

[19] See SIAC Annual Report of 2014.

[20] See http://www.sccinstitute.com/statistics/.

parties in 2012 and 2014 against Belgium and Yemen, respectively.[21]

Limited involvement of Chinese players on the international scene

Although the number of Chinese parties involved in international arbitration is on the rise, the influence of Chinese legal practitioners remains limited. This is due, among others, to existing trends regarding the nature and scope of participation and representation of Chinese parties in international arbitration proceedings:

(1) Chinese parties are still under-represented in international arbitration either because they fail to participate, or because they are not represented by counsel.

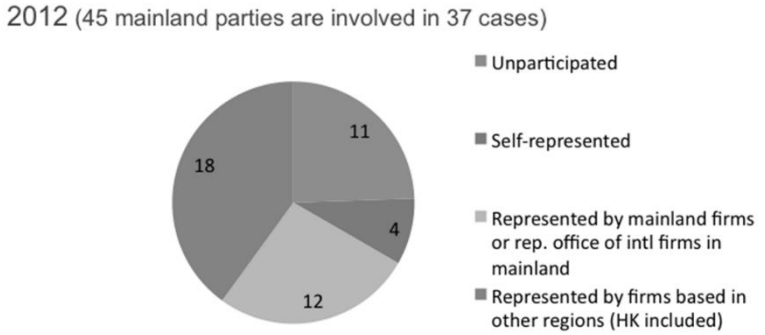
(2) When opting for legal representation, there is harsh competition between international firms and Chinese law firms with the latter gaining more and more terrain.

These trends are clearly visible when looking at the HKIAC statistics for 2012 and 2013:

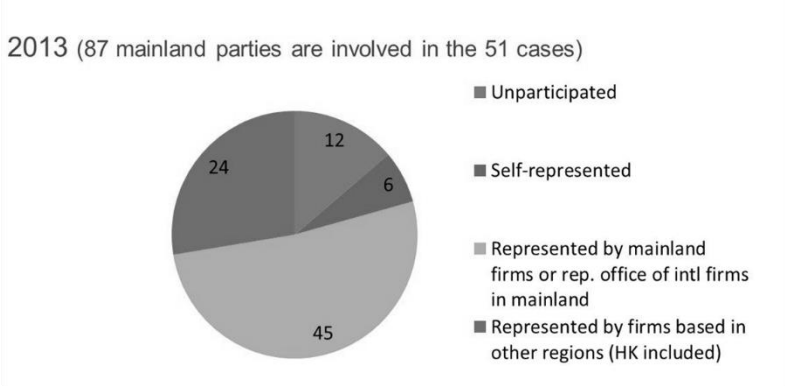
- In 2012, out of the 45 Chinese parties involved in HKIAC administered arbitrations, 11 (i.e. almost 25%) did not participate whereas 4 (i.e. 8%) participated but without being represented by lawyers. Among those who participated and were represented by lawyers, most of them were represented by law firms based in other regions:[22]

[21] See ICSID Cases No. Arb/14/30 and Arb/12/29.

[22] See PPT presentation "HKIAC Arbitration Cases Involving Mainland Parties (2012-2013)" on file with the author.



- In 2013, whilst the percentage of defaulting parties drastically decreased, the proportion of self-represented parties remained steady (i.e. 7%). In contrast to 2012, however, the proportion of Chinese firms representing Chinese parties drastically increased to represent more then 50% compared to 27% in 2012: [23]



A further trend which is also worth mentioning is that Chinese parties are most often involved in international

[23] See PPT presentation "HKIAC Arbitration Cases Involving Mainland Parties (2012-2013)" on file with the author.

arbitration as respondents, although there seems to be a tendency in recent years of Chinese parties launching arbitrations as claimants:

	2011	**2012**	**2013**	**2014**
ICC[24]	79% as Respondents[25]	65% as Respondents[26]	69% as Respondents[27]	67% as Respondents[28]
HKIAC[29]	76% as Respondents[30]	76% as Respondents[31]	n/a	n/a

Finally, it is also worth mentioning the positioning of Chinese arbitrators. Except for the HKIAC, where the total number of Chinese arbitrators appointed in 2014 was 16, ranking in second position after British arbitrators with 35 appointments,[32] Chinese arbitrators are hardly to be found anywhere else:

- *In SIAC arbitration*, the percentage of Chinese arbitrators appointed in 2014 was 2%.[33] This is particularly striking considering that Chinese parties represent almost 20% of the parties involved in SIAC arbitrations and that SIAC's panel of arbitrators lists 22 Chinese arbitrators (in third position after Singaporean arbitrators (113) and British arbitrators (52)).

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24 See ICC Statistical Reports 2011, 2012, 2013 and 2014.
25 8 as Claimants vs 29 as Respondents.
26 10 as Claimants vs 18 as Respondents.
27 18 as Claimants vs 40 as Respondents.
28 21 as Claimants vs 41 as Respondents.
29 Information received by the author from the HKIAC Secretariat.
30 8 as Claimants vs 25 as Respondents.
31 11 as Claimants vs 35 as Respondents.
32 Information received by the author from the HKIAC Secretariat.
33 SIAC Annual Report 2014.

- *In ICC arbitrations*, the total number of Chinese arbitrators in 2014 was 10, representing less then 1% of the total number of nationalities of arbitrators. This nevertheless represents an increase compared to previous years with only 6 Chinese arbitrators in 2013, 7 in 2012 and 3 in 2011.[34]
- *In Swiss Rules arbitrations*, Chinese arbitrators are absent from the ranking of arbitrators' nationality. [35]
- *In LCIA arbitrations*, Chinese arbitrators were absent from the list of arbitrators appointed in 2012 and made their entrance in 2013, although the statistical report 2013 does not specify the specific number or proportion of Chinese arbitrators.

In summary, whilst the presence of Chinese parties, lawyers and arbitrators in international arbitrations is steadily increasing, their participation in such proceedings is still hesitant, tainted by their traditional position as Respondents and focused on the Asia-Pacific region.

III. Challenges for the Swiss Arbitration Community

A. Switzerland: Reaching Market Saturation?

As mentioned above, Switzerland has traditionally enjoyed a prime positioning in international arbitration in particular in

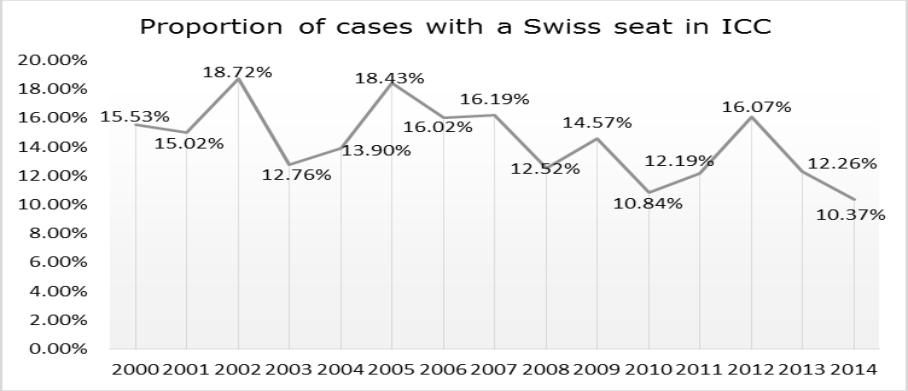
[34] See ICC Statistical Reports 2011, 2012, 2013 and 2014.

[35] See https://www.swissarbitration.org/sa/download/statistics_2013.pdf and https://www.swiss arbitration.org/sa/download/statistics_2014.pdf.

terms of place of arbitration, applicable law as well as appointment of arbitrators and involvement of Swiss lawyers. In view of the small size of Switzerland, one can even talk about "over-representation". However, such prime positioning seems to have reached a point of saturation with a clear indication of a decreasing importance of Switzerland's influence in international arbitration.

As concerns the Place of Arbitration

In 2002, 111 cases representing 18.72% of all ICC cases were seated in Switzerland.[36] In 2009, whilst the number of cases with a Swiss seat increased to 119, their proportion decreased representing only 14.57% of the total number of cases. [37] Since then, both the numbers of cases with a Swiss seat, as well as their proportion are decreasing with an all time low reached in 2014 with a total number of 82 cases representing only 10.37% of all ICC cases.[38]



[36] According to the 2002 ICC Statistical Report, the number of total new cases registered with the ICC in 2005 was 593, within which the number of cases seated in Switzerland was 111.

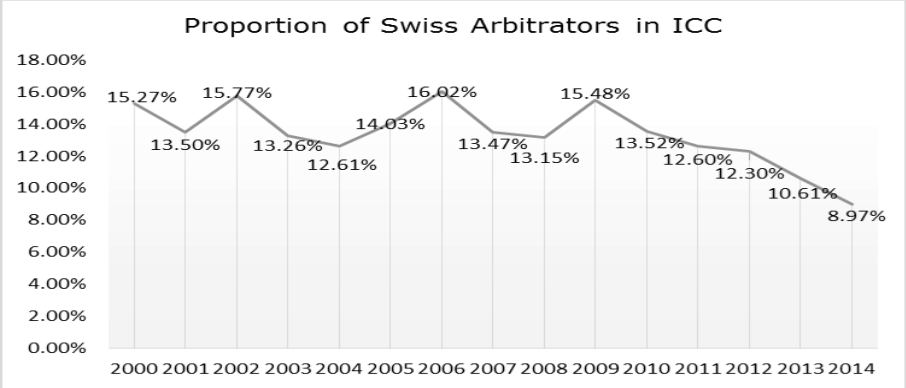
[37] According to the 2009 ICC Statistical Report, the number of total new cases registered with the ICC in 2009 was 817, within which the number of cases seated in Switzerland was 119.

[38] According to the 2014 ICC Statistical Report, the number of total new cases registered with the ICC in 2014 was 791, within which the number of cases seated in Switzerland was 82.

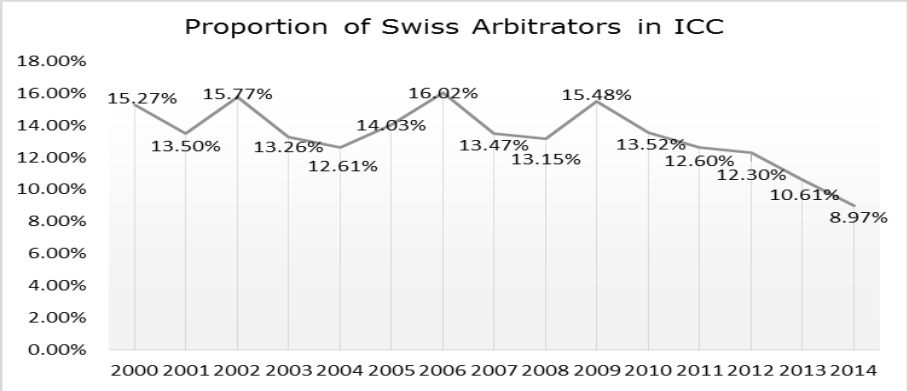
Thus, whilst Switzerland (i.e. Zurich and Geneva) was still ranking as the most popular seat of arbitration in 2012 in front of Paris and London, it ranked second in 2013 between Paris in pole position and London in third position. In 2014, Switzerland has further gone down and occupies now the third position after Paris and London.

As concerns Swiss Arbitrators

Between 2000 and 2009, the number of appointments of Swiss arbitrators in ICC arbitration was increasing, reaching a high of 202 in 2009 representing 15.48% of all appointments. As of 2010 this number has been steadily decreasing with the lowest point reached in 2014 with 112 appointments representing only 8.97%. [39]



[39] See ICC Annual Reports of 2000, 2009, 2010 and 2014.



At ICSID, in 2014 and in the first half of 2015, Swiss arbitrators were nevertheless in 4th position after the UK, France and the US, gaining one place over Canada compared to 2013. [40]

As concerns Swiss law as the applicable law

In ICC arbitration, Swiss law traditionally ranked among the two most popular applicable laws together with English law. In recent years, English law seems to have consolidated its pole position. In 2014, English law was selected in 14.1% of ICC cases and Swiss law in 10.2% of ICC cases.[41]

In short, whilst it is undeniable that Switzerland's position is still very advantageous considering its small size, there are also undeniable signs of a starting decline.

B. China: Not Aware of Switzerland's Advantages

As explained above, it is only a matter of time until China breaks through and occupies its due position on the

[40] See the ICSID Caseload Statistics Issues 2015-1, 2015-2 and 2013-2 (see Chart 14), available on https://icsid.worldbank.org.

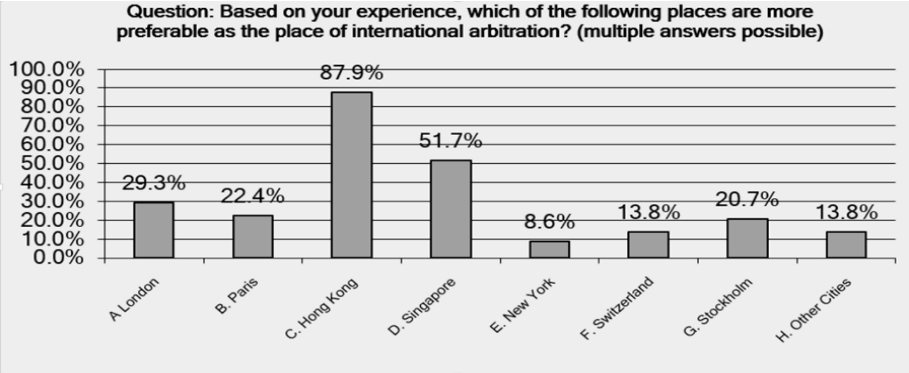
[41] See ICC Annual Report of 2014.

international arbitration scene. Thus, the preferences and practices of Chinese parties and their lawyers will have an important impact and may be game changers, in particular for Switzerland.

According to a survey carried out by the author from May to October 2013 among approximately 100 Chinese lawyers located in Beijing and Shanghai (hereinafter "CVW Chinese Survey 2013"), the following trends came to light:

Predominance of Hong Kong and Singapore as preferred Arbitration Hubs

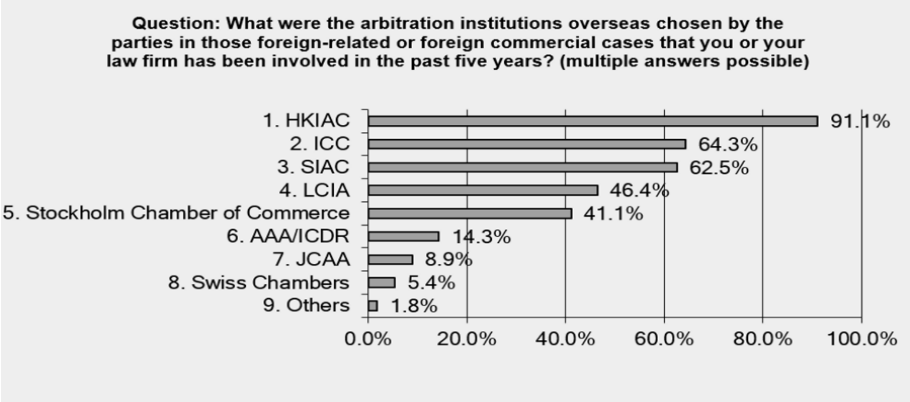
Among the survey respondents, the most popular places of international arbitration were by far Hong Kong (87.6%) and Singapore (51.7%) with Switzerland in sixth position with 13.8% after London (29.3%), Paris (22.4%) and Stockholm (20.7%).



A similar predominance arose with regard to the choice of arbitration institutions:

When asked about the foreign arbitration institutions chosen by the parties in foreign-related or international commercial cases, 91.1% of the survey respondents indicated having been involved in HKIAC arbitration, 64.3% in ICC arbitration and 62.5% in SIAC arbitration. The Swiss Chambers ranked

in 8th position with 5.4% after the LCIA (46.4%), the SCC (41.1%), the AAA/ICDR (14.3%) and the JCAA (8.9%).



Predominance of English law among Chinese Parties

In the CVW Chinese Survey 2013, when asked to choose between different applicable laws, 64.9% of the survey respondents indicated that they had no strict preference and that their choice of the applicable law depended on the specific contractual circumstances. However, 14.0% showed a preference for English law and 64.9% for international commercial law independent of the specific circumstances of the case. Generally speaking, among the survey respondents who indicated a preference, civil law, including unified international commercial law, seemed more popular than common law.

Comparing these results with relevant statistics of the two arbitration institutions with the highest numbers of Chinese parties, i.e. the HKIAC and the SIAC, the situation seems to indicate a stronger preference for English law:

- *In HKIAC arbitrations* involving Chinese parties, the law most frequently chosen in 2012 and 2013 was PRC law, followed by Hong Kong law. English law came in third position followed by US law.

Swiss law was chosen only once in 2013, and the UNIDROIT Principles once in 2012.[42] In 2014, the HKIAC did not issue detailed statistics as concerns the choice of law of Chinese parties. Looking at the overall statistics however, they confirm the predominance of Hong Kong law, followed by English law and PRC law. Swiss law seems largely absent from the parties' choice. [43]

- *In SIAC arbitrations*, the law most frequently applicable was Singaporean law with 44.5% in 2013 and 49% in 2014, followed by English law with 31.6% in 2013 and 25% in 2014. The next most popular choice was Indian law with 7.4% in 2013 and 4% in 2014.[44]

Preference for arbitrators from China or the UK

As mentioned above, judging by the trend at the ICC, the positioning of Swiss arbitrators has been decreasing in recent years. Considering the growth of cases involving Chinese parties and looking at the two Chinese and the three international institutions which are currently dealing with the bulk of these cases, this trend is likely to accelerate:

- *At CIETAC and BAC*, the official panels of arbitrators, which are not strictly binding anymore (except for the nomination of the presiding or sole arbitrator) but which still serves as the basis for most appointments, only counts nine and four Swiss arbitrators out of a total of 1,215 and 506 respectively. In contrast, the number of arbitrators from the UK and the US

[42] See PPT presentation "HKIAC Arbitration Cases Involving Mainland Parties (2012-2013)" on file with the author.
[43] See 2014 HKIAC Annual Report.
[44] SIAC Annual Reports of 2013 and 2014.

are 48 and 46 respectively at CIETAC and 15 and 21 at BAC respectively.

- *At the HKIAC*, in 2014, Swiss arbitrators were absent from the top 10 nationalities of arbitrators acting on cases involving Chinese parties. This top 10 includes Britain, China, New-Zealand, Singapore, Canada, Malaysia, USA, Australia, Austria, and France.[45]
- *At the SIAC*, whilst specific statistics on appointments are not available, it is striking to see that the SIAC panel of arbitrators only lists 7 Swiss arbitrators compared to 52 from the UK, 22 from Australia, 20 from Hong Kong and 11 from France.[46]
- *At the SCC*, in 2009,[47] Swiss arbitrators ranked only in 6th position among foreign nationalities, after Russia, Britain, Finland, 'Unknown' and the USA. [48]

Preference for Chinese or International Law Firms

Chinese law firms still lack experience in representing clients in international arbitration, which may explain the high proportion of Chinese clients represented by non-Chinese law firms (see above HKIAC statistics). Although there are not detailed statistics, it is presumed that Swiss law firms are underrepresented for the following reasons:

The great majority of Swiss law firms with substantial arbitration work have no offices outside of Switzerland. This is not only true for mainland China, but also for Singapore

[45] Information received by the author from the HKIAC Secretariat.
[46] See http://www.siac.org.sg/our-arbitrators/siac-panel.
[47] More recent statistics are not publicly available.
[48] See PPT presentation "Arbitration in Sweden and the role of the SCC" of Johan Lundstedt available on www.arbitrationacademy.org.

and Hong Kong which have become the main arbitration hubs for China-related disputes. Only one Swiss law firm has offices in Singapore, and none of the relevant Swiss law firms have offices in Hong Kong and/or China. It is only logical that Chinese parties shop in their own market and region and thus disregard Swiss law firms. After all, why would a Chinese party hire a Swiss law firm for an international arbitration with no connection to Switzerland?

Wrong perceptions among Chinese parties with regard to Switzerland

In addition to the above mentioned challenges, Switzerland is also often wrongly perceived by Chinese parties:

- **Switzerland is perceived as being geographically and culturally "far away" from mainland China**. In contrast, Hong Kong and Singapore are perceived as "little Chinas" based on their close ties with China and the high proportion of ethnical Chinese living in these regions. Whilst this perception may be accurate with regard to Hong Kong, it is largely unfounded with regard to Singapore. The only proximity between Singapore and China is the presence in Singapore of an important population of Chinese descent. However, these ethnical Chinese do not always master the Chinese language and their mentality and culture are mountains away from those of a Chinese mainlander. In addition, most Chinese parties disregard the fact that Hong Kong and Singapore are common law jurisdictions and that their legal system is therefore substantially different to the Chinese legal system.

Actually, not only is Switzerland only 4 more hours away then Singapore,[49] but the laws of Switzerland are much closer to those of China, then the laws of Hong Kong or Singapore. The same applies to the working style of lawyers, which is necessarily influenced by the legal framework where such lawyers are practicing. In addition, 65 years ago, Switzerland was one of the first western countries to recognize the People's Republic of China and has since then entertained excellent relationships with China. As such, Switzerland should not have any inhibition towards Hong Kong or Singapore.

- **Switzerland is further perceived as culturally "western", and not necessarily "neutral"**. Although both Switzerland, and Sweden, have a tradition of neutrality with regard to international conflicts, they are still perceived as culturally western. In contrast, Hong Kong and Singapore are perceived as China-friendly.

  It is undeniable that Switzerland is located in the western hemisphere and is of European culture. However, of Switzerland's strengths has always been its multi-linguism and multi-culturalism, which is also one of the reasons why Switzerland has been able to act as peace-maker between many countries in conflict. In addition, whilst Hong Kong may be perceived as China-friendly and thus be attractive to Chinese parties, the close ties between Hong Kong and China have also discouraged non-Chinese parties from

[49] It takes 6 hours to fly from Beijing or Shanghai to Singapore, and 10 hours to fly to Switzerland.

selecting Hong Kong as place of arbitration out of fear of a pro-China bias.

- **Switzerland is perceived as a very "expensive" country**, and the same perception automatically applies to the Swiss arbitration system. However, most Chinese parties are ignorant of the fact that a place of arbitration in Switzerland does not require a physical presence of the parties or the arbitrators in Switzerland. They are also ignorant of the cost components of arbitration proceedings and do not realize that the fees of the lawyers make up over 80% of the costs of arbitration proceedings.

  In this regard, the legal fees charged by Swiss firms are certainly lower compared to law firms in Hong Kong and Singapore, in particular compared to the fees charged by Queen's Counsel, Barristers and/or Senior Counsel in those jurisdictions.[50] Considering also the efficient Swiss court system which supports our arbitration system, it is highly unlikely that arbitrations in Switzerland cost more than arbitrations in Hong Kong or Singapore.

These wrong perceptions are currently influencing the choice of Chinese parties to the detriment of Switzerland as a arbitration hub.

[50] See WUNSCHHEIM/BARASCHE/SZULC/LIU, International Arbitration - How much does it cost and how to control these costs? A Practical Guide for Chinese Companies and Their Lawyers; in Arbitration in Beijing, No. 90, February 2015.

C. Risk of Further Decline of the Swiss Positioning

Indeed, whilst Switzerland enjoys a splendid reputation in China as a successful economic model and an environmental-friendly society, Switzerland is not perceived by Chinese parties or lawyers as an attractive "market for legal services". However, as demonstrated above, these perceptions are mostly inaccurate.

Unfortunately, our Swiss culture of understatement as well as our federal structure, which affects even our arbitration institution, has so far prevented us from doing efficient and targeted marketing in China. In the meantime, Hong Kong and Singapore, supported by their local governments, have spread their wings all over China where they have developed close cooperation with the local arbitration institutions and are holding regular free events promoting in Chinese language their own arbitration system and institutions. This targeted and regular marketing explains the stark increase in arbitration cases involving Chinese parties with the HKIAC and the SIAC. It also creates a home advantage for practitioners situated in those regions, who happen to be primarily of common law culture, which in turns explains the rising predominance of English law and UK practitioners in China-related cases.

In summary, if Switzerland does not wake up and educate the Chinese market about the advantages of Swiss arbitration, it will further lose ground among Chinese practitioners. You may be thinking: So what?

Switzerland cannot afford to lose the fight in China and the reasons are mathematical: Considering the size of the Chinese arbitration market, if Switzerland disappears from the mind of the Chinese lawyers as an attractive dispute resolution forum or applicable law, as more and more Chinese practitioners enter the scene of international

arbitration (and there are thousands to come), the dilution effect on Switzerland's positioning will be tremendous.

Besides the direct impact for Switzerland, the developments described above will also further strengthen the already strong influence of common law in international dispute resolution and international transactions in general. If a country as big as China with a strong civil law tradition ends up favouring a common-law style of dispute resolution, what hope is there for civil law in the region?

This is why Switzerland needs to react and seize the opportunities offered by the Chinese market.

IV. Opportunities to Seize

A. Switzerland has what China needs

In view of the challenges described above, it is clear that Switzerland needs to act, and there is a lot Switzerland can do.

- China has an enormous volume of arbitration cases. Yet, most of these cases are domestic. In contrast, arbitration cases in Switzerland are mostly of an international nature.[51] Chinese arbitration institutions thus need help in improving their service offer and coping with the challenges arising out of the international nature of cases, something our arbitration institution has been doing very well.
- Very few Chinese law firms get to represent clients in international arbitrations. In contrast, Swiss law firms and lawyers have established a

[51] In Swiss Chambers' arbitration, the percentage of cases involving Swiss parties is below 25%, meaning that 75% of the cases involve foreign parties.

long tradition of representing clients of all sorts of nationalities in all sorts of international arbitrations, whether in Switzerland or abroad. Chinese companies and law firms are thus in dire need for the know-how owned by the Swiss law firms.

- Chinese arbitrators are almost absent on the international arbitration scene. Swiss arbitrators are (still) over-represented compared to the size of the Swiss population. Swiss arbitrators could thus fill in the gap for the Chinese and also train the next generations of Chinese arbitrators.

In short, China and Switzerland are at antipodes. China is an enormous arbitration market with still unexploited potential and a dire need for know-how. In contrast, Switzerland as a tiny little country seems over-represented in international arbitration with a high degree of market saturation and ever growing competition from other countries.

The Chinese dispute resolution market represents a golden opportunity for Switzerland to maintain and even grow its positioning provided it is able to "export" and offer its know-how and resources to that market.

B. Four Steps to Grab the Opportunities

In order to grab the opportunities offered by the Chinese arbitration market and help Switzerland maintain its international positioning, the following actions are necessary:

1. **Lobbying:** The Swiss arbitration community should develop co-operations with Chinese arbitration institutions, Chinese legislators and Chinese courts to "export" Swiss law and practice standards in the field of international arbitration.

Our arbitration law, i.e. Chapter 12 of the PILA, has proven its value and attractiveness. The same applies to the Swiss court's involvement in arbitration. In contrast, Chinese courts and institutions are still struggling with the key legal concepts of international arbitration. A co-operation at the governmental and court level would be of tremendous help to raise awareness for the advantages of the Swiss arbitration legal framework.

2. **Marketing:** The Swiss arbitration community should organize regular marketing actions in China in the form of seminars and Chinese language publications. In this regard, the recent events held by ASA at the IPBA annual conference in Hong Kong and the two training seminars held in Beijing and Shanghai together with the China Overseas Development Agency and the Shanghai International Arbitration Center in May 2015 are the kind of initiatives which should become a regular thing.

3. **Training:** As mentioned above, Chinese arbitration practitioners are in dire need of know-how and experience. Sharing some of our know-how to local arbitration institutions and their practitioners would position Switzerland as a country to learn from and thus to look at. It would also show the Chinese arbitration community that our arbitration culture may be much closer to theirs then the arbitration culture of Hong Kong or Singapore which are strongly influenced by common law culture.

4. **Academic Exchange:** One of the key reasons why Chinese seem to prefer English or US law for their international transactions has of course

something to do with the number of Chinese law students pursuing legal studies in the UK and US. Whilst Switzerland attracts a comparatively high number of international students with Chinese students comprising the largest group of Non-EU students in Switzerland, the number of law students among these Chinese students is still insignificant compared to the number of Chinese students pursuing legal degrees in the US or the UK.

It goes without saying that in order to yield results, it is indispensable to adopt a "one" Switzerland approach. We therefore need to overcome our federalist and regionalist way of thinking and join forces to appear united and to represent Switzerland in the best interests of the entire arbitration community as a whole and not to the sole benefit of particular regions or institutions.

It is also necessary to obtain more governmental support. The HKIAC and SIAC's success in China is largely linked to the strong support of their local governments, in terms of financial support, but also in terms of lobbying. Thus, although it is primarily the task of the Swiss arbitration community to defend its interest in China, the battle can only be won with the support of the Swiss government.

V. Conclusions

Whilst the Swiss arbitration community still enjoys a preferential positioning, its influence on the international arbitration scene has already started to decrease. Switzerland has already lost its former pole position and the increasing global competition will only accelerate this trend.

China is an enormous market, which is still largely unexploited. Competitors are already there, but there is still

room for other players and in particular for the Swiss arbitration community, provided however we do not miss the next train. Missing it would inevitably lead to a further dilution of Switzerland's influence in the international arbitration community. This would be a pity, and even a shame.

Indeed, as described above, Switzerland has exactly what it takes to develop a strong partnership with Chinese players and there is a lot to be done, including lobbying, marketing, training and academic exchanges to start with.

Thus, it is high time that the Swiss arbitration community organized and establishes an action plan with regard to the Chinese market.

Switzerland has managed to achieve its unique international positioning notwithstanding the competition from other European countries. It has succeeded thanks to the characteristics of its arbitration system and community and a certain dose of audacity.

There is no reason why Switzerland would not be able to establish a strong positioning in other parts of the world, including China. All it takes is some of its forgotten audacity, a good strategy and people willing to implement it.

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

LUCA BEFFA

Contents

I. Introduction

This paper reviews the case law of the Swiss Federal Supreme Court (the "Supreme Court") in international arbitration matters, covering the decisions published on the Court's website[1] between 25 August 2014 and 25 August 2015 (hereinafter, the "period under review" or the "year under review").[2] Decisions issued in domestic arbitration matters or purely procedural decisions merely acknowledging the withdrawal of the petition to set aside the arbitral award or declaring the challenge inadmissible for non-payment of the advance of costs, will not be examined.

During the period under review, the Supreme Court has **rendered 33 decisions** in international arbitration matters (excluding the above-mentioned purely procedural decisions), 29 of which pertain to setting aside proceedings, 2 to revision proceedings, and 2 to enforcement proceedings. These figures are almost identical to the ones of the previous period of review.[3] They remain, therefore, slightly lower than the average number of decisions rendered during the past few years.[4]

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1 http://www.bger.ch/ (last visited: 25 August 2015).

2 Because publication on the Court's website generally takes place a few weeks after a decision is issued, there may have been additional decisions issued in the period under review, which were not yet published on the Court's website on 25 August 2015.

3 See ROBERT-TISSOT, *Review of the Recent Case Law of the Swiss Federal Supreme Court*, in: Müller/Rigozzi/Besson (eds.), *New Developments in International Commercial Arbitration 2014*, 2014, p. 121 *et seq.*, p. 122, reporting that, for the period from 25 August 2013 to 25 August 2014, the Supreme Court rendered 32 decisions, 29 of which pertained to setting aside proceedings, 1 to revision proceedings and 2 to enforcement proceedings.

4 See ROBERT-TISSOT, *op. cit.*, pp. 122-123, recalling that, as reported by the preceding authors of this review, the Supreme Court rendered: 38 decisions for the period from 25 August 2009 to 25 August 2010; 35 decisions for the period from 25 August 2010 to 25 August 2011; 34 decisions for the period from 25 August 2011 to 25 August 2012; and 41 decisions (a record) for the period from 25 August 2012 to 25 August 2013.

3 of the **decisions** reviewed in this contribution have been (or will be) **published** in the Supreme Court's reporter (the "ATF").[5] All 3 decisions pertain to setting aside proceedings. Curiously enough, 2 of the 3 decisions were rendered on the same day (28 August 2014) and deal with the same procedural question, i.e. the **admissibility of** the **grounds** set forth in letters (c) (decisions beyond claims or failure to adjudicate claims), (d) (violation of the principle of equal treatment of the parties or of their right to be heard) and (e) (incompatibility with public policy) of Article 190(2) of the PILA, in challenge proceedings brought **against preliminary or interim awards** based on letters (a) (irregular constitution of the arbitral tribunal) or (b) (incorrect decision on jurisdiction) of the same provision.[6]

The 3rd decision designated for official publication[7] deals with one of the most frequently examined principles over the past few years, i.e. ***res judicata***. This decision, which concerns a US Firm and one of its German partners, gave the Supreme Court the opportunity to confirm that the requirements of *res judicata* must be reviewed in Switzerland according to Swiss law (more precisely, to what the Supreme Court calls the *lex fori*). The Court also explicitly refused the application of a more international or transnational concept of *res judicata* as recommended (for instance) by the International Law Association (ILA).

The *res judicata* principle has again been very popular this year. 2 other decisions address the *res judicata* effect either of foreign arbitral awards,[8] or of both state court decisions

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5 Decision No. 4A_74/2014 of 28 August 2014, published in ATF 140 III 477; decision No. 4A_6/2014 of 28 August 2014, published in ATF 140 III 520; and decision No. 4A_633/2014 of 29 May 2015, which had not yet been published at the time of writing.

6 ATF 140 III 477 and ATF 140 III 520.

7 Decision No. 4A_633/2014 of 29 May 2015.

8 Decision No. 4A_374/2014 of 26 February 2015.

(although regarding preliminary or conservative measures) and prior awards rendered by the same arbitral tribunal in the same proceedings.[9] A further decision also deals with the principle of *res judicata*, but more indirectly, in the context of the analysis of the consequences of a withdrawal of an appeal against a decision of the FIFA Dispute Resolution Chamber in a multi-party arbitration.[10]

Although *res judicata* and, thus, incompatibility with public policy have given rise to a number of noteworthy developments, the **most frequently invoked ground** in setting aside proceedings remains the violation of the parties' right to be heard (Article 190(2)(d) PILA), followed by incompatibility with public policy (Article 190(2)(e) PILA), incorrect decisions on jurisdiction (Article 190(2)(b) PILA), decisions beyond claims or failures to adjudicate claims (Article 190(2)(c) PILA) and irregular constitution of the arbitral tribunal (Article 190(2)(a) PILA),[11] which was invoked only twice in the period under review.[12]

Although being the least invoked ground, the incorrect constitution of the arbitral tribunal has given rise to one of the most interesting decisions rendered in the period under review, i.e. decision No. 4A_709/2014 of 21 May 2015 dealing with a very hot (because of the Yukos' saga) and debated issue: the appointment and tasks of **arbitral tribunal's secretaries**. In this decision, the Supreme Court confirmed that not only can arbitrators appoint secretaries and delegate administrative tasks to them, but also that arbitral tribunal's secretaries may be involved in the

9 Decision No. 4A_606/2013 of 2 September 2014.

10 ATF 140 III 520.

11 This was the case also in the past year: see ROBERT-TISSOT, *op. cit.*, p. 123. See also, for the previous year, ALARCÓN DUVANEL, Review of the Recent Case Law of the Swiss Federal Supreme Court, in: Müller/Rigozzi (eds.), New Developments in International Commercial Arbitration 2013, 2013, p. 111 *et seq.*, p. 113.

12 Decision No. 4A_606/2013 of 2 September 2014 and decision No. 4A_709/2014 of 21 May 2015.

deliberations and in the drafting of the award, provided that they act under the supervision and instruction of the arbitral tribunal.

Only **2** of the 29 decisions rendered in setting aside proceedings during the period under review resulted in a **partial annulment** of the challenged award, the first due to the tribunal's lack of jurisdiction *ratione personae* to hear part of the dispute (Article 190(2)(b) PILA)[13] and the second for a violation of the right to be heard due to the sole arbitrator's failure to examine and address relevant arguments invoked by the petitioner (Article 190(2)(d) PILA).[14] Both cases concerned CAS arbitrations.

Although the overall **success rate** of approximately **7%** (6.9% to be precise) is more or less in line with the statistics concerning the past few years,[15] it has to be noted that the success rate in commercial arbitration cases has drastically dropped (from an average rate of approximately 7% to **0%**), whereas the success rate in sports arbitrations has significantly increased (from an average rate of approximately 10% to **14%**).[16]

As usual for this review, we will analyse in turn the decisions issued in setting aside proceedings (§ II), in revision proceedings (§ III), and in enforcement proceedings (§ IV). We will then discuss very briefly a couple of issues concerning costs of federal proceedings (§ V), before

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13 ATF 140 III 520.

14 Decision No. 4A_246/2014 of 15 July 2015.

15 See ROBERT-TISSOT, *op. cit.*, p. 124, reporting the following success rates between 2010 and 2014: 6.9% for the period between 25 August 2010 and 25 August 2011; 6.45% for the period between 25 August 2011 and 25 August 2012; 5.26% for the period between 25 August 2012 and 25 August 2013; and 13.8% for the period between 25 August 2013 and 25 August 2014.

16 14 of the 29 decisions rendered in setting aside proceedings in the period under review concerned sports arbitration. With respect to the statistics concerning the past few years, see DASSER/ROTH, *Challenges of Swiss Arbitral Awards – Selected Statistical Data as of 2013*, in: ASA Bull. 3/2014, p. 459 *et seq.*

concluding our paper with a quick overview of the most interesting developments during the period under review (§ VI). As in the past year's review, the main developments in the Supreme Court's case law in the period under review will be summarized in a table of cases at the end of this paper (§ VII).

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

A. Admissibility of applications to set aside

1. Time limit to challenge the award (or to answer a challenge)

a) Decision No. 4A_609/2014 of 20 February 2015

Facts: On 27 September 2010, an Italian company (A.) entered into a sponsorship contract with a Spanish company (B.) that was managing a cycling team (C.). The contract contained the following arbitration clause (free translation from Italian): "*All disputes arising out of or in connection with the present contract shall be decided in a final manner by an arbitral tribunal to the exclusion of ordinary courts, in accordance with the rules of UCI (i.e. the Union Cycliste Internationale) and Italian law*".

The disputes that arose out of said contract gave rise to two *ad hoc* arbitrations: a first arbitration initiated by B. and terminated with a final award rendered on 25 July 2011; and a second arbitration initiated by A. and terminated with a final award dated 23 September 2014. The decision at hand concerns the second arbitration.

The **final award** was **sent** to the parties on 23 September 2014 **both by email and by registered letter**. In the email, the President of the arbitral tribunal wrote (free

translation from Italian): "*Please find attached an anticipated copy of the Arbitral Tribunal's letter of today with its enclosure (the Final award)*". In the registered letter, he wrote (free translation): "*Registered letter anticipated by email*" above the addresses of the respective counsel; and "*Please find attached to the present the original copy of the Final award"* in the text of the letter.

A. moved to set aside the award before the Supreme Court on 24 October 2014. B. objected, *inter alia*, on the basis that the **challenge** was belated, since it should have been filed **within 30 days from the notification of the Final award by email**, i.e. by 23 October 2014, rather than within 30 days from the receipt of the original copy of the Final award by registered letter.

