Christoph Müller | Sébastien Besson | Antonio Rigozzi (Eds)

New Developments in International Commercial Arbitration 2018

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Preface

This volume contains the written contributions of the speakers at the 11th bi-annual conference on New Developments in International Commercial Arbitration, organized by the CEMAJ (Research Center on Alternative and Judicial Dispute Resolution Methods) of the University of Neuchâtel on 9 November 2018.

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

In the first contribution of this book, Cesare Jermini and Luca Castiglioni give an insider's insight – which will undoubtedly be highly informative for those involved in arbitrations administered by the SCAI – into the recent developments in the practice of the SCAI Arbitration Court. After briefly setting out the composition and functions of the SCAI Arbitration Court, their contribution focuses on selected case law of the Court and sheds light on: (i) the factors taken into account by the Court when deciding whether or not to consolidate cases; (ii) the grounds which led the Court to uphold or to reject the challenge of arbitrators; (iii) the grounds which led the Court to remove an arbitrator; (iv) the criteria taken into account by the Court in determining the seat of the arbitration; (v) the Court's approach in cases in which it is alleged that there is manifestly no agreement to arbitrate; (vi) the considerations taken into account by the Court leading it to reduce the

arbitrators' fees; and (vii) the time taken by the Court to appoint an emergency arbitrator.

The second contribution, authored by JORGE IBARROLA, deals with selected recent procedural issues arising in CAS arbitral proceedings. IBARROLA's contribution, filled with insights from personal practice and experience, firstly examines the issue of whether or not the examination of a party constitutes oral evidence and whether such party can be subject to examination or cross-examination. IBARROLA then turns to the parties' standing to appeal a decision of a federation, association or sports-related body before the CAS in particular focusing on the recent approach taken by CAS awards in this regard. IBARROLA's contribution ends with a proposed manner to proceed (including pitfalls to avoid) in urgent situations in order to quickly obtain an award on the merits when the opposing party does not consent to expedited proceedings and the appellant is reluctant to request provisional measures.

In the third contribution of this book, DOROTHÉE SCHRAMM examines in detail the most significant decisions rendered by the Swiss Federal Supreme Court on arbitration-related matters between 23 August 2016 and 26 July 2018. Notable decisions which are discussed include, *inter alia*: (i) a leading decision of the second civil law division of the Supreme Court holding that a facebook friendship between a judge and a party was insufficient to create an appearance of partiality (5A_701/2017); (ii) decisions rejecting attempts to establish a sport-specific or investment-specific notion of public policy (4A_116/2016; 4A_312/2017; 4A_157/2017); (iii) a leading decision concerning an alleged conflict of interest which includes an interesting discussion on the role of the 2014 IBA Guidelines on Conflicts of Interest in International Arbitration (142 III 521); (iv) three leading decisions in which challenges were declared inadmissible on the basis that the parties had waived their right to challenge the award (143 III 589; 143 III 55; 143 III 157); (v) decisions rejecting attempts to follow

in the footsteps of the *Matuzalem* decision and have awards set aside for allegedly awarding excessive amounts that violated the debtor's personality rights; (vi) several decisions elaborating on the distinction between procedural orders and awards which has significant implications on whether the decision is subject to challenge or not; and (viii) decisions setting aside awards for failing to take into account a party's amended request for relief and for incorrectly interpreting the arbitration agreement.

The fourth contribution authored by GUSTAV FLECKE-GIAMMARCO and MAX BLÜHER examines the 2018 revision of the DIS Rules. Their contribution firstly sets out the key modifications made to the DIS Rules and the (mostly positive) reception of the new Rules by practitioners. Their contribution underlines, in particular, the differences in the new DIS Rules as compared to other institutional arbitration rules and how the new DIS Rules are thereby "bucking the trend". The authors, however, also note that the new DIS Rules share many commonalities with other institutional arbitration rules in a bid to be more attractive to international users. They conclude by stating that the new DIS Rules are state-of-the-art, highly efficient and extremely flexible rules which are suitable for both domestic and international users, noting that the DIS has taken a "go your own way" approach in order to avoid over-codification and to stay true to its civil law roots.

Instigated by the recent mandate entrusted to a UNCITRAL Working Group to work on the possible reform of investor-State dispute settlement, MICHELE POTESTÀ opines, in the final contribution of this book, on the three potential reform options of the investor-State dispute system. The first is a so-called "light" option whereby the existing arbitration framework will be maintained with targeted reforms (exemplified by the on-going amendment of the ICSID Rules and the draft 2018 Dutch Model BIT). The second is a so-called "medium" option whereby the existing arbitration framework is maintained but

an appeal mechanism is made available. The third option is the so-called "heavy" option whereby the arbitration framework would be replaced by a multilateral investment court with tenured judges. POTESTÀ analyses each of these potential reform options, laying emphasis, in particular, on the legal and policy challenges that would confront each of these options.

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

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

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

We would further like to extend our gratitude to CARINE MAGNE of the Secretariat at the University of Neuchâtel Faculty of Law without whom, the organization of the conference and the timely publication of this book would not have been possible.

Neuchâtel, October 2018

Christoph Müller Sébastien Besson Antonio Rigozzi

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Principal Abbreviations

AAA	American Arbitration Association
AM	Appeal mechanism
Art(s).	Article(s)
ASA Bull.	Swiss Arbitration Association Bulletin
ASIL	American Society of International Law
ATF	*Arrêt du tribunal fédéral* (Decision of the Supreme Court)
AYIA	Austrian Yearbook on International Arbitration
BIT	Bilateral investment treaty
ca.	circa
CAS	Court of Arbitration for Sport
CAS Code	Code of Sport-Related Arbitration
CC	Swiss Civil Code 1907, SR 210
CETA	Comprehensive Economic and Trade Agreement between Canada and the EU signed on 30 October 2016, entered into force on 21 September 2017
cf.	*confer* (see)
CHF	Swiss Francs
CO	Swiss Code of Obligations 1911, SR 220
Court	SCAI Arbitration Court
CPC	Swiss Code of Civil Procedure 2008, SR 272
CPR	Conflict Prevention and Resolution
DIS	Deutsche Institution für Schiedsgerichtsbarkeit (German Arbitration Institution)
DIS Rules 2018	DIS Arbitration Rules which entered into force on 1 March 2018

DIS Rules 1998	Previous version of the DIS Arbitration Rules which entered into force in 1998
ECHR	European Convention on Human Rights
ed(s).	Editor(s), edition
e.g.	*exempli gratia* (for example)
et seq.	*et sequentes* (and the following)
EU	European Union
EUR	Euros
FAI	Arbitration Institute of the Finland Chamber of Commerce
FDC	FIFA Disciplinary Code
ff.	and the following pages
FIFA	Fédération Internationale de Football Association
FIM	Fédération Internationale de Motocyclisme
FSCA	Federal Supreme Court Act 2005, SR 173.110
HKIAC	Hong Kong International Arbitration Centre
IBA	International Bar Association
IBA Rules	IBA Rules on the Taking of Evidence in International Arbitration (2010)
ibid	in the same source
ICC	International Chamber of Commerce, Paris
ICCA	International Council for Commercial Arbitration
ICDR	International Centre for Dispute Resolution
ICSID	International Centre for Settlement of Investment Disputes
idem	the same
i.e.	*id est* (that is)
infra	below, further on

IR/Internal Rules	Internal Rules of the Arbitration Court of the SCAI
ISDS	Investor-State Dispute System
JAMS	Judicial Arbitration and Mediation Services
LCIA	London Court of International Arbitration
MIC	Multilateral investment court
n(s)/no(s).	Number(s)
NJW	*Neue juristische Wochenschrift* (New Legal Weekly)
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)
p.a.	per annum
PILA	Swiss Federal Private International Law Act 1987, SR 291
RIW	*Recht der internationalen Wirtschaft* (International economic law)
SCAI	Swiss Chambers Arbitration Institution
SCC	Stockholm Chamber of Commerce
SchiedsVZ	*Zeitschrift für Schiedsverfahren* (German Arbitration Journal)
SFSCD	Swiss Federal Supreme Court Decision
SIAC	Singapore International Arbitration Centre
Supreme Court	Swiss Federal Supreme Court
Swiss Rules	Swiss Rules of International Arbitration
TDM	Transnational Dispute Management
TFF	Turkish Football Federation
UEFA	Union of European Football Association

UNCITRAL	United Nations Commission on International Trade Law
VIAC	Vienna International Arbitration Center
Vol.	Volume
viz	namely
vs	versus
WADA Code	World Anti-Doping Association Code
WG III	Working Group III
ZPO	*Zivilprozessordnung* (Code of Civil Procedure, Germany)

Recent Developments in the Practice of the SCAI Arbitration Court

CESARE JERMINI & LUCA CASTIGLIONI

Contents

I. Introduction

The internal practice of the SCAI (Swiss Chambers' Arbitration Institution) Arbitration Court has already been the topic of a short presentation, made by the first author of the present paper in the framework of the 8th annual Conference on New Developments in International Commercial Arbitration, which took place on 14 November 2014 in Neuchâtel.[1]

The present contribution is a follow-up of that presentation and focuses on the practice of the Court in the last six years (2012 to date).

The first part basically describes the functioning of the Court and the allocation of competences within the Court. The second part is dedicated to the decisions issued by the Court, in particular regarding, consolidation, seat, challenge of arbitrators, administration of cases under the Swiss Rules and costs.[2]

II. Arbitration Court

A. In general

The Chambers of Commerce and Industry of Basel, Bern, Geneva, Lausanne, Lugano, Neuchâtel and Zurich, which have

[1] JERMINI, Internal Practice of the Arbitration Court under the Swiss Rules, PPT presentation, 14 November 2014, Neuchâtel.

[2] For obvious reasons, this contribution deliberately confines itself to reporting the cases, without providing any comment.

been offering arbitration services for about 150 years, founded the Swiss Chambers' Arbitration Institution ("**SCAI**") as an independent non-profit Institution[3] "*that offers means of dispute resolution based on the Swiss Rules of International Arbitration (the "Swiss Rules") and the Swiss Rules of Commercial Mediation*" in 2004.[4]

In order to administer the arbitrations under the Swiss Rules, the SCAI established an Arbitration Court (hereinafter: the "**Court**") as an autonomous body.[5] The Court replaces the former "Arbitration Committee" under the 2004 Swiss Rules[6] and carries out its functions independently. The Members are experienced international arbitration practitioners from Switzerland and abroad.[7]

The Court is assisted in its work by the Secretariat of the Court (the "**Secretariat**"), which is responsible for the administrative tasks relating to arbitration proceedings pending under the Swiss Rules. The Secretariat manages all arbitration cases through its 3 administering offices in Zurich (which also encompasses Bern and Basel), Geneva (which also encompasses Neuchâtel and Lausanne) and Lugano. The request for arbitration can nonetheless still be submitted, as usual, to any one of the seven Swiss Chambers of Commerce (see Art. 3(1) and Appendix A of the Swiss Rules).

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3 SCAI is organized as an association pursuant to Art. 60 et seq. of the Swiss Civil Code, with its registered seat in Basel-Stadt.

4 See <https://www.swissarbitration.org/About-us> accessed on 25 August 2018.

5 See <https://www.swissarbitration.org/About-us>, accessed on 25 August 2018. BESSON/THOMMESEN, in: ZUBERBÜHLER/MÜLLER/HABEGGER (eds.), Swiss Rules of International Arbitration, Commentary, 2013, 2nd ed., Introduction, para. 16, p. 5 (hereinafter: "**SR-Commentary, Author**").

6 SR-Commentary, BESSON/THOMMESEN, Introduction, para. 16, p. 5.

7 For the current overview of the Members of the Court, see <https://www.swissarbitration.org/About-us>, accessed on 25 August 2018.

B. The Internal Rules

For the purpose of organizing the work of the Court and the Secretariat, the SCAI has adopted the "Internal Rules of the Arbitration Court of the Swiss Chambers' Arbitration Institution" (hereinafter: "**Internal Rules**" or "**IR**").[8] The adoption of these Internal Rules allows for a clear allocation of tasks among the members of the Court.[9]

Pursuant to Art. 1 of the Internal Rules, the Court consists of a President, two Vice-Presidents and ordinary members (collectively designated as "**Members**"). All are appointed by the Board of Directors of the SCAI.

The Court renders its decisions as provided for under the Swiss Rules, e.g. pursuant to Articles 4(1), 11(3) and 16(3) Swiss Rules. The Court may delegate to one or more members or committees the power to make certain decisions pursuant to the Internal Rules.[10]

The plenary sessions of the Court are held in regular intervals – normally 4 times per year. The main aim of the plenary sessions is to define a common practice in order to ensure a consistent and efficient administration of all arbitration proceedings. In this regard, the Members (assisted by the Secretariat) have to report to the Court if they have encountered an issue of interpretation of any provision of the Swiss Rules or have rendered a decision leading to a change of practice in the administration of arbitration proceedings pending under the Swiss Rules.[11]

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[8] The last version of the Internal Rules entered into force on 14 September 2016 (Art. 11 IR). The Internal Rules are available online on the Swiss Chambers' Arbitration Institution website (see <https://www.swissarbitration.org/files/9/INTERNAL%20RULES%20OF%20THE%20ARBITRATION%20COURT%202016%20-%20Published%2020170818.pdf>, accessed 8 October 2018).

[9] SR-Commentary, BESSON/THOMMESEN, Introduction, para. 45, p. 11.

[10] Swiss Rules, Introduction lit. b and Art. 2 IR.

[11] Art. 5(2) IR.

Apart from the plenary sessions, which ensure a unitary implementation of the Swiss Rules, the Court acts through the followings different bodies that are explored more in detail below:

- Case Administration Committees;
- Court Special Committee; and
- The President and Vice-Presidents.

C. Case Administration Committees

Upon receipt of a Notice of Arbitration, the Secretariat designates, among the Members of the Court, one to four Member(s) of the Court, who together will constitute the Case Administration Committee for the arbitration proceeding at hand (Art. 3 IR)[12].

The Case Administration Committees "*shall be empowered to make – after consultation with the Secretariat – all decisions within the powers of the Court relating to the case concerned, which are not expressly delegated to the Court Special Committee*" pursuant to Article 4 IR, or to the President or any Vice-President pursuant to Article 6 IR (see Art. 3 IR).

While there is no express indication in the Internal Rules as to the specific tasks that the Case administration Committees have to fulfil, such tasks result from the general delegation clause. In general terms, the Case Administration Committees have to follow and monitor the proceedings assigned to them and, in particular, accomplish the following main tasks:

- Extension or shortening of any time-limit it has fixed or has the authority to fix or amend (Art. 2(3) Swiss Rules);

[12] See SR-Commentary, BESSON/THOMMESEN, Introduction, para. 40, p. 11.

- *Prima facie* decision as to the existence of an agreement to arbitrate referring to the Swiss Rules (Art. 3(12) Swiss Rules);
- Confirmation and appointment of arbitrators (Arts. 5-8 Swiss Rules);
- Approval or adjustment of costs (Art. 40(4) Swiss Rules);
- Extension of the 6 month deadline to issue the award under the Expedited Procedure rules (Art. 42(1) Swiss Rules); and
- Exceptions to the application of the rules on Expedited Procedure for amounts in dispute that do not reach the threshold of CHF 1 mio. (Art. 42(2) Swiss Rules).

D. Court Special Committee

Pursuant to Article 4 IR, the Court Special Committee comprises seven Members of the Court, together with the President and the Vice-Presidents of the Court. As a whole, the Court Special Committee is thus composed of ten Members of the Court.

The Court Special Committee has the power to render the following decisions (Art. 4 IR):

- Appointment of an arbitrator in the circumstances contemplated by Articles 5(3) and 13(2)(a) Swiss Rules;
- Challenge of an arbitrator (Art. 11 Swiss Rules);
- Removal of an arbitrator (Art. 12 Swiss Rules);
- Revocation of an arbitrator (Art. 5(3) Swiss Rules);

- Non-replacement of an arbitrator (Art. 13(2)(b) Swiss Rules);
- Determination of the seat of the arbitration (Art. 16 Swiss Rules); and
- Those decisions which may be necessary relating to the consolidation of the proceedings (Art. 4(1) Swiss Rules).

The decisions rendered by the Court Special Committee are valid provided that at least five of its Members have participated in the decision making process and are taken by simple majority.

E. President and Vice-Presidents

When seized with an application for emergency relief proceedings, the Secretariat assigns to the President, or one of the Vice-Presidents, the emergency relief proceedings for the purpose of deciding upon (Art. 6 Swiss Rules):

- The appointment of the emergency arbitrator (Art. 43(2) Swiss Rules);
- The challenge of an emergency arbitrator (Art. 43(4) Swiss Rules);
- The removal of an emergency arbitrator (Art. 43(4) Swiss Rules); and
- The determination of the seat of the emergency relief proceedings (Art. 43(5) Swiss Rules).

All other administrative decisions relating to the emergency relief proceedings, such as extensions of time to render the decision on the application, approval or adjustment of fees of the emergency arbitrator etc., are rendered by the designated Case Administration Committee.

III. Selected Case Law of the SCAI Arbitration Court

This review covers the internal decisions of the Court (including the Case Administration Committees, the Court Special Committee, the President and the Vice-Presidents) concerning the administration of the arbitration cases from 2012 (date of entry into force of the revised Swiss Rules) to date (the "**period under review**").

For every type of decision considered, statistical data is provided. The various cases are grouped into categories, whereas representative cases are briefly summarized.

A. Consolidation of Proceedings (Art. 4(1) Swiss Rules)

1. Statistics

In the period under review, the Court Special Committee was requested to make a decision on consolidation in 21 cases. In 15 cases (≡ ca. 70%) the request for consolidation was granted, in 6 (≡ ca. 30%) cases, it was denied.[13]

2. Grounds for Consolidation

According to Art. 4(1) Swiss Rules, the Court has to take into consideration the following criteria when deciding on the consolidation of the proceedings:

- The parties requesting consolidation must be already involved in other arbitral proceedings pending under the Swiss Rules. It is, however, not

[13] The previous review encompassing the case law of the years 2004-2014 showed a very similar percentage.

necessary that the parties are the same in all proceedings;

- The opinion of all the parties and any confirmed arbitrator in all proceedings; and
- All relevant circumstances, including the links between the cases and the progress already made in the pending arbitral proceedings.

a) Consolidation granted

In 7 cases, where the parties were identical and all agreed to the consolidation, the Court decided to consolidate the proceedings.

Consolidation was further ordered in 7 cases, where the parties to the second arbitration were not completely identical to those involved in the arbitration case that had been initiated first. In all of these cases, the parties either formally agreed, or did not object (in one case because Respondent did not take part in the proceedings) to the consolidation of the proceedings.

In 1 case, the Court decided that the proceedings should be consolidated despite the objection of one of the parties. The parties were the same in both cases (Claimant in Case no. 1 was Respondent in Case no. 2). The underlying contract was the same. The Claimant in the first case objected to the consolidation on the basis that the proceedings were well advanced (the parties had already exchanged written statements and the evidentiary hearing was upcoming) in the first case and that consolidation would not be procedurally efficient.

b) Consolidation denied

Consolidation was denied in 6 cases: in all cases, one of the parties objected to the consolidation request and not all of the parties were identical in the pending arbitrations.

In a case from 2012, the underlying facts were similar and Respondent was the same in both arbitrations. However, the Claimants were different, the already pending case was well advanced (only the post hearing briefs were outstanding) and Respondent and the sole arbitrator were opposed to the consolidation request.

In another case from 2012, Claimant filed one single request for arbitration, "blending" three separate contracts which involved 4 Parties (grouped differently under each contract), provided for the application of Swiss and Italian law and set out three different arbitration clauses (with different seats: Lugano and Bologna). The Court rejected the request for consolidation as it found that a request for consolidation requires at least two separate proceedings to be consolidated, one of which should be already pending.

In a case from 2013, two Claimants had filed one single request for arbitration directed against the same Respondent. Only one case was thus pending before the Arbitral Tribunal. Contrary to the case from 2012 mentioned above, the Court found the request to be inadmissible, as it reasoned that it is up to the Arbitral Tribunal to decide whether or not it can address the claims of both Claimants in one single arbitration (issue of jurisdiction rather than of consolidation).

B. Challenge of Arbitrators (Art. 11 Swiss Rules)

1. Statistics

The Court Special Committee was requested to decide on 8 challenges of arbitrators in the period under review. In 1 case (≡ ca. 12%), the challenge was upheld, in 7 cases (≡ ca. 88%), it was denied.

The only decision that was upheld in the period under review dates back to 2013. The trend seems to go towards less challenges: between 2013 and 2014, 7 notices of challenge were filed (and only 1 upheld), whereas from 2015 onwards only one notice of challenge was filed (and rejected by the Court).[14]

One should note that the Court is not involved at the beginning of the challenge procedure. The notice of challenge must be sent to the Secretariat, which will communicate it to the arbitrator and to the other parties involved. Within fifteen days, the arbitrator may decide to withdraw or the other parties may agree to the challenge.[15] In these circumstances, the procedure ends, without a decision of the Court. The Court will then be called upon to replace the arbitrator according to Article 13 Swiss Rules.