Decision: The Supreme Court upheld B.'s objection. It recalled that **the manner in which an award must be notified depends on the agreement or the rules chosen by the parties**, *in casu* the rules of the UCI. Said rules provide that the original of the award must be signed by the President of the Panel and deposited with the Secretariat of the UCI, with the parties receiving a copy of the decision. In other words, contrary to the CAS rules[17] or the rules of the World Intellectual Property Organisation (WIPO),[18] the rules of the UCI do not require that an original of the award duly signed by the arbitrators be notified to the parties.

The Supreme Court further observed that **electronic communications** were **regularly used** between the

[17] Article R31 of the CAS Code provides that: "*All arbitration awards, orders, and other decisions made by CAS and the Panel shall be notified by courier and/or by facsimile and/or by electronic mail but at least in a form permitting proof of receipt*"; see in this respect decisions nos 4A_392/2010 and 4A_394/2010.

[18] Article 55 of the WIPO Expedited Rules provides that: "*The award shall be communicated by the Tribunal to the Center in a number of originals sufficient to provide one for each party, the arbitration and the Center. The Center shall formally communicate an original of the award to each party and the arbitrator*"; see in this respect decision no. 4A_582/2009.

arbitral tribunal and the parties **during the arbitral proceedings**. Therefore, the Supreme Court considered that the 30-day deadline to challenge the award started to run when the parties received a copy of the Final award by email, and that, thus, the challenge filed by A. was inadmissible.

Comment: This decision makes clear that, if the agreement or the rules chosen by the parties do not oblige the arbitral tribunal to serve an original hard copy to the parties, the arbitral tribunal is entitled to notify the award by email, in particular when electronic communications are regularly used during the arbitral proceedings. In such circumstances, the **time limit** for filing a request to set aside the award **starts to run with the notification of the award by email**.

This demonstrates that one cannot rely on what is perceived to be the normal practice of Swiss courts, i.e. that only formal notification triggers the deadline for a challenge.[19] This is particularly true in *ad hoc* arbitrations which are not governed by specific arbitration rules. We agree with VOSER/PETTI that, at least in such cases, parties should be careful to either **agree on the applicable method for communicating awards**, or file their **challenge within 30 days from the first notification of the award** according to the method of communication used during the arbitral proceedings.[20]

b) Decision No. 4A_374/2014 of 26 February 2015

Facts: This decision concerns a CAS award ordering a Mexican football club (Club A.), to indemnify two Argentinian

[19] See in this respect VOSER/PETTI, *Diligence is required when determining the 30-day deadline for challenging awards*, available at: http://www.swlegal.ch/getdoc/c1d73643-5b28-45cd-8f70-5d877c150ddd/2015_Nathalie-Voser_Angelina-Petti_Diligence-is-re.aspx.

[20] VOSER/PETTI, *op. cit.*

coaches (B. and C.) on several grounds. The facts of the case will be summarized in detail below.[21] For the purposes of commenting on the findings of the decision regarding admissibility and time limits, it is sufficient to mention that on 16 June 2014, Club A. moved to set aside the CAS award before the Supreme Court, which invited B. and C. to file their respective answers by 29 September 2014. This deadline was eventually extended until 20 October 2014 upon B. and C.'s request. B. and C. filed their replies on 21 October 2014, i.e. **one day after the expiry of the deadline**.

According to the explanations given by B. and C.'s counsel, the latter had handed over the envelope allegedly containing the replies and the accompanying exhibits to the Swiss Post on 20 October 2014. Since the **price paid for sending** the correspondence was **not sufficient**, the Post had deposited the envelope in the postal box of B. and C.'s counsel and requested payment of the difference. Instead of paying the difference and handing back the envelope to the Post, the counsel had opened the envelope, removed the replies and accompanying exhibits, and inserted them in another envelope that was handed over directly to the Supreme Court on 21 October 2014.

B. and C. argued that the replies had been timely submitted. This was challenged by Club A.

Decision: Club A.'s challenge was upheld by the Supreme Court. Whilst accepting, in view of the specific evidence adduced by B. and C.'s counsel, that an envelope had indeed been handed over to the Swiss Post on 20 October 2014, the Supreme Court held that B. and C.'s counsel had **not** provided **sufficient evidence** regarding the fact that said **envelope contained the same documents** handed over to the Supreme Court on 21 October 2014.

[21] See § II.B.5.e) below.

After recalling that **strict proof (*preuve stricte*)** is required regarding compliance with time limits in challenge proceedings and that **preponderant likelihood (*vraisemblance prépondérante*) is not sufficient**, the Supreme Court held that B. and C.'s counsel should simply have paid the difference and handed back the envelope to the Post instead of taking the replies and exhibits out of the envelope in order to hand it over directly to the Supreme Court. Accordingly, the Supreme Court rejected B. and C.'s replies and accompanying exhibits and refused to take them into account in its reasoning.

Fortunately for B. and C., however, the Supreme Court eventually dismissed Club A.'s challenge on the merits, as discussed below.[22]

Comment: Although this decision concerns, *stricto sensu*, the compliance with the time limit set forth by the Supreme Court to answer to a challenge against an award, its findings apply, *mutatis mutandis*, to all time limits applying to challenge proceedings, including the time limit to challenge an award which is provided by law.

In its decision, the Supreme Court provided practical guidance on how to ensure that a deadline is complied with in the unfortunate case that the sender pays **insufficient postage**. The sender can simply **pay the missing amount without opening the envelope** in order to avoid that its submission be deemed to have been filed after the prescribed time limit.

[22] See § II.B.5.e) below.

2. Legal interest to challenge the award

a) Decision 4A_126/2015 of 14 April 2015

Facts: An athlete provided samples in anti-doping controls conducted during two international competitions. The results were negative. In 2013, however, new tests carried out by the International Olympic Committee (IOC) on the same samples revealed the presence of a prohibited substance.

The athlete formally denied the use of the prohibited substance and the IOC decided to carry out new tests. The athlete requested that said tests be entrusted to a laboratory of a third independent country, but the IOC refused, entrusting the tests to the *Centre Hospitalier Universitaire Vaudois* (CHUV).

The athlete appealed against this decision before the CAS, but objected to the appointment of an arbitrator mentioned in the **official list of arbitrators issued by the CAS**. The athlete initiated several proceedings aimed at challenging the arbitrators successively appointed by the CAS. She also seized the *Tribunal d'arrondissement* of Lausanne (the "Lausanne Court") requesting several measures aimed at constituting a Panel exclusively composed of arbitrators not mentioned in the official list of the CAS.

On 21 January 2015, the Lausanne Court declared the athlete's requests inadmissible, principally because the procedure of appointment, revocation and replacement of arbitrators is governed exclusively by the CAS Code and, thus, the Lausanne Court had no authority to act as ***juge d'appui*** pursuant to Article 179(2) PILA.

On 23 February 2015, the athlete moved to set aside said decision before the Supreme Court, as well as before the *Tribunal cantonal* of the canton of Vaud. The appeal proceedings before the latter court were stayed.

In the meantime however, more precisely on 10 November 2014, the CAS dismissed the appeal filed by the athlete for lack of jurisdiction. It is not established whether the parties received the full award (with grounds) or only the dispositive part thereof by the time the athlete moved to set aside the decision of the Lausanne Court.

Decision: The Supreme Court declared the athlete's challenge inadmissible for lack of interest. It recalled that the petitioner must have an **interest worthy of protection** for the annulment of the challenged decision. Such an interest must be **actual**, i.e. must **exist throughout the entirety of the challenge proceedings**.

The Supreme Court held that this was not the case in the present instance, as the CAS had already rendered a final decision before the date on which the athlete initiated challenge proceedings against the decision of the *juge d'appui* and, in any event, before the date on which the Supreme Court rendered its decision. Indeed, pursuant to Article R59(3) of the CAS Code, an award is enforceable as of the written notification of its dispositive part.

Comment: This decision is logical and does not deserve particular comment. The athlete is left with the option of challenging the CAS award, provided that this is still possible.

The decision of the Supreme Court in the possible challenge proceedings against the CAS award, if any, is likely to be more interesting than the present one, since it may give the Supreme Court the opportunity to address whether a CAS Panel composed of arbitrators from the official CAS list meets the **requirements of independence and impartiality**.[23] The Supreme Court may also seize this

[23] See in this respect VOSER/BOEHM, *Swiss Supreme Court: no decision yet on composition of CAS panels*, available at: http://www.swlegal.ch/getdoc/

opportunity to express its opinion in relation to the **Pechstein decision** rendered on 15 January 2015 by the *Oberlandesgericht* of Munich.[24]

3. Limited grounds to set aside an arbitral award and procedural requirements

a) Decision No. 4A_36/2015 of 26 January 2015

Decision: The Supreme Court confirmed that an international award can be challenged **only** for one or more of the **grounds provided for in Article 190(2) PILA**, and that the Supreme Court reviews exclusively the grounds which are raised and substantiated by the petitioner (so-called "***Rügepflicht***" and "***Substantiierungspflicht***"; see Article 77(3) of the FTA).

In the present case, the petitioner, a football club, did not raise any of the grounds provided for in Article 190(2) PILA, but limited itself to questioning the way in which the CAS Panel interpreted and applied the rules contained in the articles of association of the club, as well as the assessment made by the Panel of a specific piece of evidence. Therefore, the Supreme Court declared the challenge inadmissible.

b) Decision No. 4A_698/2014 of 5 March 2015

Decision: The Supreme Court confirmed the **same principles** in a decision in which it dismissed the challenge brought by a Polish company against an award ordering it to pay EUR 218,519.06 to a German company. The Supreme Court recalled in particular that a party cannot simply argue that the award violates both substantive and procedural

bd8e169f-3180-4584-91c7-fc3557835d4c/2015_Nathalie-Voser_Hannah-Boehm_Swiss-Supreme-(2).aspx.

[24] For more details concerning the Pechstein decision, see the paper of FAVRE-BULLE contained in this book.

principles without **substantiating its arguments** in relation to the grounds provided for in Article 190(2) PILA.

c) Decision No. 4A_623/2014 of 30 April 2015

Decision: The Supreme Court again confirmed that an international award can be challenged only for one or more of the grounds provided for in Article 190(2) PILA. The case involved an IT company which moved to set aside an award rendered by a sole arbitrator under the Swiss Rules in a dispute between the company and one of its employees.

The petitioner argued that the sole arbitrator had violated its right to be heard insofar as she **should not have taken into account the statements of certain witnesses**. The Supreme Court held that such an argument did **not** fall within the scope of Article 190(2)(d) PILA, nor **under** the scope of any other ground provided for in **Article 190(2) PILA**, including the principle *ne eat iudex ultra petita partium* (Article 190(2)(c) PILA).

d) Decision No. 4A_174/2015 of 30 June 2015

Decision: The Supreme Court reaffirmed the so-called "***Substantiierungspflicht***", confirming that an international award can be annulled only if the challenge is sufficiently reasoned in order to show the existence of a violation of Article 190(2) PILA. This was not the case in the present instance, where the petitioner failed to explain why the CAS violated Article 190(2) PILA in holding that the appeal was belated.

4. No review of the facts in setting aside proceedings

a) Decision No. 4A_231/2014 of 23 September 2014

Decision: The Supreme Court confirmed that it is bound by the facts as established by the arbitral tribunal,[25] except when one of the grounds of Article 190(2) PILA is raised against those facts or when new facts or evidence result from the award and can, thus, be taken into account in setting aside proceedings.[26]

In the present case, which will be discussed in more detail below,[27] the petitioner (Y.) invoked a fact (i.e. that a person, F., had been indicted in the US because he/she was suspected of having accepted bribes from Y.'s adverse party, B.) which had not been taken into account in the award at stake because it had been communicated to the arbitral tribunal after the award had already been signed.

Y. argued that the Supreme Court should take this fact and the corresponding evidence (i.e. the Indictment ("*acte d'accusation*") pronounced against F.) into account because of the importance of the alleged consequences that compliance with the award by Y. could trigger (i.e. criminal sanctions). However, the Supreme Court refused Y.'s request holding that the new fact and evidence did not result from the award and could not therefore be considered by the Supreme Court.

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[25] See Article 77(2) FTA, excluding the application of Article 105(2) FTA in setting aside proceedings.

[26] See Article 99(1) FTA.

[27] See § II.B.5.b) below.

5. Challengeable awards

a) Decision No. 4A_586/2014 of 25 November 2014

Decision: The Supreme Court confirmed its long-standing case law pursuant to which the **decisions of private bodies** (such as the ICC Court of Arbitration or the International Council of Arbitration for Sport - ICAS) **cannot be challenged before the Supreme Court**. The parties must wait until a challengeable award is rendered in order to ask the Supreme Court to review (indirectly) such a decision.

In the case at hand, an athlete moved to set aside a decision of the ICAS which held that the challenge brought by the athlete against the sole arbitrator who had been appointed had been withdrawn by the athlete. The Supreme Court declared the challenge inadmissible.

Comment: The well-established case law pursuant to which the decisions of private bodies such as the ICC Court or the ICAS cannot be challenged before the Supreme Court is not always satisfactory in our opinion. Although this principle may be justifiable, not only from a procedural point of view, but also as a deterrent to preposterous challenges aimed solely at delaying the proceedings, it would be very frustrating for the parties to go through the whole proceedings, have the tribunal render the award, and then have to recommence the entire procedure because the Supreme Court admits a challenge which was dismissed at the beginning of the proceedings.[28]

This is even more so in sport arbitrations, in which time is often of the essence. We agree with RIGOZZI that it may be unfair in certain circumstances to force an athlete to endure the full procedure with an arbitrator he or she considers to

[28] See BEFFA, *Challenge of international arbitration awards in Switzerland for lack of independence and/or impartiality of an arbitrator – Is it time to change the approach?*, in: ASA Bull. 3/2011, p. 598 *et seq.*, p. 602.

lack independence or impartiality before having the opportunity to submit a challenge to a court.[29]

In ATF 139 III 511 of 13 November 2013, the Supreme Court had given the impression of being ready and willing to abandon this case law.[30] The future will tell whether this is still the case, notwithstanding the Supreme Court's confirmation of this case law in decision No. 4A_586/2014.

b) Decision No. 4A_698/2014 of 5 March 2015

Decision: On top of reaffirming the so-called "*Rügepflicht*" and "*Substantiierungspflicht*",[31] the Supreme Court confirmed that a party who wants to **challenge the jurisdiction of the arbitral tribunal** must do so **against the preliminary or interim award** by which the arbitral tribunal admits it jurisdiction and cannot wait until the final award is rendered (as the Polish company did in the case at hand).

c) Decision No. 4A_633/2014 of 29 May 2015

Decision: In this decision which will be discussed in detail below,[32] the Supreme Court confirmed that if, as in the case at hand, the arbitral tribunal **dismisses a *res judicata* defence** in a procedural order, it **does not render a partial award** in the sense of Article 188 PILA (which is challengeable without restriction), but rather a **preliminary or interim award** in the sense of Article 190(3) PILA (which is challengeable only for the grounds set out in Article 190(2)(a) and (b)) because it does not put an end, even partially, to the proceedings.

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[29] See RIGOZZI, *The Swiss Federal Supreme Court slams the door four times on Valverde's Operation Puerto's challenges*, in: Paris Journal of International Arbitration 2012, p. 950 *et seq.*, p. 955.

[30] See ROBERT-TISSOT, *op. cit.*, p. 20.

[31] See above, decision No. 4A_36/2015.

[32] See § II.B.5.g) below.

6. Preliminary or interim awards and grounds to set them aside

a) ATF 140 III 477 (decision No. 4A_74/2014 of 28 August 2014)

Facts: The facts of this very interesting decision published in the Supreme Court's reporter will be summarized below.[33] For the purposes of commenting on the findings of the decision regarding preliminary or interim awards and the grounds to set them aside, it is sufficient to mention that the sole arbitrator appointed by the Arbitration Court of the Swiss Chambers' Arbitration Institution (SCAI) upheld his jurisdiction in a preliminary or interim award, in which he rejected the arguments of the petitioner (the Luxembourg company A).

A. moved to set aside the award before the Supreme Court for lack of jurisdiction (Article 190(2)(b) PILA), arguing, *inter alia*, that the sole arbitrator had violated its right to be heard and the equality of the parties in upholding his jurisdiction.

Decision: The Supreme Court recalled first of all that, pursuant to **Article 190(3) PILA**, preliminary or interim awards may be challenged only on the grounds of Article 190(2)(a) (irregular constitution) or (b) (jurisdiction) PILA. However, the Supreme Court held that the very purpose of Article 190(3) PILA, which is to decide upon questions of judicial organization as soon as possible in a conclusive manner, requires that the Supreme Court decide on a factual basis that cannot be challenged later.

This is why the parties are entitled, according to the Supreme Court, to argue that the challenged decision regarding the constitution or the jurisdiction of the arbitral tribunal also violates other grounds of Article 190(2) PILA, in

[33] See § II.B.2.a) below.

particular the parties' right to be heard. The Supreme Court added, however, that the **grounds set forth in letters (c), (d) and (e) of Article 190(2) PILA** (i.e. decisions *ultra* or *infra petita*, violations of the principle of equal treatment or the right to be heard and incompatibility with public policy) **can** only **be invoked to set aside a preliminary or interim award provided that they are strictly limited to issues directly concerning the composition or the jurisdiction of the arbitral tribunal** (letters (a) and (b) of Article 190(2) PILA).

In view of the above, the Supreme Court held that A's argument pursuant to which the sole arbitrator had violated its right to be heard and the equality of the parties when upholding his jurisdiction was admissible.

Comment: The main interest of this decision, which will be further discussed below as to its merits,[34] lies in the confirmation by the Supreme Court that Article 190(3) PILA does not prevent parties from raising grounds based on Article 190(2) letters (c), (d) and (e) PILA in challenge proceedings against preliminary or interim awards concerning the composition and/or jurisdiction of the arbitral tribunal (Article 190(2) letters (a) and (b) PILA), provided that the grounds raised are strictly limited to issues directly concerning the composition and/or the jurisdiction of the tribunal.

This **principle** was **already admitted by the vast majority of scholars**,[35] but the Supreme Court had thus far

[34] See § II.B.2.a) below.

[35] See among others: BERGER/KELLERHALS, *International and domestic arbitration in Switzerland*, 2nd ed., 2015, para. 1696, pp. 592-593, referring to their comments in the previous edition of their book; KAUFMANN-KOHLER/RIGOZZI, *Arbitrage international*, 2nd ed., 2010, para. 717, p. 458; see also the other authors referred to by the Supreme Court in its decision.

failed to recognize it.[36] This **confirmation** is welcome mainly because, as admitted by the Supreme Court in its decision, it serves the legislature's objectives[37] and procedural efficiency.[38] Both command that the questions of composition and jurisdiction of the arbitral tribunal be definitively resolved at an early stage of the proceedings. Preventing the aggrieved party from challenging for instance a violation of its right to be heard in relation to a preliminary or interim award asserting jurisdiction until the arbitral tribunal has rendered a partial or final award would obviously conflict with this purpose. It would also trigger the risk that the Supreme Court denies the arbitral tribunal's jurisdiction in challenge proceedings against the partial or final award, after having upheld it in challenge proceedings against the preliminary or interim award simply because the challenging party was not entitled to raise a violation of its right to be heard in the first challenge proceedings.[39]

This decision means that parties challenging a preliminary or interim award pursuant to Article 190(3) PILA should **immediately raise all possible grounds** provided for in Article 190(2) PILA to the extent that they directly relate to the facts on which the arbitral tribunal rendered its decision concerning its composition or jurisdiction. It is submitted that parties cannot wait to raise such grounds in (potential)

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[36] The question had been left open for instance in decision No. 4A_414/2012 of 11 December 2012 (see para. 3.2).

[37] In this sense, see also BERGER/KELLERHALS, *op. cit.*, loc. cit.

[38] See VOSER/ESCHMENT, *Swiss Supreme Court clarifies standard for challenging the basis of preliminary or interim awards regarding an arbitral tribunal's composition or jurisdiction*, available at: http://www.swlegal.ch/getdoc/3786eac5-daa3-4deb-bc9c-c4d1c80f4f6b/2014_Nathalie-Voser_Jorn-Eschment_Swiss-Suprem-(2).aspx).

[39] See in this sense STUTZER/BÖSCH, *The Federal Supreme Court clarifies the Grounds for an Action for Annulment against preliminary and interim Awards*, available at: http://thouvenin.com/federal-supreme-court-clarifies-grounds-action-annulment-preliminary-interim-awards/.

challenge proceedings against the partial or final award: such grounds would be forfeited.[40]

b) ATF 140 III 520 (decision No. 4A_6/2014 of 28 August 2014)

Facts: The facts of this other interesting decision published in the Supreme Court's reporter will also be summarized below.[41] For the purposes of commenting on the findings of the decision regarding preliminary or interim awards and the grounds to set them aside, it is sufficient to mention that a football club moved to set aside a CAS award annulling a decision of the FIFA Dispute Resolution Chamber (DRC) and sending the case back to the DRC for a new decision.

The club essentially argued that the CAS lacked jurisdiction (Article 190(2)(b) PILA), but also invoked the grounds of *ultra petita* (Article 190(2)(c) PILA) and public policy (Article 190(2)(e) PILA).

Decision: The Supreme Court started by examining whether the CAS award should be considered as a **final award** (i.e. an award which terminates the proceedings on a substantive or procedural ground), as a **partial award** (i.e. an award which deals only with some of the claims at stake or with part of the total amount of a claim, or which terminates the proceedings against some (but not all) of the respondents), or as a **preliminary or interim award** (i.e. an award which determines only one or more preliminary questions, whether of procedural or substantive nature).

The Supreme Court noted that, whilst such a **classification** is well-suited for commercial arbitrations in which a final award does indeed terminate the arbitral proceedings, it does **not** appear to be **particularly suitable for sports**

[40] In this sense, see VOSER/ESCHMENT, *op. cit.*
[41] See § II.B.2.b) below.

arbitration in which the decision of a sport federation can be appealed before the CAS. In such a case, although the award rendered by the CAS terminates the proceedings before it and should, thus, be considered as final pursuant to the above classification, it does not necessarily terminate the proceedings on the merits between the relevant parties. The proceedings on the merits continue if the **CAS annuls the challenged decision and sends the case back to the sport federation for a new decision**.

According to the Supreme Court, proceedings initiated before the sport federation and continued before the CAS are similar to state court proceedings subject to both first instance and appeal proceedings. As provided for by the legislator in its message of 28 February 2001 (concerning the revision of the organization of the Swiss federal justice), state court proceedings must be considered as terminated only when both the first instance and the appeal proceedings are actually terminated. Thus, the decision by which an appellate court annuls the challenged decision and sends the case back to the first instance court for a new decision on the merits qualifies as a **preliminary or interim award, even if it terminates the appeal proceedings** (so-called "***Zwischenentscheid***"). It is therefore justified, according to the Supreme Court, to apply the same principle to the appeal proceedings before the CAS, the rationale being to ensure that the Supreme Court deals with a specific case only once, subject to the relevant exceptions admitted by case law.

The Supreme Court then moved on to examine the admissibility of the grounds invoked by the club. It confirmed the **principle laid down in ATF 140 III 477** (rendered the same day and discussed above)[42] i.e. that, notwithstanding the wording of Article 190(3) PILA, the

[42] See § II.A.6.a) above.

grounds set forth in letters (c), (d) and (e) of Article 190(2) PILA can also be invoked to set aside a preliminary or interim award provided that they are strictly limited to issues directly concerning the composition or the jurisdiction of the arbitral tribunal (letters (a) and (b) of Article 190(2) PILA).

According to the Supreme Court, this condition was not met in the present case since the grounds of *ultra petita* and violation of public policy were not invoked by the club in the context of Article 190(2)(b) PILA, but separately, as self-standing grounds, and were therefore inadmissible. The Supreme Court thus limited its analysis to the only admissible ground, i.e. the purported lack of jurisdiction of the CAS. The Supreme Court's findings in this respect will be discussed below.[43]

Comment: This decision is important not only because it reiterates the principle already set out in ATF 140 III 477 discussed above,[44] but also because it **clarifies the nature** of a CAS award which upholds an appeal against a decision rendered by a sport federation and sends the case back to the federation for a new decision (so-called "*Zwischenentscheid*"). By holding that such a decision constitutes a **preliminary or interim award**, the Supreme Court makes it clear, *inter alia*, that the award can be immediately challenged only for irregular composition of the arbitral tribunal or for an incorrect decision on the tribunal's jurisdiction.

The Supreme Court had already confirmed this principle in its decision No. 4P.298/2006 of 14 February 2007.[45] In said decision, however, the Supreme Court had not explained the **underlying reasoning**. This is why the clarifications

[43] See § II.B.2.b) below.

[44] See § II.A.6.a) above.

[45] In that decision the Supreme Court already qualified that a CAS award annulling a decision rendered by FIFA and sending back the case to FIFA for a new decision is to be considered as a preliminary award.

provided by the Supreme Court in the case at hand are welcome.

The Supreme Court further confirmed in this decision its inclination to take into account the **peculiarities of sports arbitration**. Specifically, the Supreme Court took into consideration the fact that, contrary to commercial arbitration, sports arbitration provides for a **double degree of appeal** against a decision of sport federations or associations: first before the CAS, and then before the Supreme Court. This peculiarity justifies that the decisions of the CAS be subject to the same treatment that is reserved for the decisions of an appellate court in state court proceedings.[46]

7. Waiver of setting aside proceedings (Article 192(1) PILA)

a) Decision No. 4A_633/2014 of 29 May 2015

Decision: In the same decision referred to above,[47] and which will be discussed in detail below,[48] the Supreme Court confirmed its long-standing case law pursuant to which the **mere reference to specific Rules containing a waiver**, such as for instance the ICC Rules,[49] is **not sufficient** to fulfil the strict requirements of Article 192(1) PILA.

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[46] In this sense, see BÄRTSCH/RANEDA, *CAS arbitral award partially annulled for lack of jurisdiction*, available at: http://www.swlegal.ch/Publications/Arbitration-Case-Digest/CAS-arbitral-award-partially-annulled-for-lack-of.aspx; see also ZIMMERMANN, *Anfechtung von Zwischenentscheiden des CAS beim Bundesgericht*, Jusletter of 8 December 2014, p. 7.

[47] See § II.A.5.c) above.

[48] See § II.B.5.g) below.

[49] Article 34(6) of the ICC Rules provides that "*by submitting the dispute to arbitration under the Rules, the parties undertake to carry out any award without delay and shall be deemed to have waived their right to any form of recourse insofar as such waiver can validly be made*".

8. Other procedural requirements in setting aside proceedings

a) Decision No. 4A_606/2013 of 2 September 2014

Decision: In this decision the Supreme Court recalled two other procedural requirements in setting aside proceedings: first of all, that to be admissible the **reasons must be contained in the challenge** and the parties cannot simply refer to the assertions, evidence and offers of evidence contained in the briefs submitted in the arbitral proceedings; second, that a party may **not** use its **reply** either **to invoke new factual or legal arguments** not submitted in a timely manner, namely before the expiry of the time limit to file a challenge, or **to supplement insufficient reasons**.

The petitioners manifestly disregarded these principles in the case at hand and the Supreme Court correctly decided not to consider mere references to briefs submitted in the arbitral proceedings and arguments raised for the first time by the petitioners in their Reply.

b) Decision No. 4A_199/2014 of 8 October 2014

Decision: In this decision, the Supreme Court reaffirmed the principles set out in decision No. 4A_606/2013.[50] In particular, it criticized the petitioner for having referred to the facts contained in the award instead of simply providing a summary thereof.

The **Supreme Court** confirmed that, although this is not a procedural duty imposed upon the parties, it is appreciated when **the petitioner presents in general terms the factual background**, in particular in complex cases and when the award is not written in one of the Swiss official languages, for instance when it is written in English.

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[50] See § II.A.8.b) above.

Furthermore, the Supreme Court refused to take into account the new arguments contained in the petitioner's reply, although the latter had been submitted by newly appointed lawyers who were merely aiming at completing the manifestly insufficient and unclear argumentation contained in the appeal submitted by the petitioner's former lawyers.

B. Substantive grounds to set aside

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

a) Decision No. 4A_606/2013 of 2 September 2014

Facts: This dispute concerned a contract under which a German company (Y.) undertook to deliver to an Algerian company (X.) a beer production unit including a brewery. The facts of the case will be summarized in detail below.[51] For the purposes of commenting on the findings of the decision regarding the constitution of the tribunal, it is sufficient to mention that the dispute was heard by an arbitral tribunal constituted in accordance with the rules of the International Commercial and Industrial Arbitration Court (CARICI).

The arbitral tribunal rendered, in turn, two partial awards and a final award. X. moved to set aside both the second partial award and the final award before the Supreme Court on the same grounds, i.e. irregular constitution of the arbitral tribunal (Article 190(2)(a) PILA), violation of its right to be heard (Article 190(2)(d) PILA), and violation of procedural public policy (Article 190(2)(e) PILA). The Supreme Court dismissed both challenges: the first one in September 2007 (see decision no. 4P.4/2007 of 26

[51] See § II.B.4.a) below.

September 2007); and the second one in the decision at hand.

Decision: In relation to Article 190(2)(a) PILA,[52] X. complained about a purported **lack of independence and impartiality** of the arbitrators, arguing that the arbitral tribunal had manifestly favoured Y. over X. insofar as it had systematically violated the burden of proof and committed numerous errors.

The Supreme Court rejected this argument by recalling first of all that, although the disqualification of an arbitrator for lack of independence or impartiality does **not necessarily** require an **effective bias** but merely an **appearance of a bias** which casts doubt on the arbitrator's independence or impartiality, such an appearance must be **based on objectively identified circumstances**. In other words, the mere subjective impressions of the party filing the challenge are not decisive.

The Supreme Court further confirmed that the existence of an alleged bias must be assessed strictly. **Procedural mistakes or erroneous decisions on the merits are not sufficient** to create the appearance that an arbitrator is biased, except for particularly severe or repeated mistakes that would constitute a blatant breach of the tribunal's obligations. According to the Supreme Court, such an exception cannot be accepted lightly.

The Supreme Court found that X. did not meet the above requirements in the case at hand. It did not show the existence of an objectively identifiable bias, or a blatant breach of the arbitrators' obligations.

Comment: This decision confirms that it is **extremely difficult** to annul an international arbitration award for lack of independence or impartiality of one or more arbitrators.

[52] The other grounds will be discussed below (see § II.B.4.a and § II.B.5.a).

Contrary to other recent decisions,[53] however, the reasoning adopted and the conclusions reached by the Supreme Court in the case at hand are not open to criticism.

b) Decision No. 4A_709/2014 of 21 May 2015

Facts: This dispute concerned a CHF 5 million work contract between a Luxembourg company (B. - the principal) and a Swiss company (A. - the contractor) for the refurbishment of a building in Bienne, Switzerland. The contract contained an *ad hoc* arbitration clause stipulating that disputes would be heard by a **sole arbitrator**, namely, by the **architect of the project** (D.), who had previously been hired by B to work on the building, and who should decide *ex aequo et bono*.

B. immediately terminated the work contract and submitted a request for arbitration to D. A. **challenged** D. in the arbitration proceedings and before the *judge d'appui* in Geneva **for lack of independence and impartiality**, but both challenges were dismissed. Eventually, D. rendered an award ordering A. to pay CHF 2,5 million plus interest and arbitration costs.

A. moved to set aside the award before the Supreme Court arguing, *inter alia*, that the arbitral tribunal had been irregularly constituted (Article 190(2)(a) PILA).[54] A. contended that the award had actually been rendered by **two arbitrators**, D. and a Geneva lawyer (E.), who were

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[53] See for instance decision No. 4A_110/2012, critized among others by MARGUERAT, *Indépendance et impartialité de l'arbitre: le devoir de révéler de l'arbitre eclipse*, in: Jusletter 15 April 2013; see also BEFFA, *Challenge of international arbitration awards in Switzerland for lack of independence and/or impartiality of an arbitrator – Is it time to change the approach?*, in: ASA Bull. 3/2011, p. 598 *et seq.*, discussing *inter alia* decisions No. 4A_256/2009 and 4A_258/2009, decision No. 4A_458/2009 and ATF 136 III 605.

[54] The other grounds raised by A. (i.e. decision *ultra petita* and violation of A.'s right to be heard) will be discussed in the relevant sections below (see § II.B.3.a) and § II.B.4.j)).

helped by a secretary (F.), whereas the arbitration clause provided for one arbitrator (D.) and did not foresee the possibility of nominating a secretary. A. alleged in particular that the hearing had been entirely conducted by E.

Decision: The Supreme Court confirmed first of all that the mission of the arbitrator is eminently personal, the contract with an arbitrator being concluded *intuitu personae*. This means that **the arbitrator cannot delegate his or her mission to a third person**, be it a colleague working in the same firm. An award that does not comply with this unwritten rule, which, the Supreme Court held, is sometimes ignored in the arbitration practice, can be annulled for violation of Article 190(2)(a) PILA.

The Supreme Court also held, however, that this prohibition of delegation does not automatically exclude the right of an arbitrator to seek assistance from a third person. It confirmed in this respect that the **right of an arbitrator to appoint a secretary**, which is expressly recognized in domestic arbitration by Article 365(1) of the CCP, applies also in international proceedings although it is not expressly mentioned in Chapter 12 of PILA, provided that the parties have not agreed to the contrary.

The Supreme Court also recalled that, when adopting Article 365(1) CCP, the Swiss legislator expressly decided not to submit the arbitral tribunal's right to appoint a secretary in domestic proceedings to the **parties' consent** in order to favour the organisational autonomy of the tribunal and avoid delays. The Supreme Court did not expressly state that this rule should apply also in international arbitrations, but its reasoning seems to indicate that this should indeed be the case.

The Supreme Court went on to explain that the **tasks of a secretary** are comparable to the ones of a clerk (*greffier*) in state court proceedings: to organize briefs and hearings,

draft the minutes of the hearing, and manage accounts for fees and costs. The secretary can also be involved in the drafting of the award, but only under the instruction and supervision of the arbitral tribunal. He or she can therefore sit in on hearings and deliberations, but cannot be entrusted with judicial powers.

The Supreme Court further confirmed that the **arbitral tribunal can also seek assistance from** other persons, for instance **external consultants** that can help the arbitrator to deal with specific questions for which he or she does not have the necessary expertise. If the parties have not agreed upon specific rules in this respect, the arbitral tribunal can also appoint such consultants *sua sponte* on the basis of Article 182(2) PILA, without requesting the parties' consent.

Applying these principles to the case at hand, the Supreme Court noted that, upon A.'s request, D. had confirmed that he had been assisted by E. and that D. was in charge of E.'s remuneration. A. had not immediately reacted after receiving said explanation, and had waited 5 months before challenging E.'s participation in the hearing. A.'s **good faith** was therefore questionable, according to the Supreme Court.

In any event, the Supreme Court considered that the record did not show that E. and F. had done more than **simply assist** D. in dealing with the procedural issues at stake from an administrative and legal point of view. In particular, there was no evidence in support of A.'s allegation that the hearing had been entirely conducted by E. Furthermore, D. had confirmed in his award that E. and F. had merely helped him to address the numerous objections raised by A. at the hearing and to comply with procedural requirements with which D. was not familiar, without participating in the decision-making process.

The Supreme Court found the role of E. as **legal consultant** to be more unusual than the one of F. as administrative

secretary. However, it confirmed that an arbitrator can seek the assistance of external assistants, such as an **arbitration specialist** if the arbitrator has no particular expertise in arbitration proceedings, as long as such assistants operate under the same restrictions as tribunal's secretaries in that they do not have decision-making powers. The Supreme Court considered that this was the case in the present instance, and that on the basis of the evidence at hand D. had decided alone, as sole arbitrator.

Comment: This is one of the most important decisions rendered in the period under review, since it expressly confirms for the first time that arbitral tribunals sitting in Switzerland can **appoint a secretary** and delegate specific tasks to him or her, and can **seek advice, including legal advice, from external assistants**, provided that the parties have not agreed to the contrary and the decision-making mandate is fulfilled by the arbitral tribunal alone.

As stressed by BÄRTSCH/GEORGE, this principle is **in line with international opinion**.[55] Indeed, on the one hand, "*the use of tribunal secretaries belongs to the modern reality of international arbitration practice*".[56] This is evidenced in particular by the fact that the possibility to appoint a tribunal's secretary is expressly admitted by the major arbitral institutions and rules.[57]

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[55] See BÄRTSCH/GEORGE, *Swiss Supreme Court outlines permissible use of administrative secretaries and "consultants" to arbitral tribunals*, available at: http://www.swlegal.ch/getdoc/a32b1490-1b2e-4954-a006-838a7ba8e254/2015_Philippe-Bartsch_Anya-George_Swiss-Supreme-Co.aspx.

[56] BERGER K.P., *Private Dispute Resolution in International Business: Negotiation, Mediation, Arbitration*, 3rd ed., 2015, para. 27-8, p. 618. See also BORN, *International Commercial Arbitration*, 2nd ed, 2014, p. 2043, who provides some historical background on this issue.

[57] See for instance the Swiss Rules (Article 15(5)) and the UNCITRAL Rules (Articles 5, 16 and 40); see also the ICC Note on the Appointment, Duties and Remuneration of Administrative Secretaries.

On the other hand, however, it is commonly recognized that the arbitrator has a **duty not to delegate its "core functions"**, such as "*the duty of deciding a case, attending hearings or deliberations, or evaluating the parties' submissions and evidence*".[58] This duty is also widely reflected in ethical guidelines and notes of arbitral institutions[59] and in best practice standards.[60]

The exact scope of the "core functions" that cannot be delegated to secretaries and external assistants is, however, subject to debate. Particularly critical is the question whether arbitral tribunals can **delegate the drafting of the award, or at least of a part thereof**, to a secretary or assistant. This is currently a hot topic in light of the allegation by Russia that the bulk of the work in the Yukos arbitrations was conducted by the tribunal's secretary and that the latter effectively performed the role of fourth arbitrator.[61]

In state court proceedings, the practice varies from country to country: while in many countries, such as Switzerland, it is widely accepted that a court clerk drafts judgments without this being seen as a delegation of core judicial

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[58] BORN, *op. cit.*, p. 1998.

[59] See for instance the AAA Code of Ethics, Canon V(C) ("*[a]n arbitrator should not delegate the duty to decide to any other person*") and the CIArb Code of Ethics, Article 7.3 ("*[a] member shall not delegate the duty to decide to any other person*"); see also the ICC Note on the Appointment, Duties and Remuneration of Administrative Secretaries ("*Under no circumstances may the Arbitral Tribunal delegate decision-making functions to an Administrative Secretary. Nor should the Arbitral Tribunal rely on the Administrative Secretary to perform any essential duties of an arbitrator*").

[60] See for instance Article 1(4) of the Young ICCA's Best Practices for the Appointment and Use of Arbitral Secretaries, which provides that "*[i]t shall be the responsibility of each arbitrator not to delegate any part of his or her personal mandate to any other person, including an arbitral secretary"*.