2. Grounds for Challenge

Pursuant to Article 9(1) of the Swiss Rules, "*Any arbitrator conducting an arbitration under these Rules shall be and shall*

[14] The previous review encompassing the case law of the years 2004-2014 showed a similar picture.

[15] Art. 11 (2) Swiss Rules reads as follows: "*If, within 15 days from the date of the notice of challenge, all of the parties do not agree to the challenge, or the challenged arbitrator does not withdraw, the Court shall decide on the challenge*."

remain at all times impartial and independent of the parties." This is a basic requirement for each arbitrator. Therefore, "*any arbitrator may be challenged if circumstances exist that give rise to justifiable doubts as to the arbitrator's impartiality or independence*."[16]

It is worth mentioning that Article 1(4) Swiss Rules explicitly states that by submitting their dispute under the Swiss Rules, "*the parties confer on the Court, to the fullest extent permitted under the law applicable to the arbitration, all of the powers required for the purpose of supervising the arbitral proceedings* […] *including the power* […] *to decide on the challenge of an arbitrator on grounds not provided for in these Rules*." Thus, apart from the grounds explicitly set out in Articles 9-10 Swiss Rules, the parties may agree on specific qualifications for the arbitrators which might lead to a challenge if not respected.[17]

The case law in the period under review highlights three main case studies that are discussed hereunder.

a) Professional Relationships of the Arbitrator

In a case from 2013 pending before an Arbitral Tribunal between a Claimant with seat in India and a Respondent with seat in Germany, Respondent challenged the arbitrator nominated by Claimant due to concerns about his potential partiality "*for lack of independence, impartiality and his incorrect statement of independence*." More specifically, Respondent pointed out that the webpage of the law firm of the challenged co-arbitrator mentioned Claimant's group, respectively the family owning that group, among the high profile clients of the law firm. This was the only case in which the challenge was upheld.

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[16] Art. 10(1) Swiss Rules.
[17] SR-Commentary, SPOORENBERG/FELLRATH, Art. 1, para. 19, p. 21.

In other cases, the alleged "professional relationship" put forward by the challenging party was not considered sufficient or sufficiently proven to uphold the challenge.

In another case from 2013, the parties could not reach an agreement on the designation of a sole arbitrator. The Case Administration Committee in charge appointed an arbitrator, who was challenged by Respondent for an alleged "*conflict of interests*". The previous involvement of the sole arbitrator was as counsel of a third party in a totally unrelated dispute, not against the Respondent, but against a company in which the Respondent had a substantial (minority) shareholding. This previous case was concluded more than three years before the acceptance of the appointment (see Orange List of the IBA Guidelines, Section 3.1.2.) and was totally unrelated to the previous one.

b) Personal Relationship of the Arbitrator

In a case from 2014, the Respondent (an Iranian individual) challenged the sole arbitrator (a resident of Lugano; mother tongue Italian) appointed by the Court on the ground that he had the same nationality, spoke the same language and came from the same town as Claimant (who was represented by a Counsel based in Lugano). In reality, Claimant was a company incorporated in Cyprus, with an operative branch in Lugano. The Court found no sufficient reason for a challenge.

In a subsequent case from the same year, the challenge was grounded on a "serious dispute" that had allegedly arisen between the co-arbitrator designated by Claimant and Respondent's counsel, who had been on opposing sides in a previous arbitration that did not have any relationship with the arbitration at hand. The Court found that such personal animosity between the co-arbitrator and one of the counsel

was based on subjective feelings of the applicant and thus did not warrant a challenge.[18]

c) Perceived Bias due to Orders/Actions of the Arbitrator(s)

In a case from 2014, Claimant filed a notice of challenge based on the written statement that the Chairman of the Arbitral Tribunal had previously filed to object to its own removal. In Claimant's view, in that letter the arbitrator had manifested a personal opinion on the arbitration at hand. Moreover, the arbitrator had stopped all the work as soon as the request for removal had been filed.

The Court found the challenge to be time barred. Article 11 Swiss Rules provides that the applicant shall file the challenge within 15 days after the circumstances giving rise to the challenge became known to it. According to the Court, the deadline for a challenge started to run when the challenging party became aware of the arbitrator's written statement in the framework of the removal proceedings and not only when the decision rejecting the request for removal was notified to it. Generally speaking, even if a decision on the request for removal is still outstanding, the notice period for a possible challenge will not be extended.

Further, the Court Special Committee noted that the Swiss Rules do not provide any guidance with respect to the impact of a challenge on the arbitral proceedings. The arbitrator "may" proceed with the arbitration but is not obliged to do so.

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[18] The Court followed the Decision of the Federal Supreme Court ATF 139 III 433, which found that, if an unrelated case is fought with particular animosity between Counsel, it is not excluded that this may lead to a situation where that "conflict" may have a negative effect on the requirement of impartiality. The applicant has, in this regard, to substantiate the conflict and show why, on the basis of objective reasons, the arbitrator appears to be partial. Merely subjective feelings of the applicant are, in this regard, not sufficient.

Unsurprisingly, a further decision issued in 2014 held that the mere disagreement with some decisions of the Arbitral Tribunal does not *per se* constitute a valid ground for challenge.

C. Removal of an Arbitrator (Art. 12 Swiss Rules)

1. Statistics

The Court Special Committee only had to decide two cases concerning the removal of an arbitrator. Both cases date back to 2014. In one case the request was accepted, in the other case, it was denied.

2. Grounds for Removal

Article 12(1) Swiss Rules provides that "*if an arbitrator fails to perform his or her functions despite a written warning from the other arbitrators or from the Court, the Court may revoke the appointment of that arbitrator*." This provision addresses the removal of an arbitrator by decision of the Court and not the case of removal by common agreement of the parties.[19]

According to the doctrine, "*it is up to the Court to further develop the concept of 'failure to perform the functions' in practice on a case-by-case basis*".[20] Such notion may comprise obstructive behaviour of the arbitrator; failure to use reasonable dispatch in conducting the proceedings or drafting the award; lack of impartiality or independence of the arbitrator (in case the parties have not challenged the arbitrator in due time).[21]

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[19] See SR-Commentary, FREI/AEBI, Art. 12, para. 3, p. 163.
[20] SR-Commentary, FREI/AEBI, Art. 12, para. 6, p. 164.
[21] See SR-Commentary, FREI/AEBI, Art. 12, para. 6, p. 164.

In a case decided on in 2014, the procedure had followed aslow path, with several warnings from the Court to the President of the Arbitral Tribunal. Even after these warnings, the President of the Arbitral Tribunal took considerable time to proceed. Additionally, when the parties could not agree on a date for the hearing, the Arbitral Tribunal simply decided to postpone the issue. The request for removal came approximately 5 years after the beginning of the proceedings. The Court criticized the excessive duration of the proceedings. However, it also considered that the Chairman had promptly reactivated the procedure each time a warning was received, that the numerous objections raised by the same party requesting the removal had slowed down the procedure and that the Arbitral Tribunal had not remained completely idle after postponing the decision about the hearing. In conclusion, the Court decided to dismiss the request for removal. Nevertheless, it promptly requested the Arbitral Tribunal to issue an amended provisional timetable covering all remaining steps, including the rendering of the final award.

In another case from 2014, the sole arbitrator did not react to a submission filed by Claimant on 22 January 2014. On 25 March 2014, the sole arbitrator's daughter informed the parties that her father was not able to deal with the case anymore due to a serious illness. Given that the sole arbitrator was not able to respond and could not even be contacted anymore at his address, the Court – upon Claimant's request – decided to remove the arbitrator.

D. Determination of the Seat of the Arbitration (Art. 16 Swiss Rules)

1. Statistics

During the period under review, the Court Special Committee had to take a decision in 27 cases. In 22 cases (≡ ca. 80%),

the Court fixed the seat itself (9 in Geneva and 13 in Zurich). In the remaining 5 cases (≡ ca. 20%), the Court decided to let the Arbitral Tribunal determine the seat of the arbitration.

2. Criteria for the Determination of the Seat of the Arbitration

If the parties have not determined the seat of the arbitration, or if the designation of the seat is unclear or incomplete, it is up to the Court Special Committee to determine the seat of the arbitration (Art. 16(1) Swiss Rules).

In determining the seat of the arbitration, the Court Special Committee has to take into account "*all relevant circumstances*" (Art. 16(1) Swiss Rules). The Court Special Committee has considered *inter alia* the following circumstances in its decisions during the period under review.

a) Reference to the Pre-existing Arbitration Rules of a Swiss Chambers of Commerce

If an arbitration agreement refers to the previous arbitration rules of the Zurich, Geneva or Lugano Chambers of Commerce (in particular), the Court will designate the respective cities as the seat of the arbitration.

All of these pre-existing arbitration rules do indeed provide for a default seat in the respective cities of Zurich, Geneva and Lugano.[22]

This was *e.g.* decided in a case from 2014, where the arbitration clause provided that: "*the case shall be submitted to the court of arbitration of the Zurich Chamber of Commerce*

[22] Art. 6(1) International Arbitration Rules of the Zurich Chamber of Commerce; Art. 3 Arbitration Rules of the Chambre de Commerce et d'Industrie de Genève; Art. 4 Lugano Arbitration and Conciliation Rules.

for a final Decision pursuant to the said Conciliation and Arbitration Rules" and in 8 further cases with similar wording.

b) Reference to the Chamber of Commerce of a Specific City in Switzerland

When the arbitration agreement refers to "*the International Chamber of Commerce <u>of</u>* " a specific city in Switzerland, then this city generally becomes the seat of the arbitration.

This was the case in a decision from 2012, where the arbitration clause referred to the *"International Chamber of Commerce of Geneva"*, as well as in 7 other similar cases.

c) Arbitral Tribunal to Determine the Seat

Failing any other indication as to the seat, in case of particular ambiguity in the arbitration clause or when the decision on the seat needs further input from the parties, the decision can be left to the Arbitral Tribunal. The Court decided to do so in 5 cases.

However, in such cases, the Court can also take the decision itself, if it deems so fit. In a case from 2014 for instance, the arbitration agreement contained only a reference to the Swiss Rules. The parties were from Luxembourg and Spain and had different opinions concerning the seat of the arbitration (Madrid, respectively, Luxembourg-city). The Court noted that there is no obligation to have the seat of the arbitration in Switzerland, and that the seat is not determinative for the place of the hearings.[23] The Court considered Zurich and Geneva to be seats granting the best access in Switzerland from both countries, Spain and Luxemburg. Ultimately, Geneva was chosen as the seat of the arbitration.

[23] Art. 16(2) Swiss Rules.

E. Administration of the Case when Respondent does not Submit an Answer, or Raises an Objection to the Arbitration Being Administered under the Swiss Rules (Art. 3(12) Swiss Rules)

According to Article 3(12) Swiss Rules, "*if the Respondent does not submit an Answer to the Notice of Arbitration, or if the Respondent raises an objection to the arbitration being administered under the Swiss Rules, the Court shall administer the case, unless there is manifestly no agreement to arbitrate referring to these Rules*."

1. Statistics

In the period under review, the Case Administration Committees were confronted with 12 cases falling under Art. 3(12) Swiss Rules. In 4 cases (≡ ca. 34%), it was decided that there was manifestly no agreement to arbitrate referring to the Swiss Rules.

2. Agreement to arbitrate referring to the Swiss Rules affirmed

a) Reference to an Arbitral Body in a Specific City in Switzerland

In 1 case (≡ ca. 8%), the arbitration clause provided that the dispute should be submitted to arbitration before the "*empowered jurisdiction of Geneva, Switzerland*". The Court found that there was a plausible case for the existence of an agreement to arbitrate referring to the Swiss Rules, although no specific reference to the Swiss Rules was made.

b) Reference to the "International" Chamber of Commerce of a City in Switzerland

In 4 cases (≡ ca. 34%), the arbitration clause referred to "*the Geneva Courts of International Arbitration*", "*arbitration by the International Rules of the Geneva Courts of International arbitration, to be held in accordance with the rules and legislation of international Court in Geneva, Switzerland*." The Court found that, despite the misleading wording used by the parties, the reference to the Geneva Chamber of Commerce (as opposed to the International Chamber of Commerce in Paris) and its Rules was sufficiently clear for it to administer the cases.

c) Objections Related to the Existence, Validity and Scope of the Arbitration Clause in Presence of a Clear Reference to the Swiss Rules

In 2 cases (≡ ca. 17%), Respondent objected to the jurisdiction of the Arbitral Tribunal, although the reference to the Swiss Rules was clear and undisputed. The Court found that objections concerning the jurisdiction of the Arbitral tribunal do not fall within the jurisdiction of the Court. Rather, it is for the Arbitral Tribunal to rule on those objections during the proceedings.

d) Plain Reference to the Swiss Rules

In 1 case (≡ ca. 8%), the arbitration clause provided that the arbitration shall be settled "*by a competent Swiss arbitration service in accordance with the Swiss rules of arbitration.*" The Court considered the wording sufficient to be a reference to an Arbitral Tribunal under the Swiss Rules.

3. Manifestly no Agreement to Arbitrate Referring to the Swiss Rules

In three cases (≡ ca. 25%) from 2014 and 2015, the arbitration clause provided for arbitration in Geneva, but there was no reference to the Swiss Rules, *e.g.*: "*under the rules of the International Chamber of Commerce*" and "*arbitration administered by the European Arbitration Association, under its Commercial Arbitration Rules and Judgment.*"

In another case (≡ ca. 8%) from 2014, the clause referred to Geneva, but that the dispute should be conducted "*before such a board, organization, institution or otherwise to be mutually agreed upon.*"

Due to a lack of a reference to the Swiss Rules (and to arbitration altogether, in the latter case), the Court decided not to administer the cases.

F. Approval and Adjustment of the Determination on Costs (Art. 40(4) Swiss Rules)

The Court, by way of the relevant Case Administration Committees, approves or adjusts the determination on costs made by the Arbitral Tribunal. The Court checks in particular

- the fees and expenses of the arbitrators;
- the costs of expert advice;
- the Registration Fee paid to the SCAI; and
- the Administrative Costs owed to the SCAI.

Arbitral Tribunals are requested to provide the Secretariat with the receipts of all expenses incurred, as well as an indication of the number of hours dedicated to the case and an assessment of the complexity of the case.

Whilst the fees of the Arbitral Tribunal are determined within a scale of fees (Appendix B of the Swiss Rules), when controlling the fees of the arbitrators, the Court makes sure that the resulting hourly rate is reasonable.[24]

1. Statistics

In the vast majority of cases, the arbitration costs were approved, subject to minor adjustments (e.g. for banking costs, minor typo-graphical mistakes).

In the period under review, in 6 cases the Court decided to adjust (i.e. to reduce) the fees of the arbitrators.

2. Grounds for the Adjustment (Reduction) of the Fees of the Arbitrators

In the following 3 cases, in light of their circumstances, the Court reduced the fees proposed by the arbitrators:

- Delay in issuing the final award by the sole arbitrator (10 months after the exchange of the post-hearing briefs). The Court made an adjustment of approximately CHF 18'700.
- Settlement of the dispute prior to the constitution of the Arbitral Tribunal (sole arbitrator), which was requested to issue an award on consent. The reduction amounted to approximately CHF 7'000 (hourly rate adjusted from CHF 890 to CHF 700).

[24] Art. 39 Swiss Rules provides as follows: "*The fees and expenses of the arbitral tribunal shall be reasonable in amount, taking into account the amount in dispute, the complexity of the subject-matter of the arbitration, the time spent and any other relevant circumstances of the case, including the discontinuation of the arbitral proceedings in case of settlement. In the event of a discontinuation of the arbitral proceedings, the fees of the arbitral tribunal may be less than the minimum amount resulting from Appendix B (Schedule of Costs)*."

- A three-member Arbitral Tribunal was constituted. In the course of the proceedings, the parties requested the co-arbitrators to conduct a mediation in order to try to settle the case. The case was settled and the Arbitral Tribunal issued a termination order. Given that the proceedings were terminated early (and as it was unclear whether the co-arbitrators had received direct payments from the parties for their mediation work), the Court considered the fees suggested by the Arbitral Tribunal to be too high and reduced them accordingly (by CHF 41'000).

In 3 other cases – all of them with (very) high amounts in dispute – the Court decided to adjust the fees because the resulting hourly rates of the arbitrators were considered to be excessive:

- The Arbitral Tribunal requested fees of CHF 900'000, which corresponded to hourly rates of CHF 870 for the presiding arbitrator, respectively of CHF 1'500 and CHF 2'200 for the co-arbitrators. The Court reduced the fees to CHF 720'000 (i.e. -20%).
- The Arbitral Tribunal requested CHF 800'000, which corresponded to hourly rates of CHF 800 for the presiding arbitrator and CHF 600 for the co-arbitrators. The Court reduced the fees of the Arbitral Tribunal to CHF 720'000 (i.e. -10%).
- The Arbitral Tribunal requested fees in the amount of CHF 142'000, corresponding to hourly rates of around CHF 850 for the presiding arbitrator and CHF 710 for the co-arbitrators. The fees were lowered by 10% (CHF 127'800).

G. Emergency Relief (Art. 43 Swiss Rules)

The emergency relief procedure was introduced with the 2012 Swiss Rules, under Article 43 Swiss Rules.

1. Statistics

In the period under review, 8 emergency relief proceedings were administered by the Court: 6 were filed in Geneva and 2 in Zurich. In one of the cases, the Claimant withdrew the Application for emergency relief and proceeded with the arbitration on the merits.

2. Time to Appoint the Emergency Arbitrator

If the conditions are met, the President or Vice-President, upon assignment by the Secretariat, will proceed with the appointment of an emergency arbitrator as soon as possible.

The practice of the Court shows that the appointment of the emergency arbitrators is made very quickly after receipt of the Application, the Registration Fee and the deposit for emergency relief proceedings:[25]

- In 2 cases (≡ ca. 25%), an emergency arbitrator was appointed in less than 24 hours.
- In 4 other cases (≡ ca. 50%), the Court appointed the emergency arbitrator in 1 working day.
- In 1 case (≡ ca. 12.5%), the Court appointed the emergency arbitrator in 2 working days.

In no case did it take the Court more than 2 working days to designate an emergency arbitrator.

[25] This corresponds to the expectation of the doctrine: According to MEIER, "*one may expect that it will usually take the Court not more than two business days*" (SR-Commentary, MEIER, Art. 43, para. 22, p. 461).

Selected Recent Procedural Issues Arising in CAS Arbitral Proceedings

JORGE IBARROLA

Contents

I. Introduction

We have been given a "*tribune libre*" or open forum to address some recent procedural issues arising in CAS proceedings. Inevitably, this meant quite some latitude to choose the topics to explore. Some of the issues that we ultimately selected are based on a review of applicable laws, regulations and decisions issued by CAS or other tribunals. Some other topics describe almost exclusively our personal practices, not always reflected in CAS and other publications.

We have decided to shed some light on three specific issues, taken from our personal practice and experience.

First, we will discuss the status of the party, compared to the status of a witness, asked to give oral evidence in CAS proceedings. We have indeed experienced situations where the parties, and even the CAS Panel, have encountered doubts

as to whether the examination of a party could constitute oral evidence or not, and whether such party could be subject to examination or cross-examination on factual issues.

The second issue is not new. It relates to the parties' standing to appeal. The purpose of our analysis is to review the latest developments in the CAS jurisprudence, and compare it to older precedents, showing a rather consolidated approach by the Panels.

The third and last topic relates to the need to obtain a swift resolution in urgent situations, through provisional measures, expedited proceedings or what we call "fast track" procedures conducted under the appellant's initiative.

II. Parties' Statements and Testimonies as Evidence in CAS Proceedings

Procedures before the CAS are subject to the Swiss Private International Law Act ("**PILA**") and to the Code of sports-related arbitration (the "**CAS Code**"). In particular, Article 184(1) PILA provides that the arbitral tribunal conducts the taking of evidence.

Article R57 of the CAS Code further provides that, in appeals proceedings, the Panel has full power to review the facts and the law. This, combined with Article 184(1) PILA, gives the Panel almost total latitude to determine the weight of evidence presented by the parties, so long as the Panel ensures equal treatment and the parties' right to be heard in adversarial proceedings.[1]

Certain matters relating to evidence will be governed by the procedural rules included in the CAS Code, with the exception

[1] DE LA ROCHEFOUCAULD, The Taking of Evidence before the CAS, in (2015) CAS Bulletin, Issue 1, (hereinafter "**DE LA ROCHEFOUCAULD, evidence**") p. 29.

of possible specific evidentiary rules provided by the applicable sport regulations. For example, CAS procedural rules determine the time limit to submit evidence, the authorised form of evidence– such as the documentary evidence, oral or written statements of witnesses and experts, etc. – and admissibility of evidence. In accordance with Article 182 PILA, if the Code is silent on a specific issue, the competent CAS Panel will fill this lacuna.[2]

The CAS Code is not long-winded when it comes to the witnesses' oral evidence and even less so with regard to the parties' statements and testimonies.