[61] See in this respect: GALAGAN, *The Challenge of the Yukos Award: an Award Written by Someone Else - a Violation of the Tribunal's Mandate?*, available at: http://kluwerarbitrationblog.com/blog/2015/02/27/the-challenge-of-the-yukos-award-an-award-written-by-someone-else-a-violation-of-the-tribunals-mandate/.

functions, in other countries, such as the UK, the judges tend to write their own decisions.[62]

In arbitration, the issue is highly debated. Some authors are against any form of involvement of tribunals' secretaries in the drafting of the award, as well as in the deliberations,[63] whereas other authors defend a more liberal approach.[64]

We tend to agree with the more **liberal approach**, and in particular with PARTASIDES' suggestion:

> *"(…) I would suggest that there exists no good reason why a secretary cannot, under careful supervision, legitimately assist an arbitrator with the production of a first draft of those parts of the award that are uncontroversial (e.g., the description of the procedural history or factual background of the dispute).*
>
> *Beyond this, it is for the individual arbitrator to decide whether he or she can delegate the full drafting of the award to a secretary without jeopardizing decision-making control. (…)"*[65]

It is clear that delegation of at least part of the drafting of an award happens in practice as shown by a recent survey carried out by PARTASIDES and other renowned practitioners.[66] This is only logical as it is unrealistic to

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[62] In this sense, see BÄRTSCH/GEORGE, *op. cit.*

[63] See for instance CLAY, *Le secrétaire arbitral*, in: Revue de l'Arbitrage, Vol. 4/2005, p. 931 *et seq.*, para. 43, p. 954, and the authors quoted therein; see also, although less extreme, BERGER K.P., *op. cit.*, para. 27-19, p. 624 ("*As a general rule, the drafting of substantive parts of the final award, which include its operative part, must be reserved for the arbitral tribunal*").

[64] See for instance KAUFMANN-KOHLER/RIGOZZI, *op. cit.*, para. 678, p. 434; see also PARTASIDES, *Secretaries to Arbitral Tribunals*, in: MOURRE/HANOTIAU (ed.), *Players Interaction in International Arbitration*, Dossiers of the ICC Institute of World Business Law, Vol. 9, 2012, p. 84 and seq., p. 86.

[65] PARTASIDES, *op. cit.*, p. 86.

[66] The results of the survey are discussed in PARTASIDES, BASSIRI, ET AL. *Arbitral Secretaries*, in: VAN DEN BERG (ed), *International Arbitration: The Coming of a New Age?*, ICCA Congress Series, Vol. 17, 2013, p. 327 *et seq.*: 70% of over

believe that arbitrators can produce long and complex awards without assistance.[67] We agree with PARTASIDES that a refusal to recognize such practice "*will compel arbitrators to continue to be less than transparent about the current reality, and so the double-speak - or hypocrisy - will continue in a way that can only be damaging to the legitimacy of the arbitral process*".[68]

For this reason, the decision of the Supreme Court confirming, *inter alia*, that a tribunal's secretary can be involved in the drafting of the award, under the instruction and supervision of the arbitral tribunal, is most welcome in our opinion.

More delicate is the question whether an arbitral tribunal can seek assistance from an **external legal consultant** and to what extent. We consider that the Supreme Court's decision not to sanction D. for having retained the assistance of an arbitration specialist (E.) was correct in view of the circumstances. As stressed by the Supreme Court, nothing should prevent an architect who lacks the necessary experience and legal knowledge to deal with delicate procedural questions in a contentious arbitration from retaining the services of a lawyer to assist him in the conduct of the arbitration.

We submit, however, that the Supreme Court would probably have been stricter in its analysis if the circumstances had been different, for instance if the parties had chosen an arbitrator with better knowledge of arbitration proceedings

200 members of the arbitration community (divided evenly between institutional representations, arbitrators, counsel, lawyers who work as secretaries and commercial users of the arbitral process) have included the drafting of part of the award among the tasks performed by a secretary in practice (whereas only 27% have included the drafting of the entire award among them).

67 See in this respect PONCET, in: KARADELIS, *Swiss court okays tribunal's assistants*, available at: http://globalarbitrationreview.com/news/article/34037/swiss-court-okays-tribunal-assistants/.

68 PARTASIDES, *op. cit.*, p. 86.

or if the arbitrator had not been permitted to decide *ex aequo et bono*. We believe the situation may also have been different if A. had been able to prove that E. did more than simply assist D. in relation to procedural issues.

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

a) ATF 140 III 477 (decision No. 4A_74/2014 of 28 August 2014)

Facts: A Turkish company (B.) initiated arbitration proceedings before the Basel Chamber of Commerce (the *Handelskammer beider Basel*) against a Luxembourg company (A.) in relation to three Share Purchase Contracts (the "First Contracts") containing the following clause:

> *"Art. 16 Applicable Law and resolution of disputes*
>
> *For all disputes arising out of this contract, the Arbitration Committee, to be established in Basel (Switzerland) is authorized and the law to be applied is Swiss law. The Arbitration language is German.*
>
> *The decision of the Arbitration Committee is a judgment in absolute, eliminating the right to appeal of the parties."*

B. argued that, by agreeing to the jurisdiction of the Basel Chamber of Commerce, the parties intended to have their disputes resolved in accordance with the Swiss Rules issued by the SCAI. A., on its part, challenged the jurisdiction of the Basel Chamber of Commerce contending that the arbitration clause in the First Contracts was not valid for the following alternative reasons: first, the person who signed them on behalf of B. was not authorised to do so; second, the arbitration clause had been replaced by the jurisdiction clauses in contracts entered into by the parties a few days after the First Contracts had been concluded (the "Second

Contracts"); and third, the parties intended to submit their disputes to an *ad hoc* arbitral tribunal rather than to a tribunal constituted in accordance with the Swiss Rules.

As already stated above,[69] the sole arbitrator appointed by the Arbitration Court of the SCAI upheld his jurisdiction in a preliminary award, in which he rejected A.'s arguments. A. therefore moved to set aside the award before the Supreme Court for lack of jurisdiction (Article 190(2)(b) PILA), arguing, *inter alia*, that the sole arbitrator had violated its right to be heard and the equality of the parties in upholding his jurisdiction.

Decision: After holding that A's argument that the sole arbitrator had violated its right to be heard and the equality of the parties when upholding his jurisdiction was admissible,[70] the Supreme Court nevertheless rejected said argument by holding, in a nutshell, that A. had failed to establish the existence of the violations it claimed.

More specifically, the Supreme Court dismissed A.'s principal argument concerning the purported **inexistence or invalidity of the arbitration agreement**, by upholding the sole arbitrator's reasoning, according to which the person who signed the First Contracts was entitled to do so on the basis of the **power of attorney** it had received **to sign** the Second Contracts. The Supreme Court also held that the sole arbitrator had not violated Article 178(1) PILA, confirming, *inter alia*, that said provision merely requires that the arbitration agreement be in writing, and not that it be signed by an authorised person.

The Supreme Court further dismissed A's first alternative argument that the **arbitration agreement** contained in the First Contracts had been **replaced by** the **jurisdiction**

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[69] See § II.A.6.a) above.
[70] See § II.A.6.a) above.

clauses contained in the Second Contracts. It upheld the sole arbitrator's reasoning that the First Contracts represented the actual agreement between the parties, whereas the Second Contracts, which provided for substantially lower purchase prices, had been entered into exclusively to be filed with the relevant authorities.

The Supreme Court finally dismissed A.'s second alternative argument that the arbitration agreement contained in the First Contracts provided for *ad hoc* arbitration. In doing so, the Supreme Court confirmed that **pathological arbitration clauses** which contain incomplete, unclear or contradictory provisions, are **not necessarily invalid** to the extent that they do not concern mandatory elements of the arbitration agreement, namely the binding submission of the dispute to a private arbitral tribunal.

The Supreme Court recalled its well-established case law pursuant to which, in case of pathological clauses, the arbitral tribunal shall, by way of **interpretation or completion in accordance with general principles of contract law**, try to find a solution which respects the intent of the parties to submit their dispute to arbitration. In case mutual intent cannot be established, the arbitration clause must be interpreted according to the principle of trust: the putative intent is to be ascertained as it could and should have been understood by the parties in good faith.

If the interpretation of the clause shows that the parties intended to submit the dispute to an arbitral tribunal and to exclude state jurisdiction, although with differences as to how the arbitral proceedings should be carried out, the parties' intent shall prevail and the clause shall be given a meaning that allows it to be enforced (so-called "***Utilitätsgedanke***"). Accordingly, an **imprecise or flawed designation of the arbitral tribunal** should **not** lead to the **invalidity of the arbitration clause** if it is **possible to determine** which **arbitral tribunal** the parties had in mind.

The Supreme Court held that, in the present case, the sole arbitrator had not violated the above-mentioned rules for the following reasons: the designation of the arbitral tribunal as "*the Arbitration Committee*", and in particular the word "*the*" and the capital letters used, intended to refer to an arbitration institution rather than to an arbitration panel; the word "*to be established*" did not detract from this interpretation because the arbitral tribunal must also be "established" (i.e., constituted) in institutional arbitration; the fact that the clause did not refer to the Basel Chamber of Commerce was not relevant, since the clause showed that the parties intended to entrust their disputes to an arbitral institution seated in Basel and A. did not argue that there are other arbitral institutions in Basel; a parallel could be made with other decisions of the Supreme Court accepting that designations such as "Swiss Arbitration Court, Zürich", "International Arbitration Organization Zurich" or "International Trade arbitration in Zurich" could be interpreted as referring to the Zurich Chamber of Commerce.

Comment: In addition to the comments made above regarding the admissibility of grounds to set aside preliminary or interim awards,[71] this decision also serves as a useful reminder that a **(very) imprecise or flawed designation of the arbitral tribunal** such as the one at hand **does not necessarily lead to the invalidity of the arbitration agreement**. To the contrary, the arbitral tribunal shall try to find a solution which respects the (putative) common intent of the parties to submit to arbitration.

[71] See § II.A.6.a) above.

b) ATF 140 III 520 (decision No. 4A_6/2014 of 28 August 2014)

Facts: A football club (the "former club") brought an action against a player (the "player") and his new club (the "new club") before the FIFA DRC, seeking payment of compensation for the player's unilateral termination of his contract with the former club in order to be hired by his new club. The DRC partially upheld the former club's claims and ordered the player and the new club to pay compensation to the former club.

Both the player and the new club appealed against this decision before the CAS. However, the player failed to pay the advance on costs on time. His appeal was thus considered withdrawn in accordance with Article R64.2(2) of the CAS Code.

Relying on the **withdrawal of the player's appeal**, the former club challenged the Panel's jurisdiction to hear the appeal of the new club, or alternatively to decide upon the compensation that the player and his new club had been jointly and severally ordered to pay. The CAS Panel, however, upheld the appeal, annulled the DRC's decision and sent the case back to the DRC for a new decision to be rendered in compliance with the applicable procedural rules.

In essence, the CAS Panel upheld its jurisdiction to decide on the new club's argument that the DRC had violated its right to be heard, irrespective of the question as to whether it had the power to examine the merits of the DRC's decision. The Panel further held that the right to be heard of the new club had indeed been violated since it had not been served with the request filed by the former club prior to the DRC taking its decision. According to the CAS, the importance of the guarantee which had been violated (i.e. the club's right to be heard) triggered the invalidity of the first instance proceedings vis-à-vis all parties, irrespective of the

withdrawal of the player's appeal. The CAS considered that this justified the annulment of the DRC's decision in its entirety, and that the case be sent back to the DRC for a new decision to be rendered in full compliance with the parties' rights.

The former club moved to set aside the award before the Supreme Court, arguing, *inter alia*, that the **CAS lacked jurisdiction to annul the DRC's decision insofar as it concerned the former club and the player**. According to the former club, the withdrawal of the player's appeal against the decision of the DRC triggered the extinction of the arbitration clause and, thus, of the jurisdiction of the CAS to annul the decision insofar as it ordered the player to compensate his former club.

Decision: After holding that the CAS award should be considered as a preliminary or interim award, and that the only admissible ground raised by the former club was the purported lack of jurisdiction of the CAS,[72] the Supreme Court upheld the former's club objection to jurisdiction.

The Supreme Court confirmed that the former club and the player formed a so-called "***consorité matérielle simple passive***" ("***passive einfache materielle Streitgenossenschaft***"), which does not affect the plurality of the cases and parties or their independence. Therefore, the measures or behaviour adopted by one party, such as withdrawal, failure to appear or appeal, do not have any influence on the legal position of its "*consorts"* ("*Streitgenossen*"). This principle applies also in appeal proceedings, and implies, *inter alia*, that the ***res judicata*** **effect** of a decision be **examined separately for each "*consort*"**.

[72] See § II.A.6.b) above.

The Supreme Court concluded from the above that, while the CAS Panel was indeed competent to decide upon the appeal raised by the new club, it was **not competent *ratione personae*** to annul the final and binding decision of the DRC ordering the player to compensate his former club, since this decision exclusively concerned the case between the player and his former club. According to the Supreme Court, the **withdrawal by the player of his appeal** had put an end to the appeal proceedings between the player and his former club. Therefore, the decision of the DRC had become ***res judicata* vis-à-vis the player and his former club**.

Comment: This is the **first of two decisions in which the Supreme Court annulled an international arbitral award**, although only partially, in the period under review.[73] This was the only possible solution in the case at hand, in view of the **manifestly erroneous decision** of the CAS Panel.[74]

c) Decision No. 4A_446/2014 of 4 November 2014

Facts: A New York company (B.) entered into a contract with a Swiss company (A.) for the construction of a Turkish hammam in a chalet in Gstaad owned by D. After paying the first instalments, A. requested the suspension of the construction. B. initiated arbitration proceedings in Geneva (under the Swiss Rules pursuant to the arbitration clause contained in the contract) against A., D. and a Cyprus company (C.) to which D. had allegedly entrusted the management of his assets.

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[73] The second decision in which the Supreme Court partially annuls a CAS award is decision No. 4A_246/2014; see § II.B.4.k) below.

[74] More interesting in this decision are the clarification of the nature of a CAS award which upholds a challenge against a decision rendered by a sport federation and sends the case back to the federation for a new decision (preliminary or interim award), and the confirmation of the grounds that can be invoked against such an award. These issues have already been discussed above in § II.A.6.b).

One of the three managers of B., E., argued that B. had initiated the arbitration proceedings without his approval and requested the annulment of the proceedings. A. and D. seized the opportunity to **request that the proceedings be discontinued or, at least, stayed** until the question of the powers of attorney of the three managers of B. was clarified in accordance with the Operating Agreement entered into by them.

The sole arbitrator appointed by the SCAI eventually **dismissed** the request for a stay of the proceedings in a "*Procedural Order no. 4 regarding the application of Respondent* (i.e. A.) *for the discontinuation or, alternatively, the stay of the proceedings until the dispute with respect to B. ____'s management is resolved*", whilst stressing that the parties could file another request for a stay in the course of the proceedings in case of a change of circumstances.

The sole arbitrator based his decision on the following reasons: he lacked jurisdiction to decide upon the dispute among the three managers of B. because the latter were not party to the arbitration proceedings and the Operating Agreement entered into by them was subject to New York law and provided for arbitration in Westchester (New York) under the AAA rules; A. had not explained what impact the possible arbitration proceedings in New York would have on the proceedings at stake; pursuant to the well-established case law of the Supreme Court, arbitration proceedings should be stayed and (even more so) discontinued only in exceptional circumstances, which were not present in the case at hand; and although he was not an expert in New York law, the sole arbitrator considered, *prima facie* on the basis of the documents currently in his possession, that the two managers of B. who decided to initiate arbitration proceedings had the power to do so.

A. moved to set aside the Procedural Order before the Supreme Court, arguing that the sole arbitrator had violated

Article 190(2)(b) PILA insofar as he had, **implicitly and incorrectly, admitted his jurisdiction** to decide upon the claims raised by B.

Decision: The Supreme Court started by recalling that mere procedural orders, which can be modified in the course of the arbitration proceedings, cannot be challenged under Article 190(2) PILA. This principle applies to an arbitral tribunal's **decisions regarding the stay of the proceedings**, which qualify as **procedural orders** and which can thus **not** be **challenged before the Supreme Court, except if they implicitly rule also on the arbitral tribunal's jurisdiction**.

A. argued that this was indeed the case in the present instance, since the sole arbitrator had considered that, *prima facie*, the two managers of B. who decided to initiate arbitration proceedings had the power to do so. In so doing, he had allegedly decided upon a question of jurisdiction *ratione materiae* in its broader sense (*lato sensu*), i.e. the capacity of B. to be a party to the arbitration.

The Supreme Court found that the question whether the **arbitration proceedings** have been **initiated by individuals who have the necessary power to do so** (and all the related objections and requests, such as the one of E.), concerns the **jurisdiction *ratione materiae*** *lato sensu*, of the arbitral tribunal and must be decided upon in accordance with the **laws pursuant to which the company is organized**, i.e. New York law in the present case.

The Supreme Court, however, also held that the sole arbitrator had **not implicitly decided upon his jurisdiction** in the Procedural Order at stake. To the contrary, his reasoning clearly showed that his **decision** was **strictly limited** to the question of whether the proceedings should be discontinued or stayed, and did not relate to the

question of whether the two managers of B. who initiated the proceedings had the power to do so. Furthermore, his decision was clearly a **temporary decision** which could be modified in the course of the proceedings, as stressed by the sole arbitrator himself in the Procedural Order.

The Supreme Court held that the fact that the sole arbitrator had considered that, *prima facie*, the two managers of B. who decided to initiate arbitration proceedings had the power to do so, was to be interpreted within this context. Such a consideration was the mere expression of a **preliminary opinion**, rather than the result of a reasoned analysis after careful review of all the arguments raised by the parties and the evidence filed by them. According to the Supreme Court, the fact that the sole arbitrator did not provide any reasons supporting such a consideration reinforced this conclusion.

Therefore, the Supreme Court held that the sole arbitrator had not intended to decide once and for all whether the arbitration had been validly initiated or not, but had limited himself to considering the opportunity to discontinue or stay the proceedings until the question of the powers of attorney of the two managers of B. were clarified by the arbitral tribunal possibly seized by virtue of the Operating Agreement, or by himself as a preliminary question.

Comment: In view of the fact that a member of the author's law firm is indirectly involved in the case, we will refrain from commenting on the merits of the decision. We will simply share the advice already given by other authors who have commented on this decision: when drafting a procedural order concerning the discontinuation or stay of arbitration proceedings, arbitrators should **make** it **clear**

that the order is not final and is not intended to rule upon the arbitral tribunal's jurisdiction.[75]

d) Decision No. 4A_676/2014 of 3 June 2015

Facts: Under an investment agreement, a Dutch foundation (A.) granted USD 10 million to a US company (B.) against the promise by the third party to the agreement (D.) to repay this amount plus USD 100 million. A. did not receive the promised payments.

After obtaining a default judgment from the ordinary courts of California ordering B., D. and the CEO of B. (C.) to pay to A. a total of approximately USD 44 million, A. entered into a Settlement Agreement and Release (the "Agreement") with B. and C. pursuant to which, *inter alia*, B. and C. undertook to pay to A. USD 65 million. The Agreement contained the following clause: "*This agreement shall be interpreted in accordance with and governed in all respects by the provisions and statutes of the International Chamber of Commerce in Zürich, Switzerland and subsidiary by the laws of Germany*".

B. and C. failed to comply with their undertaking, therefore A. initiated arbitration proceedings before the SCAI. B. and C. did not participate in the proceedings. Eventually however, the arbitral tribunal dismissed A.'s claims for lack of jurisdiction.

After confirming that, when the **Respondent does not participate in the proceedings**, the arbitral tribunal has to

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[75] See in this sense: VOSER/LEIMBACHER, *Procedural orders on stay of arbitral proceedings cannot be challenged before the Swiss Supreme Court except when they implicitly decide on jurisdiction*, available at: http://www.swlegal.ch/getdoc/5650ca53-42cc-4518-a9c8-aa80c83c3fbe/2014_Nathalie-Voser_Elisabeth-Leimbacher_Procedura.aspx; SPOORENBERG/FRANCHINI, *Challenge against decision to discontinue or stay arbitration proceedings?*, available at: http://www.internationallawoffice.com/newsletters/detail.aspx?g=553aff43-2156-4bc6-bc32-2c1a99658114.

examine its jurisdiction *ex officio*, the arbitral tribunal moved on to examine whether the above clause could be considered as a valid arbitration clause. It did so in accordance with both German and Swiss law on the basis of Article 178(2) PILA which provides that the arbitration agreement shall be valid if it conforms to the law chosen by the parties, to the law governing the dispute, or to Swiss law.

In its analysis under Swiss law, the arbitral tribunal found that, although formally valid, the above **clause did not contain the essential elements of an arbitration agreement**. In particular, the clause did not establish, either subjectively or objectively on the basis of its wording, a common intent of the parties to have their dispute settled by arbitration instead of ordinary litigation. According to the arbitral tribunal, the clause seemed to determine the applicable law rather than the jurisdiction of the relevant arbitral or ordinary tribunal.[76]

A. moved to set aside the award before the Supreme Court arguing that the arbitral tribunal had violated Article 190(2)(b) PILA.

Decision: The Supreme Court recalled its long-standing case law pursuant to which an **arbitration agreement** is **valid** as to its substance if it expresses the intention of the parties to have an **arbitral tribunal** decide certain disputes **rather than a state court**, and if the **arbitral tribunal** is either **determined or at least determinable**.

The Supreme Court also confirmed that, as already stated in ATF 140 III 477 commented above, **pathological arbitration clauses** which contain incomplete, unclear or contradictory provisions are **not necessarily invalid** to the

[76] According to the arbitral tribunal, the same conclusion applied also under German law.

extent that they do not concern mandatory elements of the arbitration agreement, namely the binding submission of the dispute to a private arbitral tribunal.

Applying the above principles to the case at hand, the Supreme Court first held that the arbitral tribunal's finding that A. had not succeeded in establishing, from a subjective point of view, the existence of a real and common intent of the parties to submit their disputes to arbitration instead of state jurisdiction, was a factual observation (*constatation de fait*) which bound the Supreme Court.

The Supreme Court also upheld the objective interpretation of the relevant clause of the agreement made by the arbitral tribunal. Whilst admitting that the fact that the clause did not contain **words such as "arbitration", "arbitral tribunal", "arbitrator", "arbitration clause"** or similar is **not decisive** in order to determine the objective meaning of the intent expressed by the parties, the Supreme Court nevertheless held that the clause at hand should be considered as a choice of law clause rather than a jurisdiction or arbitration clause. The Supreme Court based its conclusion on the **absence of any reference, even indirect, to a dispute to be resolved**, on the fact that the **clause simply dealt with the law applicable** to the interpretation of the agreement, and on the fact that, by using the word "*subsidiary*", the clause established a link between the "*International Chamber of Commerce in Zürich, Switzerland*" and the "*laws of Germany*".

The Supreme Court also considered that the **mere reference to the "*International Chamber of Commerce in Zürich, Switzerland*"** was **not sufficient** to hold in favour of an arbitration clause since it was not established that the parties knew that such an institution offered arbitration services. That the parties, all foreign, could have erroneously thought that the rules of the Chamber of Commerce of Zurich qualified as substantive law when

agreeing on the specific clause was also not considered as relevant by the Supreme Court.

The Supreme Court concluded that the contractual **clause** was **not only pathological** insofar as it did not designate with sufficient precision the arbitral institution which had to appoint the arbitral tribunal, **but did not qualify as arbitration agreement** either, as it did not express with sufficient clarity the objective intent of the parties to waive state jurisdiction in favour of arbitration. That the real meaning of the clause remained relatively vague did not change anything according to the Supreme Court.

Comment: This decision deals with the important **distinction between invalid and pathological (but valid) arbitration clauses**. This topic has already been addressed above, in relation to ATF 140 III 477.[77] However, while in the latter decision the Supreme Court considered the arbitration clause at stake as merely pathological since it clearly expressed the parties' intent to arbitrate their disputes, in the present decision the Supreme Court correctly found that such intent was impossible to ascertain in view of the very unclear wording used by the parties.

This is a helpful reminder of the **importance of drafting** clear and unambiguous arbitration clauses in order to avoid any risk that such clauses be considered as invalid and, thus, unenforceable.[78]

This decision is also useful insofar as it recalls that the **"default" of the Respondent** does not have any impact on

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[77] See § II.B.2.a) above.

[78] In this sense, see also BÄRTSCH/ESCHMENT, *Clause referring to "International Chamber of Commerce, Zürich" with no reference to arbitration or dispute settlement is not a valid arbitration agreement*, available at: http://www.swlegal.ch/getdoc/6e84b6b5-7cbd-4fb7-a403-90b210ebdb01/2015_Philippe-Bartsch_Jorn-Eschment_Clause-referri.aspx.

the arbitral tribunal's duty to thoroughly examine its jurisdiction *ex officio*.[79]

e) Miscellanea

i. Decision No. 4A_634/2014 of 21 May 2015

Decision: The Supreme Court recalled that a party that **participates in the arbitral proceedings without challenging the jurisdiction of the arbitral tribunal** waives its right to do so later, in particular when attempting to set aside the award.

In the present case, an Italian football club was ordered by the CAS to pay to an English company, owner of the financial rights of an Argentinian player, EUR 9,4 million. Since the club had entered into the merits of the case without challenging the jurisdiction of the CAS, the Supreme Court considered that the club had forfeited the right to raise such an objection in the challenge proceedings against the CAS award.

ii. Decision No. 4A_633/2014 of 29 May 2015

Decision: In this decision which will be discussed in detail below,[80] the Supreme Court reaffirmed the principle already recalled in ATF 140 III 477 and ATF 140 III 520[81] that a preliminary or interim award such as a procedural order can only be challenged for incorrect composition of the arbitral tribunal (Article 190(2)(a) PILA) or for an incorrect decision regarding the tribunal's jurisdiction (Article 190(2)(b) PILA). The other grounds provided for in Article 190(2) PILA can only be invoked if they directly concern the tribunal's composition or jurisdiction.

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[79] With respect to "default" proceedings, see for instance BEFFA, *Enforcement of "Default Awards"*, in ASA Bull. 4/2013, p. 756 *et seq.*

[80] See § II.B.5.g) below.

[81] See § II.A.6 above.

In the present case, the petitioner (B.) argued that its opponent (A.) should have raised the ground of violation of public policy in a challenge brought against the procedural order in which the arbitral tribunal had dismissed the objection of *res judicata*, because in so doing the tribunal had implicitly admitted its jurisdiction. The Supreme Court rejected the argument holding that the ground invoked by B. (incompatibility with public policy) did not concern the tribunal's composition or jurisdiction, but an alleged violation of the *res judicata* principle.

3. Decisions beyond claims or failure to adjudicate claims (Article 190(2)(c) PILA)

a) Decision No. 4A_709/2014 of 21 May 2015

Facts: The facts of the case involving an architect as sole arbitrator have already been summarized above.[82] As stated, the contractor (A.) moved to set aside the award rendered by the sole arbitrator (D.) arguing, *inter alia*, that the latter decided ***ultra petita*** (Article 190(2)(c) PILA) by ordering it to pay EUR 2.5 million, whereas in the **prayers for relief** contained in its last written submission the principal (B.) had limited its claims to approximately CHF 900,000.

Decision: The Supreme Court confirmed that Article 190(2)(c) PILA allows a party to challenge an award when the arbitral tribunal decides beyond the claims it is seized of. Awards granting more (***ultra petita***) or something else (***extra petita***) fall within such provision.

However, the Supreme Court also recalled that, pursuant to its longstanding case law, an arbitral tribunal does **not** decide beyond the claims: (i) **if it ultimately does not award more than the total amount sought by the claimant**, yet assesses some of the elements of the claim

[82] See § II.B.1.b) above.

differently from that party: or (ii) when it finds that a legal relationship in dispute exists and does so in the award rather than rejecting the action seeking a finding that the right in dispute does not exist. The arbitral tribunal is nevertheless bound by the object and the amount set out in the submissions in front of it, in particular when a party qualifies or limits its claims in such submissions.

In the present case, the Supreme Court held that, contrary to what A. contended, B's last prayers of relief were not the ones contained in its last written submission. Indeed, B. had **specified its prayers at the hearing**, increasing its claims to a total of CHF 2.5 million. Therefore, the sole arbitrator had not decided *ultra petita* by ordering A. to pay such an amount.

The Supreme Court also held that the question as to whether B. was entitled to amend its prayers for relief at the hearing does not concern Article 190(2)(c) PILA.

Comment: This decision does not deserve any particular comment. The Supreme Court simply reaffirmed its **well-established case law** regarding the ground of *ultra* or *extra petita*, whilst confirming that a party may in principle amend its prayers for relief at the hearing, unless otherwise agreed upon.

b) Decision No. 4A_684/2014 of 2 July 2015

Facts: On 2 July 2008, an Egyptian football club (the "club") and a binational player from Ghana and the UK (the "player") entered into an employment contract for three seasons. Mid-March 2009, the player returned to the UK and requested via his lawyer that the club pay the amounts due to the player by the end of the month. On 1 April 2009, the player terminated the contract with immediate effect.

The club seized the FIFA DRC, requesting damages for unlawful termination of the contract. The player

counterclaimed for the payment of the outstanding amounts and for damages. The DRC dismissed the claims of the club and admitted partially the claims of the player, ordering the club to pay EUR 189,767.- as outstanding amounts and EUR 1.4 million as damages.

The club appealed against the DRC's decision before the CAS, which partially admitted the appeal and ordered the club to pay EUR 152,799.- and USD 30,000.- as outstanding amounts, as well as EUR 654,736.- and USD 66,000.- as damages.

The club moved to set aside the CAS award before the Supreme Court arguing, *inter alia*, a violation of Article 190(2)(c) PILA on the basis that the CAS had ordered the club to pay USD 30,000.- as accommodation expenses whereas the DRC had held that the player was not entitled to any accommodation expenses. According to the club, the CAS could not take such a decision since the player had not challenged the decision of the DRC. Therefore, the CAS had allegedly decided ***ultra petita***.

Decision: The Supreme Court confirmed the well-established principles recalled in decision No. 4A_709/2014 above. In particular, it reaffirmed that the arbitral tribunal does not decide *ultra petita* if ultimately it does not award more than the total amount sought by the claimant, yet assesses some of the elements of the claim differently from that party.

The Supreme Court considered that this was in fact what the CAS Panel did in the case at hand. Indeed, although the Panel assessed some of the elements of the claim differently from the player, it ultimately awarded less than the total amount ordered by the DRC.

Comment: This decision does not require any particular comment, whether in relation to the Supreme Court's considerations concerning the ground of *ultra petita*, or

concerning the other ground raised by the club, i.e. the violation of its right to be heard.[83]

c) Decision No. 4A_246/2014 of 15 July 2015

Facts: This dispute concerned a football club and 9 of its players whose contracts provided that the total amount of their monthly salary would be due only if each of them played at least 70% of the minutes played by the club during the relevant month. The players brought an action before the Dispute Resolution Chamber (DRC) of the federation to which the club was affiliated (L.), which confirmed their right to terminate their contracts and ordered the club to pay outstanding salaries to all the players.

The club appealed against this decision before the Appeal Commission of L., which declared the club's appeals concerning seven players (players 1 to 7) to be belated, reduced the amount granted to player 8 and upheld the decision of the DRC concerning player 9.

The club appealed against this decision before the CAS. The CAS arbitrator declared the proceedings concerning players 6 and 9 closed upon production by the club of an agreement whereby the two players renounced their right to such claims and withdrew from the proceedings, and dismissed the appeal concerning the other players.

The club moved to set aside the CAS award before the Supreme Court arguing, *inter alia*, that the arbitrator had decided ***infra petita*** (Article 190(2)(c) PILA) by failing to annul the decisions of L. concerning players 6 and 9.[84]

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[83] We will refrain from discussing the rather detailed but essentially fact-driven findings with which the Supreme Court rejected an alleged violation of the club's right to be heard.

[84] The club also argued that the CAS had violated its right to be heard (Article 190(2) (d) PILA) and procedural public policy (Article 190(2)(e) PILA). These arguments will be discussed in § II.B.4.k) and § II.B.5.h) below.

Decision: The Supreme Court recalled that, according to its case law, **if an arbitral tribunal fails to rule on a claim raised by the parties**, it commits a **formal denial of justice** and its award can be annulled pursuant to Article 190(2)(c) PILA (*infra petita*).

The Supreme Court found that this was not the case in the present instance. It first stressed that the CAS arbitrator had correctly held that the club had **not formally claimed** that the decisions of L. should be annulled, but had simply informed the arbitrator that players 6 and 9 were withdrawing from the proceedings. Therefore, by declaring the proceedings concerning those two players closed, the arbitrator had not decided *infra petita*.

The Supreme Court also held that, in any event, the club did **not** have a **legal interest** in challenging the decision of the CAS concerning the two players. Indeed, if L. were to initiate disciplinary proceedings against the club in relation to its dispute with the two players, the club could easily escape any liability by simply producing the agreement signed with the two players.

Comment: Similar to the other decisions concerning Article 190(2)(c) PILA rendered in the period under review (discussed immediately above), this decision does not call for any particular comment. The findings of the Supreme Court concerning the principle *ne eat iudex infra petita partium* and its application to the case at hand are perfectly sound.

4. Violation of the principle of equal treatment or the right to be heard (Article 190(2)(d) PILA)

a) Decision No. 4A_606/2013 of 2 September 2014

Facts: As already mentioned above,[85] this dispute concerned a contract under which a German company (Y.) undertook, together with its subsidiary (A.), to deliver to an Algerian company (X.) a beer production unit including a brewery.

The parties tried to settle their dispute through the signature of several protocols, in particular one entered into in April 2002 (the "2002 protocol"), but did not succeed. Therefore, in May 2004, X. called a bank guarantee issued by Y. and initiated arbitration proceedings against Y. and A. before CARICI in accordance with the arbitration clause contained in the contract.

Y. and A. opposed the claims and counterclaimed for restitution of the amount covered by the bank guarantee and for payment of the fees and costs incurred in the proceedings they had brought (and lost) in Germany in opposing the payment of the bank guarantee. They argued, in particular, that A.'s claims were time-barred, and requested the arbitral tribunal to decide on this issue before entering into the merits of the dispute. The arbitral tribunal dismissed this objection in a partial award rendered in September 2005 (the "2005 award").

After having rendered the 2005 award, the arbitral tribunal issued several procedural orders aimed at organizing the exchange of submissions on the merits and the taking of evidence. It also gave the parties the opportunity to plead orally during a hearing.

[85] See § II.B.1.a) above.

During the discussions and deliberations following said hearing, the arbitral tribunal decided to rule on certain preliminary questions in order to restrict the taking of evidence only to the facts that were material to the outcome of the case. It therefore rendered in November 2006 a second partial award (the "2006 award") in which it held that the parties had settled all the points of dispute raised until then by entering into the 2002 protocol and that, as a result, the dispute would be limited to what happened thereafter. The arbitral tribunal also seized the opportunity to dismiss some of the prayers for relief submitted by X., as well as one of the prayers for relief of Y. (which had in the meantime taken over A.) requesting the arbitral tribunal to declare that its liability was limited to 10% of the contractual value.

X. moved to set aside the 2006 award before the Supreme Court, challenging the independence and impartiality of the arbitrators and arguing a violation of its right to be heard and a violation of procedural public policy. The Supreme Court dismissed the challenge in September 2007.[86]

The arbitral tribunal resumed the arbitral proceedings shortly thereafter. Although considering that the case could be decided upon without hearing witnesses or experts, the arbitral tribunal nevertheless accepted the requests of X. for the hearing of witnesses and the appointment of an expert. X. subsequently challenged the expert appointed by the arbitral tribunal after the issuance of two reports.

The arbitral tribunal dismissed X's challenge, and rendered its final award in November 2013, admitting 10% of X.'s claims and 90% of Y's claims.

X. moved to set aside the final award before the Supreme Court for irregular constitution of the arbitral tribunal (Article 190(2)(a) PILA), violation of its right to be heard (Article

[86] See decision no. 4P.4/2007 of 26 September 2007.

190(2)(d) PILA) and incompatibility with procedural public policy (Article 190(2)(e) PILA). The following analysis will be limited to the ground of violation of X.'s right to be heard,[87] pursuant to which X. argued that the arbitral tribunal had failed to take into account several issues, including the arguments raised by X. in relation to the 2002 protocol.

Decision: The Supreme Court recalled that the right to be heard in contradictory proceedings within the meaning of Article 190(2)(d) PILA does not require that an international arbitral award be reasoned. However, it does impose on the arbitrators a **minimal duty to examine and address the relevant issues** at stake. This duty is breached when, inadvertently or due to a misunderstanding, the arbitral tribunal fails to take into consideration specific submissions, arguments, evidence and offers of evidence submitted by one of the parties and important for the decision to be rendered.

The Supreme Court confirmed its well-established case law pursuant to which, if the award totally disregards elements which seem to be important to adjudicate the dispute, **it behoves the arbitrators or the respondent to justify this omission** in their observations. They have to show that contrary to the appellant's arguments, the elements omitted were not relevant or, if they were, that they were implicitly rejected by the arbitral tribunal. However the arbitrators are **not** under a **duty to discuss all arguments raised** by the parties. Therefore, they do not breach the right to be heard in contradictory proceedings if they do not reject an argument objectively devoid of any relevance.

The Supreme Court held that the arbitral tribunal had not breached its minimal duty in the case at hand. It specified in

[87] The ground of irregular constitution of the arbitral tribunal has already been discussed above (see § II.B.1.a), and the ground of incompatibility with procedural public policy will be discussed below (see § II.B.5.a).

particular that the compliance with this duty does not depend on the length of the developments an arbitral tribunal devotes to a specific issue. It also recalled that the right to be heard does not encompass the weighing of evidence as this cannot be reviewed in challenge proceedings.

The Supreme Court further rejected X.'s suggestion that the arbitral tribunal had not taken into account X.'s arguments related to the 2002 protocol. The Supreme Court recalled that although only the dispositive part of an award has ***res judicata*** effect, **the arbitral tribunal cannot simply disregard in its final award an opinion it had expressed in a prior award dealing with a preliminary issue**.

According to the Supreme Court, the arbitral tribunal had dealt with the interlocutory issue concerning the scope of the 2002 protocol in its 2006 award. Therefore, it could not revisit this issue in its final award, without breaching procedural public policy.

Comment: The above findings of the Supreme Court are interesting insofar as they confirm that the ***res judicata*** principle applies not only to final awards rendered by another arbitral tribunal or state court in separate proceedings, but also to **preliminary or partial awards previously rendered by the same arbitral tribunal in the same proceedings**.

This means that a petitioner cannot challenge the decisions taken in such preliminary or partial awards in the context of challenge proceedings brought against the final award, and that arbitral tribunals do **not** violate the petitioner's **right to be heard** if they disregard arguments which, although raised in challenge proceedings against the final award, are actually aimed at criticizing the decisions taken in preliminary or partial awards.

b) Decision No. 4A_199/2014 of 8 October 2014

Facts: This dispute concerned a distribution agreement entered into by company A. and company B., under which B. granted to A. the non-exclusive right to import and sell pharmaceutical products in a specific country. The contract provided that it could be amended only in writing. According to A., however, the parties had agreed to amend the contract orally, by transforming it into a long-term exclusive distribution agreement.

A. initiated arbitration proceedings in compliance with the ICC arbitration clause contained in the contract, claiming that B. had violated the contract as orally amended and was obliged, therefore, to pay compensation to A. on this ground as well as on the ground of unjust enrichment. *In concreto*, A. argued that it had undertaken intensive activities in order to influence the decision-making process for financing the acquisition of the pharmaceutical products manufactured by B. According to A., its efforts had been successful and had triggered a significant increase of sales of those products in the relevant country. However, A. had not benefited from its work because of B.'s fault.

The arbitral tribunal dismissed A.'s claims on the basis that it had not established that the parties had indeed agreed to modify the contract. The arbitral tribunal also held that A. had neither proven the exact nature and purpose of its services, nor that the services rendered had gone further than what was covered by the existing contract.

A. moved to set aside the award before the Supreme Court, claiming several violations of its **right to be heard** (Article 190(2)(d) PILA).

Decision: A. first contended that the arbitral tribunal had ignored the witness statements of four witnesses merely because, according to the arbitral tribunal, those witnesses were A.'s employees. The Supreme Court admitted that the

arbitral tribunal was wrong in considering that those witnesses were A.'s employees, but nevertheless rejected A.'s argument.

After questioning whether the **failure to take into account the testimony of a witness due to his or her close links with one of the parties** concerns the **right to be heard or**, rather, the **assessment of evidence** (which cannot be reviewed by the Supreme Court in challenge proceedings), the Supreme Court held that, in any event, A. had not proven that the arbitral tribunal had not taken into account the witness statements at hand because of the reason mentioned by A. Furthermore, the arbitral tribunal held in an alternative reasoning that taking into account the litigious witness statements would not have had any impact on the tribunal's legal analysis, thereby rendering A.'s argument moot.

Second, A. argued that the arbitral tribunal had violated its right to be heard by **refusing to hear orally some of its witnesses** and one expert. The Supreme Court considered that the arbitral tribunal's decision complied with the procedural rules set forth in Procedural Order no. 1, which provided that any witness who had submitted a written statement would be heard at the hearing **only if the adverse party requested to cross-examine him or her**. The Supreme Court also held that A. had had the opportunity to submit additional witness statements in order to rebut the allegations contained in B.'s submission and witness statements, but had decided not to do so.

Third, A. contended that the arbitral tribunal had failed to take into account the legal argument of corruption invoked by A. The Supreme Court also rejected this argument, holding that A. had failed to establish that this **legal argument** was **relevant for the decision at stake.** Indeed, A. simply claimed that a finding of corruption would have led the tribunal to "*appreciate in a different way the*

contractual relations between the parties", which was manifestly insufficient in view of the strict requirements with which a petitioner must comply.

Fourth and finally, A. complained that the arbitral tribunal had failed to examine the reliability of one of B.'s witnesses, notwithstanding A.'s objections in this respect. The Supreme Court rejected this last argument as well, holding that **determining the reliability of a witness** falls under the **assessment of evidence which cannot be reviewed** by the Supreme Court in challenge proceedings.

Comment: The decision at hand is noteworthy insofar as it appears to admit that the **right to be heard** of a party is **not violated** by the tribunal's refusal to hear witnesses in cases in which the **procedural rules** agreed upon by the parties **provide that only the witnesses that the adverse party wants to cross-examine can testify** at the hearing.[88] This is an important issue in practice, since Procedural Orders no. 1 often contain such a rule.

Although it is not clear whether the Supreme Court actually decided on this issue or left the question open,[89] it is recommended that parties who wish to reserve the **right to call their own witnesses** at the hearing request that this be **expressly provided for in the specific procedural rules** governing the proceedings.[90]

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[88] See in this sense VOSER/KOZMENKO, *Swiss Supreme Court: inadmissibility of new arguments raised after first submission, including whether oral examination of witnesses is a fundamental procedural right*, available at: http://www.swlegal.ch/getdoc/194b3d78-60d1-493c-ba43-44f1247b3dfe/2014_Nathalie-Voser_Anna-Kozmenko_Swiss-Supreme-Co.aspx.

[89] Contrary to what VOSER/KOZMENKO seem to state in their commentary (*op. cit.*), we believe that the former is true.

[90] In this sense see also VOSER/KOZMENKO, *op. cit.*

c) Decision No. 4A_324/2014 of 16 October 2014

Facts: In Spring 2011, a number of representatives of the Turkish football club Fenerbahçe allegedly bribed representatives of opposing clubs in order to guarantee Fenerbahçe's success in various matches of the Turkish top football league (the "Süper Lig").

Fenerbahçe eventually won the 2010/2011 season of the Süper Lig and qualified directly for the 2011/2012 UEFA Champions League. However, in July 2011, the Turkish police arrested 61 persons for **match-fixing**, including Fenerbahçe's President and Vice-President, two members of its board, its coach and its financial director. As a result of an investigation requested by the Executive Committee of the Turkish Football Federation ("TFF"), on 24 August 2011 the TFF Ethics Commission informed UEFA of its decision to prevent Fenerbahçe from participating in the 2011/2012 Champions League.

Fenerbahçe first appealed against this decision before the Arbitration Commission of the TFF, which rejected the appeal, and then before the CAS. Fenerbahçe eventually withdrew its 2011 CAS appeal after the CAS dismissed Fenerbahçe's request for preliminary measures (which had been aimed at allowing it to participate in the 2011/2012 Champions League).

In the meantime, the TFF Disciplinary Commission initiated disciplinary proceedings against Fenerbahçe and its representatives, as well as other Turkish clubs and their representatives. In May 2012, the TFF Disciplinary Commission imposed, *inter alia*, a 3-year ban from any football-related activity on a member of Fenerbahçe's board, as well as a 1-year ban on Fenerbahçe's Vice-President and coach.

Shortly thereafter, in July 2012, the High Criminal Court of Istanbul accepted that a criminal organization had been

constituted under the guidance of Fenerbahçe's President insofar as various Fenerbahçe officials had participated in the manipulation of 13 matches of the 2010/2011 season of the Süper Lig. Criminal sentences were pronounced against 48 persons including, among others, Fenerbahçe's President (sentenced to 2 1/2 years' imprisonment for building a criminal organization and with 3 years and 9 months plus a fine for manipulating matches), Vice-President, board members, coach and financial director.

In June 2013, after a two-year investigation, the UEFA Disciplinary Commission decided to ban Fenerbahçe from participating in the next 3 competitions organized by UEFA for which the club would qualify. Fenerbahçe first appealed against this decision before the UEFA Appeals Body, which eventually reduced the ban to 2 UEFA competitions, and then before the CAS.

On 18 July 2013, i.e. two days after having filed its appeal, Fenerbahçe informed the CAS that the parties (i.e. Fenerbahçe and UEFA) had agreed to adopt an expedited timetable providing for the following deadlines: 26 July 2013 for Fenerbahçe to file its appeal brief; 9 August 2013 for UEFA to reply; 21-23 August 2013 for the hearing; and 28 August 2013 for the CAS to render its award.[91]

The parties and the CAS followed this timetable. 20 witnesses were heard at the hearing, and Fenerbahçe renounced its right to hear 13 additional witnesses. On 28 August 2013, the CAS rendered its award, rejecting Fenerbahçe's appeal and upholding the decision of the UEFA Appeals Body.

Fenerbahçe moved to set aside the CAS award before the Supreme Court, arguing, *inter alia*, a violation of the

[91] Tight deadlines often occur in CAS proceedings in view of the need to obtain a decision before the relevant competitions start.

principle of equal treatment of the parties and a violation of its right to be heard.[92]

Decision: Fenerbahçe first argued that the CAS Panel had violated the principle of **equal treatment of the parties** insofar as it had rendered its decision extremely quickly (six weeks after the lodging of the appeal and six days after the hearing, respectively), especially when compared to the 2 years that UEFA had taken to carry out its investigations and render its report. This was even more striking, according to Fenerbahçe, because Fenerbahçe had been provided only 10 days to comment on the report, the UEFA Appeals Body had rendered its decision only 5 days after Fenerbahçe lodged its first appeal, and the hearing before the CAS lasted only 2 days, thereby limiting the opportunity of the parties to properly question witnesses and experts.

Fenerbahçe also argued that it had not voluntarily accepted **expedited proceedings**, since the latter were provided for in a document, the UEFA admission form, which Fenerbahçe had to sign in order to participate in UEFA competitions. Fenerbahçe alleged that it would not have accepted such expedited proceedings if it had had the possibility to participate in the UEFA competitions without signing the admission form.

The Supreme Court rejected these arguments essentially because Fenerbahçe had not raised them during the CAS proceedings as it should have done. The Supreme Court confirmed its long-standing case law pursuant to which a party must **object immediately to any purported violation of due process** and cannot wait until the award is rendered before complaining.

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[92] Fenerbahçe also claimed a violation of public policy, which will be discussed in § II.B.5.c) below.

Second, Fenerbahçe argued that the CAS Panel had violated its right to be heard by making a **surprising application of the law**, insofar as it had not reduced the duration of the ban pronounced by the UEFA Appeals Body despite admitting that Fenerbahçe had manipulated only 4 matches (not 8 as submitted by UEFA) and had not given untrue statements in the admission form (contrary to the UEFA Appeal Body's findings). Fenerbahçe argued that the Panel had applied by analogy the rules of the World Anti-Doping Code concerning the fixing of sanctions, without giving the parties the opportunity to discuss this allegedly surprising analogy.

The Supreme Court rejected this second argument holding that the CAS Panel had made its decision on the basis of Article 17 of the UEFA Disciplinary Regulations, explaining in its award why a 2-year ban was justified pursuant to said provision and irrespective of the provisions of the World Anti-Doping Code. That the Panel had also noted that similar sanctions are common in doping matters did not mean, according to the Supreme Court, that it had based its decision on an analogy with doping matters. Therefore, the Panel was not obliged to give the parties the opportunity to comment on the analogy.

Third, Fenerbahçe argued that the CAS Panel had also violated its right to be heard by failing to examine several of its arguments. After confirming its long-standing case law that the right to be heard does not oblige the arbitral tribunal to deal expressly with every argument raised by the parties but merely imposes a **minimal duty** on the arbitral tribunal to examine the **issues relevant for the outcome of the dispute,**[93] the Supreme Court rejected this third argument holding that the CAS Panel had complied with its duty insofar as it had addressed all relevant questions in its award.

[93] See in this respect decision No. 4A_606/2013 above.

Comment: The considerations of the Supreme Court regarding the alleged violations by the CAS Panel of the principle of equal treatment of the parties and of Fenerbahçe's right to be heard do not require any particular comment. The reasoning of the Supreme Court was clear and consistent with its long-standing case law.

More interesting are the considerations of the Supreme Court regarding the alleged violation of public policy, which will be discussed in § II.B.5.c) below.

d) Decision No. 4A_544/2014 of 24 February 2015

Facts: On 19 November 2013, Croatia and Iceland played the return leg of their qualification matches for the 2014 FIFA World Cup in Brazil. The match was played in Zagreb and Croatia won, thereby qualifying for the World Cup. At the end of the match the Croatian player, Josip Simunic, moved alone to the center of the football field and shouted at least twice "*u boj, u boj*" ("*to battle, to battle*"), to which the Croatian supporters replied by shouting "*za narod svoj*" ("*for our Nation*"). Thereafter, he shouted four times "*za dom*" ("*for the Homeland*"), to which the audience replied by shouting "*spremni*" ("*we are ready*"). The player accompanied his shouting with regular upward movements of his left arm.

The day after the match, the FARE network, an umbrella organization acting against **discrimination** in football, reported the case to FIFA, alleging that the expression "*za dom spremni*" was used by the Croatian fascist movement "Ustasha" during the Second World War. The FIFA Disciplinary Committee initiated disciplinary proceedings against Simunic and found that he had violated Article 58(1)(a) of the FIFA Disciplinary Code, which prohibits offenses to the dignity of a person or group of persons through contemptuous, discriminatory or denigratory words or actions concerning race, colour language, religion or

origin. The Disciplinary Committee suspended Simunic for ten international matches, and imposed a stadium ban and a fine of CHF 30,000 against him.

Simunic appealed to the FIFA Appeal Committee, which upheld the decision and Simunic then challenged the Appeal Committee's decision before the CAS. The parties agreed that the proceedings would be conducted in an expedited manner. The hearing took place on 8 May 2014. Two experts appointed by Simunic (Professors B. and C.) were heard by the CAS Panel as well as one expert appointed by FIFA (Professor D.). On 12 May 2014, the Panel rendered its decision dismissing the challenge brought by Simunic and upholding the decision of the FIFA Appeal Committee.

The CAS Panel considered it proven that, by shouting "*za dom – spremni*", Simunic had established a link to the fascist movement "Ustasha", thereby violating Article 58(1)(a) of the FIFA Disciplinary Code. The Panel rejected the argument of Simunic that he had not himself shouted "*spremni*", holding that the reply of the audience was also attributable to him.

Simunic moved to set aside the CAS award before the Supreme Court, claiming a violation of the principle of equal treatment of the parties and of his right to be heard. Simunic's claim was based on the decision of the President of the CAS Panel to refuse both any additional questions about the credibility of Professor D., and any additional questions to him at all.

Decision: The Supreme Court rejected the arguments raised by Simunic holding that he had not proven that the equal treatment of the parties or his right to be heard had indeed been violated. The Supreme Court recalled that the right to be heard does **not** grant the parties an **unlimited** (time- and content-wise) **right to question an expert** appointed by the adverse party. To the contrary, the arbitral tribunal is,

in principle, not prevented from: (i) imposing **time limits** for the parties' questioning of witnesses and experts; or (ii) **refusing specific questions**, for instance because they are not relevant or have already been asked, or because the arbitral tribunal considers the facts to which the question refers as already proven.

The Supreme Court further held that Simunic had neither **specified which additional questions** he wanted to ask to Professor D., nor shown the relevance of such additional questions. In addition, Simunic had not shown, nor complained, that he had been prevented from responding to Professor D.'s statements or from presenting his position.

The Supreme Court also found that, in any event, Simunic had failed to **invoke such violations** during the arbitration proceedings as he should have done according to the Supreme Court's long-standing case law. To the contrary, Simunic's counsel had confirmed at the end of the hearing that: "*We are very satisfied with the fact how we were treated by the Panel here; thank you very much, Mr. President!*".

Comment: This decision is interesting insofar as it clarifies that **the arbitral tribunal is entitled to limit the right of a party to question experts** called by the opposing party, in particular if the questions are irrelevant, have already been asked or relate to facts that have already been proven. We agree with other commentators that this confirmation may help arbitrators to limit unnecessary or excessive cross-examinations.[94]

This decision also provides useful guidance to parties insofar as it confirms that a party who wishes to convince the

[94] See in this sense VOSER/BOEHM, *Swiss Supreme Court approves of restrictions on witness examination*, available at: http://www.swlegal.ch/getdoc/c3b055ad-afb6-4e60-b311-5fde376dfb5d/2015_Nathalie-Voser_Hannah-Boehm_Swiss-Supreme-(1).aspx.

Supreme Court that the arbitral tribunal violated its right to be heard by limiting its questions to the opposing party's expert, must at least **specify which questions** it wanted to ask **and why they were relevant** for the decision.

e) Decision No. 4A_486/2014 of 25 February 2015

Facts: A holding company (A.) of a group controlled by a family and active in the development of renewable energies, developed seven construction projects of hydroelectric plants in a certain country. A. controlled these projects through six project companies, five of which were headed by a holding company.

In this context, A. entered into a Share Purchase Agreement (SPA) and two Shareholders Agreements with a subsidiary of group B. (X.B.), pursuant to which A. sold to X.B., *inter alia*, half of the shares held by A. in the holding company controlling five of the six project companies, as well as 48,55% of the company controlling the sixth project company.

The performance of these Agreements gave rise to many difficulties, to the point that X.B. initiated ICC arbitration proceedings against A. and three members of the family controlling A. (pursuant to the arbitration clause contained in the SPA). The three-member arbitral tribunal partially admitted X.B.'s claims against A., who was ordered to pay several million Swiss francs to X.B., but dismissed X.B.'s claims against the three members of the family.

A. moved to set aside the award before the Supreme Court on grounds falling under Articles 190(2)(d) (equal treatment and right to be heard) and (e) (public policy).

Decision: A. first argued that the arbitral tribunal had committed a **formal denial of justice** by **failing to apply the principles of interpretation** provided for by Swiss law under **Article 18(1) of the CO**. Stressing that said

provision was not even mentioned in the award, A. contended that the arbitrators did not seek the real and common intent of the parties, or their presumed intent, as requested by A. in the arbitral proceedings.

The Supreme Court recalled that Article 18(1) CO does indeed oblige judges and arbitrators to first seek the **real and common intent** of the parties. If such an intent cannot be established or if the intent of the two parties differs, the judge or arbitrator must interpret the declarations and behaviours of the parties according to the **principle of trust (*principe de la confiance*)** by looking at how a declaration or a behaviour could be understood in good faith in view of all the circumstances.

The Supreme Court held that the arbitral tribunal had correctly applied the above principles in its interpretation of the SPA. It noted in particular that the mere fact that **Article 18(1) CO** was **not mentioned in the award** does **not necessarily** mean that it had **not been taken into account**. The Supreme Court admitted that it also fails sometimes to referto such a provision in its own decisions, which shows that an express reference to Article 18(1) CO is not necessary.

The Supreme Court further held that A.'s **real intent** was to **challenge the result of the interpretation** carried out by the arbitral tribunal rather than its purported failure to properly carry out such an interpretation. The Supreme Court confirmed that its power of review is limited to the grounds set forth in Article 190(2) PILA (*in casu* the question of whether the right to be heard of A. had been violated), and does not extend to the merits of the arbitral tribunal's decision.

A. also argued that the arbitral tribunal had violated its right to be heard by failing to take into account the expert reports filed by A. in compliance with the procedural rules governing

the arbitral proceedings. The Supreme Court also rejected this argument recalling that an arbitral tribunal can **refuse to take into account specific evidence** without violating the right to be heard of the parties if said evidence is **not capable of convincing** the arbitral tribunal, if it concerns a **fact already proven or irrelevant**, or if the arbitral tribunal comes to the conclusion, via an **anticipated assessment** of the evidence, that the evidence will not affect its decision. The Supreme Court held that, in the present case, the expert reports filed by A. concerned facts that were not relevant for the decision.

The Supreme Court also rejected the third argument raised by A. that the arbitral tribunal had violated the **adversarial principle (*principe de la contradiction*)** by authorizing X.B. to amend its initial prayers for declaratory relief into prayers for condemnatory relief on the one hand, whilst refusing to admit the expert reports submitted by A. on the other hand (see above). The Supreme Court held that the fact that the arbitral tribunal had accepted the former did not oblige it to also accept the latter.

The Supreme Court finally also rejected the last two arguments raised by A. regarding purported violations of the equality of the parties and of procedural public policy, which were based on the same reasoning as the other arguments.

Comment: This decision is a clear illustration of the **restrictive approach** adopted by the Supreme Court when examining purported violations of fundamental principles of procedure such as the parties' right to be heard.

In this decision, the Supreme Court confirmed in particular that the arbitral tribunal does not have to referto the legal provisions it applies in its award as long as it correctly

applies them.[95] This makes it particularly difficult for a party to establish that the arbitral tribunal actually failed to apply a specific provision.

f) Decision No. 4A_636/2014 of 16 March 2015

Facts: A Russian company (A.) and a Luxemburg company (B.) entered into a contract governed by English law pursuant to which B. undertook to deliver 2 million cubic meters of a mixture of sea sand and gravel. The contract provided for certain conditions precedent that had to be fulfilled in advance of the start of the works, and contained the following clause in this respect:

> "*Notwithstanding any other provision in this Contract, if all of the conditions precedent set out in Appendix 1.1.8 related to the Commencement Date have not been fulfilled within 15 calendar days from the effective date of the Agreement, the Provider shall be entitled to immediately terminate the Contract and the Provider shall be entitled to a sum payable by the Employer equivalent to 20% of the total Contract value [EUR 18 Mio.] stated in the BOQ [Bill Of Quantities].*"

B. terminated the contract contending that the conditions precedent were not fulfilled, and initiated ICC arbitration proceedings in Geneva in accordance with the arbitration clause contained in the contract, claiming for damages equal to 20% of the contract value, i.e. EUR 3,6 million. The arbitral tribunal eventually upheld B.'s claims and ordered A. to pay B. EUR 3,6 million plus interest. The arbitral tribunal also ordered A. to bear 80% of the costs of the arbitration.

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[95] In this sense, see VOSER/BERKCAN, *No violation of the right to be heard where arbitrators do not expressly mention relevant provision of substantive law*, available at: http://www.swlegal.ch/getdoc/fec0c1af-4c51-40d5-a2e2-50ef0a35aaea/2015_Nathalie-Voser_Sevim-Berkcan_No-violation-of.aspx.

A. moved to set aside the award before the Supreme Court arguing a violation of its **right to be heard** and of the principle of **equal treatment** of the parties (Article 190(2)(b) PILA). Concerning the former, A. contended that the arbitral tribunal had not taken into account its objections regarding the validity of the 20% "penalty" provided for in the contract. Concerning the latter, A. argued that the arbitral tribunal had violated the principle of equal treatment of the parties by admitting the Statement of costs submitted by B. 4 days after the expiry of the corresponding deadline.

Decision: The Supreme Court rejected both arguments. It held, first of all, that the arbitral tribunal had not violated the right to be heard of A. To the contrary, it had carefully examined on the basis of the facts of the case and the arguments of the parties whether the 20% "penalty" provided for in the contract complied with English law.

According to the Supreme Court, A.'s criticism concerned essentially the **way in which the arbitral tribunal had weighed the evidence** produced by the parties. The Supreme Court confirmed that this is **not a sufficient reason** to annul an award. It also stressed that, instead of simply denying B.'s position, A. should have **submitted its own counter-evidence** to support its position.

The Supreme Court further confirmed that the principle of equal treatment of the parties does not necessarily oblige an arbitral tribunal to disregard submissions filed after the expiry of a given deadline. Indeed, a **wrong or even arbitrary application** by the arbitral tribunal **of the procedural rules** governing the proceedings is **not sufficient** to annul an award.

More specifically, **the equality of the parties is not violated unless a party is granted something that is refused to the other party**. This is the case, for instance, if the arbitral tribunal refuses to consider a belated

submission of a party whilst accepting to consider a belated submission of the other party.

Comment: This decision serves as a useful reminder of two **uncontested but nevertheless important principles**: first, that parties should not limit themselves to simply objecting to allegations made by the other side, but should submit counter-evidence to support their own position; and second, that a wrong or even arbitrary application by the arbitral tribunal of the procedural rules governing the proceedings is not sufficient to annul an award.

g) Decision No. 4A_554/2014 of 15 April 2015

Facts: This dispute concerned a contract between a French company (A.) and a US company (B.) whereby B. undertook to provide A. with both: (i) general consulting services (related to participation in large infrastructure projects financed by international institutions based in the US); and (ii) specific assistance, project-by-project, to be rendered upon signature by both parties of a document called "Application Form" (*Fiche d'Application*).

The contract, which was governed by French law and provided for ICC arbitration in Geneva, had a fixed duration of one year (i.e. until 30 June 2008), with an automatic renewal of two years if neither party terminated it by serving notice at least two months in advance. By letter of 22 April 2008, A. informed B. that it did not intend to renew the contract after its initial period, but nevertheless envisaged to resort to B.'s services from time to time.

On 9 July 2008, B. informed A. about the existence of a project relating to the port of Cotonou in Benin financed by an US institution, and asked A. whether this project was of interest to it. On 18 July 2008, A. replied that it was already following this project and invited B. to provide A. with a list of specific projects discussed by the parties so far.

On 18 August 2008, B. sent A. twelve "Application Forms", including one concerning the Cotonou project. An employee of A. signed these "Application Forms" on 28 October 2008 and returned them to B. Following this the parties remained in contact through email.

On 28 August 2009, B. informed A. that it had learned that A. had been awarded the Cotonou project, and asked for the remuneration provided for in the contract in relation to specific assistance project-by-project. After some discussions, A. eventually refused B.'s request, arguing that the contract was no longer valid and that, in any event, the conditions to which B.'s remuneration was subject were not met.

B. initiated arbitration proceedings pursuant to the arbitration clause contained in the contract. The sole arbitrator appointed by the ICC upheld B.'s claims and ordered A. to pay a certain amount to B. In substance, the sole arbitrator held that the contract had been tacitly renewed by the parties after 30 June 2008, at least concerning the specific assistance project-by-project.

A. moved to set aside the award before the Supreme Court, arguing that the sole arbitrator had violated its **right to be heard** by basing her reasoning on a **legal argument that neither party had pleaded and which was unpredictable**. According to A., only two options were available to the sole arbitrator: either admit B.'s claims on the ground that the parties had agreed, before the expiration of the contract, that B. would provide its services in relation to the Cotonou project; or dismiss B.'s claims on the ground that A. had not entrusted B. with such a mission before the expiration of the contract. By choosing a third option, i.e. holding that the contract had been tacitly renewed after 30 June 2008, the sole arbitrator had allegedly taken the parties by surprise and had prevented them from discussing such an argument, thereby violating their right to be heard.

Decision: The Supreme Court recalled that in Switzerland the right to be heard relates mainly to the finding of facts. The parties' right to be asked for their views on legal issues is recognized only in a limited manner. As a rule, according to the principle ***iura novit curia***, state courts and arbitral tribunals freely assess the legal relevance of the facts and may also base their decisions on legal provisions, principles or concepts not invoked by the parties. The parties do not have to be heard specifically in this respect, **except** when the court or the arbitral tribunal intends to base its decision on a **legal provision, principle or concept that could not be anticipated** by the parties.

The Supreme Court considered that this was not the case in the present instance. It held that an experienced French company such as A., regularly entering into international contracts, having an internal legal desk and being assisted by two external French counsel in the arbitration, could and should have foreseen that the sole arbitrator might have considered that the contract at hand had been tacitly renewed by the parties after its term, at least with respect to the specific assistance project-by-project.

According to the Supreme Court, the fact that B. had not formally invoked such an argument was not enough to oblige the sole arbitrator to ask for the parties' comments thereon. Indeed, this was one of the few legal principles under French law which could enable the sole arbitrator to answer the key question at hand, i.e. whether the contractual relationship between the parties had continued after 30 June 2008. Therefore, its relevance could not be ignored by A.

The Supreme Court further rejected A.'s argument that specific provisions of the Terms of Reference prevented the sole arbitrator from applying the law *ex officio* and limited her review to the legal rules invoked by the parties. After confirming that the **parties may limit the arbitral tribunal's mandate to the legal arguments raised by**

them, the Supreme Court found that A. had not established that this was the case in the present instance.

The Supreme Court further underlined that, even if the parties had agreed to limit the sole arbitrator's mission to the arguments raised by them, the arbitrator's **non-compliance** with such a limitation would have entitled them to challenge the award for **lack of jurisdiction** and/or for ***ultra petita***, but not for violation of their right to be heard.

Comment: This decision reaffirms the well-established case law of the Supreme Court that **arbitral tribunals are free to apply the law (*iura novit curia*) provided that they do not take the parties by surprise**. This was obviously not the case in the present instance, as correctly held by the Supreme Court.

More importantly, the Supreme Court confirmed in the decision that the **parties can limit the arbitral tribunal's mandate** to the legal arguments invoked by them.[96] This may be a useful tool for parties who wish to limit the arbitral tribunal's discretion to apply the law.

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[96] VOSER/LEIMBACHER suggest that, by accepting that parties can prevent the arbitral tribunal from applying the principle *iura novit curia*, the Supreme Court implicitly admits that said principle is not part of Swiss procedural public policy (see VOSER/LEIMBACHER, *No violation of right to be heard where arbitrator used a legal concept not directly raised by parties which could have been reasonably anticipated*, available at: http://uk.practicallaw.com/0-616-4207#), thereby clarifying a question that has been left open by the Supreme Court thus far (see among others decision No. 4A_446/2013 of 5 February 2014) and which is debated among scholars (see BERGER/KELLERHALS, *op. cit.*, para. 1777, p. 624, defending the opinion that the principle *iura novit curia* is not part of Swiss public policy, and KAUFMANN-KOHLER/RIGOZZI, *op. cit.*, para. 843, p. 521, defending the opposite opinion). We are not convinced by VOSER/LEIMBACHER's interpretation. It does not seem to us that the simple fact that parties may waive the application of a principle in a specific case necessarily means that such principle cannot be part of public policy. For instance, parties can obviously decide not to raise the *res judicata* defence in a specific case, but this does not automatically mean that *res judicata* is not a public policy principle.

h) Decision No. 4A_70/2015 of 29 April 2015

Facts: A football club (A.) terminated an employment contract with one of its players (B.) (who had suffered health problems during his whole career) prior to the expiry of the term of the contract. B. sued A. before the FIFA DRC, which ordered A. to pay B., *inter alia*, compensation for unlawful termination of the contract.

A., represented by a Belgian counsel (Y.), appealed the DRC decision to the CAS. After producing the statement of appeal on behalf of A. and requesting an extension of the time limit set by the CAS Panel to confirm his and A.'s availability for the hearing scheduled for 13 May 2014, Y. suddenly stopped responding to the correspondences of the Panel relating to the organization of said hearing.

On the date of the hearing, a lawyer from Lausanne appeared in front of the Panel stating that he had been asked by Y. to replace him at the hearing for personal reasons unknown to him. The Panel granted the lawyer from Lausanne 90 minutes to obtain a power of attorney or, at least, some clarifications, but the lawyer failed to do so. As a result, the CAS Panel prevented him from participating in the hearing, which was maintained in order to hear B., who had come from California, and his two agents.

The day after the hearing, the CAS sent to the parties' counsel a letter explaining what had happened at the hearing and a CD with the recording thereof. It granted the parties a 10-day deadline to provide their comments regarding the hearing. Again, A.'s counsel failed to reply.

On 10 June 2014, the CAS contacted the club A. directly, stressing that it had not received any communication from Y. since 7 March 2014, and asked A. whether it was still in contact with Y. and whether the latter was still representing A. in the proceedings. On 28 July 2014, a lawyer from Lisbon informed the CAS that A. had discovered the existence of a

hearing only when it received the 10 June letter from the CAS. A. had, since then, tried to contact Y. without success. It had finally revoked Y.'s mandate on 24 July 2014 and entrusted the lawyer from Lisbon with the matter.

In his letter, A.'s new counsel requested that a new hearing be organized in order to hear A. and its witnesses. B. objected to the request and the CAS Panel dismissed it, but nevertheless granted a deadline to A. to file its observations in writing.

A. did so and B. was given the opportunity to rebut A.'s observations. Eventually, the CAS Panel rendered its award dismissing A.'s appeal, holding that the health conditions of the player did not constitute a valid reason to unilaterally terminate the contract before its term.

A. moved to set aside the award before the Supreme Court, arguing, *inter alia*, a violation of the adversarial principle (Article 190(2)(d) PILA). According to A., the CAS Panel should have held a new hearing in the circumstances.[97]

Decision: The Supreme Court confirmed that the **adversarial principle** requires that each party has the opportunity to discuss the arguments of its opponent, to examine and discuss the evidence produced by the latter, and to produce its own counter-evidence.

The Supreme Court further confirmed that a **violation** of this principle must be **invoked immediately** during the arbitration proceedings. It held that A. had not complied with such a procedural duty, insofar as its new counsel had not submitted his formal and categorical objection to the issuance of an award before the holding of a new hearing until the end of the proceedings.

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[97] A. also claimed that the award was contrary to public policy (Article 190(2)(e) PILA) because the CAS Panel had allegedly misinterpreted certain contractual and legal provisions. This argument will be discussed below (see § II.B.5.i).

The Supreme Court held that in any event the ground invoked by A. was meritless. Indeed, Article R57(4) of the CAS Code allows the Panel to **hold a hearing even if one of the parties fails to participate**, provided that said party has been **properly summoned**. The Supreme Court considered that this was the case in the present instance, as the Panel was entitled to communicate with A. through its counsel, Y., and it was manifest that Y. had received the communications since he asked a lawyer from Lausanne to replace him at the hearing. The fact that the CAS Panel decided to contact the club directly, without being obliged to do so, did not have any impact on the regularity of the communications sent to Y.

The Supreme Court seized the opportunity to stress that, under Swiss procedural law, a **failure by a party's counsel** to accomplish a procedural act or to participate in a hearing **is imputable to the party itself** who must bear the consequences. Whilst admitting that Swiss law can only be applied to the merits of a case pursuant to Article R58 of the CAS Code, the Supreme Court nevertheless held that it is possible to draw inspiration from such a procedural principle in the absence of a specific rule adopted by the parties. The Supreme Court noted that this was particularly so in the context of a contractual relationship, such as the mandate binding a party and its counsel, which pertains to substantive law.

Comment: This decision is noteworthy because it confirms that a **party is bound by its counsel's acts and omissions**. As stressed by the Supreme Court, if the counsel fails to represent its client at a hearing or fails to accomplish a procedural act, his or her failure is imputable to the defaulting party itself. If the latter is of the opinion that it would have won but for its counsel's failure, it cannot challenge the award: it can only sue its counsel.

i) Decision No. 4A_426/2014 of 6 May 2015

Facts: In November 2004, a football player (D.) was transferred by a club (A.) to another club (B.) for an amount of USD 16 million. The transfer contract contained the following clause: "*In case of a future transfer of the Player by B._____ to another club or sporting company, A._____ will have the right to obtain the 20% of the exceeding amount which is over the sum of USD 35'000'000. In case that transfer is closed for an amount below USD 35'000'000, A._____ will have no right to receive any other sum*".

In January 2005, B. and D. entered into a 2-year employment contract providing, *inter alia*, for a penalty clause of USD 100 million to be paid to B. in case of early termination of the contract by D. In August 2006, B. and D. agreed to terminate the contract by mutual consent. Two days later, D. entered into a new employment contract with another club (E.).

A. sued B. before the FIFA Players Status Committee (PSC) seeking compensation of USD 4 million for breach of the transfer contract. The PSC dismissed A.'s claims.

A. appealed the PSC decision to CAS, but the Panel again dismissed the appeal and ordered B. to bear 15% of the arbitration costs. The Panel stressed that, even if it is clearly **not common** that a top player be released by a club before the term of his employment contract and a new club hire the player immediately thereafter without paying any transfer fee, an arbitral tribunal has to limit its review to the facts established in the proceedings and to the applicable legal rules, to the exclusion of allegations which constitute **mere hypotheses**.

Accordingly, the CAS Panel held that A. had not been able to prove that B. had prevented, in bad faith, the fulfilment of the condition precedent to which the amount due to A. was

subject, i.e. the existence of a transfer of D. to another club. The Panel considered in this respect that: B. and D. were entitled to terminate their contract before its term by mutual consent; D. was entitled to enter into a new contract with E.; there was no proof that B. had received, directly or indirectly, any payment whatsoever in relation to the conclusion of the contract between D. and E.; notwithstanding the exceptional performances of the player in 2005 and the singularity of the transfer of such a player without consideration, the release of the player could be considered to be a business decision and the reasons for same could not be reviewed by the Panel.

A. moved to set aside the CAS award before the Supreme Court, arguing, *inter alia*, a violation of its **right to be heard** (Article 190(2)(d) PILA). A. claimed, on the one hand, that the CAS Panel had **not taken into account** the **alternative argument** raised by A. in its submissions that B. had behaved as it did because it knew that it would not be able to pay the required compensation to A., and, on the other hand, that the CAS had **unduly limited its power of review** by deciding not to deal with the reasons why B. had agreed to terminate the contract with D. before its term.[98]

Decision: With respect to the first argument invoked by A., the Supreme Court reaffirmed the well-established principles already recalled above concerning the **minimal duty** imposed on arbitral tribunals **to examine and address the relevant issues**.[99] The Supreme Court considered that the CAS Panel had not violated this duty, because the **alternative argument** on which A. had based its challenge **pertained to the calculation of the damages and not to the liability** of B. Since the Panel had rejected B.'s liability,

[98] A. also argued a violation of substantive public policy (Article 190(2)(e) PILA) which will be discussed in § II.B.5.f) below.

[99] See decision No. 4A_606/2013 above.

it was under no duty to review the arguments raised by the parties regarding the quantum.

The Supreme Court further held that the CAS Panel had **not unduly limited its power of review**. To the contrary, the Panel had examined in full the issues raised by the parties, and had come to the conclusion that the behaviour of B. was not reprehensible pursuant to Swiss law and the applicable contractual provisions. The CAS Panel had considered that it was not obliged to examine the reasons why the club had agreed to terminate its contract with the player before its term, whilst also holding that the club's decision could be characterised as a business decision. By so doing, the Panel had carried out a **legal assessment** of the situation which could **not** be **reviewed** by the Supreme Court.

Comment: This decision shows the importance of the parties' submissions, not only in relation to facts but also legal arguments. It is clear that the **arbitral tribunal is entitled to base its reasoning on the parties' legal submissions**. This means in particular that the arbitral tribunal does not have to carry out its own analysis of the relationship between the various arguments raised by the parties, for instance in assessing whether one is alternative to the other or vice versa.

It is therefore important that the **parties' legal submissions** be **well structured** and clearly indicate, in particular, whether a legal argument is to be considered as a principal or alternative argument.[100]

[100] In this sense, see VOSER/BERKCAN, *A petition to set aside an arbitral award is not an appeal*, available at: http://www.swlegal.ch/getdoc/228fac79-65c6-44e5-be94-a827502a4ee4/2015_Nathalie-Voser_Sevim-Berkcan_A-petition-to-se.aspx.

j) Decision No. 4A_709/2014 of 21 May 2015

Facts: The facts of the case involving an architect as sole arbitrator have already been summarized above.[101] As stated, the contractor (A.) moved to set aside the award arguing, *inter alia*, that the sole arbitrator (D.) had violated its **right to be heard** (Article 190(d) PILA).

Decision: A. first complained that the sole arbitrator had allegedly not considered the issue of the delays of the principal (B.) in paying its invoices. The Supreme Court held in this respect that A. had **not sufficiently substantiated its argument**.

Second, A. contended that the sole arbitrator had not addressed its **requests** to organize a visit on site and to appoint an expert. The Supreme Court held that the sole arbitrator had actually **rejected** both requests **for sound reasons**: the first one mainly because it was belated, and the second one because it was contrary to the intent of the parties to appoint the architect of the project as arbitrator in order to avoid having to resort to an expert.

Third, A. argued that the sole arbitrator had violated the principle of **equal treatment** of the parties by allowing B. to question its witnesses, whilst rejecting A.'s request to hear its own. The Supreme Court held that A. had requested the cross-examination of B.'s witnesses, whereas B. had **waived its right to cross-examine** A.'s witnesses. It was thus perfectly normal that the hearing be restricted to B.'s witnesses.

Finally, A. complained that the sole arbitrator had subjected the parties to a ***"frantic rhythm"***, by granting short delays for their submissions and imposing a hearing date that the parties had not suggested. The Supreme Court rejected this

[101] See § II.B.1.a) above.

argument holding, in particular, that both parties had been treated equally in the proceedings.

Comment: The Supreme Court's findings summarized above, which are essentially fact-driven, do not call for any particular comment.

k) Decision No. 4A_246/2014 of 15 July 2015

Facts: The facts of this case involving a football club and 9 of its players have already been summarized above.[102] As stated, the club moved to set aside the unfavourable CAS award before the Supreme Court arguing, *inter alia*, that the CAS had violated its right to be heard (Article 190(2)(d) PILA).

Decision: The Supreme Court first recalled the general principles applying to the notion of the right to be heard already discussed above, before addressing the specific arguments raised by the club.

The club first contended that the CAS arbitrator had failed to consider its argument that its appeals before the Appeal Commission of L. against players 1 to 7 were not belated. The Supreme Court rejected this argument holding that the fact that the arbitrator had **reviewed the merits** of the club's claims showed that he **implicitly admitted that the relevant appeals had been filed timely**.