Articles R44.1 (in ordinary appeal proceedings), R51 and R55 (in arbitration proceedings) provide that the appellant and the respondent shall specify in the appeal brief and the answer, the names of any witnesses, including a brief summary of the expected testimonies. Witness statements, if any, may be filed together with the appeal brief or answer, or upon request of the President of the Panel.

In practice, the CAS is not very demanding with respect to the summary of the witnesses' expected testimonies. A brief explanation of the facts on which the witnesses will be heard is usually considered as sufficient and compliant with the requirements of Articles R44.1, R51 and R55 of the CAS Code.

That being said, the wording of the above provisions clearly implies that only those witnesses mentioned in the parties' principal submissions shall be subject to examination, cross-examination and questions by the Panel at the hearing. In some instances, Panels have accepted that whilst the name of a witness was not explicitly mentioned in one party's written submission, the party did specify that such witness would be identified at a later stage. This may occur, in particular, where one party intends to call as a witness one of the persons who

[2] *Ibid.*

took part in the proceedings before the previous instance but does not know, upon the filing of the appeal brief or the answer, precisely who will be designated to attend the hearing depending on the availabilities of all possible witnesses.

Normally, no new witnesses can be called after the closing of the exchange of written submissions. Indeed, Articles R44.1, R51 and R55 require the respective party to mention the identity of the witness in their submissions and Articles R44.1 and R56 of the CAS Code prohibit the parties from specifying any other evidence thereafter, unless the parties agree otherwise or the President of the Panel accepts such new evidence based on exceptional circumstances.[3]

Therefore, the rule is quite clear: the parties may not, in principle, rely on any oral evidence other than that mentioned in their written submissions, in the absence of an agreement to the contrary or of the existence of exceptional circumstances. This limitation is important in order to respect the parties' right to be heard, which would be violated if the award was based on statements made by a witness who was not mentioned in a party's submissions but who was nevertheless allowed to give oral evidence at the hearing, taking the opponent party by surprise and depriving it of the possibility to prepare the cross-examination of the witness.

According to the case law of the Swiss Federal Supreme Court, denying the right to rely on a new piece of evidence not mentioned in the submissions would not amount to a violation

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[3] MAVROMATI/REEB, The Code of the Court of Arbitration for Sport, Commentary, Cases and Materials, 2015, The Netherlands, note 12 ad article R55 of the CAS Code. DE LA ROCHEFOUCAULD, evidence, p. 31: "*Conversely, pursuant to Article R51, witnesses not mentioned at all in the Appeal brief and requested to testify out of time will not be allowed to testify at the hearing as long as the Respondents did not give their consent to hear these witnesses or the Panel did not consider that exceptional circumstances justify such testimonies*." (citing CAS 2010/A/2079, *Ricardo David Pàez Gòmez vs. Baniyas & FIFA*, Award of 12 April 2011, paras. 8.11 & 8.12.).

of the right to be heard.[4] As a corollary, in our opinion, a CAS award based, without specific reasons, on oral evidence not mentioned in the submissions could give rise to a violation of the right to be heard.

With regard to the witnesses' written statements, submitted either with the written submissions or at a later stage with the approval of the President of the Panel, it is common practice, and the CAS has acknowledged it on many occasions, that such statements do not alone suffice in constituting solid evidence. In order for the panel to take them into consideration, such written statements would need to be confirmed orally at the hearing, unless the parties agree to waive such requirement and allow the Panel to consider the evidentiary weight of the content of such statement without hearing the witnesses.[5] In other words, if a witness fails to attend the hearing, any witness statement in connection with that witness is, in principle, removed from the file and the evidence is not taken into account.[6]

Neither Article R44.1, nor Articles R51 or R55 address the issue of the parties' statements, in particular as to how such statements should be considered.

Pursuant to Article R44.2, applying to both ordinary and appeals arbitration proceedings (pursuant to R57(3) of the CAS Code), the Panel "*hears the parties, any witnesses and any experts* [at the hearing], *as well as the parties' final oral arguments, for which the Respondent is heard last*." Accordingly, the Panel seems to have the power to hear the parties outside the scope of their specific written statements at the beginning, during, or at the end of the hearing.

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4 ATF 4A_312/2012, quoted in MAVROMATI/REEB, *op. cit., ibid*.

5 Article 44.2(4) CAS Code in fine provides as follows: "*With the agreement of the parties, she/he may also exempt a witness or expert from appearing at the hearing if the witness or expert has previously filed a statement*."

6 MAVROMATI/REEB, *op. cit.* para. 23 ad Article R44 CAS Code; DE LA ROCHEFOUCAULD, evidence, p. 32.

One question which arises from time to time in practice is whether, beyond the panel's prerogative to ask the parties and their representatives questions and to give them the possibility of making any statement that they would deem relevant, the parties are also entitled to examine – or cross-examine –the other party. Obviously, no party is prevented from specifying in their submissions that they intend to call the other party as a witness, if it is an individual, or the other party's legal or statutory representative/s. In such circumstances, the individual party and/or party representative would certainly have to answer questions by the other party, in addition to those put by the panel. The problem is more complex when neither party has specifically called the other party or one of its representatives to testify at the hearing but still wants to ask questions or even cross-examine such party or party representative at the hearing.

The CAS Code does not address this specific issue and, in particular, does not explicitly allow the parties to examine another party whose oral evidence is not specified in the submissions.

Article R44.2(6) of the CAS Code provides that: "*Before hearing any witness, expert or interpreter, the Panel shall solemnly invite such person to tell the truth, subject to the sanctions of perjury*." This tends to suggest that although the Panel may put questions to the parties, their statements might not have the same value as those of witnesses or experts, who are the only ones who may be invited to tell the truth under the threat of criminal sanction in case of false testimony. Therefore, is a Panel entitled to consider a party's statement as actual evidence?

As mentioned above, the Panel is entitled to fill any possible lacuna in the applicable procedural rules, as long as it ensures

at all times equal treatment of the parties and their right to be heard.[7]

The CAS Panels are certainly entitled to broadly interpret Article R44.2 and consider themselves as having the power to ask the parties and their representatives questions, even if they are not specifically mentioned as witnesses. The parties' statements might then be considered by the Panel and thus constitute evidence, the weight of which would still be subject to the Panel's free appreciation.

In international arbitration procedures, arbitrators are not bound by the rules applicable to the taking of evidence before the Swiss civil or criminal courts. According to some authors, the CAS practice tends to follow the principles crystallised in Article a(2) of the IBA Rules, namely that "[a]*ny person may present evidence as a witness, including a Party or Party's officer, employee or other representative*."[8] CAS Panels have also been known to apply or take into consideration rules or principles found in Swiss procedural laws, such as the Swiss Code of Civil Procedure ("**CPC**").[9]

With regard to the parties' statements, Articles 191 and 192 CPC specifically provide for the possibility of asking the parties questions. Pursuant to Article 191 CPC, a court may question one or both parties on the relevant facts of the case. Before the examination, the parties shall be cautioned that they must tell the truth and are advised that if they wilfully lie, they may be sanctioned by a disciplinary fine not exceeding CHF 2,000 or, in the event of repeated lying, not exceeding CHF 5,000. This rule – and in particular the

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7 DE LA ROCHEFOUCAULD, evidence, p. 29.

8 RIGOZZI/QUINN, Evidentiary Issues Before CAS, in Bernasconi (ed), International Sports Law and Jurisprudence of the CAS, 4th Conference CAS & SAV Lausanne 2012, 2014, Bern, p. 7.

9 CAS 2010/A/2267, 2278, 2279, 2280, 2281, *Football Club "Metalist" et al vs. FFU*, para. 644 in relation to Article 152(2) CPC, concerning illegally obtained evidence.

sanction attached to it – would certainly not be easy to apply by analogy in CAS arbitration proceedings. Besides, it might lack efficiency, as under this rule of the CPC, a party may be threatened with sanctions only in the case of wilful lying, which would allow for the latter to avoid answering by simply saying that they do not remember the facts on which the court is questioning them.[10] In addition, this rule does not contemplate the possibility of the parties interrogating the other party, even on a complementary basis to the questioning of the court. Finally, the party's answers to the interrogatory provided at Article 191 CPC do not constitute evidence, unless the party confesses or admits a fact prejudicial to itself. Any fact favourable to the party could not be taken into consideration, unless it is corroborated by other strong evidence.[11]

Article 192 CPC provides in turn that the court may, *ex officio*, order one or both parties to provide evidence, subject to criminal penalties for failure to do so. Before giving evidence, the parties shall be cautioned that they must tell the truth and shall be advised of criminal consequences of perjury (criminal consequences foreseen at Article 306 of the Swiss Criminal Code). The court may thus compel a party to make a statement on specific facts under the threat of criminal sanctions in case of false testimony, thus putting the party in a similar situation as a witness. Contrary to the interrogatory provided at Article 191 CPC, the party's statement under Article 192 CPC qualifies as actual evidence, subject to the judges' free appreciation.[12]

CAS Panels could thus use Article 192 CPC as an instrument, in conjunction with Arts. R44.2 and R57 of the CAS Code, to compel parties to answer questions under the threat of the

[10] BOHNET/HALDY/JEANDIN/SCHWEIZER/TAPPY, Code de procédure civile commenté, 2011, Basel, paras. 14-15 ad Art. 191 CPC.
[11] *Ibid.,* para. 3 ad Article 192 CPC.
[12] *Ibid.,* para. 4 ad Article 192 CPC.

criminal consequence of perjury, in spite of Article R44.2 of the CAS Code. The arbitrators could then consider the party's statement as evidence, subject to their free appreciation. This would obviously not apply in disciplinary matters, where athletes in particular – as well as other officials or other parties subject to disciplinary or rules of ethics subject to sanction – are technically not witnesses within the meaning of Swiss criminal law[13] and cannot be compelled to testify.[14] This would be contrary to the prohibition of self-incrimination enshrined in the Swiss Constitution and in the European Convention on Human Rights ("**ECHR**").[15] Article 3.2.5 of the WADA Code provides that a Panel can draw an adverse inference if an athlete refuses to appear and answer questions.[16] Article 39 of the FIFA Code of Ethics provides for sanction against parties "*failing to cooperate*".[17] It cannot be

[13] RIGOZZI/QUINN, *op. cit.,* p. 9.

[14] *Ibid*., p. 7.

[15] Art. 32(2) Swiss Constitution; Decision of the Swiss Federal Supreme Court no. 6B_188/2010 of 4 October 2010; Article 6 ECHR, ATF 140 I 68; it is worth noting that the CAS jurisprudence has acknowledged that Article 6 ECHR may apply to CAS arbitration proceedings, in particular in disciplinary matters (CAS 2011/A/2433; *Amadou Diakite vs. FIFA*; Award of 8 March 2012): "[…] *the Panel is conscious of the fact that certain procedural guarantees enshrined in article 6(1) of the ECHR, in disputes relating to civil rights and obligations, are indirectly applicable even before an arbitral tribunal – even more so in disciplinary matters."*

[16] Art. 3.2.5 WADA Code provides as follows: "*The hearing panel in a hearing on an anti-doping rule violation may draw an inference adverse to the Athlete or other Person who is asserted to have committed an anti-doping rule violation based on the Athlete's or other Person's refusal, after a request made in a reasonable time in advance of the hearing, to appear at the hearing (either in person or telephonically as directed by the hearing panel) and to answer questions from the hearing panel or the Anti-Doping Organization asserting the anti-doping rule violation."*

[17] Art. 39 FIFA Code of Ethics provides as follows: "1. *If the parties or other persons bound by this Code fail to cooperate in any manner or are dilatory in responding to any request from the Ethics Committee, the chairperson of the appropriate chamber issuing the request may, after warning them, charge them with a violation of art. 18 of the present Code.* 2. *To the extent the parties fail to cooperate, the investigatory chamber, in preparing a final report based on the file in its possession, and the adjudicatory chamber, in reaching a decision based on*

excluded that the implementation of such rules could amount to a violation of Swiss public policy, provided of course that the prohibition of self-incrimination is considered as part of the latter.

Another question is whether a party or its representative could be examined or cross-examined even if it has not been mentioned as a witness in the written submissions. Should a panel authorise the examination or cross-examination in such circumstances? Would it not give rise to the violation of the other party's right to be heard, as such party would not have been given the opportunity to prepare for an unexpected examination?

Article 192 CPC gives the court the exclusive power to order a party to provide evidence. The parties are entitled to suggest to the court questions to put to the parties, but they cannot ask them directly.[18] Therefore, applying this provision by analogy to CAS proceedings, a Panel could ask the party questions, under the above-mentioned threats, either spontaneously, or upon application or suggestion by either party. However, in our opinion, as neither the CAS Code nor the CPC provides for the party's right to interrogate the other party (unless the latter has been mentioned as a witness in the written proceedings), the refusal by the panel to ask questions suggested by either party would not qualify as a potential violation of the right to be heard. Likewise, we do not consider that the fact that the panel could ask questions to the parties, even upon suggestion of the other parties, should allow either party to ask questions directly to the other party, either by way of examination or by way of cross-examination.

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the file in its possession, may take into account that behaviour and add the failure to cooperate as an additional charge for violation of art. 18 of the present Code."

[18] BOHNET/HALDY/JEANDIN/SCHWEIZER/TAPPY, *op. cit.*, para. 6 ad Article 192 CPC.

Finally, one word about the form of taking oral evidence. Article R44.2(3) of the CAS Code provides that it is each parties' responsibility to bring the witnesses to the hearing. However, pursuant to the fourth paragraph of the same rule, the president of the panel may accept to hear some parties, witnesses and experts via teleconference or videoconference.

There is a widespread practice of hearing witnesses and experts by telephone or video, quite often by skype. Sometimes, the question arises as to what extent the panel or the parties need to ensure the identity and the impartiality of the witnesses, in particular that they give oral evidence without any third party influence. While it may seem difficult to deceive the panel about the witnesses' identity when the examination takes place by videoconference, the fact that they are giving evidence on their own is more difficult to manage, in particular when the examination takes place by teleconference. Many CAS practitioners and arbitrators report having experienced situations where the panel and the parties could see that the witness was actually not alone in the room from which they were providing their testimony and, sometimes, one can clearly see the witness' eyes are focused on someone and they are receiving instructions from behind the camera as to what they should answer. It is not always clear whether it is for the panel or for the parties to intervene in such circumstances. A prudent approach would be that if counsel for a party has any doubt as to whether the witness is alone whilst giving evidence before the camera, they should explicitly ask the witness to confirm that, without necessarily waiting for the Panel to do so.

When the examination takes place by teleconference, the situation is clearly more complicated to manage. The identification of the witness will only take place by asking them their personal details, including first and last names, date of birth and possibly their identification or passport number, if that information has been submitted in the written

proceedings and can thus be verified. Likewise, it will be even more difficult than in the examination by videoconference, to verify whether the witnesses are answering the questions on their own or whether they are being assisted by or under the influence of, someone else.

This is why, when the presence of the witness at the hearing is not possible, the parties are encouraged to try to organise the remote examination of witnesses by videoconference rather than by teleconference and make sure that the witnesses testify in a transparent fashion, in order to give as much weight as possible to such oral evidence. Although the CAS always puts tele- and videoconference facilities at the parties' disposal for the hearing, the parties are further advised to check in advance the good quality of the telephone and internet connexions to ensure the most efficient remote examination. This can also have a significant impact on the weight given to oral evidence.

III. Standing to Appeal in Appeals Proceedings

The next topic to consider, which has been recently re-examined in CAS proceedings, is that of the standing to appeal.

Although it would be perfectly legitimate to consider that the issue of standing to appeal is not a procedural question but an issue concerning the actual right to bring a claim on the merits, the CAS case law and scholars have long viewed this issue as of a quasi-procedural nature before the CAS. The question of the appellant's sufficient interest thus has to be

considered both at the preliminary stage of the proceedings and at the merits stage.[19]

Standing to appeal – or to sue – is a recurrent issue before the CAS yet it is not addressed in the CAS Code. We thus have to turn to the CAS precedents to determine who is entitled to challenge a decision issued by a sports body.

Pursuant to Article R47 of the 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 it prior to the appeal, in accordance with the statutes or regulations of that body.*

Therefore, for the CAS to entertain an appeal, there must necessarily be a decision (or no decision in case of a denial of justice) and a rule in the statutes or regulations of the sports-related body.

According to well-established CAS jurisprudence,[20] only parties that have a *"direct, personal and actual interest"* in the challenged decision are considered to have legal standing to appeal to the CAS.

In CAS 2016/A/4924 and CAS 2017/A/4943,[21] the Panel stated that (emphasis added):

> *Third parties generally have standing before the CAS in two cases. First, when a regulation explicitly confers it.*

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[19] DE LA ROCHEFOUCAULD, Standing to sue, a procedural issue before the CAS (2011) CAS Bulletin, Issue 1 (hereinafter "**DE LA ROCHEFOUCAULD, Standing to sue***"*), p. 12.

[20] See for instance the recent preliminary award on standing to appeal CAS 2016/A/4924 and CAS 2017/A/4943, *Paolo Barelli vs. FINA* (paras. 85-86).

[21] Award of 28 June 2017, *Paolo Barelli vs. Fédération Internationale de Natation*.

> *Secondly, when an association's measure affects not only the rights of the addressee, but also and directly those of a third party, that third party is considered "directly affected" and thus enjoys standing to sue.*[22] *This is consistent with the general definition of standing that parties, who are sufficiently affected by a decision, and who have a tangible interest of a financial or sporting nature at stake may bring a claim, even if they are not addressees of the measure being challenged.*
>
> ***There is a category of third party applicants who, in principle, do not have standing, namely those deemed "indirectly affected" by a measure.***

Therefore, in a nutshell, pursuant to the CAS jurisprudence, a party has standing to appeal in two cases:

- the sporting regulations that the CAS must apply explicitly provide for such standing. That is the case, for instance, in the WADA Code, which gives not only the athlete, but also WADA the right to appeal against basically any doping-related decision, whether or not WADA was a party to the proceedings leading to such decision.[23] The WADA

[22] CAS 2008/A/1583, *Sport Lisboa e Benfica Futebol SAD vs. UEFA and FC Porto Futebol SAD* and CAS 2008/A/1584, *Vitoria Sport Clube de Guimaraes vs. UEFA and FC Porto Futebol SAD* (para.32).

[23] Article 13.2.3 WADA Code 'Persons Entitled to Appeal' provides as follows: "*In cases under Article 13.2.1, the following parties shall have the right to appeal to CAS: (a) the Athlete or other Person who is the subject of the decision being appealed; (b) the other party to the case in which the decision was rendered; (c) the relevant International Federation; (d) the National Anti-Doping Organization of the Person's country of residence or countries where the Person is a national or license holder; (e) the International Olympic Committee or International Paralympic Committee, as applicable, where the decision may have an effect in relation to the Olympic Games or Paralympic Games, including decisions affecting eligibility for the Olympic Games or Paralympic Games; and (f) WADA. In cases under Article 13.2.2, the parties having the right to appeal to the national-level appeal body shall be as provided in the National Anti-Doping Organization's rules*

Code further grants such standing to other parties, depending on the scope of the challenged decision, such as the IOC, the International Paralympic Committee, an international federation or the national anti-doping organisations. Likewise, FIFA reserves its right to appeal against doping-related decision issued by other football bodies.[24]

- the Appellant is directly affected by the decision or by the measure which is the object of the appeal. This obviously concerns the addressee of the decision. It may also concern a third party, which is not necessarily the addressee of the decision, but claims to be directly affected by it.

Some regulations of sporting associations identify who is actually affected or not by the decision or measure. For instance, the WADA Code commentary on Article 13 excludes from the range of affected parties the athletes, or their federations, who might benefit from having another

but, at a minimum, shall include the following parties: (a) the Athlete or other Person who is the subject of the decision being appealed; (b) the other party to the case in which the decision was rendered; (c) the relevant International Federation; (d) the National Anti-Doping Organization of the Person's country of residence; (e) the International Olympic Committee or International Paralympic Committee, as applicable, where the decision may have an effect in relation to the Olympic Games or Paralympic Games, including decisions affecting eligibility for the Olympic Games or Paralympic Games, and (f) WADA. For cases under Article 13.2.2, WADA, the International Olympic Committee, the International Paralympic Committee, and the relevant International Federation shall also have the right to appeal to CAS with respect to the decision of the national-level appeal body. Any party filing an appeal shall be entitled to assistance from CAS to obtain all relevant information from the Anti-Doping Organization whose decision is being appealed and the information shall be provided if CAS so directs."

[24] Article 58, para. 5 FIFA Statutes provides as follows: *"FIFA is entitled to appeal to CAS against any internally final and binding doping-related decision passed in particular by the confederations, member associations or leagues in accordance with the provisions set out in the FIFA Anti-Doping Regulations."*

competitor disqualified,[25] although some CAS decisions come to different results (see below). Article 119 of the FIFA Disciplinary Code ("**FDC**") reserves the right to appeal against a disciplinary decision (1) to the parties of the proceedings in the first instance and (2) to third parties who have a legally protected interest in the decision. Interestingly, the FDC also entitles the national football associations (whose players, officials or members are the addressees of the decision) to appeal, even if they were not parties in the previous instance and do not necessarily have any direct interest in the decision. However, they need to obtain the written agreement of the person concerned.[26] Finally, the UEFA Statutes provide at Art. 62(2) that "*Only parties directly affected by a decision may appeal to the CAS*."

CAS Panels have had to clarify when a party is in fact directly affected by a decision. An athlete or a sports-related entity may indeed be indirectly affected by a decision, albeit not being party to the first instance proceedings or an addressee of the decision, because it is a competitor of the actual addressee of the decision at stake or because the decision would have an impact upon such third party.[27] The decision may not impose any duty or sanction on such third party, but

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[25] WADC commentary on Article 13 (emphasis added) states as follows: "*Specified Persons and organizations, including WADA, are then given the opportunity to appeal those decisions. Note that the definition of interested Persons and organizations with a right to appeal under Article 13* ***does not include Athletes, or their federations, who might benefit from having another competitor disqualified****."*

[26] Article 119 FDC 'Eligibility to appeal' provides as follows: "1. *Anyone who has been a party to the proceedings before the first instance and has a legally protected interest justifying amendment or cancellation of the decision may lodge an appeal with the Appeal Committee.* 2. *Associations may appeal against decisions sanctioning their players, officials or members. They shall have the written agreement of the person concerned."*

[27] As is the case, for instance, when a player is suspended and the club is deprived of the possibility to benefit from his services or when a club is held jointly liable for a pecuniary order imposed on its player.

may affect it indirectly from a sporting perspective or otherwise. In such circumstances, unless otherwise provided by the sporting association's rules and regulations, the third party in principle does not have a right of appeal. In particular, effects resulting exclusively from a competition are only indirect consequences of the sports body's decision and do not entitle, save in certain circumstances, a third party to appeal such decision.[28] This is precisely the purpose of the WADA Code commentary on Article 13, as seen above.

In a recent CAS Award of 27 March 2017,[29] the Panel had the opportunity to recapitulate the principles and requirements for a party to demonstrate that it has standing to appeal a decision before the CAS. It recalled and cited one of the landmark CAS cases about the standing to appeal, which displayed a "common thread" approach, differentiating parties directly affected from those indirectly affected by a decision:[30]

> *Where the third party is affected because he **is a competitor of the addressee** of the measure/decision taken by the association – **unless otherwise provided by the association's rules and regulations – the third party does not have a right of appeal**. Effects that ensue only from competition are only indirect consequences of the association's decision/measure. If, however, the **association disposes in its***

[28] CAS 2015/A/4343, para. 115; CAS 2008/A/1583, *Benfica vs. UEFA & FC Porto* and CAS 2008/A/l584, *Vitória Guimarães vs. UEFA & FC Porto*, para. 9.6.1; see also CAS 2016/A/4924 and CAS 2017/A/4943, and DE LA ROCHEFOUCAULD, Standing to sue, p. 17.

[29] CAS 2015/A/4343, *Trabzonspor vs. TFF, UEFA and Fenerbahçe*, Award of 27 March 2017.

[30] CAS 2015/A/4343, para. 115; CAS 2008/A/1583, *Benfica vs. UEFA & FC Porto* and CAS 2008/A/l584, *Vitória Guimarães vs. UEFA & FC Porto*, para 9.6.1; see also CAS 2016/A/4924 and CAS 2017/A/4943, and DE LA ROCHEFOUCAULD, *Standing to sue*, p. 17.

> ***measure/decision not only of the rights of the addressee, but also of those of the third party****, the latter is directly affected with the consequence that the third party then also has a right of appeal. (emphasis added)*

The Panel further specified (emphasis added):[31]

> *In a nutshell, the correct approach when dealing with standing is to deem* ***competitors indirectly affected*** *– and thus exclude them from standing – when the measure does not* ***have tangible and immediate direct consequences for them****.*

In other words, a third party, which is not the addressee of a decision/measure but only an indirectly affected competitor of such addressee, has standing to appeal only if a rule so provides or if the challenged decision/measure deprives it of one of its rights.[32]

With regard to the burden of proof, it is for the party asserting standing to demonstrate a legal interest worthy of protection. Moreover, the notion "directly affected" as applied to third parties who are not the addressees of a measure must be interpreted in a restrictive manner.[33]

In CAS 2015/A/4343, the Panel referred to three illustrative precedents:

> ***Beckie Scott v IOC***[34]: Beckie Scott was a Canadian cross-country skier who ranked third in the Women's 5km Free Pursuit Cross-Country Skiing competition at the Winter games in Salt Lake City in 2002, behind the Russian athletes Larissa Lazutina and Olga Danilova.

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31 CAS 2008/A/1583, para. 116.

32 See also DE LA ROCHEFOUCAULD, *Standing to sue*, p. 17.

33 CAS 2015/A/4343, para. 114, citing CAS 2015/A/3874, *Football Association of Albania vs. UEFA & Football Association of Serbia*, paras. 176 *et seq*.

34 CAS 2002/O/373, *COC & Beckie Scott vs. IOC*, Award of 18 December 2003.

Thereafter, Lazutina and Danilova tested positive for the substance Darbepoetin and were disqualified by the IOC. However, only Lazutina was stripped of her medal for the above-mentioned race, with the consequence that Ms Scott was awarded the silver medal. Ms Scott considered that Ms Danilova should also be disqualified (although she had only tested positive at a subsequent competition) and that she should be awarded the gold medal. Accordingly, she appealed the IOC's decision to disqualify only Danilova from the women's 30km classical cross-country skiing event and not from the women's 5km Free Pursuit Cross-Country Skiing competition. Interestingly, in its review of Ms Scott's standing to appeal, the Panel referred to administrative procedural principles[35] and to contractual principles,[36] to conclude that the IOC should have removed all the medals awarded to Ms Danilova, including the one in the Women's 5km Free Pursuit, and that Ms Scott was entitled to request that the IOC apply the Olympic Charter correctly.[37]

***UEFA & Porto*:**[38] in April 2004, FC Porto was accused, within a criminal procedure called "*Apito Dourado*" (Golden Whistle), of having bribed referees and their

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[35] *Ibid.,* para. 22: "*Alternatively under Swiss rules of administrative procedure, the claim would also be admissible; the basic principle being that an appellant has standing to sue if she/he has an interest worthy of protection (see e.g. P. MOOR, Droit administratif, Volume II, Berne 2002, pp. 626, N° 5.6.2). This is deemed to be the case if the appellant is factually and directly affected by the litigious decision in a fashion that can be eliminated by its annulment and if the appellant did not have the opportunity to be heard in the first instance."*

[36] *Ibid.,* paras. 28-33. The panel concluded that, due to the contractual relationship between Ms Scott and the IOC, based *inter alia* on the Entry Form-Eligibility Conditions, "*Beckie Scott is entitled to invoke any breach by the IOC of the provisions of the OC* [Olympic Charter] *and the OMAC* [Bye-Laws of the Olympic Movement Anti-Doping Code]."

[37] *Ibid.,* para. 55.

[38] CAS 2008/A/1583, *Benfica vs. UEFA & FC Porto* and CAS 2008/A/1584, *Vitoria Guimarães vs. UEFA & FC Porto.*

assistants which was made public in Portugal. Several criminal and disciplinary proceedings were conducted in Portugal and eventually the UEFA opened a disciplinary procedure before the UEFA Control and Disciplinary Body, which decided to exclude FC Porto from participating in the UEFA Champions League. FC Porto appealed to the UEFA Appeals Body, before which the teams Vitoria Guimarães and Benfica were also allowed to file submissions and participate in the hearing. The UEFA Appeals Body upheld FC Porto's appeal and annulled the sanction imposed in the first instance. Then, Vitoria Guimarães and Benfica appealed against such decision to the CAS. FC Porto disputed the Appellants' standing to appeal. The Panel rejected this objection and accepted that Vitoria Guimarães and Benfica had standing to appeal because, further to the first UEFA decision, they were statutorily granted the right to participate in the UEFA Champions League and deprived from it by the second UEFA decision.[39] The interesting conclusion reached by the Panel in this case was that:

[39] *Ibid*.,para. 32: "*If one applies this test to the present case, the Appellants are directly affected; for if UEFA grants a club a starting place in a championship which has a closed field of starters, it has at the same time made a negative decision about including other candidates for said starting place. However, UEFA's allocation or denial of a starting place in the CL is not the realisation of any vague hope or fateful bad luck for the club concerned. Rather, it is a decision about a legal right of the clubs (more particularly specified in the UCL-Regulations). For the clubs have a right that when it awards the starting places the First Respondent firstly complies with its own rules and secondly treats all of the candidates for said starting places equally. If therefore, the UCL-Regulations provide in Art. 1.07 that the starting place goes to the next-best-placed club in the top domestic league, said club has a right against the First Respondent that if the appropriate requirements are met this provision is applied just as the Second Respondent has a right to be admitted to the CL pursuant to Art. 1.05 of the UCL-Regulations if it fulfils the admission criteria.*"

> *if* […] *the association disposes in its measure/decision not only of the rights of the addressee, but also of those of the third party, the latter is directly affected with the consequence that the third party then also has a right of appeal*.[40]

Trabzonspor vs. TFF, UEFA and Fenerbahçe: Fenerbahçe won the 2010-2011 season of the Turkish Super League and Trabzonspor finished second. Thereafter, Fenerbahçe's officials were accused of match-fixing. A number of decisions were taken by the criminal authorities and by the judicial bodies of the Turkish Football Federation ("**TFF**"). UEFA also decided that Trabzonspor would replace Fenerbahçe in the UEFA Champions League 2011-2012. Trabzonspor further requested that the TFF award it the title of champion of the season 2010-2011, which was rejected. Although several officials of Fenerbahçe were punished, no sanction was imposed on Fenerbahçe. The matter was further referred to UEFA, which banned Fenerbahçe from participating in European competitions, a decision which was confirmed by the CAS in August 2013. In January 2014, Trabzonspor filed a request with the UEFA asking, *inter alia*, that TFF be ordered to award it the title of champion of the Turkish League 2010-2011. UEFA eventually dismissed this request, holding that it had no jurisdiction to intervene in match-fixing offences which had occurred at the 2010/2011 Turkish Super League. Trabzonspor appealed against such decision before the CAS, which confirmed the UEFA decision of lack of jurisdiction. On the issue of standing to appeal, the Panel interestingly noted that Trabzonspor was not the addressee of the disciplinary measures brought in proceedings before UEFA. Therefore, the question to be

[40] *Ibid*., para. 31.

resolved was whether Trabzonspor was a directly affected party in the proceedings.[41] The majority of the Panel eventually raised serious question marks over Trabzonspor's standing to appeal, because the Appellant had failed to demonstrate that the most likely scenario in the event of a withdrawal of the title from Fenerbahçe would be that Trabzonspor would become the new champion of the 2010-2011 Super League.[42]

IV. Urgent Matters – Provisional Measures or Expedited Proceedings

For a long time, CAS practitioners have asked themselves, when an urgent situation arises, whether it is more appropriate to proceed before the CAS or before civil courts in order to protect the parties' interest immediately at stake.

There has been quite a long debate as to whether Article R37 of the CAS Code, relating to provisional measures before the CAS, actually compels parties bound by a CAS arbitration clause to lodge an application for interim relief exclusively with the CAS and prohibits them from filing it with a civil court. Article R37(3) *in fine* of the CAS Code reads:

> *In agreeing to submit any dispute subject to the ordinary arbitration procedure or to the appeal arbitration procedure to these Procedural Rules, the parties expressly waive their rights to request any such measures from state authorities or tribunals.*

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[41] *Ibid.*, para. 113.

[42] *Ibid*., para. 123: *"As a runner-up, Trabzonspor could be affected by sanctions imposed on Fenerbahçe, such as withdrawal of the title. In the counterfactual where Fenerbahçe is sanctioned with withdrawal of the title or point deduction, the Appellant may become the champion of the 2010-2011 Turkish League, as it ended the season second with the same number of points as the winner."*

To date, the Swiss Federal Supreme Court does not seem to have issued any decision clarifying this issue. In the quite abundant legal literature, some scholars consider that both the arbitral tribunal and the ordinary courts have jurisdiction to rule on an application for provisional measures, at least until the Panel has been duly and fully constituted;[43] other scholars are of the opinion that the parties may not validly renounce in advance the civil courts' jurisdiction on provisional measures;[44] while yet another part of the legal literature considers that Article R37 of the CAS Code specifically provides for such explicit renunciation.[45] Some authors agree that Article R37 of the CAS Code constitutes a valid waiver, but only when the arbitral tribunal has been formed.[46]

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[43] GOKSU, Schiedsgerichtsbarkeit, 2014, para. 1908ss p.582 ff., in particular para. 1911 p. 583.

[44] BUCHER, Commentaire Romand LDIP, para. 21 ad Art. 183 PILA.

[45] PATOCCHI, Les mesures provisionnelles en arbitrage international in International Sports Law and Jurisprudence of the CAS, 2014, Bern, p. 55ff., sp. p. 68. This author cites a decision of the Bezirksgericht of Zurich which confirmed the validity of such waiver.

[46] HAAS/DONCHI, Interim Measures of Protection in Arbitration and State Courts, in International Sports Law and Jurisprudence of the CAS, 2014, Bern, p.85 sp. pp. 94ff. However, these authors consider that: *"a waiver agreement between parties with unequal bargaining power can only be acceptable – in light of the constitutionally guaranteed right to effective legal protection – if the interim relief of arbitral tribunals is "comparable" to that of state courts. It is especially in relation to the access to (arbitral) justice and the effectiveness (speed and enforceability) of the legal protection that the protection must be comparable*." RIGOZZI and ROBERT-TISSOT are of the view that (RIGOZZI/ROBERT-TISSOT, "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, ASA Special Series No. 41, 2015, pp. 59 ff., sp. pp. 87-88, emphasis added): *"A (direct) waiver contained in the underlying sports regulations is not more consensual than an (indirect) waiver contained in the arbitration rules referred to by the arbitration clause in the sports regulations."* […] *In our view, the waiver contained in Article R37(3) 2nd sentence of the CAS Code differs from the waiver of the right to bring an action to set aside the award, because it does not deprive the athlete from a legal remedy without any "consideration": the athlete may request provisional measures before the*

There are at least two precedents decided at the cantonal level in Switzerland which acknowledge the validity of the waiver to access the ordinary courts for interim relief. The first precedent was decided in 2012 by the High Court of Bern, which ruled that it was, in principle, permissible to exclude the state courts' jurisdiction by way of an arbitration clause in the International Federation's Statutes, provided that such waiver is expressly stated in the arbitration clause (the waiver in Art. R37 CAS Code would be insufficient).[47] The second precedent is more recent. On 19 February 2018, the Civil Court of the Canton of Vaud ruled that the waiver provided in Article R37(3) of the CAS Code was valid and binding, even prior to the constitution of the arbitral Panel, provided that an application may actually be submitted to, and decided upon by, the CAS. This is indeed the case as the CAS Code provides for an authority – the President of the competent CAS Division – and a procedure to decide upon an application for interim measures even where the panel has not been constituted.[48]

Therefore, there seems to be a clear indication, at least in the cantonal jurisprudence, that the parties should avoid the ordinary jurisdiction for interim relief. That being said, the

arbitral institution or the arbitral tribunal. The situation is thus much more similar to the situation of the arbitration agreement where the parties "waive" state court jurisdiction "in exchange" for arbitral jurisdiction. It results from this "trade-off" rationale that the waiver. of Article R37(3) 2nd sentence of the CAS Code is valid provided that the CAS' system regarding provisional measures offers similar guarantees to those found before state courts. Therefore, ***the waiver of the state court jurisdiction over provisional measures is enforceable only to the extent that the CAS is: (i) as independent and impartial; and (ii) in a position to be as effective as state courts would be.***"

47 *Obergericht des Kantons Bern* (19 April 2012) ZK 12 111, cited and translated by HAAS/DONCHI, *op. cit.*, pp. 95-98. In relation to the same decision of the High Court of Bern, see RIGOZZI/ROBERT-TISSOT, *op. cit.*, pp. 59 ff., sp. pp. 87-88. See also RIGOZZI/HASLER, Chapter 15, Part II, Commentary on the CAS Procedural Rules, Art. R37 [Provisional and conservatory measures] in Arroyo (ed.) Arbitration in Switzerland - Practitioner's Guide - CAS Code Commentary – 2018, 2nd edition, pp. 1498-1491.

48 *Cour civile du Tribunal Cantonal du Canton de Vaud*, CM18.002875 1/2018/JMN (19 February 2018).

parties will nevertheless have to address and take a decision on the further issue of whether it is better to apply for provisional measures before the President of the competent CAS Division or, alternatively, to seek an award on the merits by way of expedited or fast track procedure.

Articles R44.4 and R52(4) of the CAS Code provide for the possibility of proceeding in an expedited manner, but only when both parties agree. In case of such agreement, the parties and the CAS decide together on a procedural schedule, in order that the award, or at least its operative part, may be served on the parties early enough to allow the appellant, if successful, to participate in a competition, for instance.

However, in practice, more often than not and mostly for strategic reasons, respondents tend to deny their consent to expedited proceedings. Disappointingly, this happens rather often with International Federations as respondents, in spite of their expected interest of resolving difficulties in relation to athletes' or officials' eligibility to participate in sporting events.

Facing the respondent's refusal to proceed expeditiously in accordance with Articles R44.4 and R52(4) of the CAS Code, the Appellant has two options: either apply for provisional measures or, if there is enough time before the date of the competition, try to convince the panel to decide the dispute before a certain date in spite of the respondent's reluctance. For that, there must be enough time for the respondent to fully benefit from the statutory 20-day deadline to file its answer (Article R51 of the CAS Code).

The advantage of obtaining a decision on the merits very swiftly (either pursuant to Articles R44.4 and R52(4) or by means of a fast track procedure conducted by the appellant) rather than an order on provisional measures is to have a final and binding award. In addition, the award is issued by a panel of one or three arbitrators, after careful review of all the

arguments and evidence and after having heard the parties and other oral evidence, and not just an order without hearing based on *prima facie* facts and arguments (which is quite difficult to obtain, given the restrictive cumulative requirements of Article R37 of the CAS Code and the corresponding practice of the CAS Division Presidents in this regard).

Therefore, if a respondent refuses the CAS expedited procedure and an appellant is reluctant to request provisional measures, the appellant could contemplate conducting a "fast track procedure", from a timing perspective, taking into consideration the unavoidable requirement that the respondent is entitled to the 20-day deadline to file its answer.

First, the appellant should ask the Panel to schedule a hearing, if needed, shortly after the expiration of the answer deadline. If this is done, the arbitrators nominated by the parties and the president of the panel should be chosen on the basis of their availability for such hearing. In general, if there is a real urgency to rule on the dispute and if the respondent refuses to cooperate by objecting to the expedited procedure, the panel will likely be inclined to find a hearing date to resolve the matter timely.

Second, the appellant should file its statement of appeal and appeal brief simultaneously, within a time frame which would allow the CAS Court Office to serve such submission on the respondent early enough for the deadline of the answer to expire before the date of the hearing.

For example, if a competition is to start on 1 September and the appealable decision – preventing the appellant from participating in the competition in question – is notified to the parties at the beginning of August, then the appellant may reasonably expect, even if the respondent refuses to proceed expeditiously, that the panel issues a final award on 31 August. To allow the panel to reach a decision within such

short timeframe, the last day for the filing of the Answer should be around 28 August, meaning that the respondent should have received the appeal brief on 8 August at the latest. Therefore, the appellant should aim at filing its appeal at least two or three days before 8 August, in order for the CAS Court Office to have sufficient time to serve it on the respondent. Accordingly, the time limit within which the appellant ought to file its statement of appeal and appeal brief, would be around 5 August, even if the statutory deadline to appeal expires far later.

Prudently, the appellant, should also explicitly mention in its submission:

- that it requests that a hearing be held on, or shortly after, the expiry of the deadline for the answer;
- that the respondent should be ordered to nominate swiftly its arbitrator;
- that the Division President should swiftly appoint the President of the panel;
- that all members of the Panel should be asked to swiftly confirm their availability for a hearing to be held on such short notice (alternatively, the appellant might consider requesting that the matter be referred to a sole arbitrator); and finally
- that the appellant opposes in advance any possible request by the respondent to extend the deadline to file the answer. Given the respondent's refusal to proceed expeditiously, the CAS Court Office and/or the panel should be quite understanding of such constraint put on the respondent to file its answer.