The Supreme Court also rejected the argument raised by the club concerning the decision of the CAS arbitrator not to admit new evidence which had not been produced in the proceedings before the Dispute Resolution Chamber (DRC) of the federation to which the club was affiliated. The Supreme Court upheld the arbitrator's decision not to admit the evidence in the absence of an explanation by the club as to why such evidence could not have been produced earlier.

[102] See § II.B.2.c) above.

The arbitrator was entitled to take such a decision pursuant to Article R57 para. 3 of the CAS Code, which provides that CAS arbitrators have **discretion to exclude new evidence** presented by the parties if it was available to them or could reasonably have been discovered by them before the challenged decision was rendered.

By contrast, the Supreme Court **upheld** the club's argument concerning the CAS arbitrator's **failure to deal with the specific questions raised by the club** in relation to players 1 to 3. Concerning player 2, the club had argued that it was under no duty to pay him a salary since the player was injured and had not played any official match. The player had not proven that he was entitled to receive the salary despite the clear wording of the contract which provided that the total amount of his monthly salary would be due only if he played at least 70% of the minutes played by the club during the relevant month.[103] The player also had not proven that he was entitled to the payment of his medical costs. Concerning players 1 and 3, the club had challenged the calculation of their salaries made by the DRC in its decision.

These **issues** were obviously **relevant** for the CAS arbitrator's decision concerning these three players. Notwithstanding, the arbitrator failed to deal with them, thereby violating the club's right to be heard. The Supreme Court considered that it was striking that the award did not even mention these issues.

The Supreme Court indicated that, concerning player 2, the arbitrator should have at least indicated whether he considered the contractual clause linking the payment of the salary to the number of minutes actually played by the player in case of injury to be applicable, and should have dealt with the question of the payment of the medical costs

[103] See above, § II.B.3.c).

expressly invoked by the player. Concerning players 1 and 3, the arbitrator should have reviewed the calculation of their salaries made by the DRC since the amount actually due to the players was dependent upon such calculation.

Comment: This is the **second decision in which the Supreme Court partially annulled a CAS award** in the period under review, after ATF 140 III 520.[104]

This decision is correct. The **failure** by the arbitrator to deal with relevant questions such as the ones at hand is **hard to justify**. The fact that these questions were not even mentioned in the award tends to show that the arbitrator may have forgotten to deal with them. The (partial) annulment of the award was therefore justified.

l) Miscellanea

i. Decision No. 4A_634/2014 of 21 May 2015

Decision: In this decision, the Supreme Court confirmed its case law concerning the violation of the **right to be heard in relation to questions of law** already recalled in decision No. 4A_554/2014.[105]

In the present case, an Italian football club which had been ordered by the CAS to pay EUR 9,4 million to an English company, owner of the financial rights of an Argentinian player,[106] moved to set aside a CAS award. The club argued, *inter alia*, that the CAS had based its award exclusively on Swiss law, to the exclusion of the FIFA Rules, without giving the opportunity to the parties to discuss this issue. The Supreme Court rejected the argument holding that the club had had the opportunity to discuss the issue of governing law.

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[104] See § II.B.2.b) above.
[105] See § II.B.4.g) above.
[106] See § II.B.2.e) above.

ii. Decision No. 4A_124/2015 of 17 June 2015

Decision: In this decision, the Supreme Court again reaffirmed the requirements to set aside an arbitral award for violation of the parties' right to be heard.

The CAS ordered a football player and his new club to pay compensation to the player's former club for breach of contract committed by the player. The CAS founded the joint liability of the new club on both Article 17(2) of the FIFA Players' Status Regulations (which provides that, if a player is ordered to pay an indemnity, his new club will be jointly liable for its payment), and Article 17(4) of the same Regulations (which provides that a club entering into a contract with a player who unduly terminated his former contract is presumed to have induced the player to commit the breach).

The new club moved to set aside the CAS award before the Supreme Court arguing that the CAS Panel had failed to consider the argument raised by the new club that its joint liability could only arise upon registration of the player by the new club. Whilst admitting that such an argument might have some merit, the Supreme Court nevertheless dismissed the challenge holding that the new club had **not** proved that it **invoked** said argument in its submissions **before the CAS**.

5. Incompatibility with public policy (Article 190(2)(e) PILA)

a) Decision No. 4A_606/2013 of 2 September 2014

Facts: The facts of the case concerning the delivery by a German company (Y.) to an Algerian company (X.) of a beer production unit have already been summarized above.[107] As

[107] See § II.B.4.a) above.

stated, the arbitral tribunal seized with the matter rendered an award unfavourable to X., after having dismissed a challenge brought by the latter against the expert appointed by the arbitral tribunal.

In its challenge before the Supreme Court, X. argued, *inter alia*, that the arbitral tribunal had violated public policy, both by **failing to revoke the appointment of the expert**, and by disregarding the ***res judicata* effect of the decisions of the German state courts** rejecting Y.'s opposition to the payment of the bank guarantee called by X.[108]

Decision: Regarding the first argument raised by X., the Supreme Court confirmed that the **principle of good faith, which obliges a party to challenge an arbitrator immediately** after discovering his or her purported bias, **applies also to the challenge of experts**. The Supreme Court held that, *in casu*, X. had not complied with this principle, as it had waited until the second report issued by the expert before challenging him.

The Supreme Court rejected also the argument on *res judicata*, recalling, *inter alia*, that **decisions on provisional or conservatory measures do not have *res judicata* effect** and do not bind the (state or arbitral) tribunal seized with the merits of the case. In the present case, the German courts had to decide whether it was justified to prevent, by way of a provisional measure or an attachment, the payment of the bank guarantee. By deciding that this was not justified, the German courts had rendered a decision on provisional or conservatory measures which was not subject to the *res judicata* effect.

Comment: As already stated, the main interest of this decision lies in the confirmation that the *res judicata* principle applies not only to final awards rendered by

[108] See § II.B.4.a) above.

another arbitral tribunal or state court in separate proceedings, but also to preliminary awards previously rendered by the same arbitral tribunal in the same proceedings.[109] The findings of the Supreme Court regarding procedural public policy do not call for any particular comment, because the *res judicata* effect of decisions rendered by foreign tribunals will be discussed below, in relation to decisions No. 4A_231/2014 and 4A_426/2014.[110]

b) Decision No. 4A_231/2014 of 23 September 2014

Facts: Y. and other companies of the same Group (together Y.) entered into two consultancy agreements with B., pursuant to which B. was required to assist Y. in the preparation of tenders concerning the construction and refurbishment of power plants. Both agreements contained the same clause providing for ICC arbitration in Geneva.

B. initiated arbitration proceedings against Y., claiming payment of outstanding commissions. Y. requested the stay of the proceedings contending that some projects in which Y. had participated were the subject-matter of several criminal investigations for **bribery**, notably in the US via the Department of Justice and in the UK via the Serious Fraud Office. According to Y., this obliged it to suspend the payment of commissions to B. until B.'s compliance with the legal requirements against bribery was clarified, in order not to violate the UK Bribery Act 2010 ("Bribery Act") and the US Foreign Corrupt Practices Act ("FCPA") and thereby incur significant criminal sanctions.

The arbitral tribunal dismissed Y.'s request for a stay and eventually upheld B.'s claims. Y. moved to set aside the award before the Supreme Court arguing that the **award violated substantive public policy** insofar as it **could**

[109] See § II.B.4.a) above.
[110] See § II.B.5.b) and § II.B.5.f) below.

expose Y. **to criminal sanctions**. Indeed, according to Y., the commissions paid to B. could have been used for bribery purposes.

Decision: The Supreme Court confirmed its long-standing case law that undertakings concerning the **payment of bribes** are **null and void and violate substantive public policy**. The Supreme Court held that the latter encompasses breaches of "*fundamental principles of the law applicable on the merits to such an extent that it is no longer consistent with the determining legal order and system of values*".[111] However, in order for an award to be annulled on this ground, the **bribery** must be **proven** and the arbitral tribunal must have **refused to take it into account** in its award.

In the case at hand, the Supreme Court considered that the arbitral tribunal had carefully examined, both from a factual and legal standpoint, the questions relating to the criminal investigations conducted in the UK and in the US. In relation to the UK investigations, the arbitral tribunal had held on the one hand that Y. did not run the risk of being sanctioned for violation of the Bribery Act, and on the other hand that the stay was not justified for several reasons, stressing that the **principle that criminal proceedings should put on hold civil proceedings ("*le pénal tient le civil en l'état*") is not part of public policy**. In relation to the US investigations, the arbitral tribunal had held that Y. had not been able to show the likely duration and outcome of the criminal investigations. Therefore, B.'s interest in obtaining an award in a reasonable timeframe prevailed over Y.'s interest in staying the proceedings.

The Supreme Court also held that Y. had **not sufficiently substantiated** its challenge: first of all, it had only referred the Supreme Court to the experts' declarations, which is

[111] See for instance decision No. 4A_150/2012 of 12 July 2012, para. 5.1.

obviously insufficient in the context of a challenge against an award; further, it had not indicated which provisions of the Bribery Act or the FCPA would be applicable *in casu* and which sanctions Y. could incur; finally, it had not managed to convincingly refute the appropriate balancing of interests which led the arbitral tribunal to refuse the stay of the proceedings.

Comment: This decision, as well as decisions No. 4A_532/2014 and 4A_534/2014 discussed below,[112] confirm the practice of the Supreme Court in relation to bribery allegations in the context of challenges based on public policy: whilst bribery is contrary to public policy, it will only lead to the annulment of an award if it is proven and if the arbitral tribunal refused to take it into account. The mere fact that compliance with an award would expose the losing party to **criminal sanctions** is **not sufficient** to annul an award.[113]

This decision is also noteworthy insofar as it confirms that the principle that criminal proceedings should put on hold civil proceedings ("*le pénal tient le civil en l'état*") is not part of public policy. To the contrary, the arbitral tribunal has **discretion** to decide whether to **stay the arbitration**

[112] See § II.B.5.d) below.

[113] In this sense, see BÄRTSCH/TRUTTMANN, *Swiss Supreme Court considers setting aside and revision requests in light of potential criminal sanctions faced by petitione*r, available at: http://www.swlegal.ch/getdoc/9f1f5ce1-1e2a-4b78-bcc4-243ec57b8cf6/2014_Philippe-Baertsch_Aileen-Truttmann_Swiss-(1).aspx. More generally, see also SPOORENBERG/FRANCHINI, *Bribery and incompatibility with public policy*, available at: http://www.taverniertschanz.com/uploads/publications/ILO_-_Bribery_and_incompatibility_with_public_policy.pdf. Regarding the possibility of obtaining a revision if the bribery is established after the award is rendered, see decision No. 4A_247/2014 commented in § III.a) below.

proceedings pending the outcome of **criminal proceedings**.[114]

c) Decision No. 4A_324/2014 of 16 October 2014

Facts: The facts of this decision concerning **match-fixing** activities by Fenerbahçe's representatives have already been summarized above.[115] As stated, Fenerbahçe moved to set aside the CAS award upholding the ban imposed on the club by UEFA, arguing, *inter alia*, that the CAS had violated public policy by disregarding the principle ***ne bis in idem***. Indeed, according to Fenerbahçe, the TFF had already excluded the club from the 2011/2012 edition of the Champions League. The CAS Panel could not therefore exclude Fenerbahçe a second time based on the same violation.

Decision: The Supreme Court confirmed that the principle ***ne bis in idem*** **forms part of procedural public policy**, which encompasses "*fundamental and generally recognized procedural principles, the disregard of which contradicts the sense of justice in an intolerable way, so that the decision appears absolutely incompatible with the values and legal order of a state ruled by law*".

However, the Supreme Court **left open** the question as to whether the principle ***ne bis in idem*** **also applies in sport disciplinary matters**. The Supreme Court simply held that the CAS Panel had addressed this issue in its award and had concluded that the TFF's decision did not prevent the CAS Panel from excluding Fenerbahçe from further editions of the Champions League.

According to the CAS Panel, Article 50(3) of the 2010 UEFA Statutes as well as Articles 2.05 and 2.06 of the Regulations

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[114] See BÄRTSCH/TRUTTMANN, *op. cit.* With respect to the arbitral tribunal's discretion to stay the proceedings, see also decision No. 4A_446/2014 commented in § II.B.2.c) above.

[115] See § II.B.4.c) above.

of the 2011/2012 UEFA Champions League provided for a two-step procedure allowing UEFA to pronounce first a 1-year ban as an administrative measure, and then an additional ban as a disciplinary measure. According to the Panel, these two sanctions had to be differentiated since they pursued two different goals: the 1-year "administrative" ban aimed at immediately excluding a club from the competition without having to wait until the end of the disciplinary investigation; it could not therefore be considered as a final decision, but only as a preliminary sanction aimed at preserving the integrity of the competition. The longer disciplinary ban aimed at sanctioning a club for a duly established violation of disciplinary rules; it was a final decision, rendered after the carrying out of disciplinary proceedings.

The Supreme Court upheld this reasoning by confirming that the application of the principle ***ne bis in idem*** **requires** that: (i) the tribunal seized with the first proceedings (i.e. the administrative proceedings) be able to **examine in full the facts of the case**; and that (ii) the **two sanctions** under scrutiny address and **protect the same legal interest** (identity of object). Accordingly, the principle *ne bis in idem* does not prevent the same behaviour being sanctioned not only at a criminal level but also at a civil, administrative or disciplinary level.

None of the conditions discussed by the Supreme Court was met in the present case. As to the facts, the Supreme Court held that it was not established that the TFF had been able to examine in full the facts of the case when it pronounced the 1-year (administrative) ban. As to the legal interest, the Supreme Court confirmed that the 3-year (disciplinary) ban pronounced by UEFA, eventually reduced to 2 years by the CAS, did not address and protect the same legal interest as the (administrative) sanction pronounced by the TFF.

Comment: This decision reaffirms that the principle *ne bis in idem* is part of public policy. The Supreme Court had already confirmed this in the **"Valverde" decisions** rendered in January 2011,[116] whilst leaving open the question as to whether the principle *ne bis in idem* pertains to procedural or substantive public policy.[117] The Supreme Court clarified this question in the decision at hand, confirming that the principle *ne bis in idem* forms part of procedural public policy.

Unfortunately, the Supreme Court did not seize the opportunity to clarify another question it had left open in the "Valverde" decisions, that is, whether the principle *ne bis in idem* applies also in sport disciplinary matters. As in the "Valverde" decisions, the Supreme Court did not need to address this issue because the two **sanctions** under scrutiny **lacked identity**.[118] This is a pity in view of the importance this issue bears for athletes subject to disciplinary sanctions.

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[116] Decisions No. 4A_386/2010 and 4A_420/2010. See in this respect BEFFA/DUCREY, *Review of the 2011 Case Law of the Swiss Federal Tribunal concerning Sports Arbitration*, in: Causa Sport 3/2012, p. 146 *et seq.*, pp. 147-148.

[117] See BERGER/KELLERHALS, *op. cit.*, para. 1780, p. 626.

[118] In this sense, see VOSER/BOEHM, Swiss Supreme Court considers application of double jeopardy principle between disciplinary and administrative sanctions, available at: http://www.swlegal.ch/ getdoc/8389d6c0-c09d-41d4-95df-a946e3ae69cb/2014_Nathalie-Voser_Hannah-Boehm_Swiss-Supreme-Cou.aspx; see also STUTZER/BÖSCH, *The corrupt Fenerbahçe Spor Kulübü: does the principle ne bis in idem applying to the disciplinary aspects of sport form part of international public policy pursuant to Art. 190(2)(e) PILA?*, available at: http://thouvenin.com/corrupt-fenerbahce-spor-kulubu-principle-ne-bis-idem-applying-disciplinary-aspects-sport-form-part-international-public-policy-pursuant-art-190-2e-pila-2/.

d) Decisions No. 4A_532/2014 and 4A_534/2014 of 29 January 2015

Facts: Both the facts and the legal reasoning of these decisions are very similar to those found in the decision No. 4A_231/2014.[119]
In the present decisions, a consultancy company (B.), entered into two consultancy agreements with different parties: one with companies Y. and Z. for the construction of a subway, and one with companies V. and W. for the construction of a power station. Both agreements contained the same clause providing for ICC arbitration in Geneva.

B. initiated two separate arbitration proceedings against Y. and Z. in one proceeding, and V. and W. in another, claiming payment of its commissions. The Respondents requested the stay of the proceedings contending that some projects involving companies of Y.'s Group were the subject-matter of criminal investigations for **bribery**, notably in the UK via the Serious Fraud Office. According to the Respondents, this obliged them to suspend the payment of commissions to B. until B.'s compliance with the legal requirements against bribery was clarified, in order to avoid violating the UK Bribery Act 2010 (the "Bribery Act") and thereby incur significant criminal sanctions.

The arbitral tribunal which heard the two proceedings dismissed Y.'s request for a stay and eventually upheld B.'s claims in two separate awards. Y. and Z. on the one hand, and V. and W. on the other hand, moved to set aside the two awards before the Supreme Court. They argued in particular that the **awards violated substantive public policy** insofar as they **could expose** them **to criminal sanctions** for violations of the Bribery Act. Indeed, according to the Respondents, the commissions paid to B. could have been used for bribery purposes.

[119] See above, § II.B.5.b) above.

Decision: The Supreme Court reaffirmed the same principles set out in decision No. 4A_231/2014, in particular the principle that **bribery** can lead to the annulment of an award only if it is **proven** and if the arbitral tribunal **refused to take it into account** in its award.[120]

In the case at hand, the Supreme Court considered that the arbitral tribunal had examined the issue and had come to the conclusion that the **allegation of bribery had not been proven** by the Respondents. In particular, the Respondents had not been able to evidence a single illegal payment made by B. or on its behalf. For this reason the arbitral tribunal had refused to stay the proceedings. The Supreme Court held that the Respondents had not been able to deny the solid reasoning of the arbitral tribunal, and therefore dismissed the challenge.

Comment: The same comments made above in relation to decision No. 4A_231/2014 apply *mutatis mutandis* to the present decisions.

e) Decision No. 4A_374/2014 of 26 February 2015

Facts: In February 2009, a Mexican football club (Club A.), administered by D. SA, entered into an employment contract through D. SA with two Argentinian coaches (B. and C.) until the end of the season. The contract contained an arbitration clause inviting the parties to submit any dispute to the employment courts of a certain State and to the Mexican Football Federation (MFF).

Club A. succeeded in remaining in the first division of the league. Notwithstanding, at the end of the season it decided to hire a new coach.

B. and C. initiated arbitration proceedings against the club before the Conciliation and Dispute Resolution Commission

[120] See above, § II.B.5.b) above.

(CDRC) of the MFF, arguing that the club had violated a second contract entered into between them and the club pursuant to which the latter had accepted to extend the employment contract of the two coaches for two additional seasons if the club had remained in the first division. Club A. denied the existence of that second contract, challenging the authenticity of the signature attributed to the President of the club, and initiated **criminal proceedings** in this respect.

In September 2009, the CDRC rendered a decision in which it **stayed the arbitration** proceedings "*due to the fact that the review, subject-matter and decision on the existence of criminal offences exceed its jurisdiction*" and invited the parties to "*enforce their rights in the forms and terms they deem appropriate*" (the "2009 CDRC decision" - free translation from French). Two years later, in October 2011, the CDRC rendered another decision in which it considered that the petitioners, who had not taken any measure in the two years that had passed since its first decision, had **impliedly withdrawn their claims**, and that the proceedings should therefore be closed (the "2011 CDRC decision").

In the meantime, in October 2009, B. and C. initiated new arbitration proceedings before the FIFA PSC. Club A. challenged the jurisdiction of the PSC in light of the proceedings pending at the time before the CDRC. In May 2012, after being informed by the CDRC that the proceedings had been closed, the PSC upheld its jurisdiction, but dismissed the claims of the two coaches for lack of standing of the club since the employment contract had been entered into by D. SA.

B. and C. appealed this decision before the CAS. Club A. raised two objections: ***lis pendens*** in light of the criminal proceedings allegedly pending; and **statute of limitation** in light of the time that had passed between the termination of

the employment contract (May 2009) and the filing of the appeal before the CAS (January 2013).

After having requested an expert report on handwriting and having rendered a procedural order that all the parties signed without raising any objection to its jurisdiction, the CAS Panel rendered its final award in which it annulled the decision of the PSC and ordered Club A. to compensate B. and C. on several grounds.

The CAS Panel first admitted its jurisdiction by noting that none of the parties had challenged it. It then rejected the objection of *lis pendens* holding that the relevant conditions were not met as neither the parties nor the claims were the same.[121] The Panel also held that, in any event, Club A. had not proven that the criminal proceedings were still pending. The Panel further rejected the objection regarding the statute of limitation holding that the coaches had already seized the PSC in October 2009, i.e. before the expiry of the 2 year deadline provided for in Article 25(5) of the FIFA Regulations on the Status and Transfer of Players.

The CAS Panel then went on to review the decisions of the CDRC. It held that the 2009 CDRC decision did not oblige the coaches to wait until the CDRC resumed the arbitral proceedings following a decision in the criminal proceedings, *inter alia* because this would have had the effect of **denying access to justice** to the coaches. The Panel further held that the 2011 CDRC decision which criticized the coaches for not having continued to enforce their rights before the CDRC was incompatible with the 2009 CDRC decision which prevented the coaches from doing this. Finally, the Panel noted that Club A. had not challenged its standing

[121] Indeed, on the one hand the coaches were not directly involved in the criminal proceedings in light of the complaint filed by the club. On the other hand, the purpose of the criminal proceedings was to obtain a criminal sanction whereas the purpose of the arbitral proceedings was to obtain compensation for a purportedly invalid termination of contract.

notwithstanding the fact that the contracts with the coaches had been signed by D. SA.

Club A. moved to set aside the CAS award before the Supreme Court for violation of Article 190(2)(e) PILA, arguing that the Panel had violated the ***res judicata*** effect of the 2011 CDRC decision.

Decision: The Supreme Court first confirmed that an arbitral tribunal that renders a decision without taking into consideration the *res judicata* effect of a prior decision violates **procedural public policy** and, thus, Article 190(2)(e) PILA. This is also true in an **international context**: if an arbitral tribunal seated in Switzerland is seized with a claim identical to the subject matter of a final judgment or award rendered between the same parties by a court or arbitral tribunal seated outside Switzerland, the arbitral tribunal seated in Switzerland shall declare the claim inadmissible if the foreign judgment or award is **capable of being recognized in Switzerland** pursuant to Articles 25 or 194 PILA.

After recalling that a party who wants to **raise the *res judicata* defence** is not obliged to initiate parallel proceedings to obtain the recognition of the foreign judgment or award, the Supreme Court noted that, in the present case, Club A. had not raised such a defence in the CAS proceedings. According to the Supreme Court, it would be difficult to reproach the CAS Panel for having violated the principle of *res judicata* in such circumstances.

In any event, the Supreme Court continued its analysis and found that the same conclusion would apply even if Club A. had raised the *res judicata* defence in the CAS proceedings, or if the CAS Panel had to examine such an issue *ex officio*.

The Supreme Court started by examining whether the 2011 CDRC decision could be considered as an arbitral award. It confirmed that the **NYC** does not provide a **definition of an**

arbitral award and noted that it is disputed by scholars whether the question is governed by the law of the country where the award was rendered, by the law of the country in which recognition or enforcement is sought, or by the NYC itself (although the majority of scholars appear to favour the last option).

The Supreme Court recalled that, in any event, a **private decision** can qualify as an award only if it is comparable to a state court judgment. This implies that the decision is rendered by a **tribunal which offers sufficient guarantees of independence and impartiality**, which is not the case, for instance, of the body of a sports federation which was a party to the proceedings.[122]

The Supreme Court specified, however, that such a **principle** does **not automatically apply** to the arbitral tribunals of the **national football federations** such as the CDRC. To the contrary, the legal expert mandated by Club A., after examining in detail the functioning of the CDRC, concluded that it was to be considered as an arbitral tribunal pursuant to Mexican law. The Supreme Court held that there was no reason for this opinion to be disregarded.

The Supreme Court then noted that, although in principle only a final decision on the merits can benefit from the *res judicata* effect, **certain unilateral acts** of the parties are considered to be equivalent to **actual judgments** under Swiss procedural law. This is the case for instance of the "***désistement d'action***" ("***Klageverzicht***"), by which the petitioner abandons its prayers for relief, but not of the "*désistement d'instance*" ("*Klageruckzüg*"), by which the petitioner simply puts an end to the proceedings while

[122] As confirmed by the Supreme Court, the decisions of such internal bodies are considered as mere declarations of will of the relevant federation rather than judicial acts.

maintaining the right to raise the same claims in later proceedings.

According to the opinion of the legal expert mandated by Club A., Mexican law provides for a similar distinction and rule. In his opinion, the 2011 CDRC decision had to be considered as a "*désistement d'action*" pursuant to Mexican law, thus benefitting from the *res judicata* effect. Again the Supreme Court upheld this reasoning and held that, since the conditions of identity of parties and of claims were also met, both the PSC and the CAS Panel should have declared the claims and challenge of B. and C. inadmissible.

This notwithstanding, the Supreme Court dismissed the challenge holding that the 2011 CDRC **decision** was **not capable of being recognized in Switzerland**. The Supreme Court recalled that, pursuant to Article 194 PILA, the recognition and enforcement of an award in Switzerland is governed by the NYC. Article V(2)(b) of the NYC provides, *inter alia*, that the recognition and enforcement of an award must be **refused *ex officio*** if the award is **contrary to the public policy of the country in which the recognition and/or enforcement is sought**.

The Supreme Court held that this was the case here. It considered that the 2011 CDRC decision had been rendered without hearing the parties, thereby **violating their right to be heard** which is a procedural public policy principle in Switzerland.

The Supreme Court finally found that the fact that B. and C. had failed to appeal against the 2011 CDRC decision before the CAS could not be held against them. The Supreme Court confirmed that the principle of good faith obliges a party to **immediately challenge a procedural violation** during the arbitral proceedings, and that this principle prevents a party from invoking such a procedural violation for the first time in both appeal and enforcement proceedings ("**forfeiture**

effect" or "***Preklusionswirkung***" in German). The Supreme Court also recalled that the NYC does **not oblige** a party, in addition to raising the challenge during the arbitral proceedings, to take action to **set aside** the award via the appeal options provided for in the country where the award was rendered.

The Supreme Court further admitted that the "**forfeiture effect**" referred to above is **strongly disputed** by scholars and specialized case law and that, in any event, it is not certain that it would apply to the violation of a principle such as the parties' right to be heard which must be reviewed ***ex officio*** by the enforcing court. The Supreme Court preferred to leave this question open, focusing its analysis on the specific circumstances of the present case.

The Supreme Court also held that the coaches could not be reproached for having failed to appeal against the 2011 CDRC decision before the CAS, in particular in view of the possible length and costs of such appeal proceedings and of its limited benefits from a practical point of view. Indeed, the CAS would have simply declared that the 2011 CDRC decision was invalid, thereby obliging the coaches to request that the CDRC re-open the proceedings. According to the Supreme Court, this would not have made much sense in view of the circumstances.

Comment: This interesting decision echoes another leading decision rendered in May 2014 (ATF 140 III 278), in which the Supreme Court had already set out in detail the characteristics and conditions of the ***res judicata*** principle under Swiss law.[123] However, while in ATF 140 III 278 the

[123] With respect to this decision, see ROBERT-TISSOT, *Review of the Recent Case Law of the Swiss Federal Supreme Court*, in: MÜLLER/RIGOZZI/BESSON (eds.), *New Developments in International Commercial Arbitration 2014*, 2014, p. 121 *et seq.*, pp. 227-234, with the erratum included in the electronic version available at "www.swisslex.ch"; see also BEFFA/PERETTI, *Procedimentos Paralelos. Litispendência. Coisa Julgada. Suiça. Tribunal Federal. Decisão no 140 III 278,*

Supreme Court had to deal with the *res judicata* effect of a foreign court decision, in the present decision the Supreme Court had to analyze the *res judicata* effect of a **foreign arbitral award**.[124]

Unsurprisingly, the Supreme Court adopted the same reasoning, confirming in particular the well-established principle that a *res judicata* defence arising from a foreign decision (be it a state court judgment or an arbitral award) requires that the arbitral tribunal examine as a **preliminary question whether the decision can be recognized in Switzerland**. If this is not the case, for instance because the first proceedings violated due process, as in the case at hand, the *res judicata* defence must be dismissed.

This decision is also noteworthy insofar as it addresses the rather disputed issue of the "**forfeiture effect**" in enforcement proceedings, i.e. the result of the failure by a party to invoke a procedural violation in the arbitral proceedings.[125] Unfortunately, however, the decision does not provide clarity as to whether such an effect should indeed apply and whether it should apply in all circumstances.

On the one hand, the Supreme Court seems to accept its application. On the other hand, however, it recognizes that this is a disputed issue and that it cannot be handled *in abstracto*, but only on a **case-by-case basis**.[126]

Caso 4A_508/2013. J. 27.05.2014, in: Revista Brasileira de Arbitragem, Vol. XII No. 45, 2015, p. 206 *et seq*.

[124] See VOSER/RANEDA, *Supreme Court rejects res judicata defence as foreign arbitral award is not entitled to recognition*, available at: http://www.swlegal.ch/getdoc/d5772efd-5153-4520-afcc-439ec507dc16/2015_Nathalie-Voser_Julie-Raneda_Supreme-Court-rej.aspx., who note that this is apparently the first time that the Supreme Court was confronted with such a situation.

[125] On this question, see for instance POUDRET/BESSON, *Comparative Law of International Arbitration*, 2nd ed., 2007, para. 943 *et seq.*

[126] In this sense, see also VOSER/RANEDA, *op. cit.*

Furthermore, and more importantly, the Supreme Court leaves open the question as to whether the "forfeiture effect", if admitted, should extend at the enforcement stage to violations of public policy that have to be examined ***ex officio*** pursuant to **Article V(2)(b) NYC**.[127]

f) Decision No. 4A_426/2014 of 6 May 2015

Facts: The facts of this case concerning compensation claimed by a club (A.) from another club (B.) have already been summarized above.[128] As stated, A. moved to set aside the unfavourable CAS award arguing, *inter alia*, a violation of **substantive public policy** (Article 190(2)(e) PILA). A. contended that the CAS Panel had violated two different principles: ***pacta sunt servanda*** and **good faith**.

Decision: Concerning the purported violation of the principle ***pacta sunt servanda***, the Supreme Court confirmed its restrictive interpretation pursuant to which this principle is violated only if the arbitral tribunal **refuses to apply a contractual provision whilst admitting that it binds the parties** or, conversely, if it **imposes upon them compliance with a clause that it considers as non binding**.

In other words, the arbitral tribunal must have applied or refused to apply a contractual provision in a manner that contradicts the tribunal's interpretation of that provision and its legal effects. By contrast, the process of **interpretation itself** and the legal consequences logically drawn therefrom are **not governed** by the principle *pacta sunt servanda* and can therefore not justify the annulment of an award for violation of public policy.

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[127] In this respect, see SPOORENBERG/FRANCHINI, *Supreme Court rules again on res judicata*, available at: http://www.internationallawoffice.com/newsletters/detail.aspx?g=1ab60124-e173-40ea-a775-1d1ee190bf0a.

[128] See § II.B.4.i) above.

The Supreme Court considered that A. had disregarded the above principles by claiming that the CAS had violated the principle *pacta sunt servanda* in: (i) admitting that B. was bound by the contractual clause at stake[129] and had behaved in a quite unusual way by agreeing to release a top player before the end of his contract without consideration; but (ii) denying that B. had violated the principle of good faith. According to the Supreme Court, this argument was in fact a **criticism of the application of the law** by the CAS Panel which the Supreme Court was **not able to review**.

The fact that the CAS Panel had ordered B. to pay 15% of the **arbitration costs** did not change the situation according to the Supreme Court because A. had **no interest** in the CAS ordering it to bear all the costs of the arbitration and the allocation of the costs of arbitral or ordinary proceedings largely depends on the **discretionary power** of the arbitrators or judges and on questions of equity. Indeed, Article R64.1 of the CAS Code invites the Panel to take into account not only the complexity and the outcome of the proceedings, but also the behaviour and the resources of the parties, in allocating the costs of the arbitration.

The Supreme Court also rejected the argument concerning a purported violation of the principle of good faith, confirming that this principle cannot be invoked in challenge proceedings in order to overcome the **lack of demonstration of a behaviour contrary to good faith** in the arbitral proceedings. According to the Supreme Court, A. was not entitled to challenge the CAS Panel's finding that A. had failed to show that B. had, in bad faith, prevented the fulfilment of the condition to which the compensation was

[129] As stated above, the contractual clause at stake provided that in case of transfer of the player by B., A. would have the right to obtain 20% of the amount exceeding the sum of USD 35 million (see § II.B.4.i) above).

due (i.e. the existence of a transfer of D. by B. for an amount exceeding USD 35 million).

Comment: This decision is interesting because it shows how difficult it is to successfully argue a violation of the *pacta sunt servanda* and good faith principles. As confirmed by the Supreme Court itself, **almost all contractual disputes fall outside the scope of protection of the principle *pacta sunt servanda***. Furthermore, the principle of **good faith has not yet triggered a violation of substantive public policy** to date.

In concreto, when reading the decision, it appears that A. was defrauded of its contractual rights. Indeed, it is difficult to believe that B. agreed to release D. for free and that A.'s entitlement to obtain part of the transfer amount had no impact on B.'s decision. However, one must keep in mind that **it is not up to the Supreme Court to fix unfair or unjust situations**, or to correct unfair or unjust decisions, no matter how frustrating this may be.

This decision also shows that an arbitral tribunal enjoys **broad discretion in deciding how to allocate the arbitration costs** between the parties. We do not know the reasons why the CAS decided to order the winning party to bear part of the arbitration costs. We can only note that the Panel decided not to apply the principle of "costs follow the event" strictly - which is obviously admissible and often done.[130]

g) Decision No. 4A_633/2014 of 29 May 2015

Facts: The dispute concerned a Business Combination Agreement between a US Firm (A.) and a German lawyer

[130] See in this sense VOSER/BERKCAN, *A petition to set aside an arbitral award is not an appeal*, available at: http://www.swlegal.ch/getdoc/228fac79-65c6-44e5-be94-a827502a4ee4/2015_Nathalie-Voser_Sevim-Berkcan_A-petition-to-se.aspx.

(B.), pursuant to which the German Firm founded by B. (C.) was to be integrated into A. The Agreement was governed by German law and provided for ICC arbitration in Zurich. It stipulated that A. should pay to B. an annual "Floor Amount" calculated according to certain conditions set forth in Articles 5.2 and 5.3 of the Agreement.

Differences of interpretation of these provisions arose between the parties. Eventually, B. initiated a first arbitration against A., claiming for the difference between the Floor Amount of EUR 2 million for the years 2009 and 2010 and the amounts actually paid by A. for those two years.

The arbitral tribunal, with seat in Frankfurt (as agreed by the parties) (the "Frankfurt tribunal"), dismissed B.'s claims, holding that the Floor Amount was due only if the respective Partner had fulfilled the "*prerequisites for activities, devotion and performance*" set forth in Article 5.3 of the Agreement. The Frankfurt tribunal held that these prerequisites had not been met by B.

Two years later, B. initiated a second arbitration against A., claiming the difference between the Floor Amount calculated according to Articles 5.2 and 5.3 of the Agreement for the years 2011 and 2012 and the amounts actually paid by A. for those two years.

The arbitral tribunal, with seat in Zurich (the "Zurich tribunal"), first dismissed the objection of ***res judicata*** raised by A. in two successive procedural orders ("PO 3" and "PO 5"), holding that it was not bound by the reasoning adopted by the Frankfurt tribunal and could interpret Article 5.3 of the Agreement according to its own understanding.

It then held that Article 5.3 should be interpreted by adopting a holistic approach, i.e. by considering all the criteria mentioned therein, and not only, nor primarily, the criteria of "*billable and total hours*" and the "*turnover from billable hours*" as the Frankfurt tribunal had done. Adopting

such an approach, the Zurich tribunal held that, although he had not met these two criteria, B. had met all the other criteria and was therefore entitled, in principle, to the contractual Floor Amounts for the years 2011 and 2012, save for a reduction justified under German law by B.'s contributory negligence.

A. moved to set aside the award before the Supreme Court, arguing a violation of the principle of *res judicata* and, thus, of procedural public policy (Article 190(2)(e) PILA). A. admitted that the Zurich tribunal could decide upon B.'s claims because they concerned the years 2011 and 2012, whereas the Frankfurt arbitration had concerned the years 2009 and 2010. A. nevertheless contended that the Zurich tribunal was **bound by the factual and legal conclusions** drawn by the Frankfurt tribunal, and in particular by the latter's conclusion that the Floor Amount was only due if the criteria of, notably, "*billable hours*" and "*turnover from billable hours*" set forth in Article 5.3 of the Agreement had been met in the relevant year.

In support of its position, A. principally argued that a **transnational concept of *res judicata*** should be applied in international arbitrations, rather than a purely domestic concept. As a consequence, the *res judicata* effect of a foreign award would not necessarily correspond to that of a judgment rendered by a Swiss court. Indeed, according to A., applying a transnational concept of *res judicata* should lead an arbitral tribunal to recognize the binding character **not only** of the **operative part** of a previous decision, **but also** of the **considerations** made by a tribunal to come to such a decision, as recommended by the ILA in its Final Report on Res Judicata and Arbitration published in 2006.[131]

[131] The Report is available at: http://www.ila-hq.org/en/committees/index.cfm/cid/19.

Alternatively, A. argued that the Zurich tribunal had to take into account the factual and legal conclusions drawn by the Frankfurt tribunal even in light of the Swiss concept of *res judicata*, insofar as, according to the case law of the Supreme Court, the considerations of a decision can be **prejudicially relevant**, in particular in case of a dismissal of claims.

Decision: The Supreme Court started by confirming its case law on the *res judicata* principle already set out in decisions No. 4A_606/2013 and 4A_374/2014 discussed above.[132] It reaffirmed in particular that, unless an international treaty states otherwise, the ***lex fori*** determines whether the claim raised before a foreign state court or arbitral tribunal and the claim submitted to a Swiss court or arbitral tribunal are identical (**identity of claims**). Therefore, the principles established by the case law of the Supreme Court in this respect are applicable.

The Supreme Court found that A. had disregarded these principles in its reasoning. It first held that, as already confirmed in previous decisions, the ***res judicata* scope** of an arbitral award rendered in Switzerland is the same as that of a Swiss court decision: it is **limited to the operative part** of the award and does not extend to its considerations. According to the Supreme Court, the same principle also applies to foreign awards and judgments, which enjoy the same authority they would have if rendered by a Swiss court or arbitral tribunal.

The Supreme Court further held that there is **no legal basis** justifying that a different, more **international concept of *res judicata*** be applied in Switzerland. It stressed in particular that the recommendations of a private association such as the ILA cannot be considered as legally binding.

[132] See § II.B.5.a) and § II.B.5.e) above.

The Supreme Court also recalled that, in any event, a foreign decision **cannot produce greater effects** in Switzerland than it has pursuant to the legal order from which it originates. The Supreme Court found that A. had not argued that the *res judicata* effect of the award rendered by the Frankfurt tribunal would extend to its reasoning pursuant to German law.