If the appellant completes all the foregoing requirements, there is a good chance that the panel will succeed in issuing its decision before the beginning of the competition.

There could be an additional obstacle which would delay the beginning of the respondent's deadline to file its answer and thus jeopardise the ruling being issued in time: Article R55(3) of the CAS Code, which gives the respondent the right to request that the time limit for the filing of the answer be fixed after the payment by the appellant of its share of the advance of costs. Even in urgent situations, the CAS' request that the parties pay advances of costs may take several days or weeks after the filing of the appeal brief. Therefore, the appellant's plan to have a ruling within a short period of time, in spite of conducting the fast track procedure described above, could be rendered completely ineffective by the time taken by the CAS administration to provide the parties with the amounts of the advance of costs which the appellant would have to settle before the answer deadline starts running.

An interpretation of Article R55(3) of the CAS Code could be that if "*the Respondent **may** request that the time limit of the filing of the answer be fixed after the payment by the Appellant of its share of advance of costs*" (emphasis added), this should not be binding on the CAS or on the panel (given the word "may") and that, accordingly, it could be decided that the deadline to file the answer should start running immediately in urgent situations like the one described above. Another way for the CAS to avoid the obstruction of the fast track procedure sought by the appellant is that, when it acknowledges receipt of the appeal, the CAS Court Office immediately fixes the amount of the advance of costs, which the appellant could settle upon receipt. This is something the appellant would be prudent to request upon filing.

Unfortunately, we have experienced situations where it has taken a significant amount of time for the CAS to communicate to the parties the request for the payment of

the advance of costs, rendering void the efforts to obtain an award within a short timeframe. We would advocate for a more flexible and proactive approach, for instance, as said above, by including in the acknowledgement of receipt of the appeal the request for the payment of the advance of costs. In any event, it would be advisable for the party seeking a faster procedure to spontaneously pay, upon the filing of the appeal, an amount corresponding to at least half of the total costs that the CAS is reasonably expected to request. We dare to suggest that a payment of CHF 25,000 should suffice in most instances, however one can always be unpleasantly surprised.

V. Conclusion

Some learned readers of this contribution may find it only moderately revolutionary. Yet, we hope that it will have been helpful, at least to some users of the CAS, to know or to be reminded that:

- if a party wants to hear another party as a witness, and in particular to cross-examine such party, it would be prudent to mention it in its written submission;
- that the standing to appeal will only be granted to addressees of a decision, pursuant to a specific rule or, alternatively, if the Appellant is directly affected thereby; and, finally,
- that even if a counterparty refuses to proceed expeditiously in an urgent matter, it is often possible to obtain an award on the merits, rather than an interim order, by way of conducting a fast track procedure that can enable the panel to take a decision within a very short time period, paying

however attention to the issue of the advance of costs to be paid to the CAS.

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

DOROTHÉE SCHRAMM[1]

Contents

[1] The author thanks Mr. Rodolphe Ruffié and Mrs. Laureen Moret for their invaluable help with this contribution.

I. Introduction

Over the course of the past two years,[2] the Swiss Federal Supreme Court ("**Supreme Court**") has published almost 100 decisions relating to arbitration, with the majority relating to the setting aside of awards rendered under Chapter 12 of the Swiss Private International Law Act ("**PILA**"). Almost all of these decisions continue down the well-worn path taken by the Supreme Court in previous years, and many of them contribute interesting aspects that add colour and further enrich the picture.

Amongst the many lessons that can be drawn from a two-year review of the Supreme Court's decisions, below are the ten lessons that the author finds particularly instructive.

Number 1: Arbitral tribunals are well advised to take great care on what to include in the operative part of the award, as unrequested holdings, or holdings that fall within the jurisdiction of a state court, may cause trouble. Nevertheless, the Supreme Court has saved two awards from being partially set aside by finding that the holdings in question, whilst defective, did not cause any harm to the party challenging the award (the "**appellant**").[3]

Number 2: Counsel need to carefully assess whether they can, and must, challenge unwelcome decisions that they receive. For example, following the principle of "substance over form", the Supreme Court has qualified a "procedural order" as being an award and an "award" as being a

[2] This contribution covers decisions that were rendered from 23 August 2016 onwards. The last decision that could be taken into account was rendered on 26 July 2018 and published in the second half of August.

[3] See Sections II.B.1, II.C.2.b and II.C.3 below.

procedural order, which has significant implications on whether the decision is subject to challenge or not.[4]

Number 3: The future looks bright for parties who have waived setting aside proceedings. Indeed, in all three relevant decisions, the Supreme Court has upheld the waiver, and published the decisions as leading decisions.[5]

Number 4: In the context of a request for revision, the Supreme Court rendered a leading decision rejecting the claim that an arbitrator from CMS von Erlach Poncet in Zurich had a conflict of interest when an affiliate of the claimant instructed the German firm CMS Hasche Sigle in an unrelated matter. This decision contains an interesting discussion on the role of the 2014 IBA Guidelines on the Conflicts of Interest in International Arbitration.[6]

Number 5: A decision that is interesting for arbitration purposes was rendered by the second civil law division of the Supreme Court, after having obtained the unanimous approval of all Supreme Court divisions concerned. In this decision, the Court held that the Facebook friendship between a judge and a party was, in itself, insufficient to create an appearance of partiality.[7]

Number 6: Arbitral tribunals should make sufficiently clear whether they base their interpretation of the arbitration agreement on the parties' actual intent (subjective interpretation) or on their presumed intent (objective interpretation), as only the latter can be reviewed by the Supreme Court. The Supreme Court disagreed with the objective interpretation carried out by two arbitral tribunals who accepted jurisdiction beyond the Supreme Court's

[4] See Section II.B.2 below.
[5] See Section II.B.3 below.
[6] See Section III below.
[7] See Section II.C.1 below.

comfort zone, and proceeded to set aside the awards on this basis.[8]

Number 7: Two awards were set aside based on a violation of the right to be heard. One of these decisions serves as a reminder that an arbitral tribunal needs to be careful not to lose sight of amended prayers for relief when rendering an award.[9]

Number 8: The Supreme Court decided that the notion of substantive public policy is universal, and rejected attempts to establish a sport-specific or investment-specific notion of public policy.[10]

Number 9: The Supreme Court was equally unimpressed by several attempts to follow in the footsteps of the *Matuzalem* decision and have awards set aside for allegedly awarding excessive amounts that violated the debtor's personality rights. All of these attempts failed.[11]

Number 10: With regard to procedural public policy, the Supreme Court has unfortunately left two interesting questions undecided. The first question is whether in the context of assessing the *res judicata* effect of a foreign judgment, the indirect jurisdiction of a foreign court must be analysed under the New York Convention or under the PILA. The second question is whether, and under what conditions, excessive formalism can be considered as a matter of procedural public policy.[12]

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8 See Section II.C.2.a below.
9 See Section II.C.4.a.i below.
10 See Section II.C.5.a.i below.
11 See Section II.C.5.a.ii below.
12 See Section II.C.5.b below.

II. Decisions on Applications to Set Aside Arbitral Awards (Article 190(2) PILA)

A. International vs. Domestic Arbitration

According to the Supreme Court's long-standing practice, the relevant moment to determine whether an arbitration is international or domestic in nature is when the parties enter into the arbitration agreement. If at least one party's seat, domicile or habitual residence at the time is outside of Switzerland, the future arbitration will be subject to Chapter 12 of the PILA. By contrast, if all parties to the arbitration agreement were domiciled, seated or had their residence in Switzerland when they entered into the arbitration agreement, the future arbitration will be subject to Part 3 of the Swiss Code of Civil Procedure ("**CPC**").[13]

The Supreme Court confirmed this case law in setting aside proceedings brought by Mr. Platini, the former president of the UEFA, against an award rendered by the Court of Arbitration for Sport ("**CAS**"), which imposed sanctions on him for violation of the FIFA code of ethics. Mr. Platini was domiciled in France when the arbitration agreement became binding on him, and the parties never agreed to submit the arbitration to the CPC. Thus, the arbitration should have been subject to Chapter 12 PILA. However, the president of the arbitral tribunal raised the question of the application of Chapter 12 PILA vs. Part 3 CPC at the beginning of the arbitral proceedings and held – wrongly – that the CPC was applicable. As neither party objected, the arbitration was conducted under the CPC, and Mr. Platini ultimately challenged the final award based on arbitrariness pursuant to Article 393 CPC.

[13] Swiss Federal Supreme Court Decision ("**SFSCD**") no. 4A_600/2016 of 29 June 2017, reason 1.1.1.

In response, FIFA argued before the Supreme Court that the challenge was inadmissible because Chapter 12 PILA applied, which does not allow challenges based on arbitrariness. The Supreme Court rejected FIFA's inadmissibility defence on the basis of the principle of good faith, in particular the prohibition against contradictory behaviour (*venire contra factum proprium*), since FIFA had failed to object to the application of the CPC at the outset of the arbitration.[14] It is noteworthy that FIFA's failure to object to the application of the CPC led to the Supreme Court applying an otherwise inapplicable arbitration law. The Supreme Court ultimately rejected Mr. Platini's challenge based on the CPC.

B. Admissibility of Applications to Set Aside

1. Interest Worthy of Protection in Setting Aside the Award

Article 76(1)(b) of the Federal Supreme Court Act ("**FSCA**") requires that the appellant must have an interest worthy of protection in setting aside the award. This requirement saved two awards from being set aside, one on the basis of *ultra petita*[15] and the other on the basis of a lack of arbitrability.[16] In both cases, the Supreme Court held that certain holdings in the operative part of the award were indeed defective, but that they did not cause any harm to the appellant. The Supreme Court therefore refrained from partially setting aside these awards.[17]

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[14] SFSCD no. 4A_600/2016 of 29 June 2017, reason 1.1.

[15] SFSCD no. 4A_50/2017 of 11 July 2017, reason 3.3, see Section C.3 below.

[16] SFSCD no. 4A_12/2017 of 19 September 2017, ATF 143 III 578, reason 3.2.2.2, see Section C.2.b below.

[17] SFSCD no. 4A_12/2017 of 19 September 2017, ATF 143 III 578, reason 3.2.2.2; SFSCD no. 4A_50/2017 of 11 July 2017, reason 3.3.

For the appellant to have an interest worthy of protection, the setting aside of the award must be practically useful to the appellant in preventing economic, substantive or other damage that would be caused by the award. The interest worthy of protection must exist from the time of the filing of the challenge up until the Supreme Court's decision on the challenge.[18] As an exception to this rule, the Supreme Court will accept to hear a challenge, even if the above conditions regarding an interest worthy of protection are not fulfilled, if the issue at hand may arise again at any time in identical or similar circumstances, if its nature does not allow it to be decided before it loses its relevance, and if there is a sufficiently important public interest reason in resolving the issue in dispute.[19]

2. Awards and Decisions Subject to Challenge

The Supreme Court rendered several decisions, including one published as a leading decision, on whether a decision by an arbitral tribunal had been properly characterized as a procedural order or as an (interim or partial) award. This is relevant because procedural orders cannot, in principle, be directly challenged before the Supreme Court,[20] whilst an award can, and must, be directly challenged (to the extent admissible under Article 190(3) PILA), since a party must raise his objections at the earliest possible stage of the

[18] SFSCD no. 4A_426/2017 of 17 April 2018, reason 3.1; SFSCD no. 4A_12/2017 of 19 September 2017, ATF 143 III 578, reason 3.2.2.2; SFSCD no. 4A_50/2017 of 11 July 2017, reason 3.3; SFSCD no. 4A_524/2016 of 20 September 2016, reason 3.1.

[19] SFSCD no. 4A_426/2017 of 17 April 2018, reason 3.1.

[20] Unless there are exceptional circumstances (see SFSCD no. 4A_98/2017 of 20 July 2017, ATF 143 III 462, reason 3.1), procedural orders can only be indirectly challenged by way of challenging the next award issued following the issuance of the procedural order.

procedure and is precluded from doing so later.[21] The Supreme Court continued to follow its well-established approach of "**substance over form**", according to which the substance of the decision, and not its title, is decisive for its qualification as an award or a procedural order. In terms of substance, procedural orders do not bind the arbitral tribunal and can be modified later, whilst awards constitute a final and binding decision on a claim or a quantified part of a claim (partial award) or on a preliminary question of a procedural or substantive nature (interim award).[22]

Applying these principles, the Supreme Court qualified as a **procedural order** a letter with procedural instructions in which the arbitrator confirmed the amount of the advance on costs and shared his thoughts on certain issues (including the respondent's reliance on a pre-arbitral mediation step) whilst keeping the issue open for further discussion at a case management conference.[23] It also qualified as a procedural order a decision in which the CAS designated a laboratory because the parties did not agree on a laboratory to carry out a doping analysis.[24]

By contrast, the Supreme Court qualified as an **interim award** a decision entitled "Procedural Order" (*Verfügung*) in which a DIS tribunal dismissed the parties' challenges against two of the arbitrators for impartiality.[25] This interim award had to be challenged within 30 days of receiving the "Procedural Order" based on Article 190(3) and (2)(a) PILA (irregular constitution of the arbitral tribunal). The appellant was later precluded from challenging the final award on this basis.[26]

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[21] *E.g.*, SFSCD no. 4A_98/2017 of 20 July 2017, ATF 143 III 462, reason 3.1.
[22] SFSCD no. 4A_98/2017 of 20 July 2017, ATF 143 III 462, reason 2.1; SFSCD no. 4A_524/2016 of 20 September 2016, reason 2.1.
[23] SFSCD no. 4A_555/2016 (domestic) of 10 October 2016, reason 3.2. See similarly SFSCD no. 4A_546/2016 (domestic) of 27 January 2017, reason 1.4.
[24] SFSCD no. 4A_30/2018 of 8 February 2018.
[25] SFSCD no. 4A_136/2018 of 30 April 2018.
[26] SFSCD no. 4A_136/2018 of 30 April 2018.

This decision, which was rendered within less than two months, serves as a reminder that counsel must carefully assess procedural orders and consider whether they contain an explicit or implicit decision on the arbitral tribunal's jurisdiction or its proper constitution and, as such, should be immediately challenged.

Of particular interest are decisions that seem to qualify as an award or procedural order in accordance with the substantive criteria described above, but that are still not treated as such This is discussed in depth in a decision, published as a leading decision, in which the Supreme Court rejected a challenge as inadmissible which was brought in an arbitration between Yukos Capital and the Russian Federation over claims under the Energy Charter Treaty. In this case, the arbitral tribunal had rendered a decision entitled "Interim Award on Jurisdiction", in which it finally dismissed **three out of five alternative jurisdictional objections** brought by the respondent. The Supreme Court held that this "Interim Award on Jurisdiction" could not be directly challenged because the arbitral tribunal had not yet fully decided on jurisdiction, and thus had not "wrongly accepted or declined jurisdiction" as required under Article 190(2)(a) PILA.[27]

Two other decisions relate to **termination orders** which were issued by the President of the Appeals Arbitration Division of the CAS before an arbitral tribunal was constituted. In the first case, the termination was ordered because the advance on cost had not been paid on time,[28] and in the second case, the termination was ordered because the appeal to the CAS was belated.[29] The Supreme Court held that such a termination order, even if issued by the president of one of the arbitration divisions of the CAS, was not a simple procedural order but a

[27] SFSCD no. 4A_98/2017 of 20 July 2017, ATF 143 III 462, reasons 3.2.2 and 3.3.
[28] SFSCD no. 4A_692/2016 of 20 April 2017.
[29] SFSCD no. 4A_384/2017 of 4 October 2017.

final decision on inadmissibility that could be challenged before the Supreme Court.[30]

Two other Supreme Court decisions touched upon the question of whether a decision qualifies as an award that can be challenged. In one decision, published as a leading decision, the Supreme Court was faced with a challenge brought against a CAS award despite the fact that the appellant considered that the CAS was not an arbitral tribunal "worthy of this name", as it was allegedly not independent from the counterparty FIFA. Despite the fact that the challenge would have been inadmissible according to the appellant's own pleadings, the Supreme Court nevertheless considered it as admissible due to the specific circumstances of the case.[31] It confirmed that the **CAS is sufficiently independent from FIFA** to qualify as a regular arbitral tribunal,[32] and thereby confirmed its *Lazutina* decision of 2003, in which the Supreme Court held that the CAS was independent from the International Olympic Committee.[33] The Supreme Court held that it would only reconsider this case law in case of compelling reasons that would demand that FIFA not be treated like other international sports federations due to its links with the CAS. However, it saw no such compelling reasons in the case at hand. [34]

By contrast, the Supreme Court held (unsurprisingly) that decisions of the **Arbitration Court of the Swiss Chambers' Arbitration Institution** on the constitution of the arbitral tribunal are not awards and are thus not subject to setting aside proceedings.[35] In addition, CAS awards that reject as

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30 SFSCD no. 4A_692/2016 of 20 April 2017, reason 2.3; SFSCD no. 4A_384/2017 of 4 October 2017, reason 1.2.
31 SFSCD no. 4A_260/2017 of 20 February 2018, ATF 144 III 120, reason 1.2.
32 SFSCD no. 4A_260/2017 of 20 February 2018, ATF 144 III 120, reasons 3.2-3.4.
33 SFSCD of 27 May 2003, ATF 129 III 445.
34 SFSCD of 27 May 2003, ATF 129 III 445.
35 SFSCD no. 4A_546/2016 (domestic) of 27 January 2017, reason 1.3.

inadmissible challenges brought against decisions of **sports referees** are also not subject to setting aside proceedings.[36]

Finally, the Supreme Court held that, unlike in domestic arbitration (Article 393(f) CPC), a holding in the operative part of the award in which an ***ad hoc* arbitral tribunal fixes the amount of its fees** is not subject to challenge.[37]

3. Waiver of Setting Aside Proceedings (Article 192(1) PILA)

The Supreme Court rendered three decisions, published as leading decisions, in which it declared challenges against arbitral awards inadmissible on the basis of the parties having waived their right to challenge the award.

In one case, the Supreme Court examined the meaning of the word "**appeal**" and summarized its previous decisions regarding cases in which the parties had excluded any "appeal" against the arbitral award. It held that the clause at hand ("*There shall be no appeal to any court from awards rendered hereunder*") was sufficiently clear and as such constituted a valid waiver of the right to challenge the award.[38] The Supreme Court also extended this waiver to a request for revision made by the appellant (in the alternative to the challenge) on the basis that it had discovered an alleged conflict of interest of one of the arbitrators prior to the expiry of the 30-day period to challenge the award. According to the Supreme Court, it would violate good faith if an appellant could overcome its valid agreement to waive a challenge, based on an irregular composition of the arbitral tribunal (for example due to a conflict of interest), by simply making a request for revision on the very same basis.[39] The Supreme

[36] SFSCD no. 4A_206/2017 of 6 October 2017, reason 2.
[37] SFSCD no. 4A_491/2017 of 24 May 2018, reason 2.2.
[38] SFSCD no. 4A_53/2017 of 17 October 2017, ATF 143 III 589, reason 2.
[39] SFSCD no. 4A_53/2017 of 17 October 2017, ATF 143 III 589, reason 3.2.

Court did not decide, however, whether the same principle would apply if the conflict of interest were discovered after the expiry of the 30-day period to challenge the award.

In the second case, the contract was undoubtedly clear in excluding any challenge against an arbitral award ("*The decision of the arbitrator in any such proceeding shall be final and binding and not subject to judicial review. Appeals to the Swiss Federal Tribunal from the award of the arbitrator shall be excluded*…"). The interesting aspect of this case was that the sole arbitrator **held that the entire contract was invalid**, on the basis that the respondent's signature was forged. However, the sole arbitrator still accepted jurisdiction on the basis that the respondent had entered an appearance, and the arbitral tribunal thereafter rendered an award dismissing the claimant's claim. The claimant challenged the award before the Supreme Court on the basis of an alleged violation of its right to be heard, and argued that the waiver in the contract did not apply as the sole arbitrator's jurisdiction was based on the respondent's unconditional appearance, and not on the arbitration clause.

The Supreme Court rejected this argument based on the principle of good faith and the prohibition against contradictory behaviour (*venire contra factum proprium*) because the claimant had based his claim and request for arbitration on the validity of the contract and arbitration clause, which included the waiver. The Supreme Court held that the claimant was pleading both the validity of the contract (in order to be awarded its claim) and its invalidity (in order to escape the waiver). The Supreme Court thus rejected the challenge as inadmissible because the claimant "*could not have its cake and eat it too*" ("*On ne peut pas vouloir tout et son contraire*").[40]

[40] SFSCD no. 4A_500/2015 of 18 January 2017, ATF 143 III 55, reason 3.4.