The Supreme Court finally held that the Zurich tribunal had not violated the principle of *res judicata* as interpreted in Switzerland. After admitting that the **meaning of the operative part** of a decision must be **interpreted in light of its overall considerations**, the Supreme Court held that the Zurich tribunal had examined the findings of the Frankfurt tribunal before holding that it was not bound by them.

In concreto, the Supreme Court upheld the reasoning of the Zurich tribunal that the two **claims** were **not identical** since they concerned different years, and considered that the interpretation by the Frankfurt tribunal of Article 5.3 of the Agreement was part of a mere subsumption exercise ("*Glieder des Subsumtionschlusses*") which did not enjoy *res judicata* effect.

The Supreme Court therefore concluded that the Zurich tribunal could review the claims raised by B. from scratch, without being bound by the factual and/or legal conclusions drawn by the Frankfurt tribunal. It also held that the Zurich tribunal would actually have violated procedural public policy if it had considered itself bound by the reasoning of the Frankfurt tribunal and had failed to carry out its own interpretation of the Agreement.

Comment: This is the third decision dealing with *res judicata* in the period under review, after decisions No.

4A_606/2013 and 4A_374/2014.[133] Contrary to these other cases, this decision is designated for official publication, which shows its relevance.

Three aspects of the decision are particularly relevant in our opinion:

- First of all, the Supreme Court's confirmation that the requirements of *res judicata*, and in particular the identity of claims, are governed by the ***lex fori***. The Supreme Court had already set out this principle in decision No. 4A_508/2013. By re-confirming it in the decision at hand, the Supreme Court disregarded the criticism of some commentators who had suggested that arbitral tribunals have no *lex fori*; they are only bound by the rules of the *lex arbitri* which, at least in Switzerland, does not address the principle of *res judicata*.[134] We agree with the commentators that the Supreme Court could at least have seized the opportunity to provide some reasons in support of such an important conclusion.[135]
- The second relevant aspect of this decision lies in the refusal of the Supreme Court to apply an **international or transnational concept of *res judicata*** in Switzerland. The Supreme Court made it perfectly clear that it will not be influenced by foreign, possibly more far-reaching

[133] See § II.B.5.a) and § II.B.5.e) above.

[134] With respect to decision No. 4A_508/2013, see VOSER/RANEDA, *New developments on res judicata*, available at: http://www.swlegal.ch/getdoc/10bc4fe8-cd51-4023-a832-e50faeaaf303/2014_Nathalie_Voser_Julie_Raneda_New-developments.aspxsee. This criticism was reaffirmed in relation to the decision at hand by VOSER/ESCHMENT, *Another leading case on res judicata: application of lex fori confirmed*, available at: http://www.swlegal.ch/getdoc/3d2ca31a-d41f-4af2-8bb3-33f673ed8dca/2015_Nathalie-Voser_Jorn-Eschment_Another-leading.aspx.

[135] See VOSER/ESCHMENT, *op. cit.*

concepts of *res judicata* such as the one stemming from common law jurisdictions, nor by the recommendations of private organizations such as the ILA.[136]

- In its Report on Res Judicata and Arbitration published in 2006 following a 4-year study of *res judicata*, the ILA International Commercial Arbitration Committee recommended the application of "*a more extensive notion of res judicata, which is also followed in public international law, under which res judicata not only is to be read from the dispositive part of an award but also from its underlying reasoning*".[137] While stressing that this and the other recommendations contained in the Report were "*for the benefit of international commercial arbitrators faced with res judicata issues*" and were "*not directly addressed to state courts faced with res judicata effects of arbitral awards in relation to jurisdiction, setting aside or enforcement questions*", the Committee nevertheless mentioned that its Report might "*constitute persuasive authority for domestic courts when considering res judicata effects of international commercial arbitral awards*".[138]

  In concreto, the ILA recommended that "*the conclusive and preclusive effects of arbitral awards in further arbitral proceedings (…) be governed by transnational rules applicable to international commercial arbitration*" *rather than*

[136] The Report is available at: http://www.ila-hq.org/en/committees/index.cfm/cid/19.
[137] ILA Report, Recommendation 4, no. 52.
[138] ILA Report, Introduction, no. 10.

"by national law",[139] *and that an arbitral award be considered as having "conclusive and preclusive effects in the further arbitral proceedings as to: (…) determinations and relief contained in its dispositive part as well as in all reasoning necessary thereto; (…) [and] issues of fact or law which have actually been arbitrated and determined by it, provided any such determination was essential or fundamental to the dispositive part of the arbitral award*".[140]

Some authors expressed a desire that not only arbitral tribunals but also state courts take inspiration from these recommendations. In Switzerland this opinion was defended in particular by renowned practitioners such as BERGER and KELLERHALS,[141] whose opinion is usually taken into serious consideration by the Supreme Court. But not on this issue.

Although the Supreme Court did not provide an explicit reason as to why it refused to take inspiration from the ILA Report, the fact that it held that there is no legal basis justifying that a broader concept of *res judicata* be applied in Switzerland seems to suggest that the Supreme Court does not want to open Pandora's box by agreeing to adjust its well-established case law

[139] ILA Report, Annex 2 - Recommendations, no. 2.

[140] ILA Report, Annex 2 - Recommendations, no. 4.

[141] BERGER/KELLERHALS, *op. cit.*, para. 1671, p. 585: "*These uniform standards, recommendations or guidelines represent a broad consensus generally favoured by practitioners and scholars. On that basis, we believe that a Swiss court or arbitral tribunal with its seat in Switzerland, when determining the binding effects of an international arbitral award, could also take inspiration from the (broader) notion of the conclusive and preclusive effects as described in the ILA Report*".

under the influence of recommendations coming from the arbitration field.

We consider that this approach makes sense. Abandoning a longstanding interpretation of such an important principle to respond to the certainly legitimate, but nevertheless "personal" desires of uniformisation coming from arbitration practitioners would undermine legal certainty, in particular for parties who are not necessarily familiar with international arbitration.

In this respect, we do not think that the ILA Report can be compared to other so-called "soft laws" such as the IBA Rules on the Taking of Evidence in International Arbitration or the IBA Guidelines on Conflicts of Interest in International Arbitration,[142] which "*have gradually become a code of generally accepted principles*",[143] not only by arbitration practitioners and scholars, but also by the parties themselves.[144]

We submit that the ILA Report on Res Judicata and Arbitration might not (yet) be considered as a "code of generally accepted principles". It is certainly not as well-known and applied in international arbitration as the IBA Rules and Guidelines. Furthermore, as admitted by the ILA

[142] In this sense, however, BERGER/KELLERHALS, *op. cit.*, para. 1671, p. 584-585.

[143] BERGER/KELLERHALS, *op. cit.*, para. 1313, p. 458.

[144] The Supreme Court itself recognized concerning the Guidelines that, although they "*do not have the same value as statutory law*", "*they constitute nevertheless a valuable tool, likely to contribute to the harmonisation and unification of the standards to be applied to conflicts of interest in international arbitration, i.e. an instrument that is likely to influence the practice of both institutions and state courts*": see decision No. 4A_506/2007 of 20 March 2008, para. 3.3.2.1, as translated in BERGER/KELLERHALS, *op. cit.*, para. 787, p. 282.

Committee itself,[145] it does contradict the practice of certain civil law countries, such as Switzerland. For these reasons, in our opinion, it would not be justified that the Supreme Court endorse the ILA Report in its case law, in particular where this would lead to a rather radical change of practice.

- The third relevant aspect of this decision concerns the apparently different approach of the Supreme Court to the requirements of **identity of parties and claims**. While in its landmark decision of May 2014 (ATF 140 III 278) the Supreme Court expressed its willingness to adopt a more liberal standard in order to ascertain the **identity of parties**,[146] in the present decision the Supreme Court maintained a strict approach to the requirement of **identity of claims**. The future will tell whether this was a deliberate intention as STUTZER/BÖSCH seem to advocate.[147]

h) Decision No. 4A_246/2014 of 15 July 2015

Facts: The facts of the case involving a football club and 9 of its players have already been summarized above.[148] As stated, the club moved to set aside the unfavourable CAS award before the Supreme Court arguing, *inter alia*, that it was contrary to **procedural public policy** (Article 190(2)(e) PILA).

According to the club, procedural public policy encompasses the parties' right to have their dispute resolved by an arbitrator with full powers of review as provided for in

[145] See ILA Report, Introduction, para. 6.
[146] See in this respect ROBERT-TISSOT, *op. cit.* and BEFFA/PERETTI, *op. cit.*
[147] See STUTZER/BÖSCH, *Res judicata - again!*, available at: http://thouvenin.com/wp-content/uploads/2015/06/20150619-Arbitration-Newsletter-Switzerland-Res-judicata-again.pdf.
[148] See § II.B.3.c) above.

Article 6(1) of the ECHR. The club suggested that because the internal bodies of the federation to which the club was affiliated (L.) cannot be considered as independent and impartial, the appeal to the CAS was the only way for the club to have its claims decided by a non-biased tribunal.

Therefore, according to the club, the CAS should have admitted all the evidence brought by the club, irrespective of whether such evidence had already been produced before the internal bodies of L. By **refusing to admit evidence** that had not been produced before the Dispute Resolution Chamber (DRC) of L.,[149] the CAS had violated Article 6(1) ECHR and, thus, procedural public policy.

Decision: The Supreme Court recalled that, as confirmed both by the European Court of Human Rights and by the Supreme Court itself in a decision of 2012,[150] **Article 6(1) ECHR does not prohibit the creation of arbitral tribunals** to adjudicate pecuniary disputes between individuals, provided that the parties' renunciation of their right to a state court in favour of arbitration is free, licit and unequivocal. In such a case, the **petitioner cannot claim that the arbitrators violated the ECHR**, even though its principles may be relevant to the guarantees on which the petitioner relies pursuant to Article 190(2) PILA.

The Supreme Court further stressed that the **parties can organize the proceedings** as they deem fit, in particular by reference to specific arbitration rules, provided that their equal treatment and their right to be heard in adversarial proceedings is guaranteed. This is what the parties did in the case at hand by agreeing to the CAS jurisdiction and, thus, to the application *ipso iure* of the CAS Code and of its Article R57(3), which provides that the Panel has **discretion to exclude evidence** presented by the parties if it was

[149] See § II.B.3.c) above.
[150] Decision No. 4A_238/2011.

available to them or could reasonably have been discovered by them before the challenged decision was rendered.[151]

The Supreme Court finally held that procedural public policy does not require the arbitral tribunal to handle all cases with full power of review. The **parties are free to limit the power of review** of the arbitral tribunal, either directly or indirectly by reference to specific arbitration rules. In any event, the mere fact that the CAS Panel **refused to admit evidence** which was **not correctly produced** does **not** amount to a **limitation of the power of review** of the arbitral tribunal.

Comment: This decision gave the Supreme Court an opportunity to reaffirm that a **violation of the ECHR is not sufficient** to obtain an annulment of an international award. Indeed, as confirmed by the Supreme Court in previous decisions, such a violation is not included among the limited grounds provided for in Article 190(2) PILA. This means that the petitioner must explain why, in violating the ECHR, the arbitral tribunal also violated one of the principles set forth in Article 190(2) PILA.

This is what the club tried to do in the case at hand, by arguing that the CAS Panel had violated not only Article 6(1) ECHR but also procedural public policy (Article 190(2)(e) PILA). However the Supreme Court did not accept this claim, holding not only that the CAS Panel had not violated Article 6(1) ECHR by refusing to admit evidence on the basis of Article R57(3) of the CAS Code, but also that, in any event, procedural public policy does not require the arbitral tribunal to handle all cases with full power of review.

The decision of the Supreme Court is correct. However, we agree with RIGOZZI/HASLER that Article R57(3) of the CAS Code, introduced in the 2013 edition of the Code, raises

[151] See also § II.B.4.k) above.

delicate questions, in particular in appeal proceedings against decisions rendered by the sports-governing bodies. As advocated by RIGOZZI/HASLER, in such cases at least it would be preferable that CAS Panels use the discretion granted to them by Article R57(3) of the CAS Code only in exceptional circumstances, in order to ensure at least one full-fledged review of the case by a "proper" arbitral tribunal.[152]

i) Miscellanea

i. Decision No. 4A_70/2015 of 29 April 2015

Decision: The Supreme Court recalled its long-standing case law pursuant to which, if it is not easy to define **substantive public policy** positively and to set its boundaries with precision, it is easier to exclude items from this concept. In particular, the process of interpreting a contract and the legal consequences logically drawn therefrom, as well as the interpretation of the statutory provisions of a private law body (such as the CAS Code) by an arbitral tribunal, must be excluded.

The Supreme Court also confirmed that showing that the evidence was wrongly assessed, a factual finding manifestly wrong, or a rule of law clearly violated is not sufficient to establish incompatibility with public policy, which is a concept more restrictive than **arbitrariness**.

The Supreme Court held that the petitioner (a football club) had failed to comply with these principles insofar as it had tried to question the CAS Panel's interpretation of certain contractual and legal provisions.[153]

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[152] RIGOZZI/HASLER, *Sports Arbitration under the CAS Rules*, in: Arroyo (ed.), *Arbitration in Switzerland*, 2013, para. 4 ad Article R57, p. 1036.

[153] See above, § II.B.4.h).

ii. Decision No. 4A_634/2014 of 21 May 2015

Decision: The Supreme Court again confirmed its case law concerning the principle of ***pacta sunt servanda*** in this decision, which concerned an Italian football club (A.) ordered by the CAS to pay EUR 9,4 million to an English company (B.) (the owner of the financial rights of an Argentinian player).

Whilst recognizing that a scholar, BUCHER, pleads in favour of an extension of the *pacta sunt servanda* principle,[154] the Supreme Court nevertheless confirmed its restrictive approach. The Supreme Court held, in particular, that an arbitral tribunal does **not** violate the principle of *pacta sunt servanda* simply because it allegedly adopts a **reasoning contradicting the agreements** entered into between the parties.

The Supreme Court further rejected the argument of A. that the CAS had violated substantive public policy by ordering it to pay a **penalty clause** amounting to 25% of the outstanding amounts to be paid by the club. The Supreme Court confirmed that a mere violation of a mandatory provision such as Article 163(3) CO, which allows a judge to reduce an excessively high penalty clause, is not enough to justify the annulment of an award. The Supreme Court will annul the award only if the arbitral tribunal violates the **prohibition of discriminatory or spoliatory measures**. According to the Supreme Court, this was not the case in the present instance.

[154] According to BUCHER, a party should be able to obtain the annulment of an award which manifestly disregards the contractual arrangements and provides an interpretation which cannot be reasonably defended, to the extent that it infringes the feeling of justice in view of the interests at stake: see BUCHER, in: BUCHER (ed), *Loi sur le droit international privé - Convention de Lugano, Commentaire romand*, 2011, no. 158 ad Art. 190, pp. 1712-1713.

The Supreme Court finally confirmed that the **allocation of compound interest** does not violate public policy.[155]

C. Consequences of a successful challenge

a) Decision No. 4A_623/2014 of 30 April 2015

Decision: In addition to confirming that an international award can be challenged only for one of the grounds provided for in Article 190(2) PILA, the Supreme Court reaffirmed that a challenge can only lead to a (total or partial) **annulment of the award** ("quasing" effect). The Supreme Court also confirmed that it is only entitled to **"reform" the award** ("reformatory" effect) by declaring that the arbitral **tribunal has or lacks jurisdiction** (in case of challenge based on Article 190(2)(b) PILA) or by ordering the **removal of** the successfully challenged **arbitrator(s)** (in case of challenge based on Article 190(2)(a) PILA).

In the present case, the petitioner had failed to comply with this principle insofar as it had asked the Supreme Court not only to annul the award, but also to render a new decision with respect to some issues unrelated to the arbitral tribunal's jurisdiction or composition.

b) Decision No. 4A_246/2014 of 15 July 2015

Decision: The Supreme Court confirmed that, notwithstanding the "quashing" effect of the setting aside proceedings, an award can be **annulled** only **partially** if the issues appealed or to be annulled are independent from other relevant issues.

The Supreme Court applied this rule in the present case, by annulling the decisions of the CAS concerning 3 of the 9 players involved in the dispute.[156]

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[155] In this respect, see BERGER/KELLERHALS, *op. cit.*, para. 1770, p. 621.

III. Decisions on applications for revision of arbitral awards

A. Decision No. 4A_247/2014 of 23 September 2014

Facts: This decision concerns the same factual background as in decision No. 4A_231/2014.[157]

On top of moving to set aside the relevant award for violation of substantive public policy, the petitioner, Y., filed a request for revision of said award, relying on the fact that a person, F., had been indicted in the US on suspicion of having accepted **bribes** from Y.'s adverse party, B.

On 3 March 2014, Y. informed the arbitral tribunal of F.'s **indictment** which had been pronounced on 10 February 2014. The next day, the arbitral tribunal informed Y. that Y.'s letter and the Indictment ("*acte d'accusation*") had been received **after the award had already been signed** by the three members of the tribunal. Since the tribunal could not take this new fact and evidence into account in its award, Y. relied on it to request the revision of the award.

Decision: The Supreme Court started by recalling that, pursuant to **Article 123(2)(a) FTA**, revision can be sought when the petitioner discovers, after the issuance of the award, **new facts or evidence** that he could not have invoked in the previous proceedings (to the exclusion of any facts or evidence which arose after the issuance of the award). Accordingly, revision may be justified only by facts which took place until the point at which facts could still be asserted in the previous proceedings, but were not known to the petitioner despite his or her diligence. Moreover, the

[156] See above, § II.B.3.c). The Supreme Court also applied the same rule in ATF 140 III 520 (see above, § II.B.2.b).

[157] See § II.B.5.b) above.

facts and evidence must be **relevant**, i.e. capable of modifying the factual findings on which the decision is based and leading to a different solution.

In its reasoning, the Supreme Court first rejected B.'s argument that Y. could and should have brought the new fact and evidence to the attention of the arbitral tribunal earlier, instead of waiting three weeks as it did. The Supreme Court recalled that, generally speaking, the discovery of the ground for revision implies that the petitioner has **sufficient knowledge** of the new fact to be able to invoke it, even if he is not in a position to prove it with certainty; a mere assumption is not sufficient. More specifically with regard to new evidence, the petitioner must have a document establishing the evidence he wants to introduce or sufficient knowledge to introduce it.

In the present case, the Supreme Court accepted Y.'s explanation that the three weeks between the pronunciation of the indictment and the provision of the information to the tribunal had been necessary for its counsel to carry out **necessary verifications**. It also considered that Y. could not be accused of bad faith since it was not aware of the fact that the award had already been signed when it submitted the new fact and evidence to the arbitral tribunal.

The Supreme Court then went on to examine whether the conditions for admitting the revision were met in the present case. Whilst recognizing that Y. had not been able to introduce the new fact and evidence in the arbitral proceedings (since the award had already been signed when Y. tried to do so), the Supreme Court nevertheless held that Y. had failed to show that the new fact and evidence were **capable of leading to a different solution**. The Supreme Court recalled that the very reason for which Y. was requesting the revision of the award was not the bribery allegedly affecting the contracts entered into with B., but rather the risk of serious criminal sanctions for violation of

the Bribery Act and the FCPA. It held in this respect that Y. had neither shown how the indictment of F. would impact on such a risk, nor what such a risk would mean in terms of sanctions and timing.

Comment: This decision provides a good illustration of the strict conditions applying to a revision for newly discovered facts or evidence. As recalled by the Supreme Court, the **revision is and must remain an extraordinary and exceptional measure**.

Accordingly, the mere discovery after the issuance of the award of new elements existing before said date (including elements showing bribery) is not sufficient to request a revision of the award. The petitioner has to establish that these new elements could have led the arbitral tribunal to take a different decision.[158] This is most often a very difficult task.

B. Decision No. 4A_645/2014 of 20 February 2015

Facts: This decision concerns the first arbitration held between the Italian company A. and the Spanish company B. managing the cycling team C. already discussed above in relation to decision No. 4A_609/2014.[159]

On 14 November 2014, A. filed a (second) request for revision of the final award rendered on 25 July 2011, in which the arbitral tribunal had, *inter alia*, declared the sponsorship contract valid and in full force. A. based its request for revision on the **decision of the UCI**, commented on in the media on 12 July 2014, to sanction D.,

[158] In this sense, see BÄRTSCH/TRUTTMANN, *Swiss Supreme Court considers setting aside and revision requests in light of potential criminal sanctions faced by petitione*r, available at: http://www.swlegal.ch/getdoc/9f1f5ce1-1e2a-4b78-bcc4-243ec57b8cf6/2014_Philippe-Baertsch_Aileen-Truttmann_Swiss-(1).aspx.

[159] See above, § II.A.1.a).

the captain and key figure of C. for **doping**. It argued that, if it had known that C.'s team included an athlete who had repeatedly violated anti-doping rules, it would not have agreed to sponsor C. A. considered that this was a **material error (*erreur essentielle*)** which would allow it to annul the contract.

Decision: The Supreme Court dismissed the request, considering that the conditions set forth in Article 123(2)(a) FTA and discussed above[160] were not met.

Indeed, the law applicable to the contract, i.e. Italian law, provides that the mere existence of an essential error is not enough to annul the contract; the parties must initiate annulment proceedings in this respect. In the case at hand, the possible annulment of the contract would have **occurred after the issuance of the award** and would thus not have justified a revision of the award. Indeed, real *nova*, occurring after the issuance of the award, cannot lead to its revision.

The Supreme Court also held that the fact that one of C.'s athletes had violated anti-doping rules was **not capable of modifying the factual findings** on which the award was based, *inter alia*, because it would not automatically lead to a breach of the sponsorship contract by B.

Comment: This decision is perfectly sound and does not require any particular comment.

[160] See § III.a).

IV. Decisions on the enforcement of arbitral awards

A. Decision No. 5A_409/2014 of 15 September 2014

Facts: A. and two Egyptian companies mandated a Canadian attorney (B.) to provide legal services in the context of legal proceedings against the Republic of Egypt. The contract, governed by the laws of British Colombia and providing for ICC arbitration in Toronto, specified that B.'s fees would be dependent on the outcome of the proceedings (***pactum de quota litis***).

The dispute against the Republic of Egypt settled and B. initiated arbitration proceedings against A. and the two Egyptian companies claiming payment of his fees. The Request for arbitration and its Exhibits were sent by the ICC (by DHL) to the address of A. in Cannes. Those documents were delivered, as confirmed by DHL, but were then returned to the ICC.

Shortly thereafter, the ICC sent another letter to the same address, granting A. a deadline to answer to the Request. However, this letter could not be delivered, the delivery receipt indicating that the addressee had moved. In the meantime, the above communications were also sent to different email addresses of A. with success, although the messages were later on "returned" to the ICC.

Upon B.'s request, the Request for arbitration and other procedural documents were also delivered by a court bailiff (*huissier judiciaire*) to an employee at the same address in Cannes. Furthermore, B. saved the Request on a file-sharing website and informed A. of this via a message sent on a social network.

The notifications and communications of the arbitral tribunal were then sent both by post to the address of A. in Cannes and to an email address that A. had transmitted to B. in 2008.

A. and the two Egyptian companies were eventually ordered by the arbitral tribunal to pay a total amount of approximately USD 2 million to B. The award was sent to the parties but could not be delivered to the address of A. in Cannes because the latter was apparently incorrect or incomplete and the telephone number and contact name of the addressee were missing.

Some time later, the *Tribunal de Grande Instance* in Paris granted enforcement of the award. A court bailiff attempted to notify this decision to A. at his address in Cannes, but the latter was absent. The bailiff nevertheless specified that the building manager had confirmed that A. was indeed domiciled at that address.

B. also moved to enforce the award in Switzerland. He first obtained the freezing of A.'s assets, then validated the freezing order with an order to pay which A. opposed, and finally obtained the lifting of the opposition by the *Tribunal de Première Instance* of Geneva, which granted the recognition and enforcement of the award. This decision was confirmed on appeal by the Geneva *Cour de Justice*.

A. moved to set aside the above decision before the Supreme Court, arguing essentially a violation of **Articles V(1)(b) and V(2)(b) NYC**. Concerning the former, A. contended that the submissions and other procedural documents had **not** been **properly notified** to him: they should have been sent to his official domicile in Monaco and not to the address in Cannes and the fact that they were also sent to him by email was not sufficient to render the notification effective. Concerning Article V(2)(b) NYC, A. contended that the recognition and enforcement of the

award would be contrary to **public policy**. According to him, the prohibition of *pacta de quota litis* forms part of Swiss public policy.

Decision: The Supreme Court dismissed both arguments. It first recalled that, pursuant to **Article V(1)(b) NYC**, a court may refuse to recognize or enforce an arbitral award if the party against whom the award is invoked was not given **proper notice** of the appointment of the arbitrator(s) or of the arbitration proceedings, or was otherwise unable to present its case. The Supreme Court stressed that this and the other grounds provided for in Article V NYC must be **interpreted narrowly** in order to favour the enforcement of arbitral awards, and that a party failing to raise a procedural violation or otherwise acting in bad faith is forfeited from invoking said grounds.

The Supreme Court confirmed that the question whether Article V(1)(b) NYC establishes an international standard of the right to be heard or merely refers to the law of the country in which recognition and enforcement are sought is disputed, the trend being to take such law as a basis for the review, but to render case-by-case decisions taking into account the specificities of arbitration and international criteria.

In general, the notification of procedural acts must meet **minimal requirements**, in particular with respect to form and address of the notification. Concerning the **form**, the Supreme Court noted that the national rules applicable to state court proceedings are not relevant, and that **many different means** such as regular mail, registered mail, fax or telex have been deemed appropriate. This being said, the Supreme Court confirmed that notifications made in accordance with the laws of the country where the addressee is domiciled are valid in any event.

Concerning the **address**, the Supreme Court confirmed that communications sent to the **last-known address** of a party, in accordance with the applicable arbitration rules, are fine, in particular when the addressee must reasonably expect to receive a communication.

Applying these principles to the case at hand, the Supreme Court found that the Geneva courts had not violated the NYC by holding that there was no violation of A.'s right to be heard. Indeed, the procedural documents had been validly notified to A. at his last-known address, as admitted by the applicable ICC Rules.

The Supreme Court then examined the second argument invoked by A., i.e. the purported violation of Swiss public policy. It recalled that recognition and enforcement of an arbitral award may also be refused pursuant to **Article V(2)(b) NYC** if such recognition or enforcement would be contrary to the **public policy** of the country where recognition or enforcement is sought.

The Supreme Court confirmed that this exception must also be **interpreted narrowly**, especially in the context of recognition and enforcement of foreign decisions. Accordingly, it is not sufficient that the solution in the foreign decision is different from the one in Switzerland or is unknown in Switzerland. This is even more so in cases where the link with Switzerland is remote or incidental, as in the case at hand.

Regarding the specific argument raised by A. that the *pactum de quota litis* on which B.'s remuneration was based was contrary to public policy, the Supreme Court confirmed that a **method for determining attorney's fees**, including the *pactum de quota litis* which is prohibited under Swiss law, does not necessarily violate public policy simply because it is unknown in Switzerland. What is decisive is whether the **quantitative difference** between said method and the one

that would be applied in Switzerland is **manifestly incompatible with the Swiss sense of justice**.

After recalling that in a previous decision it had already held that attorney's fees amounting to 6,5% of the value in dispute were not sufficiently exorbitant to justify a refusal of enforcement, the Supreme Court came to the same conclusion in the case at hand (in which the attorney's fees (USD 1,837,500) amounted to approximately 2% of the settlement amount earned by A. (USD 80 million)).

The Supreme Court finally confirmed that whether or not the method is permitted under the foreign law governing the merits of the case is irrelevant. Indeed, as already established in previous decisions, it is **not** for the enforcement judge to **examine the validity of the foreign decision**. This question must be raised in challenge proceedings.

Comment: This detailed decision provides useful guidance concerning enforcement proceedings in general, the notice requirements pursuant to Article V(1)(b) NYC, and the determination of attorney's fees in light of Article V(2)(b) NYC.

Regarding the enforcement proceedings in general, the Supreme Court recalled that the enforcement judge cannot review the merits of the case. He or she can **only** review whether any of the **exceptions provided for in Article V NYC** are met, it being stressed that such exceptions must be interpreted narrowly in order to favor the enforcement of arbitral awards.

Regarding the notice requirements, the Supreme Court confirmed its **liberal approach** regarding means of communications (confirming that even regular mail may be fine) and address of notification (confirming that communications may be sent to the last know address of the addressee).

Regarding the determination of attorney's fees, the Supreme Court confirmed, at least implicitly, that ***pacta de quota litis***, although prohibited under Swiss law, **do not necessarily violate Swiss public policy**, provided that the fees are not manifestly incompatible with the remuneration that would have been applied in Switzerland.

B. Decision No. 5A_165/2014 of 25 September 2014

Facts: The Zurich courts granted enforcement of two awards rendered in Sweden. The losing party (X.) moved to set aside the enforcement decision before the Supreme Court arguing a violation of **Article V(2)(b) NYC**. It contended that recognition and enforcement of the awards would violate **public policy** in view of the fact that **criminal proceedings** were pending in Germany against two witnesses accused of having committed perjury in disputing the authenticity of an exhibit.

X. also claimed that the **enforcement proceedings** should be **stayed** pursuant to **Article VI NYC** both because **challenge proceedings** were pending in Sweden and because immediate enforcement would result in X.'s bankruptcy.

Decision: The Supreme Court first confirmed that the recognition and enforcement of an award obtained fraudulently may be contrary to procedural public policy only if the losing party can establish that the **criminal behaviour affected the outcome of the case**. The Supreme Court considered that this was not the case in the present instance since, as held by the Zurich courts, the arbitral tribunal had not considered the relevant exhibit to be material to the outcome of the case.

The Supreme Court further confirmed that, in any event, the **mere existence of criminal proceedings** is **not**

sufficient to find that criminal activity has indeed been committed. In the present case, X. failed to establish that the two witnesses had indeed committed perjury. It even failed to show that the German criminal authorities had taken any measure after the filing of the complaint.

The Supreme Court finally held that the **stay** of the enforcement proceedings was not justified. Whilst leaving open the question whether Article VI NYC, which provides that the enforcing judge may adjourn the decision on enforcement if an application to set aside or suspend the award has been made at the place of arbitration, is applicable in proceedings before the Supreme Court, it held that X. had not established that the **chances of success of the challenge proceedings** pending in Sweden were significant. The argument raised by X. in order to resist enforcement tended to show the opposite.

The Supreme Court also found that the **principle of celerity** did not justify a stay of the enforcement because of the mere existence of challenge proceedings which had just started and whose duration was totally uncertain. In such circumstances a stay of the enforcement proceedings would not be appropriate irrespective of the possible consequences of bankruptcy invoked by X.

Comment: This decision clarifies that **neither** the existence of **criminal proceedings** against a person involved in the arbitration, **nor** the fact that **challenge proceedings** are pending against an award, **are sufficient to refuse enforcement or to stay enforcement** proceedings.[161]

[161] See in this respect VOSER/MENZ, *Does a pending criminal investigation against a witness, or setting-aside proceedings at place of arbitration, prevent enforcement in Switzerland?*, available at: http://www.swlegal.ch/getdoc/330d0a14-0402-4ed7-bb51-bce4221da5c9/2014_Nathalie-Voser_James-Menz_Does-a-pending-crim.aspx.

Regarding the former, in order to successfully resist enforcement one has to establish not only that a criminal offence has been committed, but also that it was material to the outcome of the case. Regarding the latter, to the extent that Article VI NYC applies in proceedings before the Supreme Court (which has been left open), one has to show that the challenge proceedings pending at the place of arbitration have some chances of success and/or that a decision will be rendered in a reasonably short timeframe in order for a stay of enforcement proceedings to be ordered.

V. Costs of federal proceedings

A. Decision No. 4A_70/2015 of 29 April 2015

Decision: This decision, already discussed above,[162] deals with a request for **security for costs**.

The Supreme Court dismissed the request because it had been formulated on the same day on which the defendant filed its observations, i.e. at a moment in time when the costs related to such observations had already been incurred. According to the Supreme Court, this rendered the request for security for costs moot.

B. Decision No. 4A_246/2014 of 15 July 2015

Decision: As already stated,[163] this decision concerned a club, the federation to which the club was affiliated and 9 players represented by an association in the proceedings before the Supreme Court. The Supreme Court admitted

[162] See § II.B.4.h) above.
[163] See § II.B.2.c) above.

only one of the three arguments raised by the club, which concerned only 3 of the players (players 1 to 3). This gave rise to an **interesting allocation of costs**.

The Supreme Court ordered the club to bear 2/3 of the costs, and players 1 to 3, who had objected to the admissibility of the challenge, the remaining 1/3 of the costs. The Supreme Court did not allocate any costs, or grant any compensation to the federation, holding that it had participated in the proceedings without an actual reason. The Supreme Court did not grant any compensation for costs to players 4 to 9 either, because they had been represented by an association rather than by a lawyer.

VI. Conclusion

The period under review has given rise to a number of interesting decisions, which have given the Supreme Court the opportunity to clarify important questions for the first time, and to reaffirm and further develop its case law regarding the different grounds provided for in Article 190(2) PILA.

The most salient developments during the period under review concern **procedural admissibility questions**. On top of confirming for the first time that, notwithstanding the wording of Article 190(3) PILA, parties are entitled to raise grounds based on Article 190(2) letters (c), (d) and (e) PILA in challenge proceedings against preliminary or interim awards concerning the composition and/or jurisdiction of the arbitral tribunal (Article 190(2) letters (a) and (b) PILA), provided that the grounds raised are strictly limited to issues directly concerning the composition and/or the jurisdiction of the tribunal,[164] the Supreme Court had the opportunity to

[164] See ATF 140 III 477 and ATF 140 III 520.

clarify other important questions with respect to the admissibility of challenges, namely that:

- CAS awards upholding an appeal against a decision of a sport federation and sending the case back to the federation in question for a new decision qualify as preliminary or interim awards ("*Zwischenentscheid*");[165]
- unless the agreement or the rules chosen by the parties provide otherwise, the time limit for filing a request to set aside an award starts to run with the notification of the award by email;[166]
- if the envelope containing a submission is returned by the Supreme Court for insufficient postage, the sender must pay the missing amount in order to avoid that its submission be deemed inadmissible; if the sender takes out the submission, inserts it into a new envelope and delivers this envelope to the Supreme Court after the expiry of the deadline, its submission will be considered as belated and, therefore, disregarded.[167]

Regarding the different grounds provided for in Article 190(2) PILA, the decisions that deserve particular attention in our opinion are the following:

- decision No. 4A_709/2014 of 21 May 2015, already highlighted in the Introduction to this paper, in which the Supreme Court clarified that not only can arbitral tribunals appoint **secretaries** and delegate administrative tasks to them, but also that secretaries may be involved

[165] See ATF 140 III 520.
[166] See decision No. 4A_609/2014 of 20 February 2015.
[167] See decision No. 4A_374/2014 of 26 February 2015.

in the deliberations and in the drafting of the award, provided that they act under the supervision and instruction of the arbitral tribunal;

- the 3 decisions dealing with the ***res judicata*** effects of foreign (state court or arbitral) decisions in which the Supreme Court: (i) held that the requirements of *res judicata* must be reviewed according to Swiss law and that a more international or transnational concept of *res judicata* is not applicable in Switzerland;[168] and (ii) confirmed important requirements and consequences of such a principle, such as the need for a foreign decision to be recognizable and enforceable in Switzerland in order to enjoy *res judicata* effects,[169] and the impossibility for a petitioner to invoke grounds in relation to issues already decided in prior awards rendered by the same arbitral tribunal in the same proceedings.[170]
- the 2 decisions in which the Supreme Court dealt with the important distinction between **invalid and pathological (but valid) arbitration clauses**, confirming that: (i) an arbitration agreement is invalid, rather than pathological, if it does not express the intention of the parties to have their disputes decided upon by an arbitral

[168] This means in particular that a second arbitral tribunal is not bound by the reasoning contained in a first award rendered by another tribunal. See decision No. 4A_633/2014 of 29 May 2015. See also the Introduction to this paper.

[169] See decision No. 4A_374/2014 of 26 February 2015, in which the Supreme Court held that the decision at stake could not be recognized in Switzerland because it was incompatible with public policy.

[170] See decision No. 4A_606/2013 of 2 September 2014, in which the petitioner argued a violation of its right to be heard in relation to the arbitral tribunal's failure to take into account arguments pertaining to issues already decided upon by the same tribunal in a prior award.

tribunal rather than a state court;[171] and (ii) that an imprecise or flawed designation of the arbitral tribunal should not lead to the invalidity of the arbitration clause if it is possible to determine which arbitral tribunal the parties had in mind;[172]

- decision 4A_199/2014 of 8 October 2014, in which the Supreme Court confirmed the validity and enforceability of the rule often contained in Procedural Orders No. 1 that only **witnesses whose cross-examination is requested** by the opposing party will be permitted to testify at the hearing; and
- the 2 decisions rendered in setting aside proceedings, as well as a 3rd decision rendered in revision proceedings, dealing with **bribery** and confirming that: (i) whilst bribery is contrary to substantive public policy, it will only lead to the annulment of an award if it is established and if the arbitral tribunal refused to take it into account;[173] and (ii) that the mere discovery after the issuance of the award of evidence of bribery existing before said date is not sufficient to request a revision of the award. Instead, the petitioner must establish not only that this new

[171] See decision No. 4A_676/2014 of 3 June 2015, in which the Supreme Court rejected the validity of the following clause "*this agreement shall be interpreted in accordance with and governed in all respects by the provisions and statutes of the International Chamber of Commerce in Zürich, Switzerland and subsidiary by the laws of Germany*", holding that it did not contain any reference, even indirect, to a dispute to be resolved, and simply dealt with the law applicable to the interpretation of the agreement.

[172] See ATF 140 III 477, in which the Supreme Court found that a clause providing for the jurisdiction of the "*Arbitration Committee, to be established in Basel*" was valid and could be interpreted as giving jurisdiction to the Swiss Chambers' Arbitration Institution.

[173] See decision No. 4A_231/2014 of 23 September 2014 and decisions No. 4A_532/2014 and 4A_534/2014 of 29 January 2015.

> evidence was not known to him or her despite his or her diligence, but also that it could have led the arbitral tribunal to make a different decision.[174]

Particularly noteworthy are the 2 decisions rendered in **enforcement proceedings**, in which the Supreme Court provided helpful guidance regarding: (i) the interpretation of the notice requirements under Article V(1)(b) NYC (holding that different means of communications may be fine (even regular mail) and notification to the last-known address of a party is sufficient);[175] (ii) the conditions under which enforcement may be refused in the event of criminal proceedings against a person involved in the arbitration (Article V(2)(b) NYC); and (iii) whether enforcement proceedings may be stayed pending a challenge against the award (Article VI NYC).[176] Regarding the existence of criminal proceedings, the Supreme Court confirmed that in order to successfully resist enforcement one has to establish not only that a criminal offense has been committed, but also that it was material for the outcome of the case. Regarding a stay of enforcement proceedings, and whilst leaving open the question of whether Article VI NYC applies to proceedings before the Supreme Court, the Supreme Court suggested that in order to be successful with the request for a stay one has to show that the challenge proceedings pending at the place of arbitration have some chances of success and/or that a decision will be rendered in a reasonably short timeframe

[174] See decision No. 4A_247/2014 of 23 September 2014.