In the third case, the Supreme Court was faced with an award rendered in a domestic arbitration, where the parties cannot validly waive their right to challenge the award in advance (this principle is the same in international arbitration in cases where one party is domiciled or resident in Switzerland). The Supreme Court held that a waiver of the right to appeal is nevertheless admissible if it is **declared in full knowledge of the award** after it is rendered.[41] It must be determined by way of contractual interpretation whether a party has irrevocably waived its right to challenge the award. In this case, the Supreme Court accepted that there was a valid waiver where the appellant's counsel had e-mailed opposing counsel stating that "*I am happy to confirm – also in light of the information that your client […] will not challenge the award […] before the Swiss Supreme Court – that our client […] has decided also not to bring such a challenge.*"[42]

4. Other Procedural Questions Related to Setting Aside Proceedings

Whilst the Swiss Federal Council recently proposed that challenges and requests for revision may be drafted in English, such submissions must currently still be drafted in an official language of Switzerland. The Supreme Court confirmed its previous case law, according to which parties who file **challenges or requests for revision on time but in English**, must, in principle, be granted an additional period of time to translate the submission into an official language of Switzerland. This principle is aimed at preventing excessive formalism, considering that many international arbitrations

[41] SFSCD no. 4A_475/2016 (domestic) of 28 March 2017, ATF 143 III 157, reason 1.2.1.

[42] SFSCD no. 4A_475/2016 of 28 March 2017, ATF 143 III 157, reasons 1.2.3-1.2.4.

are conducted in languages other than the official languages of Switzerland.[43]

In spite of this principle, the Supreme Court, in two cases, dismissed the English-language submissions from the outset, on the basis that filing them in English amounted to an **abuse of process**. In one case, this was because the challenge contained indications of the appellant's specific legal knowledge and explicitly referenced the language requirements of Articles 42(1) and 54(1) FSCA, showing that the appellant consciously filed a defective submission.[44] The Supreme Court also held that the inability to speak an official language of Switzerland was not sufficient for the appellant to obtain the appointment of court-ordered counsel.[45] The other case concerned a request for revision, which was filed only two months after the same party had requested counsel in Lausanne to file a challenge to the award in French. Furthermore, the party requesting the revision had corresponded by e-mail with the Supreme Court about the language requirement prior to filing the request, and had even inquired as to whether the Supreme Court would accept a Google translation – a question that was left unanswered.[46]

In an interesting case, the Supreme Court was asked to set aside an award on jurisdiction in an investment treaty arbitration between an investor and Russia. Upon Russia's challenge of the award, the investor requested that the Supreme Court order Russia to provide **security for costs**. The president of the Supreme Court confirmed the decision ATF 77 I 42 from 1951 and held that a contracting state of the 1954 Hague Convention on Civil Procedure is to be treated

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43 SFSCD no. 4F_8/2018 of 14 March 2018, reason 3.1; SFSCD no. 4A_510/2017 of 9 November 2017.
44 SFSCD no. 4A_510/2017 of 9 November 2017.
45 SFSCD no. 4A_510/2017 of 9 November 2017.
46 SFSCD no. 4F_8/2018 of 14 March 2018, reasons 2.1, 3.2.

like a national of other contracting states. Therefore, the foreign state may not be subject to an order for security for costs based on its lack of seat in Switzerland (Article 62(2), 1st alternative FSCA). This is the case even when the dispute concerns sovereign acts (here: an alleged expropriation).[47] In addition, even if a state is notorious for opposing any enforcement attempts against it, this is not in itself sufficient to order security for costs, as Article 62(2), 2nd alternative FSCA requires that there be a demonstrated inability to pay.[48]

The Supreme Court continued along the lines of its well-established case law according to which it is **bound by the facts established in the award**. Even if the facts established in the award are incomplete or erroneous, they can only be corrected or supplemented if the arbitral tribunal has violated the right to be heard of the party who has invoked them. The Supreme Court specified that the appellant must demonstrate: (1) where, when and how it alleged the fact in conformity with the applicable procedural rules; (2) that the factual allegation was not contested or was proven; and (3) that the fact nevertheless escaped the arbitral tribunal's attention due to a mistake or misunderstanding.[49]

The Supreme Court acknowledged that in setting aside proceedings against international arbitral awards, a **second exchange of briefs** is, in practice, the rule.[50] The Supreme Court also confirmed on several occasions that the appellant may not use the second brief to supplement insufficient

[47] SFSCD no. 4A_396/2017 of 23 November 2017, reason 2.
[48] SFSCD no. 4A_396/2017 of 23 November 2017, reason 3.
[49] SFSCD no. 4A_578/2017 of 20 July 2018, reason 3.3.1.2.
[50] SFSCD no. 4A_98/2017 of 20 July 2017, ATF 143 III 462, reason 3.2.1.

reasoning in its challenge submission or to introduce new factual or legal grounds supporting the challenge.[51]

Finally, the Supreme Court confirmed that an arbitral tribunal that submits comments and observations to the Supreme Court is not entitled to any **compensation for costs**, even if the award is upheld.[52]

C. Substantive Grounds for Setting Aside

1. Irregular Constitution of the Arbitral Tribunal (Article 190(2)(a) PILA)

The Supreme Court rendered a decision, published as a leading decision, on conflicts of interests within the **network of law firms operating under the CMS brand**. This decision was rendered in the context of a request for revision of the award, and is thus discussed under Section III below.

The Supreme Court confirmed its pre-established practice of applying a strict standard to assess the alleged lack of impartiality of an arbitrator. It reiterated the principle that the **arbitral tribunal's procedural decisions**, regardless of whether they are correct or not, cannot give rise to doubts as to the tribunal's impartiality. This is however subject to cases of particularly serious mistakes or repeated errors that constitute such serious violations of its obligations that they create the appearance of partiality.[53] Based on these principles, the Supreme Court rejected two challenges that

[51] *E.g.*, SFSCD no. 4A_478/2017 of 2 May 2018, reasons 2.2 and 3.3.2; SFSCD no. 4A_34/2016 of 25 April 2017, reason 2.2; SFSCD no. 4A_102/2016 of 27 September 2016, reason 2.4.

[52] SFSCD no. 4A_188/2016 of 11 January 2017, reason 6.

[53] SFSCD no. 4A_505/2017 of 4 July 2018, reason 4.2.2; SFSCD no. 4A_236/2017 of 24 November 2017, reason 3.3; SFSCD no. 4A_704/2015 of 16 February 2017, reason 3.1.

were brought on the basis of procedural decisions by arbitrators regarding, for example, the admission of evidence, document production, and time limits.[54] These decisions confirm that the Supreme Court carefully assesses whether a party is attempting to turn a simple criticism of the tribunal's decisions into a serious violation of its obligations, and that it is not shy to openly criticize parties for appeal-like arguments, which will affect the party's credibility.

Finally, on the outskirts of the arbitration world, the Supreme Court rendered an interesting decision, which is to be published as a leading decision, on whether doubts about a judge's impartiality can arise from the fact that a judge and a party are **friends on Facebook**. This decision was rendered by the second civil law division in a case concerning the impartiality of the president of the Child and Adult Protection Agency of Valais who decided on questions of parental custody. The second civil law division circulated its decision and obtained the unanimous approval of all other Supreme Court divisions concerned ("*Vereinigung der betroffenen Abteilungen"/"Cours réunies*").[55] What is interesting about this decision is that the constitutional standard of impartiality that the Supreme Court applied in this case is the same as the one applied, in principle, in international arbitration (subject to the specificities of international arbitration). Lessons can therefore be drawn from this decision and one can expect the Supreme Court to follow a similar approach if, and when, deciding on Facebook friendships in international arbitration.

According to the Supreme Court's case law, friendships can create an objective appearance of partiality if they reach a certain intensity and closeness that go beyond the simple fact

[54] SFSCD no. 4A_236/2017 of 24 November 2017, reason 3; SFSCD no. 4A_704/2015 of 16 February 2017, reason 3.

[55] SFSCD no. 5A_701/2017 (planned for publication) of 14 May 2018, section F and reason 4.7.

of knowing and addressing each other on an informal basis ("*duzen*"/"*se tutoyer*").[56] According to the Supreme Court, the term "friend" on Facebook does not refer to a friendship in the traditional sense, as it does not necessarily suppose a reciprocal affection and an intimate familiarity that implies closeness going beyond the mere fact of knowing each other. Whilst Facebook friendships can concern people to whom one is close and with whom one has regular contacts in real life, it can also concern people whom one would qualify as a simple acquaintance, or with whom one simply shares a common interest on social media. The circle of Facebook friends is thus much larger than the circle of friends in the traditional sense.

In its decision, the Supreme Court also references recent studies that show that Facebook friendship lists that count more than 150 friends consist of acquaintances with whom one does not maintain any real contact, and even unknown persons. Thus, in the absence of other elements, Facebook friendship alone does not suffice to establish proper friendship and an appearance of partiality. On the contrary, it is only a factor amongst others that can be used to justify the challenge of a judge (or arbitrator). According to the Supreme Court, this holding is in line with the Swiss commentaries and the approaches taken in Germany and France on the subject.[57] In the discussed case, the Supreme Court held that there was no appearance of partiality.

2. Incorrect Decision on Jurisdiction (Article 190(2)(b) PILA)

The Supreme Court rendered several decisions regarding challenges that were brought on the basis of an allegedly incorrect decision on jurisdiction. Faced with these challenges,

[56] SFSCD no. 5A_701/2017 (planned for publication) of 14 May 2018, reasons 4.3-4.4.

[57] SFSCD no. 5A_701/2017 (planned for publication) of 14 May 2018, reason 4.5.

the Supreme Court carried out a full review of the law. It determined that based on the principle of ***jura novit curia***, it can dismiss a challenge on a different legal basis than the one invoked in the award, and can accept a challenge based on a new legal argumentation that was only developed before it, provided in both cases that the new reasoning is based on facts established by the arbitral tribunal.[58]

a) Interpretation of Arbitration Clauses

The Supreme Court rendered several decisions regarding the **interpretation of arbitration clauses**. The Court confirmed its consistent case law that it will not review a subjective interpretation of the clause based on the parties' actual intent (which is a question of fact) and that it will only review an objective interpretation of the clause which is based on the parties' presumed intent. This presumed intent is determined on the basis of what a reasonable person would understand, in good faith and in like circumstances (which is a question of law).[59] In the event that it is unclear from the award whether the tribunal carried out a subjective or objective interpretation of the arbitration clause, the Supreme Court will interpret the findings of the award.[60] In two cases the Supreme Court decided to set aside the award, holding that the consent to arbitrate was not sufficiently clear when applying an objective interpretation.

The first case in which the Supreme Court decided to set aside the award concerned a reinsurance contract which included a

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[58] E.g., SFSCD no. 4A_314/2017 of 28 May 2018, reason 2.1; SFSCD no. 4A_407/2017 (domestic) of 20 November 2017, reason 2.1.

[59] SFSCD no. 4A_583/2017 of 1 May 2018, reason 3 (objective scope of arbitration clause); SFSCD no. 4A_432/2017 of 22 January 2018, reason 3 (consent to arbitrate); SFSCD no. 4A_150/2017 of 4 October 2017, reason 3 (consent to arbitrate); SFSCD no. 4A_672/2016 of 24 January 2017, reason 3 (pathological arbitration clause); SFSCD no. 4A_310/2016 of 6 October 2016, reason 3 (subjective scope of arbitration clause).

[60] SFSCD no. 4A_150/2017 of 4 October 2017, reason 3.4.

choice of court clause and was related to different offers, contracts and contract endorsements, some of which contained arbitration clauses. The Supreme Court disagreed with the arbitral tribunal's decision which held that the parties had agreed on arbitration. The arbitral tribunal had largely based its decision on international reinsurance practices and the practicability of having the same dispute resolution mechanism apply to different levels of the chain of reinsurance contracts. The Supreme Court's interpretation, by contrast, was driven by more traditional considerations regarding consent.[61]

The second case in which the Supreme Court set aside the award related to a contract between a football player and a sports agent. Unlike the CAS arbitral tribunal, the Supreme Court did not find that there was sufficient consent to arbitrate in a clause which provided that for any dispute in connection with the contract, "*without prejudice that can occur before national and international bodies corresponding states […], based on the constitutional guarantee of natural judge (Art. 18 N.C.), the parties submit themselves to the jurisdiction and decisions of the courts in the Comercial de Capital Federal, República Argentina.*"[62]

In another case, the Supreme Court interpreted the **objective scope of an arbitration clause** that referred "*disputes arising out of the present contract*" to arbitration. In this case, a lawyer asserted a right of retention under a mandate agreement as a basis for refusing to return a share certificate that the client had entrusted to him. The lawyer asserted, as the basis for his right of retention, payment claims under the mandate agreement as well as payment claims which were unrelated to the mandate agreement. The lawyer's client requested that the arbitral tribunal find, *inter alia*, that the

[61] SFSCD no. 4A_150/2017 of 4 October 2017, reason 3.5.
[62] SFSCD no. 4A_432/2017 of 22 January 2018, reason 3.3.

lawyer had no payment claims arising out of the mandate agreement or in relation to its termination. In the alternative, the client requested an order to return the share certificate against payment of any of the lawyer's claims that the arbitral tribunal deemed well founded, which included claims that were unrelated to the mandate agreement. The lawyer objected to the arbitral tribunal's jurisdiction to decide on any of the claims that were not arising out of the mandate agreement.

The Supreme Court upheld the arbitral tribunal's decision to accept jurisdiction, and found that the arbitration agreement, despite its narrow wording, covered all payment claims relating to the execution and termination of the mandate agreement, even if they did not arise out of it. As for the order requested in the alternative, the Supreme Court considered that a right of retention under Swiss law requires a natural connection to the claim on which the right of retention is based. Therefore, the Supreme Court held that the arbitral tribunal must first decide, for each payment claim, whether there is a sufficient connection justifying a right of retention. If so, the arbitral tribunal has jurisdiction to decide on any such payment claim, even if the claim does not arise out of the mandate agreement.[63]

This decision is interesting in that it links the scope of the arbitration clause to the scope of the contractual right of retention. It is also compelling because the Supreme Court does not examine to what extent the arbitral tribunal had accepted jurisdiction over certain claims in its award,[64] but instead gives clear instructions to the arbitral tribunal about how to proceed with its examination, and for which types of claims it should accept or deny jurisdiction.

[63] SFSCD no. 4A_583/2017 of 1 May 2018, reason 3.
[64] SFSCD no. 4A_583/2017 of 1 May 2018, reason 4.

In another interesting decision, the Supreme Court was faced with the question of whether the Kuwait Motor Sports Club, who had applied to become a member of the *Fédération Internationale de Motocyclisme* ("**FIM**"), but had not received any decision on its application after 2.5 years, was entitled to invoke the arbitration clause in the FIM Statutes. The relevant clause reads as follows (in English translation): "*Any recourse to the ordinary courts against final decisions rendered by the jurisdictional bodies or the General Assembly of the FIM is excluded. Such decisions must be submitted exclusively to the jurisdiction of the Court of Arbitration for Sport* […]". Interpreting this provision and other relevant provisions in the Statutes,[65] the Supreme Court held that **not only members, but also membership applicants can invoke the arbitration clause**.[66] The Supreme Court also held that a **formal denial of justice** is equivalent to a negative decision in the context of an arbitration as well (despite the fact that "*formal denial of justice is not a rose that ordinarily blossoms in the garden of private law*", to use the words of the Supreme Court). That being said, the Supreme Court held that it cannot review with unfettered powers whether there exists an unjustified delay in rendering a decision, and thus a formal denial of justice, as this question relates to the merits of the case rather than the jurisdiction of the arbitral tribunal.[67]

In two cases, the Supreme Court rendered decisions on **pathological arbitration clauses**. One clause referred disputes to the "*International Chamber of Commerce of Geneva*" and the "*Rules of Conciliation and Arbitration of the*

[65] The Supreme Court held that when interpreting statutes or other important provisions of large sports organizations (such as the UEFA and FIFA), objective interpretation methods that are used for statutory law are preferably applied, see SFSCD no. 4A_314/2017 of 28 May 2018, reason 2.3.1; SFSCD no. 4A_490/2017 of 2 February 2018, reason 3.3.2.

[66] SFSCD no. 4A_314/2017 of 28 May 2018, reason 2.3.2.

[67] SRSCD no. 4A_314/2017 of 28 May 2018, reason 2.4.

International Chamber of Commerce". The arbitral tribunal and the Supreme Court interpreted this clause as meaning ICC arbitration with seat in Geneva.[68]

Another clause, in a domestic case, was pathological on the basis that it became inoperative. The clause referred disputes to the current *Bâtonnier* of the Geneva *Ordre* des *Avocats* as sole arbitrator. If the *Bâtonnier* could not accept this mandate, he was to designate another arbitrator who "necessarily" had to be a member of the *Conseil de l'Ordre des Avocats*. When neither the *Bâtonnier* nor any member of the *Conseil de l'Ordre* was willing to act as sole arbitrator, the *juge d'appui* appointed a Geneva lawyer who fulfilled all the requirements necessary to be a member of the *Conseil de l'Ordre*, without however being one. The Supreme Court considered this to be the closest solution to what the parties had expressed in the arbitration agreement. However, ultimately the Supreme Court could not review the sole arbitrator's factual finding that the parties had the actual intent to arbitrate their dispute even if their clause was impossible to enforce.[69]

Finally, in another case, the Supreme Court had to interpret the **bilateral investment treaty** between France and Vietnam to determine whether a French company had made an "investment", within the meaning of the BIT, by entering into numerous supply and barter contracts for various French and Vietnamese goods. The Supreme Court upheld the arbitral tribunal's decision to decline jurisdiction on the basis that there had not been an investment.[70]

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[68] SFSCD no. 4A_672/2016 of 24 January 2017, reason 3.
[69] SFSCD no. 4A_407/2017 (domestic) of 20 November 2017, reasons 2.2.2.2 and 2.3.
[70] SFSCD no. 4A_616/2015 of 20 September 2016, reason 3.

b) Lack of Arbitrability

In a decision, published as a leading decision, the Supreme Court held that a lawsuit aimed at establishing a **claim in order to validate a freezing order under Swiss law** *("Arrest"/"séquestre"*) is derived from substantive law (as opposed to enforcement law), and, as such, can be submitted to an arbitral tribunal. Validating a freezing order by way of arbitration requires that the creditor observe the statutory 10-day time limit under the Swiss Debt Enforcement and Bankruptcy Act when establishing the arbitral tribunal, and when the creditor sends its request for recognition of the claim once the arbitral tribunal is constituted. Whilst the arbitral tribunal may decide on the existence of the claim on which the freezing order is based, it does not have jurisdiction to decide on the validity or the execution of the freezing order, nor on whether the procedural steps taken by the claimant comply with the time limits of the Debt Enforcement and Bankruptcy Act. These questions are – just like the setting aside of an opposition to a summons to pay ("*Beseitigung des Rechtsvorschlags"/"mainlevée de l'opposition*") – not arbitrable.[71]

In the operative part of the challenged award, the arbitral tribunal found that the claim underlying the freezing order was established – an issue which was within its jurisdiction. In addition, however, the arbitral tribunal also found, in the operative part of the award, that the freezing order had been validated, on the basis that the time limits of the Debt Enforcement and Bankruptcy Act had been complied with. This finding was not within the tribunal's jurisdiction, as this question was not arbitrable. Nevertheless, the Supreme Court refused to partially set aside the award on the basis that the holding about the validation of the freezing order was superfluous and did not have any impact, since the

[71] SFSCD no. 4A_12/2017 of 19 September 2017, ATF 143 III 578, reason 3.2.1.

enforcement court would decide on the creditor's compliance with the statutory validation requirements regardless of this holding. Therefore, the Supreme Court found that the appellant had no interest worthy of protection in the setting aside of this holding included in the operative part of the award.[72]

The fact that the Supreme Court upheld an award, which ruled on an issue in its operative part over which the Swiss courts have exclusive jurisdiction, is remarkable. In this context, it is also interesting that the Supreme Court raised the question of whether an appellant must have objected to the lack of arbitrability prior to submitting its defence on the merits (Article 186(2) PILA), or whether, by contrast, the lack of arbitrability leads to the **nullity of the award**. The Supreme Court did not decide this issue. However, it found that it is common sense that in a case where the lack of arbitrability results from a statutory restriction on party autonomy, the fact that the respondent fails to object should neither prevent an arbitral tribunal from examining the lack of arbitrability *ex officio*, nor prevent a respondent from invoking the lack of arbitrability before the Supreme Court. Deciding otherwise would mean tolerating that an arbitral tribunal makes decisions that are outside of its jurisdiction, such as handing down a criminal conviction, granting a request for divorce, definitely setting aside an opposition to a summons to pay, or deciding on an application for bankruptcy.[73]

In a domestic case, the Supreme Court confirmed, in a decision which is to be published as a leading decision, a previous landmark decision rendered under the Concordat and held – contrary to the majority of the legal doctrine – that under Article 354 CCP, the validity of arbitration clauses in **domestic employment contracts** is limited (unlike in

[72] SFSCD no. 4A_12/2017 of 19 September 2017, ATF 143 III 578, reason 3.2.2.
[73] SFSCD no. 4A_12/2017 of 19 September 2017, ATF 143 III 578, reason 3.2.2.1.

international contracts under Article 177 PILA). Specifically, claims brought by an employee which are based on mandatory employment law are not arbitrable in a domestic case in so far as the employee cannot validly waive these claims. This is the case even if the parties opt for the international *lex arbitri* and agree to submit their arbitration to the provisions of Chapter 12 PILA. Regarding the consequences of an arbitration clause in an employment contract which encompasses all claims, the Supreme Court held that, as a rule, one cannot assume that the parties would have intended to submit non-mandatory claims to arbitration and mandatory claims to state courts; hence the arbitration agreement is inoperative in its entirety. The result may be different, however, if the distinction between arbitration for non-mandatory claims and state court litigation for mandatory claims corresponds to the parties' hypothetical intent.[74]

c) Applicable Law

In a complex case, the arbitral tribunal accepted jurisdiction to decide a dispute arising out of gas supply contracts between Egypt and Israel, concluded in the aftermath of the two countries' 1979 peace treaty. Three different contracts, including one Tripartite Agreement, were concluded in 2005 concerning the sale of gas from Egypt to Israel through an intermediary. In 2011, the intermediary commenced arbitration against both the Egyptian and the Israeli parties, based on the arbitration clause in the Tripartite Agreement, regarding their failure to supply the agreed minimum amounts of gas. The Egyptian supplier challenged the award in which the tribunal had accepted jurisdiction under the Tripartite Agreement.

One specificity of this case was that the gas supply obligations arose from three different contracts, which had partially

[74] SFSCD no. 4A_7/2018 of 18 April 2018, reason 2.

incompatible arbitration clauses. In such a case, the Supreme Court held that the question of whether the provision of the Tripartite Agreement, invoked by the intermediary, actually contained an entitlement in his favour, was relevant for both the substance of the claim (standing to sue) and for jurisdiction ("*doppelrelevante Tatsache*"/"*question doublement pertinente*"). As such, the arbitral tribunal had to interpret the contract provision that allegedly contained an entitlement in favour of the intermediary in order to decide on its jurisdiction. The Supreme Court held that this contractual interpretation was governed solely by the law applicable to the Tripartite Agreement (here: English law), and that the alternative application of Swiss law under Article 178(2) PILA did not apply to this provision.[75]

3. Decisions *Ultra* or *Extra Petita* or Failure to Adjudicate Claims (Article 190(2)(c) PILA)

The Supreme Court rendered two interesting decisions on the principle of *ne eat iudex ultra petita partium*, according to which the arbitral tribunal should not rule beyond what has been requested by the parties. In one case, the claimant had requested in its prayers for relief that the arbitral tribunal should order the payment of certain amounts of money that the respondent had failed to make. The arbitral tribunal awarded payment and included, in the operative part of its award, several declarations indicating that the respondent had breached the contract by failing to make these payments. As the claimant had not requested these declarations of breach, the Supreme Court found that the arbitral tribunal "*had without a doubt been wrong*" in including them in the operative part of the award. However, the Supreme Court refused to partially set aside the award, as it found that the declarations did not cause any prejudice to the respondent

[75] SFSCD no. 4A_34/2016 of 25 April 2017, reason 3.4.

and that the respondent therefore did not have an interest worthy of protection in having them removed (*see* Section B.1 above).[76]

In another case, the Supreme Court decided that an arbitral tribunal had not violated the prohibition against a decision *ultra petita* by spelling out in the operative part of the award certain arguments made by the claimant in its submissions. Specifically, the claimant (a football coach) had requested the payment of certain amounts "net" in his prayer for relief. In his submissions, the claimant referred to a contract provision that defined the meaning of "net". Based on this contract definition, the arbitral tribunal ordered the respondent, in the operative part of the award, to pay all fees, taxes and contributions on the principal amount that it awarded. Whilst this went beyond the term "net" used in the claimant's prayers for relief, the Supreme Court found it to be acceptable, as the arbitral tribunal had interpreted the claimant's prayer for relief in light of the arguments put forward in his submissions.[77]

4. Violation of the Right to Be Heard or Equal Treatment of the Parties (Article 190(2)(d) PILA)

A violation of due process, *i.e.*, of the right to be heard or equal treatment of the parties, has once again been a popular ground for challenge in this review period, and a relatively successful one too since two challenges were upheld based on a violation of the right to be heard.

As a threshold matter, the Supreme Court confirmed that a violation of due process leads to the award being set aside regardless of the appellant's chances on the merits. However, this is not absolute; the Supreme Court will not set aside the award if it cannot be determined that the violation of due

[76] SFSCD no. 4A_50/2017 of 11 July 2017, reason 3.
[77] SFSCD no. 4A_508/2017 of 29 January 2018, reason 3.2.

process could possibly have had an impact on the procedure. Thus, the appellant must demonstrate, based on the reasoning of the award, how the (allegedly) overlooked arguments or evidence, or the equal treatment of the appellant, could have influenced the outcome of the decision.[78] Where the appellant fails to substantiate this, the Supreme Court often dismisses the challenge without even hearing the opposing party.

a) Right to Be Heard

(i) Successful challenges

More decisions were rendered on an alleged violation of the right to be heard than on an alleged violation of equal treatment.[79] In one international case and one domestic case, the Supreme Court **partially set aside an award** based on a violation of the right to be heard. In the first case, concerning a CAS award, one of the two co-respondents

[78] *E.g.*, SFSCD no. 4A_578/2017 of 20 July 2018, reason 3.1.2; SFSCD no. 4A_505/2017 of 4 July 2018, reason 3.1.1; SFSCD no. 4A_491/2017 of 24 May 2018, reason 4.1.2; SFSCD no. 4A_478/2017 of 2 May 2018, reason 3.2.2; SFSCD no. 4A_592/2017 of 5 December 2017, reasons 4.1.2 and 4.2; but see the seemingly different standard in a domestic case applied by the Swiss Federal Supreme Court in SFSCD no. 4A_570/2016 (domestic) of 7 March 2017, reason 2.4, where the Supreme Court held that, by way of exception, the domestic award is not set aside if this would lead to a formalistic standstill and unnecessary delays that would be irreconcilable with the appellant's interest in an expeditious decision on the merits, which is on an equal footing with due process.

[79] In addition to the decisions regarding the right to be heard summarized below, see also, *e.g.*, SFSCD no. 4A_404/2017 of 26 July 2018, reason 3.1; SFSCD no. 4A_491/2017 of 24 May 2018, reason 4.2; SFSCD no. 4A_247/2017 of 18 April 2018, reasons 4.2 and 5; SFSCD no. 4A_580/2017 of 4 April 2018, reason 3; SFSCD no. 4A_430/2017 of 30 November 2017, reason 2; SFSCD no. 4A_318/201 of 28 August 2017, reason 3; SFSCD no. 4A_316/2017 of 2 August 2017, reason 3; SFSCD no. 4A_470/2016 of 3 April 2017, reason 3; SFSCD no. 4A_40/2017 of 8 March 2017, reason 4; SFSCD no. 4A_478/2016 of 7 February 2017, reason 3; SFSCD no. 4A_716/2016 of 26 January 2017, reason 3.

instructed new counsel and then filed amended prayers for relief. He requested, *inter alia*, that the doping sanctions in dispute (the athlete's suspension) should start on the date of the doping test, as opposed to the effective date of the CAS award. The sole arbitrator admitted the amended prayers for relief into the record and summarized the athlete's arguments in an earlier section of the award. However, when discussing the doping sanctions and the duration and start date of the athlete's suspension period, the sole arbitrator **failed to mention the respondent's amended request** concerning the earlier start date. Instead, he only referenced the athlete's earlier request that the suspension period start on the date of the CAS award.[80]

Faced with this obvious omission, the Supreme Court referred to its long-standing case law according to which an arbitral tribunal has the duty to examine and decide on the relevant issues. This duty is violated if, by accident or misunderstanding, the arbitral tribunal does not take into consideration allegations, arguments or evidence presented by one party that are relevant for the award. Thus, if the award is completely silent on evidently important elements, the arbitrators or the opposing party must be able to explain this omission in their answer to the challenge, either by establishing that the omitted elements are not relevant for resolving the dispute, or that they were implicitly rejected by the tribunal.[81] In the case at hand, it was clear to the Supreme Court that the sole arbitrator had lost sight of the athlete's amended request, and that the request and arguments regarding the start date of the suspension period were clearly relevant. On that basis, the Supreme Court partially set aside the award and annulled the paragraph in the operative part of the award that fixed the start date of the suspension period.[82]

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[80] SFSCD no. 4A_478/2017 of 2 May 2018, reason 3.3.3.
[81] SFSCD no. 4A_478/2017 of 2 May 2018, reason 3.2.1.
[82] SFSCD no. 4A_478/2017 of 2 May 2018, reason 3.3.3.

The second (domestic) case concerned a decision on the **allocation of costs**. In this case, the arbitral tribunal closed the proceedings after the respondent had failed to pay his share of the advance on costs. The claimant decided to withdraw the arbitration and bring the matter before a state court instead of paying the respondent's share. In two submissions, which were apparently not directly sent to the respondent, the claimant requested that the respondent bear the arbitration costs and the claimant's party costs. The arbitral tribunal dismissed the request for compensation of party costs, but ordered that each party bear half of the arbitration costs. Only when the arbitral tribunal sent this order to the respondent did it also send the claimant's cost submissions to the respondent. The Supreme Court set aside the decision on the allocation of costs, holding that the arbitral tribunal ought to have invited the respondent to comment on the claimant's two submissions and to make his own requests regarding the allocation of costs.[83]

(ii) Challenges concerning the taking of evidence

Many decisions concerned the taking of evidence, which is often challenged, but typically without success. Indeed, the Supreme Court confirmed repeatedly, as it had done in the past, that the **anticipated assessment of evidence** does not violate the right to be heard, but can only be challenged if it violates public policy.[84]

In one case, the Supreme Court rejected a party's argument that its right to be heard had been violated on the basis that it was prevented from hearing and **cross-examining a key**

[83] SFSCD no. 4A_570/2016 (domestic) of 7 March 2017, reason 2.3.

[84] *E.g.*, SFSCD no. 4A_505/2017 of 4 July 2018, reason 3.1.2; SFSCD no. 4A_277/2017 of 28 August 2017, reason 3.1; SFSCD no. 4A_80/2017 of 25 July 2017, reasons 3.1.1 and 6.1; SFSCD no. 4A_587/2015 (domestic) of 15 February 2017, reason 5.3; SFSCD no. 4A_497/2015 of 24 November 2016, reason 4.2.

witness, namely the counterparty's beneficial owner, as the counterparty had not filed a witness statement for this individual. The Supreme Court rejected this argument finding that the appellant had not raised any objection during the arbitration, had never tried to have this witness sign a witness statement, had never requested the arbitral tribunal to hear him despite the lack of a witness statement, and had never sought judicial assistance.[85]

The Supreme Court confirmed and further clarified its case law regarding the **parties' right to a tribunal-appointed expert**. Under Swiss law, one of the attributes of a party's right to be heard is that they have the right to request the arbitral tribunal to appoint an expert if certain conditions are met:[86] (1) The party must expressly request a tribunal-appointed expert, in the agreed form and in a timely manner. Here, the Supreme Court clarified that this requirement is not fulfilled if the party requests the appointment of an expert in order to establish lost profits, but does not file the financial evidence that forms the necessary basis for the expert's analysis, and can no longer cure this omission.[87] (2) Second, the requesting party must be willing to advance the costs of the expert. (3) Finally, the expert opinion must be suitable and necessary to prove a relevant fact that is technical in nature or otherwise requires specific knowledge that the arbitral tribunal does not possess, and that cannot be proven otherwise. The Supreme Court clarified that, for reasons of procedural economy, these requirements also apply if both parties agree on having a tribunal-appointed expert; thus, such an agreement only binds the arbitral tribunal if the above-noted requirements are fulfilled.[88]

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[85] SFSCD no. 4A_12/2017 of 19 September 2017, ATF 143 III 578, reason 4.2.2.

[86] *E.g.*, SFSCD no. 4A_450/2017 of 12 March 2018, reason 4.2; SFSCD no. 4A_277/2017 of 28 August 2017, reasons 3.1.

[87] SFSCD no. 4A_277/2017 of 28 August 2017, reasons 3.2-3.3.

[88] SFSCD no. 4A_277/2017 of 28 August 2017, reason 3.3.

Finally, the Supreme Court rejected a violation of the right to be heard in a case where the arbitral tribunal had **rejected, on the basis that it was belated, a party's expert report** that was submitted together with the rejoinder to the counterclaim, in response to an expert report that the opposing party had submitted in its previous brief. The Supreme Court noted that there is no absolute right to a double exchange of briefs, and held that a wrong or even an arbitrary application of the procedural rules is insufficient to ground the challenge of an award.[89]

(iii) Challenges concerning alleged "surprise decisions"

The Supreme Court upheld its case law according to which the arbitral tribunal applies the law *ex officio* ("*jura novit curia"*). Thus, unless the arbitration agreement restricts the tribunal's mission solely to the examination of the legal grounds pleaded by the parties, the tribunal does not have to specifically hear the parties on their legal assessment of the facts. Only in exceptional cases does the arbitral tribunal have to give the parties an opportunity to be heard if it intends to base its decision on a provision or legal consideration that was not alleged during the proceedings and of which the importance could not have been foreseen by the parties. While it may not be easy to assess what is unforeseeable and what results in a **surprise decision**, the Supreme Court is restrictive in accepting a lack of foreseeability.

In the case at hand, the Supreme Court denied a lack of foreseeability following a **subjective interpretation** of the contract under Swiss law based on the parties' actual intent. It is not surprising that the parties' subsequent conduct, which can lead to an **implicit modification of the contract**, is taken into account for purposes of subjective interpretation. Furthermore, the application of these rules of Swiss law is to

[89] SFSCD no. 4A_356/2017 (domestic) of 3 January 2018, reason 2.4.

be expected even if the parties' counsel in the arbitration are not Swiss. This is a risk that the parties take when choosing their counsel to arbitrate a dispute arising out of a contract governed by Swiss law.[90]

The Supreme Court also denied that there was a lack of foreseeability regarding the method employed by an arbitral tribunal to **recalculate the amount of an earn-out payment** under a share purchase agreement.[91]

(iv) Challenges concerning unsolicited submissions

The Supreme Court denied a violation of the right to be heard in a case where the arbitral tribunal had not taken into account arguments that the appellant had submitted in an **unsolicited e-mail that was not provided for in the procedural timetable**.[92] The Supreme Court's decision should give comfort to arbitral tribunals in knowing that they are not required to consider unsolicited submissions that are filed without seeking leave.

b) Equal Treatment of the Parties

Under the Supreme Court's consistent case law concerning equal treatment, the key is to demonstrate that the parties have not been treated equally when they were in comparable situations. The latter aspect of the test is often neglected.

In line with this case law, the Supreme Court held that granting the parties **different time limits for their**

[90] SFSCD no. 4A_136/2016 of 3 November 2016, reason 5; see also regarding an alleged unforeseeable decision concerning contract interpretation SFSCD no. 4A_220/2017 of 8 January 2018, reason 3.2; another (less interesting) decision regarding unforeseeable decisions is SFSCD no. 4A_478/2016 of 7 February 2017, reason 3.4.

[91] SFSCD no. 4A_56/2017 of 11 January 2018, reason 3.3.

[92] SFSCD no. 4A_490/2016 of 6 March 2017, reason 3.2.2.

submissions does not necessarily imply a violation of the parties' equal treatment.[93] Evidently, an arbitral tribunal does not violate equal treatment either by **granting a one-day extension** to file the Statement of Claim, **on its own motion**, the day after the brief should have been filed, unless the respondent was denied such an extension for the Statement of Defence.[94]

In another decision, the Supreme Court held that **awarding costs to only one party**, even though the arbitral tribunal found that no party had fully succeeded with its claim, falls outside of the scope of the right to equal treatment. This right only applies during the evidentiary phase, but not during the subsequent deliberations phase, even if the decision on costs is considered to be procedural rather than substantive in nature. In this context, the Supreme Court confirmed that assimilating a failure to consider a relevant legal provision on costs or a relevant fact to a violation of the parties' right to equal treatment would mean introducing, through the backdoor, a challenge on the basis of arbitrariness, which the legislator did not want to permit with respect to international arbitral awards.[95]

5. Incompatibility with Public Policy (Article 190(2)(e) PILA)

As in previous years, many challenges have been based on an alleged violation of public policy. According to the case law of the Supreme Court, an award violates public policy if it is incompatible with the essential and widely recognized values that should, according to the prevailing notions in Switzerland, constitute the basis of every legal order. Not only the reasoning, but also the result of the award must violate

[93] SFSCD no. 4A_450/2017 of 12 March 2018, reason 3.2.1.
[94] SFSCD no. 4A_405/2016 of 2 March 2017, reason 3.3.
[95] SFSCD no. 4A_450/2017 of 12 March 2018, reason 3.2.2.

public policy for the award to be set aside. Substantive public policy will be addressed first, followed by procedural public policy.

a) Substantive Public Policy

An award violates substantive public policy if it contravenes fundamental legal principles to the extent that it is no longer reconcilable with the legal order and the relevant value system. Rather than listing all of the fundamental legal principles that constitute public policy, the Supreme Court has preferred excluding certain rules or defects from being considered as such.[96]

For example, the Supreme Court confirmed that rules regarding the burden of proof,[97] or the intrinsic inconsistency of an award's reasoning,[98] do not form part of public policy. Likewise, the Supreme Court confirmed (once again) that the "quasi-totality" of disputed questions regarding a breach of contract fall outside the protection of *pacta sunt servanda* (and thus public policy), including contract interpretation and the legal consequences drawn from this interpretation – in short, anything that leads an arbitral tribunal to conclude that someone does or does not have a claim falls outside of its scope.[99] As a final example, the Supreme Court held that Article 17(2) of the FIFA Regulations on the Status and Transfer of Players, whilst highly controversial, does not violate public policy. This provision provides that if a football

[96] See *e.g.*, SFSCD no. 4A_116/2016 of 13 December 2016, reason 4.1.
[97] SFSCD no. 4A_522/2016 of 2 December 2016, reason 3.2.1.
[98] SFSCD case no. 4A_522/2016 of 2 December 2016, reason 3.2.2.
[99] *E.g.*, SFSCD no. 4A_404/2017 of 26 July 2018, reason 4; SFSCD no. 4A_491/2017 of 24 May 2018, reason 5; SFSCD no. 4A_450/2017 of 12 March 2018, reason 5; SFSCD no. 4A_56/2017 of 11 January 2018, reason 4; SFSCD no. 4A_318/2017 of 28 August 2017, reason 4.2; SFSCD no. 4A_50/2017 of 11 July 2017, reason 4.2; SFSCD no. 4A_522/2016 of 2 December 2016, reason 3.2.2.

player has to pay an indemnity to his or her former club for an unjustified repudiation of the contract, the new club who hired the football player is jointly and severally liable for this indemnity, regardless of any fault on its part.[100]

(i) No branch-specific notion of public policy

Several decisions raised the question of whether public policy has a different meaning in different types of arbitration, or whether the **notion of public policy is universal**.

To put this question into context, the Supreme Court considered the specificities of sports arbitration with regard to certain issues, such as the validity of arbitration agreements[101] and waivers of setting aside proceedings. However, it refused to do the same in the context of substantive public policy. Not wanting to create a *lex sportiva,* the Supreme Court held that a sport-specific or football-specific notion of public policy would dilute the notion of public policy and lead to practical difficulties in shaping its content and limits.[102]

The Supreme Court also (implicitly) rejected an investment-specific notion of public policy. In challenges against an investment arbitration award, the Supreme Court refused to sanction either the erroneous interpretation of a **bilateral investment treaty** or the (allegedly) unsustainable finding on the relevant facts.[103] The Supreme Court did not find that the award violated public policy by wrongly applying the **fair-and-equitable-treatment** standard to measures taken by

[100] SFSCD no. 4A_32/2016 of 20 December 2016, reason 4.3.
[101] During the review period, see SFSCD no. 4A_314/2017 of 28 May 2018, reason 2.3.1.
[102] SFSCD no. 4A_116/2016 of 13 December 2016, reason 4.2.3; repeated and confirmed in a subsequent decision, SFSCD no. 4A_312/2017 of 27 November 2017, reason 3.3.2.
[103] SFSCD no. 4A_157/2017 of 14 December 2017, reason 3.3.4.

the host state (*in casu* a significant increase of taxation) and thereby restricting the host state's sovereignty in fiscal matters as well as its duty to protect its population from the dangers of low-stake slot machines. The Supreme Court held that it could not review the arbitral tribunal's application of the fair-and-equitable-treatment standard.[104]

Interestingly, the Supreme Court dismissed the challenge as inadmissible on the basis that, as is often the case, the appellant had not sufficiently substantiated the ways in which the challenged findings of the arbitral tribunal constituted a violation of fundamental legal principles. It is clear that the Supreme Court held it against the appellant that it had defined public policy more widely than the Supreme Court's well established definition.[105]

(ii) Challenges concerning success fees charged by attorneys

The Supreme Court had to decide on a case where a Portuguese client was sued by his former arbitration counsel regarding the payment of a success fee. The client and his Swiss counsel had entered into two engagement letters relating to the representation of the client in two arbitrations. The engagement letters provided for a success fee of 15% of any amount claimed by and awarded to the client, to be paid in addition to the counsel's regular fees. In case of a settlement, the success fee was reduced to 4%, to be calculated based on the difference between the aggregate amounts in dispute (total of claim, counter-claim and set-off defenses). In the event that the client rejected a settlement offer that the Swiss counsel deemed appropriate, the Swiss counsel was entitled to request to be compensated as if the settlement offer had been accepted.