[175] See decision No. 5A_409/2014 of 15 September 2014. This decision is also noteworthy insofar as it confirmed that *pacta de quota litis* do not necessarily violate Swiss public policy (Art. V(2)(b) NYC), provided that the attorneys' fees remain reasonable.

[176] See decision No. 5A_165/2014 of 25 September 2014.

Overall, the case law reviewed in this paper confirms that it remains **extremely difficult** to successfully challenge an international arbitration award in Switzerland, be it in setting aside, revision or enforcement proceedings. The fact that only 2 awards were partially annulled for **manifest violations** of fundamental principles such as the *res judicata* effect[177] and the right to be heard of the parties,[178] whereas no award was revised or refused enforcement during the period under review, is a perfect illustration of the restrictive and arbitration-friendly approach that continues to be adopted by the Supreme Court.

Such an approach is welcome provided that it does not become **ultra-restrictive**. In our opinion, this was not the case in any of the decisions rendered during the period under review. The fact that, in one instance, i.e. decision No. 4A_426/2014 of 6 May 2015, we had the rather unsettling impression that the outcome of the case was probably not fair for the losing party,[179] does not affect our assessment. The decision of the Supreme Court to dismiss the challenge was correct in our opinion. Whether the petitioner must blame itself or the CAS Panel is a question to which we cannot respond, for lack of sufficient knowledge regarding the facts of the case and the course of the arbitral proceedings.

Despite the above, we nevertheless find it regrettable that in some instances the Supreme Court has preferred to **leave important and debated issues open** instead of clarifying them in an *obiter dictum* as it sometimes does. In particular, we would have welcomed a clarification whether the principle *ne bis in idem* applies also in sport disciplinary matters (provided that the two sanctions at stake meet the identity

[177] ATF 140 III 520.
[178] Decision No. 4A_246/2014 of 15 July 2015.
[179] See above, § II.B.5.f).

requirement),[180] and whether the "forfeiture effect" in enforcement proceedings applies also to principles examined *ex officio* pursuant to Article V(2)(b) NYC.[181] We would also have welcomed some reasons in support of the Supreme Court's conclusion that the requirement of identity of claims applying to the *res judicata* principle is governed by the *lex fori*, in view of the generally admitted view that arbitral tribunals have no *lex fori*.[182]

Let's hope that the Supreme Court will clarify these and the other questions it left open in its recent decisions in the near future.

VII. Table of cases

A. Set aside proceedings

1. Admissibility of applications to set aside

4A_609/2014 of 20 Feb. 2015	The **manner in which an award must be notified** depends on the agreement or the rules chosen by the parties. If they do not oblige the arbitral tribunal to serve an original hard copy to the parties, the arbitral tribunal is entitled to notify the award by email, in particular when electronic communications are regularly used in the arbitral proceedings. In such circumstances, the **time limit for filing a request to set aside the award** starts to run with the notification of the award

[180] See § II.B.5.c) above, commenting decision No. 4A_324/2014 of 16 October 2014.

[181] See § II.B.5.e) above, commenting decision No. 4A_374/2014 of 26 February 2015.

[182] See § II.B.5.g) above, commenting decision No. 4A_633/2014 of 29 May 2015.

	by email.
4A_374/2014 of 26 Feb. 2015	Strict proof (*preuve stricte*) is required regarding **compliance with time limits** in challenge proceedings; preponderant likelihood (*vraisemblance prépondérante*) is not sufficient. If the envelope containing a submission is returned by the Supreme Court for **insufficient postage**, the sender must pay the missing amount in order to avoid that its submission be rejected; if the sender removes the submission, inserts it into a new envelope and delivers this envelope to the Supreme Court after the expiry of the deadline, its submission will be considered as belated and, therefore, inadmissible.
4A_126/2015 of 14 Apr. 2015	The petitioner must have an **interest worth of protection** for the annulment of the challenged decision. Such an interest must be **actual**, i.e. must exist throughout the entirety of the challenge proceedings. There is no actual interest in challenging a decision of the *juge d'appui* rejecting a challenge against an arbitrator after the arbitral tribunal has already rendered its award.
4A_633/2014 of 29 May 2015	If the arbitral tribunal dismisses a ***res judicata* defence** in a procedural order, it does not render a partial award in the sense of Article 188 PILA (which is challengeable without restriction), but rather a **preliminary or interim award** in the sense of Article 190(3) PILA (which is challengeable only for the grounds set out in Article 190(2)(a) and (b)) because it does not put an end, even partially, to

	the proceedings.
ATF 140 III 477 **ATF 140 III 520**	Notwithstanding the wording of **Article 190(3) PILA**, parties are entitled to raise grounds based on Article 190(2) letters (c), (d) and (e) PILA (i.e. decisions *ultra* or *infra petita*, violations of the principle of equal treatment or the right to be heard and incompatibility with public policy) in challenge proceedings against **preliminary or interim awards concerning the composition and/or jurisdiction of the arbitral tribunal** (Article 190(2) letters (a) and (b) PILA), provided that the grounds raised are strictly limited to issues directly concerning the composition and/or the jurisdiction of the tribunal.
ATF 140 III 520	A **CAS award** which upholds an appeal against a decision rendered by a sport federation and **sends the case back to the federation** for a new decision (so-called "*Zwischenentscheid*") constitutes a **preliminary or interim award**, even if it terminates the appeal proceedings before the CAS.

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

4A_606/2013 of 2 Sept. 2014	Although the disqualification of an arbitrator for **lack of independence or impartiality** does not necessarily require an effective bias but merely an **appearance of a bias**, such an appearance must be based on objectively identified circumstances; the mere subjective impressions of the party filing

	the challenge are not decisive. **Procedural mistakes or erroneous decisions on the merits are not sufficient** to create the appearance that an arbitrator is biased, except for particularly severe or repeated mistakes that would constitute a blatant breach of the tribunal's obligations.
4A_709/2014 of 21 May 2015	Arbitral tribunals sitting in Switzerland can delegate administrative tasks to a **tribunal's secretary** and can seek advice, including legal advice, from **external assistants**, provided that the parties have not agreed to the contrary and the decision-making mandate is fulfilled by the arbitral tribunal alone. The tribunal's secretary can also sit in on hearings and deliberations and be involved in the **drafting of the award**, but only under the instruction and supervision of the arbitral tribunal.

3. Incorrect decision on jurisdiction (Art. 190(2)(b) PILA)

ATF 140 III 477	Interpretation of **pathological arbitration clauses**. An **imprecise or flawed designation of the arbitral tribunal** should not lead to the invalidity of the arbitration clause if it is possible to determine which arbitral tribunal the parties had in mind. *In casu*, a clause providing for the jurisdiction of the "*Arbitration Committee, to be established in Basel*" has been interpreted in favour of the Swiss Chambers' Arbitration Institution.

ATF 140 III 520	Partial annulment of a CAS award for **lack of jurisdiction *ratione personae***. The withdrawal by a player of his appeal against the decision of the FIFA DRC ordering him to compensate his former club prevented the CAS from reviewing said decision insofar as it concerned the player and his former club. The decision had indeed become ***res judicata***.
4A_446/2014 of 4 Nov. 2014	Arbitral tribunal's decisions regarding the **stay of the proceedings** qualify as procedural orders and can thus not be challenged before the Supreme Court, except if they implicitly rule also on the arbitral tribunal's jurisdiction. This was not the case in the present instance, since the decision of the sole arbitrator was strictly limited to the question as to whether the proceedings should be discontinued or stayed, was temporary and expressed a preliminary opinion.
4A_676/2014 of 3 June 2015	**Distinction between invalid and pathological (but valid) arbitration clauses**. An arbitration agreement is invalid, rather than pathological, if it does not express the intention of the parties to have their disputes decided upon by an arbitral tribunal rather than by a state court. This was the case in the present instance, because the relevant clause (providing that "*this agreement shall be interpreted in accordance with and governed in all respects by the provisions and statutes of the International Chamber of Commerce in Zürich, Switzerland and subsidiary by the laws of Germany*") did not contain any reference, even indirect, to a dispute to

	be resolved, and simply dealt with the law applicable to the interpretation of the agreement.

4. Decisions beyond claims or failure to adjudicate claims (Art. 190(2)(c) PILA)

4A_709/2014 of 21 May 2015 **4A_684/2014 of 2 July 2015**	An arbitral tribunal does not decide beyond the claims (***ultra petita***) if it ultimately does not award more than the total amount sought by the claimant, yet assesses some of the elements of the claim differently from that party. This was the case in the two decisions at stake.
4A_246/2014 of 15 July 2015	If an arbitral tribunal fails to rule on a claim raised by the parties, it commits a formal denial of justice and its award can be annulled pursuant to Article 190(2)(c) PILA (***infra petita***). Violation denied in the case at hand.

5. Violation of the principle of equal treatment or the right to be heard (Art. 190(2)(d) PILA)

4A_606/2013 of 2 Sept. 2014	**Minimal duty** to examine and address the **relevant issues** at stake. ***Res judicata* vs. right to be heard**: the arbitral tribunal cannot disregard in its final award an opinion it has expressed in a prior award dealing with a preliminary issue. The tribunal does not violate the petitioner's right to be heard if it disregards arguments pertaining to issues already decided upon in a prior award.

4A_199/2014 of 8 Oct. 2014	The right to be heard of a party is not violated by the arbitral tribunal's **refusal to hear witnesses** in cases in which the procedural rules agreed upon by the parties provide that only **witnesses whose cross-examination is required** can testify at the hearing. Determining the **reliability of a witness** falls under the assessment of evidence which cannot be reviewed. The question as to whether this applies also to the failure to take into account the testimony of a witness due to his or her **close links** with one of the parties was left open.
4A_324/2014 of 16 Oct. 2014	Duty to **object immediately** against any purported violation of due process. Duty to **avoid surprise** in the application of the law. **Minimal duty** to examine and address all the **relevant issues** for the outcome of the dispute.
4A_544/2014 of 24 Feb. 2015	The arbitral tribunal is entitled to limit the **right of a party to question experts** called by its opponent, in particular if the questions are irrelevant, have already been asked or relate to facts that have already been proven. The petitioner must at least **specify** which **questions** it wanted to ask and why they were relevant for the decision in order to have a chance of succeeding in its argumentation.
4A_486/2014 of 25 Feb. 2015	Formal denial of justice for purported non-application of the **principles of interpretation** provided under **Art. 18(1) CO**. The arbitral tribunal does **not** have to **referto** the **legal provisions** it applies in its award as long as it correctly

	applies them.
4A_636/2014 of 16 Mar. 2015	**Weighing of evidence** excluded from the Supreme Court's review. Parties should not limit themselves to simply objecting to the allegations made by the other side, but should **submit counter-evidence** to support their own position. A wrong or even arbitrary **application** by the arbitral tribunal **of the procedural rules** governing the proceedings is not sufficient to annul an award. The **equality of the parties** is not violated unless a party is granted something that is refused to the other party.
4A_554/2014 of 15 Apr. 2015	Arbitral tribunals are free to apply the law (***iura novit curia***) provided that they do not take the parties by **surprise**. The parties can however **limit the arbitral tribunal's mandate** to the legal arguments invoked by them.
4A_70/2015 of 29 Apr. 2015	In CAS proceedings, the **adversarial principle** is not violated if the tribunal holds a **hearing even if one of the parties fails to participate**, provided that said party has been regularly summoned. **A party is bound by its counsel's acts or omissions**, for instance by its failure to participate in a hearing.
4A_426/2014 of 6 May 2015	The **minimal duty** to examine **relevant issues** is not violated if the arbitral tribunal does not review an alternative argument pertaining to quantum after having dismissed the Respondent's liability. The arbitral tribunal can base its

	reasoning on the **parties' legal submissions** and does not have to carry out its own analysis of the relationship between the various arguments raised by the parties.
4A_709/2014 of 21 May 2015	Duty to **substantiate** its arguments. The principle of **equal treatment** of the parties is not violated if the arbitral tribunal refuses to hear witnesses whose cross-examination is not required or if it submits both parties to the same rhythm (however "frantic" it may be).
4A_246/2014 of 15 July 2015	Discretion to **exclude new evidence** in CAS proceedings. **Minimal duty** to examine and address all the **relevant issues** for the outcome of the dispute. The CAS arbitrator **violated** such minimal duty in the case at hand.

6. Incompatibility with public policy (Art. 190(2)(e) PILA)

4A_606/2013 of 2 Sep. 2014	The **principle of good faith** which obliges a party to challenge an arbitrator immediately after discovering his or her purported bias, applies also to the **challenge of experts**. Decisions on **provisional or conservatory measures** do not have ***res judicata*** effect and do not bind the (state or arbitral) tribunal seized with the merits of the case.
4A_231/2014 of 23 Sep. 2014 **4A_532/2014 and 4A_534/2014 of 29**	While **bribery** is contrary to **substantive public policy**, it will only lead to the annulment of an award if it is proven and if the arbitral tribunal refused

Jan. 2015	to take it into account. The principle that criminal proceedings should put on hold civil proceedings ("***le pénal tient le civil en l'état***") is not part of public policy.
4A_324/2014 of 16 Oct. 2014	The principle ***ne bis in idem*** forms part of **procedural public policy**. The application of the principle *ne bis in idem* requires that: (i) the tribunal seized with the first proceedings (i.e. the administrative proceedings) be able to examine in full the facts of the case; and that (ii) the two sanctions under scrutiny address and protect the same legal interest (identity of object). Question as to whether the principle *ne bis in idem* applies also in **sport disciplinary matters** left open because the two sanctions at hand lacked identity.
4A_374/2014 of 26 Feb. 2015	An arbitral tribunal violates procedural public policy if it disregards the ***res judicata*** effects of a foreign arbitral award, provided *inter alia* that said award is capable of being **recognized** in Switzerland. This is not the case if it violates the parties' **right to be heard**. Definition of arbitral award. "**Forfeiture effect**" in case of principles examined *ex officio* pursuant to Art. V(2)(b) NYC.
4A_426/2014 of 6 May 2015	The principle ***pacta sunt servanda*** is violated only if the arbitral tribunal refuses to apply a contractual provision whilst admitting that it binds the parties or, conversely, if it imposes upon them compliance with a clause that it considers as non-binding. **Principle of good faith**, discretion in the allocation of costs and no power to fix apparently unjust or

	unfair situations.
4A_633/2014 of 29 May 2015	Requirements of ***res judicata***. Unless an international treaty states otherwise, the ***lex fori*** determines whether the claim raised before a foreign state court or arbitral tribunal and the claim submitted to a Swiss court or arbitral tribunal are identical. Refusal to apply an **international concept** of *res judicata*. *Res judicata* scope limited to the **operative part** of the award. Restrictive approach to the identity of claims requirement.
4A_246/2014 of 15 July 2015	A violation of the **ECHR** is not sufficient to obtain an annulment of an international award. Parties can freely organize the proceedings and limit the power of review of the arbitral tribunal. Discretion to **exclude new evidence** in CAS proceedings. No limitation of the tribunal's **power of review**.

B. Revision

4A_247/2014 of 23 Sep. 2014 **4A_645/2014 of 20 Feb. 2015**	In accordance with Art. 123(2)(a) FTA, the revision can be requested if the petitioner subsequently discovers **"new" facts or evidence** on which it was unable to rely in the previous proceedings despite its best efforts, excluding any facts or evidence that arose after the challenged decision. The facts and evidence must however be **relevant**. Indeed, the revision is and must remain an **extraordinary and exceptional measure**.

C. Enforcement of arbitral awards

5A_409/2014 of 15 Sep. 2014	The enforcement judge cannot review the merits of the case. He or she can only review whether any of the exceptions of **Art. V NYC** is met, it being stressed that these exceptions must be **interpreted narrowly**. Liberal approach as to **notice requirements** (Art. V(1)(b)): different means of communications may be fine (even regular mail) and notification to the last-known address of a party is sufficient. ***Pacta de quota litis*** do not necessarily violate Swiss **public policy** (Art. V(2)(b)), provided that the attorneys' fees remain reasonable.
5A_165/2014 of 25 Sep. 2014	Neither the existence of **criminal proceedings** against a person involved in the arbitration, nor the fact that **challenge proceedings** are pending against an award, are sufficient to **refuse** enforcement (Art. V(2)(b) NYC)

	or to **stay** enforcement proceedings (Art. VI NYC). Regarding the former, one has to establish not only that a criminal offence has been committed, but also that it was material to the outcome of the case. Regarding the latter, to the extent that Art. VI NYC applies in proceedings before the Supreme Court, one has to show that the challenge proceedings pending at the place of arbitration have some chances of success and/or that a decision will be rendered in a reasonably short timeframe.

Pechstein v. Court of Arbitration for Sport: How Can We Break the Ice?

XAVIER FAVRE-BULLE[1]

Contents

[1] I thank David Dubin, Nadia Smahi and Nicolas Eckert (Lenz & Staehelin Arbitration Group) for the assistance in the preparation of this paper.

I. Introduction

Among the numerous cases in which an athlete has been sanctioned for a doping offence, the *Pechstein* "saga" has regularly been in the spotlight. In a first phase taking place in Switzerland, Ms Pechstein unsuccessfully challenged by all means the decision of disqualification and suspension against her. However, in a second phase which took place before the German courts, the analysis of the case was conducted with a completely different angle, much more favourable to the athlete. Many have seen the outcome as a sharp revolution for the resolution of sports disputes. The issue is not the anti-doping rules themselves and how they have been applied in the *Pechstein* case on the merits. The target of the German courts has been the Court of Arbitration for Sport ("CAS") in Lausanne, the reliability of which as a valid arbitral tribunal has been challenged in two ways: 1) lack of consent of the athlete to have her case referred to the CAS as an arbitration process unilaterally imposed by the sports federation; 2) lack of independence of the CAS, with the consequence that the arbitration agreement is deemed null and void as in breach of German competition law.

After a brief overview of the Swiss and German proceedings, the main issues which will be addressed below are: i) the extent to which a foreign court may revisit the findings of a Swiss arbitral tribunal; and ii) the sources of divergence between the courts as to the consent of the athlete to the CAS jurisdiction, the independence of the CAS and the role of competition law.

II. Swiss Proceedings

A. Decision of the ISU Disciplinary Commission

Claudia Pechstein is a world-renowned German speed skater and a member of the Deutsche Eisschnelllauf-Gemeinschaft e.V. ("DESG"), the German national federation (based in Munich) and member of the International Skating Union ("ISU", based in Lausanne). Among other merits, Claudia Pechstein has earned 7 Olympic medals, including 5 gold medals, since her first participation in the Albertville Winter Olympic Games in 1992.

Ms Pechstein underwent frequent anti-doping controls between 2000 and 2009. None of these controls led to abnormal results. In the course of the World Allround Speed Skating Championships organised in Norway in February 2009, the ISU collected samples that showed an increased level of reticulocytes in Ms Pechstein's blood. The ISU filed a complaint with the ISU Disciplinary Commission ("ISU DC"), accusing Ms Pechstein of blood doping. Ms Pechstein and the DESG denied the accusations.

After hearing experts, the ISU DC considered that the high levels of reticulocytes in Ms Pechstein's blood could be caused by two factors: either voluntary blood manipulation or a very rare congenital blood disease. Ms Pechstein was granted the opportunity to provide medical proof of the existence of such disease, but she refused and asked for a decision on the basis of the evidence already available.

On 1 July 2009, the ISU DC declared Ms Pechstein liable for an anti-doping violation under the ISU anti-doping rules by using a prohibited method of blood doping. Her results obtained during the World Allround Speed Skating

Championships were disqualified and a two-year ineligibility was pronounced.[2]

B. CAS Award

Ms Pechstein and the DESG brought (distinct) appeal arbitration proceedings before the CAS against the decision of the ISU DC. The proceedings were consolidated. On 4 September 2009, the CAS Panel partially upheld an application by Ms Pechstein for interim measures, authorising her to take part in all training sessions in relation to the Vancouver Winter Olympic Games.

The jurisdiction of the CAS was not challenged. In signing the Order of Procedure, the parties agreed to have their dispute decided by the CAS. The CAS Panel considered Ms Pechstein's arguments regarding the methods used for her blood profiling, the results obtained, as well as the likelihood of a congenital blood disease. Several witnesses and experts were heard.

On 25 November 2009, the CAS Panel issued a 63-page award whereby it dismissed the appeals. The ISU DC decision was upheld. Ms Pechstein was disqualified and suspended for two years.[3]

C. Decisions of the Swiss Federal Supreme Court

Ms Pechstein first sought to have the CAS Award set aside by the Swiss Federal Supreme Court. She later applied for the

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[2] Decision of the International Skating Union Disciplinary Commission of 1 July 2009, available online at: http://static.isu.org/media/104483/full-decision-of-the-isu-disciplinary-commission-pechstein1.pdf.

[3] CAS 2009/A/1912, *Claudia Pechstein v. International Skating Union* and CAS 2009/A/1913, *Deutsche Eisschnelllauf Gemeinschaft e.V. v. International Skating Union*, Award of 25 November 2009.

revocation of the CAS Award on the basis of new medical evidence. The Supreme Court dismissed both applications.[4]

1. Setting Aside Proceedings

In its first decision of 10 February 2010[5] based on the grounds relied upon by Ms Pechstein under Art. 190(2) PILA, the Supreme Court dismissed all complaints pertaining *inter alia* to the application of the ECHR, Ms Pechstein's right to be heard and to equal treatment, as well as public policy (in particular regarding the taking of evidence). The Supreme Court also dismissed Ms Pechstein's complaints regarding the improper constitution of the CAS Panel and its alleged lack of independence (Art. 190(2)(a) PILA). It found that the CAS Panel was a legitimate arbitral tribunal. This could not be questioned by unsupported allegations regarding interests of the International Olympic Committee ("IOC"), its representatives and the international sports federations to see Ms Pechstein sanctioned for doping as "an example". Further, the argument that the President of the CAS Panel took a "hard line on doping issues" was not precise enough to create reasonable doubts with regards to his impartiality. Ms Pechstein's additional argument that the IOC and international sports federations could have influenced the CAS Award during the process of scrutiny by the CAS Secretary General – a process specifically provided for in the CAS Code as discussed below[6] – was also deemed purely

[4] See PATOCCHI/FAVRE-BULLE, Case Notes on International Arbitration, SZIER/RSDIE 2012, pp. 384 *et seq*. Ms Pechstein also filed a number of requests for interim relief to participate in competition training sessions, as well as an application for stay of the award. The Supreme Court allowed two of Ms Pechstein's requests, denied the others and dismissed the application for stay. See in detail: RIGOZZI, Speed Skating and Court Rushing, in: Jusletter 28 June 2010.

[5] *Claudia Pechstein v. International Skating Union and Deutsche Eisschnelllauf Gemeinschaft e.V.*, decision by the Swiss Federal Supreme Court No. 4A_612/2009 of 10 February 2010.

[6] V.B.4. below.

speculative. The Supreme Court stressed that, if Ms Pechstein had any issues with the independence of the CAS Panel, she should have raised them from the outset of the CAS proceedings and not for the first time during the setting aside proceedings. Such conduct was incompatible with the principle of good faith.

2. Revocation Proceedings

Following the dismissal of her application to have the award set aside, Ms Pechstein applied for the revocation of the award, relying on new (medical) evidence within the meaning of Art. 123(2) of the FTA. In its decision of 28 September 2010[7] dismissing the application, the Supreme Court considered that Ms Pechstein had not proven that she had been unable to rely on an alleged new diagnosis (with a new algorithm) in the CAS arbitration proceedings. It was held not acceptable to rely on scientifically recognised methods and to submit expert evidence during the arbitration proceedings and, after facing an adverse award, to make an application for revocation based on some unpublished scientific methods yet to be established.

III. German Proceedings

A. Decision of the Landgericht München

Following the proceedings in Switzerland, Ms Pechstein initiated proceedings in Germany before the Landgericht München I ("LG"). She sought to have the two-year ineligibility declared unlawful and claimed damages in excess

[7] *Claudia Pechstein v. International Skating Union (ISU)*, decision by the Swiss Federal Supreme Court No. 4A_144/2010 of 28 September 2010.

of EUR 3.5 million. The LG dismissed the action by a decision dated 26 February 2014.[8]

In the first part of its decision, the LG held that the arbitration agreements entered into between Ms Pechstein and the DESG, on the one hand ("DESG Agreement", in favour of the DIS Sports Arbitral Tribunal in Germany), and Ms Pechstein and the ISU, on the other hand ("ISU Agreement", in favour of the CAS in Switzerland), were both invalid. The Court considered that Ms Pechstein had no other alternative but to sign entry forms referring to CAS arbitration if she wished to participate in international competitions and thus practice her profession. The LG found that this resulted in a structural imbalance ("*strukturelle Unterlegenheit*") between the athletes and the sports federations. More specifically, the DESG Agreement, which was governed by German law, was found to be invalid due to the absence of free consent by Ms. Pechstein; her waiver of the procedural rights available before the state courts was *contra bonos mores* within the meaning of §138(1) of the German Civil Code (*Bürgerliches Gesetzbuch*, "BGB").[9] For its part, the ISU Agreement, governed by Swiss law, was also found to be invalid, as it breached Art. 27(2) CC, pursuant to which "*no person may surrender his or her freedom or restrict the use of it to a degree which violates the law or good morals*". The Court held that, in view of the ISU's position at the time of the conclusion of the arbitration agreement, Ms Pechstein could not validly waive her right to justice. The LG considered that the Swiss Federal Supreme Court's approach towards sports arbitration agreements – whereby such agreements are deemed valid notwithstanding the somewhat limited free consent of the athlete as

[8] LG München I Az. 37 O 28331/12, Urteil vom 26. Februar 2014, reported in Causa Sport 2014, pp. 154 *et seq*.

[9] In addition, the arbitration clause was held invalid as to its content ("*Inhaltskontrolle*" within the meaning of §§138, 242 BGB).

discussed below[10] – could not be followed in the light of Art. 6 ECHR.

Despite having found both arbitration agreements invalid, the LG then considered that the CAS Award had carried *res judicata* effect. The Court held that Ms Pechstein could not invoke the invalidity of the arbitration agreement in order to prevent recognition of the CAS Award pursuant to Art. V(1)(a) NYC. Although Ms Pechstein was aware of the invalidity of the arbitration agreement at the time of the CAS proceedings, she proceeded without raising an objection as to the Panel's jurisdiction. In line with general principles of international arbitration, Ms Pechstein implicitly waived her right to subsequently invoke the invalidity of the arbitration agreement; hence, she was precluded from doing so before the German Courts. The LG denied further objections based on the NYC, such as Ms Pechstein's contention that the CAS Award breached (both procedural and substantive) public policy.

B. Decision of the Oberlandesgericht München

Ms Pechstein appealed against the LG decision to the Oberlandesgericht München ("OLG"), which upheld the appeal by a decision dated 15 January 2015.[11] In essence, the OLG held that the ISU Agreement was null and void and denied the *res judicata* effect of the CAS Award. Ms Pechstein was not prevented from seeking relief before the state courts, in particular in claiming damages against the ISU. Unlike the LG, the appellate Court considered that an

[10] V.A. below.

[11] OLG München Az. U 1110/14 Kart, *Claudia Pechstein gegen Deutsche Eisschnelllauf-Gemeinschaft e.V. (DESG) und International Skating Union (ISU)*, Teil-End- und Teil-Zwischenurteil vom 15. Januar 2015, reported in SpuRt 2015, pp. 78 ff; RIW 2015, pp. 233 *et seq*.

arbitration agreement is not necessarily null and void due to the lack of free consent of the athlete, and does not *per se* breach Art. 6 ECHR. By contrast, the OLG held that the arbitration agreement in favour of the CAS breached mandatory provisions of German competition law.

According to the OLG, the ISU is a monopolist within the relevant market, which it defined as the market for the organisation of speed skating world-championships. As a monopolist, the ISU is prohibited under German law from imposing business terms that would likely not be agreed to in a free market. This includes arbitration agreements which impair recourse to state courts. The OLG emphasised that the requirement for an athlete to enter into an arbitration agreement for disputes arising out of international competitions is not *per se* an abuse of a dominant position as long as the agreement provides for a "structurally neutral" tribunal.

However, an arbitration agreement referring disputes to the CAS would not have been agreed to by an athlete in a free market situation, due to the "structural imbalance" of CAS arbitration in favour of the sports federations. According to the Court, a disproportionate influence in favour of the sports federations is in particular reflected by Art. S4 and S14 of the CAS Code 2004, which set out the rules of constitution of the International Council of Arbitration for Sport ("ICAS") and the selection of arbitrators to be included on the CAS closed list of arbitrators. These structural deficiencies affect the independence of the CAS arbitral tribunals. The OLG also criticised the imbalance arising from Article R54 of the CAS Code 2004, which in its view allowed the sports federations to exercise an indirect influence on a CAS Panel through the nomination of its President. No rational justification for the imbalance in favour of the sports federations was found to exist. As a consequence, the

arbitration agreement was held to be null and void because of the abuse by the ISU of its dominant position.

Having established its jurisdiction over the claims asserted by Ms Pechstein, the OLG further held that the CAS Award has no *res judicata* effect. The CAS Award does not necessitate a particular recognition process in Germany; however, the Court must at least verify that the requirements for the recognition of that award are met. Pursuant to German law and Art. V(2)(b) NYC, recognition and enforcement of an arbitral award may be denied if the award is contrary to German public policy, which includes fundamental provisions of competition law. Given that the CAS arbitration agreement imposed by the ISU on Ms Pechstein is an abuse of dominant position prohibited under German competition law, the CAS Award which upheld such arbitration agreement cannot be recognised and enforced in Germany. Therefore, the German Courts are not bound by the findings of the CAS as regards the doping sanction at stake; they will be able to examine the merit of Ms Pechstein's action, which is admissible (in part).

This interim decision allowing further proceedings on the merits has been challenged by the ISU before the German Supreme Court (*Bundesgerichtshof*). According to our information, no decision is expected before 2016.

IV. How Far May a Foreign Court Revisit the Findings of a Swiss Arbitral Tribunal?

The way in which the two Munich Courts reviewed the CAS Award in the *Pechstein* case calls for an analysis in two parts: (1) what are the situations in which, and the conditions under which, a foreign court may make findings on a dispute which already led to a first decision by the CAS

in Switzerland, and (2) did the German Courts remain within what is acceptable when revisiting the *Pechstein* case?

A. Principles

An arbitral award made by an arbitral tribunal sitting in Switzerland is final from its notification to the parties (Art. 190(1) PILA). The award may be set aside before the Swiss Federal Supreme Court (Art. 190(2) PILA). The suspensive effect is not automatic; it may be requested[12] and the situations in which it is granted are rather exceptional.[13] In the absence of any suspensive effect, or when the award is ultimately upheld by the Swiss Federal Supreme Court upon the dismissal of the application to set aside, the award may be sought to be enforced, in Switzerland or abroad.

In a foreign state, the Swiss award has neither any existence nor binding effects unless and until it is recognised and enforced or at least held recognisable, most often in accordance with the NYC (when applicable). Recognition and enforcement of the award may be refused only if at least one of the narrow grounds set out in Art. V is met. Most courts interpret these grounds narrowly in order to safeguard the "pro-enforcement-bias" of the Convention.[14]

A foreign court should in principle not revisit a decision on the merits (whether a judgment or arbitral award) made in Switzerland in the same case. The general and widely recognised principle of civil procedure barring an open review of a Swiss decision in subsequent proceedings abroad is *res judicata*. In a system based on principles of natural justice and legal certainty, there is an obvious interest that a dispute between parties already settled by a decision in force

[12] Art. 103 FTA.

[13] In Ms Pechstein's case, the athlete's application for stay of the award was dismissed (see footnote 4 above).

[14] FAVRE-BULLE, New York Convention, p. 65.

is not revisited by another court or tribunal in subsequent proceedings. When a party is unhappy with a first decision and seizes a second court to hear the matter again, that court should in principle dismiss the action as it is bound by the *res judicata* effect of the first decision. When the second court is not in the same state, it will also have to consider as an ancillary issue whether the first decision is recognisable. Whilst clear in its nature, *res judicata* is nevertheless a principle of law the application of which may slightly vary from a state to another (*e.g.* as to whether the first decision is binding on the second court only with respect to its operative part or also as regards to its reasons).

B. The German Court Decisions in *Pechstein*

The *Pechstein* case, namely the dispute between the athlete and the ISU regarding the sanction applied for a doping offence, has been fully heard and finally decided by an arbitral tribunal sitting in Switzerland, *i.e.* a CAS Panel. The CAS Award has been upheld by the Swiss Federal Supreme Court, both in setting aside and revocation proceedings. It has not been sought to be recognised and enforced abroad, in particular not in Germany, since there was no need to do so (Ms Pechstein was banned from all competitions for two years by application of the ISU anti-doping rules). In short: the CAS Award was final and binding; there was no reason that it be revisited by any other judicial body.

The very clever move by Ms Pechstein was to initiate new proceedings on the merits in Germany, in her own country before the Munich Courts (where the national federation [DESG] has its registered office), in suing the ISU as co-defendant pursuant to Art. 6(1) of the Lugano Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, 2007 ("Lugano Convention"). Ms Pechstein is seeking a declaration that her sanction of 2009 is invalid, as well as significant damages.

From a formal point of view, this prayer for relief is different from what has been decided in the operative part of the CAS Award. However, it is fairly obvious that Ms Pechstein's action in Germany is intended to have the findings of the CAS revisited by a new court having a fresh look at a matter already decided on the merits.

In such circumstances, one would have expected the Munich Courts to have taken a very prudent approach of the case in avoiding the consideration of issues of substance already decided by a foreign tribunal. The main obstacle for the Munich Courts was the *res judicata* effect of the CAS Award, which prevented them from deciding afresh on matters already adjudicated upon by a first tribunal. Depending on how *res judicata* is applied in German civil procedure, this principle could apply directly, if the applicable requirements are met, or at least indirectly, if the Courts consider that the new action by Ms Pechstein in Germany runs counter to the rules of good faith and constitutes an abuse of process.

Two other issues are also relevant. First, while the jurisdiction of the German Courts rests on the Lugano Convention, arbitration is expressly excluded from the scope of application of that treaty, in Art. 1(2)(d). Considering that Ms Pechstein was bound by a CAS arbitration agreement with the ISU (which led to the CAS Award being made on that basis), the German Courts could have decided that they had no jurisdiction to hear Ms Pechstein's action in Germany against the ISU based on the Lugano Convention. Second, Ms Pechstein had not raised the invalidity of the arbitration agreement before the CAS and she had not denied the jurisdiction of that arbitral tribunal. One could consider that, after having accepted to have her case fully heard by the CAS, Ms Pechstein was precluded from denying the jurisdiction of that tribunal in subsequent proceedings; her

new action in Germany could thus be seen as an abuse of right (*venire contra factum proprium*).[15]

Surprisingly, neither the LG nor the OLG exploited these routes as one would have expected. Instead of starting with the issues of the arbitration exclusion in the Lugano Convention, *res judicata* and the principle of good faith and the prohibition of the abuse of right, both Courts first embarked on a thorough analysis of the validity of the arbitration agreement, whether as to Ms Pechstein's consent to have her case referred to CAS arbitration (LG) or in competition law (OLG), as if the German Courts were the first courts to hear the matter on the merits. At no point did the German Courts apply a *prima facie* test whereby, in presence of an arbitration agreement, the detailed examination of the jurisdiction under that agreement should be left to the arbitral tribunal; the so-called negative effect of the competence-competence principle was not considered.[16]

Res judicata and the abuse of process by Ms Pechstein were considered by the LG, but only at the end of the decision, after lengthy reasons on the invalidity of the arbitration agreement. Since the LG ultimately dismissed Ms Pechstein's claims, on the ground that she had not raised any jurisdictional objection before the CAS and was thus bound by the *res judicata* effect of the CAS award, one may wonder why the LG dedicated significant parts of its decision to Ms Pechstein's lack of consent as to the CAS arbitration agreement "imposed" by the ISU. As regards the OLG, it took another approach in denying any *res judicata* effect to the CAS Award on the ground that it could not be recognised in Germany since the abuse of dominant position of the ISU in "imposing" a CAS arbitration agreement was against

[15] DUVE/RÖSCH, Kartellrecht, p. 73; MONHEIM, pp. 93-94. Contra: ROMBACH, p. 110.
[16] See in detail: GAILLARD, pp. 257 *et seq*.

public policy. Although the validity of an arbitration agreement providing for arbitration in Switzerland in a matter also governed by Swiss law on the merits should be decided under Swiss law by the arbitral tribunal constituted under that agreement (Art. 178, 186, 187 PILA), the OLG applied conflict of laws provisions and provisions of substantive law exclusively under German law.[17]

The specific grounds held by the German Courts will be discussed in the next section, to assess the extent to which these grounds had sufficient merit to hold in favour of Ms Pechstein.

The preliminary conclusion to be drawn at this juncture is the great concern one should have in the critical stand taken by the German Courts, with their unfettered power to review and decide on issues already considered by a foreign tribunal. On that basis, other parties unhappy with a first decision might wish to have it reconsidered on the merits *de novo* by a second court, although without any good reason insofar as the first decision was final and in force. When the Lugano Convention was adopted, the underlying idea of the Member States was that a European court seized after a first decision had been made in another European country should recognise and enforce it without any review of the merits of the decision (Art. 36) and even without considering in most cases whether the first court had jurisdiction (Art. 35). In light of such spirit of judicial cooperation in Europe, it is puzzling that a CAS award made in Switzerland, when brought before the German courts, draws little interest and that the German courts would feel entitled to proceed with a full review of the substance of the dispute already decided, in disregarding the arbitration agreement. The *Pechstein* case may have very negative consequences for arbitration and put at risk the legal certainty of arbitral awards made in

[17] See DUVE/RÖSCH, Kartellrecht, pp. 73-74.

Switzerland when they are revisited by a foreign court without the appropriate restraint.

V. The Swiss View versus the German View: the Sources of Divergence

On the one hand, the *Pechstein* case was successively heard in Switzerland by the ISU instances, a CAS Panel and the Swiss Federal Supreme Court. The sanction against Ms Pechstein for a doping offence and the submission of the dispute to CAS arbitration were considered valid and enforceable. On the other hand, for certain grounds, both the LG and OLG Munich came to completely different conclusions. The question arising for determination, when comparing the "Swiss approach" and the "German approach" as to the issues at stake, is: who is right?

A. The Athlete's Consent to the CAS Jurisdiction

Arbitration is of a consensual nature, and such is supposed to be the case of CAS arbitration,[18] which is not *per se* intended to be a form of forced or compulsory arbitration.

[18] See Article R27 CAS Code (2013 version): "*These Procedural Rules apply whenever the parties have agreed to refer a sports-related dispute to CAS. Such reference may arise out of an arbitration clause contained in a contract or regulations or by reason of a later arbitration agreement (ordinary arbitration proceedings) or may involve an appeal against a decision rendered by a federation, association or sports-related body where the statutes or regulations of such bodies, or a specific agreement provide for an appeal to CAS (appeal arbitration proceedings)".* For appeals arbitration proceedings, see Article R47 CAS Code: "*An appeal against the decision of a federation, association or sports-related body may be filed with CAS if the statutes or regulations of the said body so provide or if the parties have concluded a specific arbitration agreement and if the Appellant has exhausted the legal remedies available to him prior to the appeal, in accordance with the statutes or regulations of that body*".

However, the reality of sports disputes is different, as discussed below.

When assessing the validity of a CAS arbitration agreement, a CAS Panel may apply Swiss law under Art. 178(2) PILA. As for any other system of law, the arbitral tribunal will have to determine whether the legal requirements are met in order to consider that an (arbitration) agreement has validly been entered into. Under Swiss law, the basic requirement is that the parties have expressed their mutual intention to refer their disputes to CAS arbitration (Art. 1 *et seq.* CO) and that the parties' consent was not vitiated (Arts 21, 23 *et seq.* CO).

This test does not automatically lead to acknowledge that a CAS arbitration agreement is valid and binding and that the CAS has jurisdiction. There are instances where, in view of the circumstances of the case, the Swiss Federal Supreme Court disagreed with the CAS Panels and held that a CAS arbitration agreement had not properly been entered into.[19] However, as regards the consent given by the athlete when agreeing to a CAS arbitration agreement contained in the statutes of a sports federation, the decided cases of the Swiss Federal Supreme Court show that the test should not be too strict.

This "liberal approach" ("*Wohlwollen*"; "*bienveillance*") has been applied in order to favour prompt settlements by specialised arbitral tribunals with sufficient guarantees of independence and impartiality, including in anti-doping matters in view of the significant role taken by the CAS in the fight against doping.[20] When reviewing the validity of

[19] See *e.g. Busch v. World Anti-Doping Agency (WADA)*, decision by the Swiss Federal Supreme Court No. 4A_358/2009 of 6 November 2009; *X. v. Y.*, decision by the Swiss Federal Supreme Court No. 4A_456/2009 of 3 May 2010.

[20] See *e.g.* the leading *Cañas* case: *X. v. ATP Tour and Tribunal Arbitral du Sport (TAS)*, BGE/ATF 133 III 235, 22 March 2007*; Fussballclub X. v. Y. S.à.r.l.*,

such arbitration agreements, the Supreme Court gives more weight to substantive consent (Art. 178(2) PILA) than to the formal requirements (Art. 178(1) PILA), in admitting clauses contained in statutes and therefore incorporated by reference.[21] Regarding the substantive consent, the Supreme Court also assumes that an athlete agrees to the regulations of a federation when he/she seeks a general authorisation from that federation in order to be allowed to participate in a competition.[22]

This position of the Swiss courts is of course open to debate and some commentators and practitioners have expressed criticism.[23] However, the merit of this soft approach in the review of the athlete's consent is to be pragmatic and efficient. Although leading commentators rather analyse the Supreme Court's position as the acknowledgement that sports arbitration is in fact non-consensual and compulsory (in particular based on the *Cañas* decision), the validity of the arbitration agreement despite the athlete's lack of true consent is supported.[24]

The reality of sports is that the athletes want to participate in competitions, not negotiate with federations as to the contents of a dispute resolution clause. The professional athletes usually know that the statutes of their international federation provide for CAS arbitration and that CAS arbitration is not worse than most state courts with poor knowledge of sports law. Accordingly, those athletes accept at least by conduct that the CAS would be the tribunal of

BGE/ATF 138 III 29, 7 November 2011; *A. and B. v. AMA and VTV*, decision by the Swiss Federal Supreme Court No. 4A_428/2011 of 13 February 2012.

21 *A. v. World Anti-Doping Agency (WADA), Fédération Internationale de Football Association (FIFA) and Cyprus Football Association (CFA)*, decision by the Swiss Federal Supreme Court No. 4A_640/2010 of 18 April 2011.

22 *X. v. Y. and Fédération Internationale de Football Association (FIFA)*, decision by the Swiss Federal Supreme Court No. 4A_548/2009 of 20 January 2010.

23 See *e.g.* BADDELEY, pp. 717-719; ZEN-RUFFINEN, pp. 489-495.

24 RIGOZZI/ROBERT-TISSOT, pp. 64-72.

competent jurisdiction in case they have to challenge a decision of their sports federation. The submission that the athlete did not consent to CAS arbitration is often an argument used by legal counsel when the CAS award was not favourable to their client. This is what happened with Ms Pechstein.

The Munich Courts did not consider these aspects. The LG applied a very strict test of consent, which is hardly realistic and would suggest that most arbitration agreements incorporated by reference to the statutes/regulations of the sports federation and/or competition entry forms are null and void as they are imposed on athletes, who have no choice but to agree to them if they want to participate in competitions. This approach – amounting to a quasi-presumption of nullity of arbitration agreements resorted to for sports disputes – goes too far.[25] Whilst acknowledging the advantages of a specialised tribunal dealing with sports disputes, the OLG, for its part, criticised arbitration clauses used to force athletes to refer their disputes to an arbitral tribunal that lacks sufficient independence.

Arbitration agreements proposed by sports federations in favour of CAS or other arbitration schemes (*e.g.* DIS Sports Arbitral Tribunal in Germany) are in the interest of an efficient resolution of the dispute.[26] They are not imposed by sports federations simply willing to abuse their dominant position.[27] For all sports submitted to the World Anti-Doping Code adopted by the World Anti-Doping Agency ("WADA"), the CAS is specifically the tribunal mandatorily designated to hear appeals for international events or international-level athletes. This is why CAS arbitration was referred to in the

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[25] BRANDNER/KLÄGER p. 115; ROMBACH p. 109; Note on LG München by MAISONNEUVE, Chronique de jurisprudence arbitrale en matière sportive, Revue de l'arbitrage 2014, pp. 670 *et seq.*, 672.

.[26]. RIGOZZI/ROBERT-TISSOT, p. 68; DUVE/RÖSCH, Pechstein, p. 223.

[27] GÖKSU, p. 360.

statutes of the ISU. CAS arbitration allows sports disputes to be decided in one forum worldwide, in principle efficiently (short proceedings), with the same rules applying to all athletes, thereby ensuring equal treatment.[28]

For these reasons, CAS arbitration agreements are not *contra bonos mores*. They do not *per se* constitute a contractual restriction on the economic freedom of the athletes within the meaning of Art. 27(2) CC.[29] This provision of Swiss law may apply in very specific circumstances, but not in a very broad way simply because a CAS arbitration agreement is at stake. Art. 27(2) CC was applied by the Swiss Federal Supreme Court in the *Matuzalem* case in view of the sanction regime imposed by the FIFA Disciplinary Code when a football player does not pay the damages decided against him, not at all because of the presence of a CAS arbitration agreement.[30] In sum, Swiss law was not correctly applied by the LG.[31] Further, referring a sports dispute to CAS arbitration is not incompatible with Art. 6 ECHR.[32]

Another fundamental circumstance acknowledged by the LG but somewhat ignored by the OLG (for which the abuse of ISU's dominant position prevailed) is that Ms Pechstein had agreed to the jurisdiction of the CAS when appearing before it, at least in signing the Order of Procedure and not raising any jurisdictional objection. In so doing, the athlete waived any grievances she could have as to the invalidity of the CAS

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[28] RIGOZZI/ROBERT-TISSOT, p. 72; Note on LG München by MAISONNEUVE, Chronique de jurisprudence arbitrale en matière sportive, Revue de l'arbitrage 2014, pp. 670 *et seq.*, 673; GÖKSU, p. 360.

[29] GÖKSU, p. 359; RIGOZZI/ROBERT-TISSOT, pp. 71-72. Contra : BADDELEY, pp. 710 – 714; ZEN-RUFFINEN, pp. 488-494.

[30] *Francelino da Silva Matuzalem v. Fédération Internationale de Football Association (FIFA)*, BGE/ATF 138 III 322, 27 March 2012. See FAVRE-BULLE/VIRET, pp. 393 *et seq.* and the references cited.

[31] GÖKSU, p. 363; HAAS, pp. 708-713, 733.

[32] HAAS, pp. 716-733. Contra: MURESAN/KORFF, p. 10.

arbitration agreement she had agreed to (unless her consent was vitiated, which she did not contend). As a general principle of international arbitration, a plea against the jurisdiction of the arbitral tribunal must be presented at the outset of the arbitration proceedings (see Art. 186(2) PILA under Swiss law and Art. 1040(2) ZPO under German law). As emphasised above,[33] relying on the absence of consent to challenge the validity of the arbitration agreement in subsequent court proceedings after an adverse CAS award is not compatible with the rules of good faith and should have been disregarded by the OLG.

B. Sufficient Independence of the CAS?

1. The CAS as a True Arbitral Tribunal

In view of the increasing number of sports disputes and the absence of any independent authority that specialising in such disputes, the CAS was set up and became operational in 1984 on the initiative of the IOC. Over time, international sports federations adopted CAS arbitration agreements in their statutes and the CAS became the most important sports dispute resolution institution worldwide.

After amendments to its statutes and procedural rules in 1990, the CAS faced cases before the Swiss Federal Supreme Court where its independence was tested by applications to set aside filed by athletes. In the first leading case of 1992 (*Gundel*),[34] the Supreme Court, while acknowledging the nature of the CAS as an independent arbitral tribunal despite its closed list of arbitrators, emphasised numerous ties between the CAS and the IOC (in particular as regards the costs of the CAS, its statutes and

[33] IV. B. above.

[34] *Gundel v. Fédération Equestre Internationale and Tribunal Arbitral du Sport*, BGE/ATF 119 II 271, 15 March 1993.

the appointment of the arbitrators on the CAS list), which could compromise the independence of the CAS in situations where the IOC would be a party to the proceedings.

This led to a major reform of the CAS, characterised by the setting up of the ICAS, which took over responsibilities from the IOC to ensure more independence, and the adoption of the Code of Sports-related Arbitration ("CAS Code"), which came into force on 22 November 1994.

Among other cases brought before the Supreme Court after that reform,[35] the Supreme Court confirmed in the *Lazutina* case,[36] upon a fresh and thorough review of the institution and its rules, that the CAS was sufficiently independent from the IOC. Since then, this position has been consistently maintained, including in Ms Pechstein's own case decided on 10 February 2010 as described above.[37]

The CAS Code has regularly been amended since its adoption, to adapt it to modern arbitration practice and standards, and to take into account certain developments in case law.[38] The main revisions came into force in 2004, 2012 and in 2013 for the current version. The cornerstone of the *Pechstein* case lies in the provisions of the version of the CAS Code which applied at the time (2004), some of which have subsequently been amended, as discussed below. The main issues stressed by the OLG as impeding the

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[35] *Nagel v. Fédération Equestre Internationale*, decision by the Swiss Federal Supreme Court No. 4C_44/1996 of 31 October 1996; *Raducan v. Comité International Olympique*, decision by the Swiss Federal Supreme Court No. 5P.427/2000 of 4 December 2000; *Stanley Roberts v. Fédération Internationale de Basketball (FIBA)*, decision by the Swiss Federal Supreme Court No. 4P.230/2000 of 7 February 2001.

[36] *A. and B. v. Comité International Olympique, Fédération Internationale de Ski and Tribunal Arbitral du* Sport, BGE/ATF 129 III 445, 27 May 2003.

[37] II.C.1. above.

[38] RIGOZZI/HASLER/QUINN, pp. 2 *et seq.*; FAVRE-BULLE, CAS Code, p. 46. See also RIGOZZI, *L'importance du droit suisse de l'arbitrage dans la résolution des litiges sportifs internationaux,* RSD 2013 I, p. 301 *et seq.*

independence of the CAS concern the influence of the ICAS on the list of approved CAS arbitrators (i) and the influence of the CAS on the appointment of the President of a CAS Panel (ii); although this was not discussed by the OLG, the LG further criticised the scrutiny of the draft award by the CAS Secretary General (iii).

2. The CAS List of Arbitrators

The selection of arbitrators in CAS arbitration proceedings is based on a closed list from which the parties have to pick arbitrators to constitute the CAS Panel. This system has been considered efficient since it guarantees that the arbitrators have sufficient expertise in sports and arbitration.[39] The OLG did not contest the principle of a list, but the way arbitrators are selected to be on that list, considering that sports organisations have a decisive influence on the selection of the persons acting as CAS arbitrators.

According to Art. S6(3) of the CAS Statutes, the ICAS appoints the arbitrators who constitute the list of CAS arbitrators. Under the 2004 version of the CAS Statutes, in force at the time of the CAS proceedings in Ms Pechstein's case, Art. S14 provided that, in establishing the list of CAS arbitrators, the ICAS shall "*call upon personalities with full legal training, recognized competence with regard to sports law and/or international arbitration, a good knowledge of sport in general and a good command of at least one CAS working language*". In addition, the ICAS had to appoint arbitrators pursuant to a specific composition (Art. S14): (a) 1/5th of the arbitrators selected from among the persons proposed by the IOC, chosen from within its membership or from outside; (b) 1/5th of the arbitrators selected from among the persons proposed by the International Sports

[39] See *e.g.* DUVAL/VAN ROMPUY, p. 22.

Federations ("IFs"), chosen from within their membership or outside; (c) 1/5th of the arbitrators selected from among the persons proposed by the National Olympic Committees, chosen from within their membership or outside; (d) 1/5th of the arbitrators chosen, after appropriate consultations, with a view to safeguarding the interests of the athletes; (e) 1/5th of the arbitrators chosen from among persons independent of the bodies responsible for proposing arbitrators in conformity with Art. S14.

Accordingly, only 2/5th of the arbitrators were not designated by sports organisations. These 2/5th were to be nominated by the ICAS, whose composition is in turn governed by Art. S4.

Pursuant to Art. S4 (substantially the same in the 2004 and 2013 versions), the ICAS is composed of twenty experienced jurists appointed in the following manner: (a) four members are appointed by the ("IFs"), *viz.* three by the Summer Olympic IFs ("ASOIF") and one by the Winter Olympic IFs ("AIOWF"), chosen from within or from outside their membership; (b) four members are appointed by the Association of the National Olympic Committees, chosen from within or from outside its membership; (c) four members are appointed by the IOC, chosen from within or from outside its membership; (d) four members are appointed by the twelve members of the ICAS listed above, after appropriate consultation with a view to safeguarding the interests of the athletes; (e) four members are appointed by the sixteen members of the ICAS listed above and chosen from among personalities independent of the bodies designating the other members of the ICAS.

It results from Art. S4 that the sports organisations designate 12 members out of the 20 that constitute the ICAS. These 12 members then designate the 1/5 of the members in the interests of the athletes and then have an

influence on the designation of the last 1/5 of the arbitrators on the list.

The OLG considered that, through their influence on the composition of the ICAS, the sports federations exercised a considerable influence on the composition of the list of CAS arbitrators. The independence of the ICAS itself was also questioned given the influence of sports federations on its very own composition. In short, the OLG took the view that this "structural deficiency" threatened the neutrality of the arbitral tribunal, regardless of the fact that a person included on the CAS list may or may not be personally connected to a sports federation. In other words, the OLG considered that the "tainted" composition of the ICAS influences all arbitrators on the list. An athlete should rather have the possibility of picking the arbitrator of his/her choice, perhaps while additionally proving that the arbitrator has the expertise needed.

These reasons are somewhat surprising in that they presume an inherent lack of independence of the individuals composing the ICAS and in turn of the list of CAS arbitrators, as if a person potentially close to a sports federation should by nature be biased. This strong stance has never been shared by the Swiss Federal Supreme Court, which preferred to limit its considerations on a possible lack of independence to situations where concrete circumstances so suggest.

In any event, the 2004 CAS Statutes have been revised since the *Pechstein* case. The current 2013 CAS Statutes provide for a new process to establish the list of arbitrators under Art. S14:

> "*In establishing the list of CAS arbitrators, ICAS shall call upon personalities with appropriate legal training, recognized competence with regard to sports law and/or international arbitration, a good knowledge of sport in general and a good command of at least one*

> *CAS working language, whose names and qualifications are brought to the attention of ICAS, including by the IOC, the IFs and the NOCs. ICAS may identify the arbitrators with a specific expertise to deal with certain types of disputes*".

Since Arts. S4 and S6(3) of the CAS Statutes have substantially remained the same, the ICAS still designates the arbitrators on the list and is still composed in the same manner. If the issue raised by the OLG lies in the constitution of the ICAS itself, the amendments to the disputed provisions have not resolved the problem. However, it would be quite schizophrenic to presume that the arbitrators on the CAS list, despite the new appointment system in Art. S14, are still influenced by the sports federations having themselves an influence on the composition of the ICAS. Such considerations do not exist when bodies of arbitration institutions appoint arbitrators (although not from a closed list in commercial or investment arbitration). Creating high suspicion of bias simply because one is dealing with sports organisations seems unjustified, not to say unfair.

3. Appointment of the President of a CAS Panel

The OLG criticised the process by which the President of a CAS Panel is appointed, *i.e.* by the President of the Appeals Arbitration Division,[40] who is himself nominated by the ICAS (Art. S6(2) of the CAS Statutes).

[40] Article R54 of the CAS Code provides in relevant part (the 2004 version was substantially the same) that "*If three arbitrators are to be appointed, the President of the Division shall appoint the President of the Panel following nomination of the arbitrator by the Respondent and after having consulted the arbitrators*. *The arbitrators nominated by the parties shall only be deemed appointed after confirmation by the President of the Division. Before proceeding with such confirmation, the President of the Division shall ensure that the arbitrators comply with the requirements of Article R33*".

In the OLG's opinion, since the sports federations influence the composition of the ICAS, the designation by the ICAS of the President of the Division allows him to have an indirect influence on the third member of the Panel that will deal with a given dispute.

Again, this position may appear rather extreme in that it assumes that the President of a CAS Panel will more often than not be chosen to preserve the interests of the sports federation involved in the dispute, as opposed to those of the athlete. Compared to other sets of arbitration rules, an efficient system would have been to let the party-appointed arbitrators select the president, possibly in consultation with the parties as is often the case in commercial arbitration. The appointment by a representative of the arbitration institution upon mere consultation of the party-appointed arbitrators certainly leaves more discretion to the CAS in the selection of what they consider suitable chairpersons. However, this does not necessarily make this choice arbitrary and pro-sports organisations biased.

4. Proofreading of the Draft Award

As an additional flaw, the LG mentioned the proofreading of arbitral awards by the CAS Secretary General. Although the Court recognised the validity of such process in other institutional arbitrations (*e.g.* the ICC), it considered that this compromised the independence of the Panel in Ms Pechstein's case since the arbitration agreement was "forced".

According to Art. R59 of the CAS Code,[41] the award drafted by the Panel shall be transmitted before it is signed to the CAS Secretary General who may make rectifications of pure form and may also draw the attention of the Panel to fundamental issues of principle.

[41] For appeal proceedings. Art. R46 applies to ordinary proceedings.

This process does not appear unreasonable in nature. While it mostly allows for corrections of formal mistakes (*e.g.* spelling, grammar or miscalculation of figures), it also enables the Secretary General to point out substantial issues (*e.g.* missing elements of the award or differences potentially unjustified with established CAS case law).[42] As long as the Secretary General cannot impose these changes on the Panel and the arbitrators keep their entire discretion to make their award as they deem appropriate, the independence of the arbitral tribunal is preserved.[43] The CAS Secretary General's assistance shall remain a mere optional device to improve the quality of the CAS awards. As held by the Swiss Federal Supreme Court in its *Pechstein* decision,[44] the contention that the IOC and the sports federations may influence a CAS award through the scrutiny process by the CAS Secretary General is speculative.

5. Reform of the CAS: Wish, Necessity or Uselessness?

Although the method and outcome may be seen as rather harsh, the decisions of the Munich Courts in *Pechstein* have at least the merit of questioning whether the CAS deserves some reform. This is also what the Swiss Supreme Court did in the *Gundel* case mentioned above.[45]

The short answer is yes.[46] As emphasised by some commentators, the CAS – and in turn the decided cases of the Swiss Federal Supreme Court in CAS matters – have been the target of strong criticism over recent years which

[42] MAVROMATI/REEB, p. 366.
[43] RIGOZZI/ROBERT-TISSOT, p. 72. Contra : ZEN-RUFFINEN, pp. 507-508.
[44] See II.C.1. above.
[45] V.B.1. above.
[46] ROMBACH, p. 110; DUVE/RÖSCH, Kartellrecht, p. 77; ZEN-RUFFINEN, pp. 533-537.

cannot be completely ignored.[47] However, one should be careful not to throw out the baby with the bathwater and destroy or dramatically affect what has patiently been built over time. On balance, the CAS system as an arbitration scheme dedicated to the resolution of sports dispute is to be approved. Its day-to-day functioning could yet be improved so as to strengthen the trust that everyone should have in the system, not only the sports organisations but also all athletes.[48]

Hence, the reform should not necessarily be major. It is not of paramount urgency either in view of the improvements brought about by the 2013 revision of the CAS Code. The most efficient way to go forward would be to organise a large consultation process so as to gather the opinion of all circles involved in sports. Another question to be addressed could be the role that the CAS Court Office has throughout the proceedings as the direct contact point of the parties. More autonomy could be left to the Panels. As regards the alleged influence of the sports organisations on the CAS, the issue is very subtle as it is difficult to measure absent a concrete and established bias. The reasons in the Munich Courts' decisions show that the grievances expressed are inherent in the manner the system is framed and operated in general, regardless of what happens in each concrete case. At no time was Ms Pechstein able to demonstrate an actual flaw which directly affected her as an athlete in the proceedings.[49] It is all about impressions and how far sports organisations and their representatives may be trusted or presumed biased.

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47 See *e.g.* PONCET, pp. 31 *et seq.*; BEFFA, pp. 600-601; BADDELEY, pp. 707 *et seq.*; ZEN-RUFFINEN, pp. 483 *et seq.*

48 RIGOZZI/ROBERT-TISSOT, p. 71.

49 GÖKSU, p. 360 ; PATOCCHI/FAVRE-BULLE, Case Notes on International Arbitration, SZIER/RSDIE 2012, pp. 382 *et seq.*, 388.

In a statement issued on 27 March 2015 after the OLG Decision, the CAS confirmed that it is "*always prepared to listen and analyse the requests and suggestions of its potential users i.e. the athletes, sports federations and other sports entities, in order to continue its development with appropriate reforms*" and that "*it will continue to improve and evolve with changes in international sport and best practices in international arbitration law*".[50] Such a statement of intent should now be concretised with effective steps for an efficient reform.

The key question regarding CAS arbitration is whether a closed list should be maintained.[51] On the one hand, arbitration proceedings may be conducted and be efficient and fair without predetermined arbitrators, as most sets of arbitration rules show. On the other hand, the closed list (if sufficiently large) guarantees a selection of various profiles and that former athletes may be appointed as arbitrators. A free choice of arbitrators might lead to the regular appointment of so-called "usual suspects", more likely to be experienced arbitration practitioners than individuals having solid sports background, or conversely, to the appointment of sports "friends" having no sufficient arbitration experience.

In case the list is maintained, which arbitrators are put on that list and how the ICAS members are appointed (possibly with more representation power of athletes' and players' unions) is an area for improvement, as is the appointment of the President of the Panel in a given case. The message sent by the German Courts in *Pechstein* is clear: the appearance of independence of the CAS vis-à-vis the sports

[50] Statement of the CAS on the decision made by the Oberlandesgericht München in the Case between Claudia Pechstein and the International Skating Union (ISU), 27 March 2015, available at: http://www.tas-cas.org/fileadmin/user_upload/CAS_statement_ENGLISH.pdf.

[51] See RIGOZZI/ROBERT-TISSOT, p. 72.

organisations (IOC, IFs, etc.) is key, and sufficient confidence in the system will only exist if reforms are concretely made in this respect.[52] In turn, this is the only way to ensure that CAS awards, even when upheld by the Swiss Federal Supreme Court, are not revisited by foreign courts.

C. CAS "Imposed" by Sports Federations: Breach of Competition Law?

While the LG did not find any breach of competition law in the way Ms Pechstein had been treated, the main feature of the appeal decision by the OLG is that it gives significant weight to German competition law – to such an extent that the CAS Award was ultimately held to be against German public policy and thus not recognisable. The room left to competition law in the German decisions is not surprising since the matter was submitted to the antitrust section of the Courts in view of the nature of Ms Pechstein's complaints.

However, as emphasised by some commentators,[53] the reasons of the OLG are hardly persuasive. A thorough analysis of German competition law cannot be conducted in this paper.[54] This section will be limited to highlighting some areas where the OLG's approach seems questionable.

First, the OLG made very strong findings as to the application of competition law to how the resolution of sports disputes is organised (*i.e.* submission to the CAS), including in anti-doping matters. One may be surprised that such findings were not backed up by a thorough analysis by the German competition authorities (*Bundeskartellamt)*, which

[52] NIEDERMAIER, p. 286.
[53] DUVE/RÖSCH, Kartellrecht, pp. 71 *et seq.*
[54] See *e.g.* STANCKE, pp. 46 *et seq.*

could have intervened in the proceedings in providing their opinion on the legal issues at stake.

Second, a specific international sports federation (such as the ISU in the *Pechstein* case) may hardly be blamed for abusing its dominant position in "imposing" the CAS as an arbitration institution. The CAS is the body, recognised by WADA, that each Olympic sport has to choose as the competent arbitral tribunal for appeals in anti-doping matters.[55] The OLG's finding that this circumstance is without relevance from a competition law perspective ("*für die kartellrechtliche Würdigung ohne Belang*") is not convincing.

Third, the OLG decision is silent on the application of EU competition law. Yet, within the EU, national and European competition laws are often applied concurrently. When a court applies national competition law to the abusive practice of a dominant undertaking, and this practice may affect trade between the Member States, it must also apply EU competition law.[56] The OLG applied a provision of German law[57] which prohibits the abuse of a dominant position through the imposition of business terms that would likely not be agreed to in a free market. It should also have examined the application of an essentially identical provision of European law, Art. 102 TFEU[58] (ex Art. 82 of the Treaty establishing the European Community). The Court would then have had to determine whether the ISU's behaviour was capable of influencing, directly or indirectly, actually or potentially, the pattern of trade in goods or services on the

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55 YAZICIOGLU/GROZDANOVSKI, p. 9; HANDSCHIN/SCHÜTZ, p. 181.

56 Art. 3(1) Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty.

57 Art. 19 *Gesetz gegen Wettbewerbsbeschränkungen* ("GWB").

58 Treaty on the Functioning of the European Union, 2012/C 326/01, 13 December 2007.

market. In view of the OLG's reasoning under German law, an effect on trade between member states would have been found, leading to the application of EU competition law.[59]

Fourth, it is doubtful that the requirements for an abuse of dominant position would be met in the *Pechstein* case when applying the principles laid down by the European Court of Justice ("ECJ"), in particular under the *Meca-Medina* test.[60] In *Meca-Medina*, the ECJ held that a rule emanating from a sports federation may or may not constitute an abuse of dominant position, depending on the overall context in which the rule was adopted or produces its effects and objectives, whether the restrictions caused by the rule are inherent in the pursuit of those objectives and whether the rule is proportionate in light of the objective pursued.[61] The ECJ found in *Meca-Medina* that the anti-doping rules imposed upon the athletes could not be considered an abuse of dominant position. This was later embraced by the European Commission in the Commission Staff Working Document,[62] which concluded that anti-doping rules "*have been found or are likely not to infringe* [Articles 101(1) and 102 TFEU] *provided that the restrictions contained in such rules are inherent and proportionate to the objectives pursued*". The European Commission also stated that rules excluding legal challenges of decisions by sports associations before national courts represent a higher likelihood of problems concerning compliance with EU competition law if the denial of access to ordinary courts facilitates anti-competitive agreements or conduct, although some of them could be justified.

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[59] DUVAL/VON ROMPUY, p. 12. Despite the absence of any mention of EU competition law in its decision, the OLG refers to the ECJ's decision in *MOTOE* as support of its position that competition law may also apply to sports.

[60] *David Meca-Medina and Igor Majcen v. Commission of the European Communities*, ECJ Decision C-519/04 P, 18 July 2006.

[61] BRANDNER/KLÄGER, p. 116.

[62] Commission Staff Working Document - The EU and Sport: Background and Context - Accompanying document to the White Paper on Sport, 11 July 2007.

Applying these tests to the *Pechstein* case, the sanction arising from anti-doping rules based on the WADA Code appears legitimate and in compliance with competition law. *Mutatis mutandis*, one hardly understands why the appeal process against the ISU DC decision before an arbitral tribunal such as the CAS should be subject to stricter requirements, all the more so if an alleged lack of independence is not concretely demonstrated. In any event, the OLG did not conduct any such tests. The brief and unconvincing examination of whether there could be a "rational justification" ("*sachliche Rechtfertigung*") for the imbalance in favour of sporting organisations falls short of the test which should be carried out under EU competition law. It can be expected that, following the OLG decision, a number of athletes will refer similar cases to their respective national courts in the EU. This might lead national courts to conduct a true analysis of the position under EU competition law.

Fifth, the OLG held that the CAS Award in *Pechstein* could not be recognised in Germany as it runs counter to public policy in upholding a breach of competition law by the ISU. By contrast, the position of the Swiss Federal Supreme Court is that competition law does not fall within public policy.[63] The extent to which public policy encompasses competition law is a disputed question, which goes much beyond sports arbitration and cannot be discussed here.

VI. Conclusions

Several conclusions may be drawn from the *Pechstein* case:

1. A party cannot in principle validly waive its right to refer a dispute to the state courts without sufficient

[63] *X. S.p.A. v. Y. S.r.l.* ("*Tensacciai*" case), BGE/ATF 132 III 389, 8 March 2006.

consent. However, an arbitration agreement in favour of the CAS is not *per se* invalid for the sole reason that it is contained in the statutes of a sports federation. A soft test should apply when assessing the athlete's consent to the CAS jurisdiction. An athlete shall be precluded from challenging the CAS jurisdiction at a later stage if he/she has appeared before the CAS Panel without raising objections to that effect.

2. CAS arbitrators appointed in a given case must be presumed independent and impartial as soon as they have provided a statement to that effect. A CAS award should only be set aside in case of concrete circumstances of bias. The position that the composition of the ICAS is detrimental to the athletes and necessarily contaminates the selection of the arbitrators on the CAS list, as well as the appointment of the President of the CAS Panel in a given case, is unsupported.

3. On balance, the CAS is a reliable arbitration institution, recognised by WADA for all anti-doping matters and better suited to deal with sports disputes than most state courts. Most flaws pointed out by the LG and OLG Munich are either without solid foundation or have somewhat been cured by the 2013 revision of the CAS Code (selection process of the arbitrators on the CAS list). However, certain issues, both institutional and operational, should be improved. A well thought-out reform of the CAS should thus be welcomed so as to ensure that all interests at stake, in particular those of the athletes, are sufficiently taken into account.

4. Sports law is not immune to competition law. By nature, a unique international federation in a given sport may appear as having a dominant position. However, an abuse of such position should not be found too easily. Applying WADA-based anti-doping rules and

referring appeals to the CAS are legitimate matters, complying with public interest. Hence, a CAS arbitration agreement entered into by an athlete in that context does not breach competition law, whether under national law or EU law, unless other circumstances clearly establish an anti-competitive behaviour in the relevant market.

5. When a CAS award has been made and upheld by the Swiss Federal Supreme Court, the findings of the arbitral tribunal should not be reviewed on the merits by a foreign court. When a similar dispute is brought by the athlete before a foreign court, so that the CAS decision is somewhat revisited by the foreign court by way of declarations, damages or other equivalent relief, the court should in principle be barred from doing so due to the *res judicata* effect of the CAS award, unless specific and justified circumstances prevent the recognisability of the CAS award in that foreign state under the NYC (when applicable). A foreign court should refrain from reviewing the validity of a CAS arbitration agreement with unfettered power, outside recognition proceedings (see Art. V(1)(a) New York Convention). In the presence of a *prima facie* valid arbitration agreement (CAS or otherwise), the decision on jurisdiction should mainly be left to the arbitral tribunal; in reliance on the negative effect of the competence-competence principle, a state court should refrain from holding that it has jurisdiction (under the Lugano Convention or otherwise) and disregarding the arbitration agreement under its own law. When a CAS Panel has acknowledged its jurisdiction and upheld the validity of the arbitration agreement, this decision has *res judicata* effect on a subsequent court/tribunal seized of the same matter.

On a final note, the *Pechstein* saga mainly appears as an athlete's personal fight to have a court acknowledge that she did not violate any anti-doping rule. Yet, all of Ms Pechstein's attempts have failed so far, after six years of proceedings: on the one hand, the court proceedings are still pending in Germany; on the other hand, the ISU on 9 July 2015 issued a statement entitled "*Claudia Pechstein has not been rehabilitated*" whereby the international federation stressed that, from an expert point of view, the athlete has still not demonstrated the alleged legitimate cause (inherited blood disease) for the significant peaks and excess of variation of her hematologic parameters in the relevant period 2007-2009.[64]

While having no concrete effects on her case, at least for the time being, Ms Pechstein's action before the German Courts has had a very damaging collateral effect in affecting the credibility of the CAS and, thereby, of the whole process of resolving sports disputes by way of a specialised arbitration institution referred to in the sports federations' statutes. One may wonder whether this case justified such a storm. The risk from now on is legal uncertainty: a door has been opened for a review of CAS arbitration agreements and of the merits of the case by foreign courts, in spite of the Swiss Federal Supreme Court's upholding of the CAS award beforehand. This is not satisfactory.

More clarity is expected to be brought in the upcoming months by the courts which will hear the matter: the BGH, on the one hand (when reviewing the OLG decision on appeal), and the European Court of Human Rights, on the other hand (since Ms Pechstein also lodged a complaint

[64] ISU Statement, *Claudia Pechstein has not been rehabilitated*, 9 July 2015, available at: http://www.isu.org/en/news-and-events/news/2015/07/claudia-pechstein-has-not-been-rehabilitated.

against Switzerland on the basis of Art. 6 ECHR).[65] From a Swiss arbitration perspective, and in the interest of maintaining the reliability of CAS arbitration for all sports actors involved, one may hope that the issues of the athlete's consent and the role of competition law will be assessed differently by the higher courts than by the Munich regional courts.

[65] Note on LG München by MAISONNEUVE, Chronique de jurisprudence arbitrale en matière sportive, Revue de l'arbitrage 2014, pp. 670 ff, 672-674.

Bibliography

BADDELEY MARGARETA, Droits de la personnalité et arbitrage: le dilemme des sanctions sportives, in: Gauch/Werro/Pichonnaz (eds.), Mélanges en l'honneur de Pierre Tercier, Geneva/Zurich/Basel 2008, pp. 707-725.

BEFFA LUCA, Challenge of international arbitration awards in Switzerland for lack of independence and/or impartiality of an arbitrator – Is it time to change the approach?, ASA Bull 2011, pp. 598-606.

BRANDNER GERT/KLÄGER ROLAND, Ein Sieg über (oder für) das System der Sportschiedsgerichtsbarkeit?, SchiedsVZ 2015, pp. 112-119.

DUVAL ANTOINE/VAN ROMPUY BEN, The Compatibility of Forced CAS Arbitration with EU Competition Law: *Pechstein* reloaded, available at SSRN: http://ssrn.com/abstract=2621983 or http://dx.doi.org/10.2139/ssrn.2621983.

DUVE CHRISTIAN/RÖSCH KARL ÖMER, Der Fall Pechstein: Kein Startschuss für eine Neugestaltung der Sportschiedsgerichtsbarkeit, SchiedsVZ 2014, pp. 216-227 [cited: Pechstein].

DUVE CHRISTIAN/RÖSCH KARL ÖMER, Ist das deutsche Kartellrecht mehr wert als alle Olympiasiege?, SchiedsVZ 2015, pp. 69-77 [cited: Kartellrecht].

FAVRE-BULLE XAVIER, 50 Years of the New York Convention on Enforcement of Awards: Conventional Wisdom and Recent Developments, in: Müller/Rigozzi (eds.), New Developments in International Commercial Arbitration 2008, Zurich/Basel/Geneva 2008, pp. 61-79 [cited: New York Convention].

FAVRE-BULLE XAVIER, Recent amendments to the CAS Code (2010-2012), GSLTR (Global Sports Law and Taxation Reports), June 2012, pp. 46-50 [cited: CAS Code].

FAVRE-BULLE XAVIER / VIRET MARJOLAINE: First Arbitral Award Set Aside for Breach of Substantive Public Policy in Switzerland, Revista de Arbitragem e Mediaçaõ, 2012/4, pp. 393-408.

GAILLARD EMMANUEL, Negative Effect of Competence-Competence: The Rule of Priority in Favor of the Arbitrators, in: Gaillard/Di Pietro (Eds), Enforcement of Arbitration Agreements and International Arbitral Awards: The New York Convention in Practice, London 2008, pp. 257-273.

GÖKSU TARKAN, Das "Pechstein-Urteil" des Landgerichts München: Falsche Anwendung schweizerischen Rechts, Causa Sport 2014, pp. 356-363.

HAAS ULRICH, Zwangsschiedsgerichtsbarkeit im Sport und EMRK, ASA Bull 2014, pp. 707-734.

HANDSCHIN LUKAS / SCHÜTZ TONY M., Bemerkungen zum Fall "Pechstein", SpuRt 2014, pp. 179-181.

HEERMANN PETER W., Zukunft der Sportschiedsgerichtsbarkeit sowie entsprechender Schiedsvereinbarungen im Lichte des Pechstein-Verfahrens sowie des § 11 RegE-AntiDopG, SchiedsVZ 2015, pp. 78-88.

MAVROMATI DESPINA/REEB MATTHIEU, The Code of the Court of Arbitration for Sport, Commentary, Cases and Materials, Alphen aan den Rijn 2015.

MONHEIM DIRK, Das Ende des Schiedszwangs im Sport – Der Fall Pechstein, SpuRt 2014, pp. 90-94.

MURESAN REMUS/KORFF NIKLAS, Sportschiedsgerichtsbarkeit: Wie weiter nach dem "Pechstein-Urteil" des Landgerichts München?, Causa Sport 2014, pp. 199-211.

NIEDERMAIER TILMAN, Schiedsvereinbarungen im Bereich des organisierten Sports, SchiedsVZ 2014, pp. 280-287.

PONCET CHARLES, The independence of the Court of Arbitration for Sport, European International Arbitration Review, 2012/1, pp. 31-56.

RIGOZZI ANTONIO/ROBERT-TISSOT FABRICE, « Consent » in Sports Arbitration : Its Multiple Aspects, Lessons from the Cañas decision, in particular with regard to provisional measures, in: Geisinger/Trabaldo-de Mestral (Eds), Sports Arbitration: A Coach for Other Players?, New York 2015, pp. 59-94.

RIGOZZI ANTONIO/HASLER ERIKA/QUINN BRIANNA, The 2011, 2012 and 2013 revisions to the Code of Sports-related Arbitration, Jusletter 3 June 2015.

ROMBACH ANNETT, The "Pechstein-judgment" of the OLG München: What does it mean for international sports and commercial arbitration?, SchiedsVZ 2015, pp. 105-111.

STANCKE FABIAN, Pechstein und der aktuelle Stand des Sportkartellrechts, SpuRt 2015, pp. 46-51.

YAZICIOGLU ALARA EFSUN/GROZDANOVSKI LJUPCHO, The Pechstein case: will the flap of a butterfly's wings in Germany cause a tornado in the sports world?, GSLTR (Global Sports Law and Taxation Reports), June 2015, pp. 6-13.

ZEN-RUFFINEN PIERMARCO, La nécessaire réforme du Tribunal Arbitral du Sport, in : Rigozzi/Spurmont/Hafner (eds.), Citius, Altius, Fortius, Mélanges en l'honneur de Denis Oswald, Basel 2012 pp. 483-537.