[104] SFSCD no. 4A_157/2017 of 14 December 2017, reason 3.3.4.
[105] SFSCD no. 4A_157/2017 of 14 December 2017, reason 3.3.5.

The two arbitrations ended by way of settlement, and the client subsequently refused to pay the success fee claimed by his Swiss counsel. The law firm thus initiated a Swiss Rules arbitration, claiming a success fee of CHF 2.5 million. The sole arbitrator awarded the law firm almost CHF 1.7 million. In doing so, he accepted the agreed success fee which went beyond the limits of an admissible ***pactum de palmario*** established in a recent leading decision of the Supreme Court (ATF 143 III 600),[106] as explicitly acknowledged by the sole arbitrator. The client challenged the award on the basis of a violation of public policy.

The Supreme Court openly criticized the success fee awarded by the sole arbitrator, which amounted to about five times the amount of the regular fees and created a significant economic incentive for the attorney to settle the case. The Supreme Court considered this to be problematic on the basis of the attorney's duty of independence.[107] However, the Supreme Court considered that it did not have to decide whether the attorney's independence was a matter of Swiss public policy, since the case did not concern the attorney's independence vis-à-vis the client's counterparty in the two arbitrations, but only created a conflict with his own financial interests.[108] In this regard, the Supreme Court highlighted that it had already rendered several decisions regarding the compatibility of success fees with public policy, in which it accepted success fees amounting to: 2% of a settlement amount; 30% of the

[106] In the decision ATF 143 III 600 dated 13 June 2017, the Swiss Supreme Court held that a *pactum de palmario* is admissible if: (1) the amount of fees that are independent of the outcome of the litigation cover the attorney's costs plus a reasonable profit; (2) the success fee is not so high that it affects the attorney's independence (while the Supreme Court did not define this requirement in the abstract, it held that a success fee that exceeds the regular fees is clearly beyond the admissible limit); and (3) the success fee is agreed either at the beginning of the engagement or after the end of the litigation.

[107] SFSCD no. 4A_125/2018 of 26 July 2018, reason 3.1.

[108] SFSCD no. 4A_125/2018 of 26 July 2018, reason 3.3.2.

amounts awarded in legal proceedings; and a pure success fee of CHF 6.5 million, which corresponded to about 6.5% of the amount in dispute.[109] In the case at hand, in line with these previous decisions, the Supreme Court denied a violation of public policy, on the basis that the awarded success fee was less than 2% of the amount in dispute. The Supreme Court held that neither the imbalance between the success fees and the regular fees based on hourly rates, nor the lack of parallel interests between the attorney and his client due to the compensation mechanism, violated public policy.[110]

(iii) Challenges concerning the quantum of amounts awarded and violation of personality rights

Many decisions were rendered regarding the quantum of amounts awarded to the claimant and alleged violations of personality rights. Whilst these two topics seem to have little to do with each other at first sight, public-policy challenges against quantum must typically meet the same standards that apply to violations of personality rights.

In several decisions, the Supreme Court determined whether public policy limits the **amounts that can be claimed under a contractual penalty clause or as contractual interest**. The Supreme Court did not find that there was a violation of public policy in a case where the parties had contractually agreed to the combination of a late payment interest of 12% p.a., a contractual penalty for late payment of 10% p.a. and a statutory default interest of 5% p.a.[111]

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[109] SFSCD no. 4A_125/2018 of 26 July 2018, reason 3.2.3.

[110] SFSCD no. 4A_125/2018 of 26 July 2018, reason 3.3.

[111] SFSCD no. 4A_536/2016 and 4A_540/2016 of 26 October 2016, reason 4.3.2. The Supreme Court also held that the combination of contractually agreed late payment interest, a contractual penalty for late payment and statutory default interest on the contractual penalty does not have the character of **punitive**

The Supreme Court also rejected a violation of public policy in a sports case where (under a now-prohibited third-party participation scheme) an investment fund financed 75% of a football player's transfer fee (EUR 3 million out of EUR 4 million), and in exchange was entitled, after two years, to receive 75% of the football player's onward transfer fee, now amounting to EUR 15 million out of EUR 20 million.[112]

In another case, the penalty that was awarded to the claimant (a football coach) amounted to EUR 4.5 million, which was more than 18 times the average monthly salary of the football coach. The arbitral tribunal considered a reduction of the penalty based on Article 163(3) of the Swiss Code of Obligations and decided to partially reduce it. The Supreme Court found that there was no violation of public policy. It held that, whilst a contractual penalty can violate public policy if it results in an excessive restriction of the debtor's economic freedom (as alleged by the appellant, a football club), in this case, the appellant had not sufficiently substantiated and established this exceptional violation. Specifically, the football club did not establish that it had become subject to the coach's arbitrariness, or that its economic freedom was abrogated or restricted to the extent that the foundations of its economic existence were in peril.[113]

The same standard was applied in three other football decisions, in which the Supreme Court upheld the strict requirements necessary for a **violation of personality rights** as established in the *Matuzalem* case (ATF 138 III 322). The Supreme Court confirmed that a violation of Article 27 of the Swiss Civil Code (which prohibits excessive and overly restrictive contractual obligations) can only

damages. Thus, whilst the Supreme Court referenced the majority view that the awarding of punitive damages does not in itself violate public policy, it could leave this question undecided (reason 4.3.2).

[112] SFSCD no. 4A_116/2016 of 13 December 2016, reason 4.2.3.

[113] SFSCD no. 4A_508/2017 of 29 January 2018, reason 4.

constitute a violation of public policy if it constitutes a serious violation of fundamental rights, such as an excessive contractual restriction of economic freedom.

In one case, the Supreme Court denied the excessive nature of an order imposed on a football club to pay USD 620,000, on the basis that the club had hired a player for an annual salary of EUR 360,000 and had failed to disclose its financial situation in the arbitration.[114]

In a second case, the Supreme Court denied that a commission fee of EUR 3.1 million to be paid by a football club to an intermediary for placing a football player for five years was excessive, despite the fact that this commission fee was 228% of the player's salary for the entire five years (EUR 1.36 million) and more than ten times his annual salary of EUR 272,000. In this case, the Supreme Court refused to set a percentage above which a commission fee to an intermediary will be considered excessive, but held that this has to be determined on a case by case basis. In this particular case, the football club had signed a letter of acknowledgment, one year after the football player had been placed, in which it accepted the commission fee without raising any objection.[115]

In a third case, regarding a much smaller payment amount and in which a public policy violation was denied, the Supreme Court confirmed that the case law regarding Article 27 of the Swiss Civil Code would apply *mutatis mutandis* to Article 20(1) of the Swiss Code of Obligations (which considers contracts null and void if its terms are unlawful or immoral).[116]

In the context of deciding the above-mentioned challenge (relating to the third-party participation scheme which is now prohibited in football), the Supreme Court considered whether

[114] SFSCD no. 4A_32/2016 of 20 December 2016, reason 4.3.
[115] SFSCD no. 4A_312/2017 of 27 November 2017, reason 3.3.
[116] SFSCD no. 4A_668/2016 of 24 July 2017, reason 4.2.

an appellant (here: a football club) could base its challenge on the fact that the awarded contract claim violates the **personality rights of a third party** (here: a football player). Whilst the Supreme Court held that it would appear difficult to force a party to perform a contract that seriously violates the fundamental rights and human dignity of a third party, it did not have to decide this question because no such violation had taken place in the case at hand.[117]

On a related but slightly different question, the Supreme Court held that a CAS award did not violate public policy in holding that the Russian Paralympic Committee could not assert the personality rights of member athletes against their suspension by the International Paralympic Committee.[118] The member athletes were not parties to the arbitration.

(iv) Challenges concerning allegations of corruption

As in previous years, the Supreme Court had to decide several challenges that were based on allegations of corruption (see Section III below for a successful application for revision relating to corruption). The Supreme Court confirmed that contracts promising bribes violate public policy and are null and void. However, a challenge on this basis requires that the corruption be established and that the arbitral tribunal refuse to take it into account in its award.[119] It is not sufficient for a party to argue that the ordered payments violate their internal compliance rules which incorporate internationally recognized anti-corruption rules, and as such create a risk of criminal penalties.[120]

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[117] SFSCD no. 4A_116/2016 of 13 December 2016, reason 4.3.3.
[118] SFSCD no. 4A_470/2016 of 3 April 2017, reason 4.2.
[119] SFSCD no. 4A_136/2016 of 3 November 2016, reason 4.1; SFSCD no. 4A_50/2017 of 11 July 2017, reason 4.3.2.
[120] SFSCD no. 4A_136/2016 of 3 November 2016, reason 4.2.2; SFSCD no. 4A_50/2017 of 11 July 2017, reason 4.3.3.

b) Procedural Public Policy

Procedural public policy guarantees the parties' right to an independent decision on their requests and the facts that they submit to the arbitral tribunal, in compliance with the applicable procedural rules. Procedural public policy is violated if the arbitral tribunal has breached fundamental and generally recognized principles which lead to an intolerable denial of justice causing the decision to appear as incompatible with the values of a state of law.

The Supreme Court confirmed its previous case law according to which ignoring the ***res judicata* effect** of a previous decision rendered by the arbitral tribunal itself or by a foreign court constitutes a violation of procedural public policy. However, this principle only applies if the foreign judgment can be recognized in Switzerland under Article 25 PILA or international treaties, such as the Lugano Convention. A foreign court judgment that was rendered despite the existence of a valid arbitration agreement cannot be recognized due to the fact that it lacked indirect jurisdiction (i.e., recognized jurisdiction), and as such cannot prevent an arbitral tribunal from rendering an award.[121]

Whilst the Supreme Court had held in the *Condesa* decision of 1997 that the question of indirect jurisdiction was to be assessed under Article II(3) New York Convention, the Supreme Court now acknowledged the criticisms of reputable legal commentators according to which indirect jurisdiction should be examined under Article 7 and Chapter 12 PILA. However, it left this question undecided, since it was clear in the case at hand that the District Court of Khamovniki (Moscow) had ignored the (properly invoked) arbitration clause without ruling that it was null and void, inoperative or incapable of being performed. Accordingly, the Russian

[121] SFSCD no. 4A_247/2017 of 18 April 2018, reason 4.1.1.

judgment did not have a *res judicata* effect and the award did not breach procedural public policy.[122]

The Supreme Court rendered two decisions regarding an alleged violation of public policy based on **excessive formalism**. Interestingly, whilst the Supreme Court in its earlier decision simply examined whether or not there had been excessive formalism,[123] a few months later it seems to be raising doubts as to whether excessive formalism is really an element of public policy.[124] The Supreme Court drew parallels between excessive formalism on the one hand and arbitrariness in applying the governing arbitration rules on the other (which is not part of public policy). It raised the question as to whether a violation of public policy should only be considered in cases of serious violations of excessive formalism, in order to prevent an abuse of this ground for challenge. Unfortunately the Supreme Court ended up leaving this question undecided.[125]

In both cases, excessive formalism was denied. In the earlier case, the CAS held that the appeal was inadmissible because it had been filed within the deadline only as a facsimile and not as an original.[126] In the second case, the President of the Appeals Arbitration Division of the CAS terminated an appeal on the ground that the advance on costs had not been paid on time, despite clear reminders.[127]

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[122] SFSCD no. 4A_247/2017 of 18 April 2018, reason 4.1.
[123] SFSCD no. 4A_690/2016 of 9 February 2017, reason 4.2.
[124] SFSCD no. 4A_692/2016 of 20 April 2017, reason 6.1.
[125] SFSCD no. 4A_692/2016 of 20 April 2017, reason 6.1.
[126] SFSCD no. 4A_690/2016 of 9 February 2017, reason 4.2. As a side remark, the Supreme Court rejected in the second case the response to the challenge for exactly the same reason, as the response brief was submitted on the last day of the time limit by facsimile whilst the original was handed over on the same day to a courier service in the U.S., with the result that the original reached the Supreme Court a few days later (SFSCD no. 4A_692/2016 of 20 April 2017, reason 4).
[127] SFSCD no. 4A_692/2016 of 20 April 2017, reason 6.2.

III. Decisions on Applications for Revision of Arbitral Awards

The Supreme Court rendered a decision, published as a leading decision, on a request for revision that was based on an alleged **conflict of interest** of a sole arbitrator within the network of law firms operating under the CMS brand. The decision concerned a case where the losing respondent alleged a lack of independence of the sole arbitrator, a lawyer from CMS von Erlach Poncet in Zurich, on the basis that a team of CMS Hasche Sigle in Germany had advised an affiliate of the claimant during the arbitration on an unrelated M&A transaction. The respondent's counsel discovered this fact more than two months after the final award had been rendered from a press release published a few months prior to the final award.

The Supreme Court analysed the controversial question of whether a request for revision based on a lack of independence of the sole arbitrator can be filed if the ground for challenge could have been invoked in setting aside proceedings against the award, but was only discovered later on. After having performed a detailed analysis, the Supreme Court clearly indicated that the belated discovery of a lack of an arbitrator's independence should allow a party to seek revision of the award, provided that the requesting party, whilst using the diligence required by the circumstances, could not have discovered the ground for challenge during the arbitral proceedings. However, since the Supreme Court denied that there was a lack of independence in this case, it did not consider it to be opportune to decide this question, and thus left it up to the legislator to address this issue in the ongoing revision of Chapter 12 of the PILA.[128]

[128] SFSCD no. 4A_386/2015 of 20 July 2017, ATF 142 III 521, reason 2.3.

The Supreme Court carried out a detailed review of the 2014 IBA Guidelines on Conflicts of Interest in International Arbitration. According to the court, the IBA Guidelines do not have the force of law, but constitute a useful working tool that can contribute to the harmonization of standards applicable to conflicts of interest in international arbitration, and as such should have an influence on the practice of the arbitral institutions and courts.[129]

In this case, the Supreme Court denied that there was a lack of independence. While CMS presents itself on its website as one global firm with 3,000 lawyers, having CMS-wide practice groups and annual global partners meetings, the website also states that CMS is a network of ten independent firms. In the case at hand, the Supreme Court held that the Swiss firm CMS von Erlach Poncet in Zurich and the German firm CMS Hasche Sigle are two independent firms which are not financially integrated and do not share profits, other than when they cooperate on specific cases. The Supreme Court thus held that all of these circumstances would not appear to a reasonable third party as sufficiently serious to cause the upholding of the arbitral award to be incompatible with justice and equity. This was further supported by the fact that the sole arbitrator did not have knowledge of the German firm's work for an affiliate of the claimant at the time of the arbitration.[130]

A **request for revision was upheld** in a case that concerned allegations of bribery made in an arbitration between a German diesel engine producer and a company in Panama. The arbitration concerned a claim for commissions asserted by the Panama company under a consultancy agreement relating to supply opportunities for large energy projects. The German company rejected the payment claim, alleging that the Panama company had not rendered any services, but was

[129] SFSCD no. 4A_386/2015 of 20 July 2017, ATF 142 III 521, reason 3.1.2.
[130] SFSCD no. 4A_386/2015 of 20 July 2017, ATF 142 III 521, reason 3.3.

solely a vehicle for the payment of bribes to officials of the concerned country. The arbitral tribunal found that the contract would be invalid if the corruption allegations were to be proven, and ordered the production of certain bank documents to establish the beneficial owner of the Panama company. After the Panama company failed to comply with the order, the arbitral tribunal found that the corruption allegations had not been proven and awarded the Panama company the payment of the contractually agreed commission.

However, five years after the award was rendered, criminal proceedings against a former employee of the German company unearthed the banking documents that fell under the arbitral tribunal's past order for the production of documents and established the beneficial owner of the Panama company. Within the 90-day deadline of Articles 123(2)(a) and 124(1)(d) FSCA, the German company requested revision of the award based on newly discovered relevant evidence that it could not have filed in the arbitration. The Supreme Court granted the request, on the basis that the arbitral tribunal had considered the discovered documents as being relevant and had ordered their production, and that the documents indeed suggested that the Panama company was a vehicle for the payment of bribes.[131]

IV. Decision on the Enforcement of Arbitral Awards

The Supreme Court rendered an interesting decision regarding the **application of the Lugano Convention to court decisions related to arbitration**. In the case at hand, party X obtained a payment award against Y from an arbitral

[131] SFSCD no. 4A_412/2016 of 21 November 2016, reason 3.

tribunal seated in Italy. X then obtained an Italian court decision holding that the award was effective against Z, on the basis that Y was only a shell company. The Italian court decision was declared enforceable and a freezing order was obtained against the assets of Z in Switzerland. Z argued that the Lugano Convention was not applicable to the Italian court decision, as it excludes arbitration from its scope.

The Supreme Court referenced the various decisions of the European Court of Justice as well as the opinions of legal commentators and held that the arbitration exception in the Lugano Convention encompasses court proceedings that are functionally linked to the arbitration and are aimed at protecting the parties' right to submit their disputes to arbitration. For example, proceedings regarding the validity of the arbitration agreement, the setting aside, modification, or recognition and enforcement of arbitral awards, as well as proceedings that aim at implementing the arbitration (ancillary proceedings) are all excluded from the Lugano Convention. By contrast, procedures that are conducted in parallel to the arbitration and aim at supporting them (parallel proceedings) are subject to the Lugano Convention.[132]

Applying these principles, the Supreme Court held that the Italian decision holding that the arbitral award was effective against Z fell well within the scope of the Lugano Convention, since it did not aim to implement the arbitration, but rather related to a civil law question that the arbitral tribunal did not have to decide and also involved other parties than those in the arbitration.[133]

[132] SFSCD no. 5A_1056/2017 of 11 April 2018, reason 5.1.1.
[133] SFSCD no. 5A_1056/2017 of 11 April 2018, reason 5.2.

V. Conclusion

The Supreme Court has been busy over the past two years rendering decisions relating to arbitration. In doing so, the Supreme Court has once again been a guarantor of reliability and stability, whilst fulfilling its role as an ultimate safeguard in cases in which something had truly gone wrong.

The New DIS Rules – Bucking the Trend to Succeed in a Changing Market?

GUSTAV FLECKE-GIAMMARCO & MAX BLÜHER

Contents

"Nobody goes there anymore. It's too crowded."[1]

I. Introduction

The German Arbitration Institute (Deutsche Institution für Schiedsgerichtsbarkeit e.V. – "**DIS**") recently revised its arbitration rules, following an 18-month revision process that was basically conducted as a one-text-procedure ("**Rules Revision Process**"). During this time frame, 28 meetings of the reform commission, comprising of a drafting committee,

[1] Cf. BERRA, The Yogi Book, 1998, Workman Publishing, p. 9. PETER LAWRENCE "Yogi" BERRA was a professional Major League Baseball player/coach for the New York Yankees and widely known for his "Yogi-isms".

a consolidation committee and an expert committee, were held. The Rules Revision Process (launched by DIS under the headline "Hello, Rules Revision!") included consultations of 12 interest groups and the 263-member reform commission.[2]

With so much time and effort volunteered by various contributors in the form of town hall meetings, smaller committee meetings as well as public consultations and proposal gathering by email, it is safe to say that the Rules Revision Process was a genuine grass-roots project. It was even supported by a website issuing a call for ideas.[3]

In the best German tradition, one of the main goals of the Rules Revision Process was to adopt clear and concise provisions. This article will analyse whether the DIS has succeeded with this endeavour or fallen into the trap of over-codification of institutional arbitration rules.

In this context, HUNTER points to the trend of "*ever-increasing institutional regulation and control.*"[4] Further, his comparison between the old and the new DIS Rules shows that their page number has also increased.[5]

LANDBRECHT shares his impression of new rules published each quarter with increasing codification and consequent increase in length and detail and raises the question whether this development is beneficial to the users of international

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[2] Cf. MAZZA, Preface, SchiedsVZ Beilage zu Heft 1/2018, p. 3; DAS GUPTA, New 2018 DIS Arbitration Rules to enter into effect on 1 March 2018 available at <http://knowledge.freshfields.com/cp/Global/r/3702/new_2018_dis_arbitration_rules_to_enter_into_effect_on_1> accessed on 6 August 2018.

[3] See <http://ideasfordisrules.com/>, accessed on 6 August 2018.

[4] HUNTER, Introduction to DIS – Past, Present, Future, in Flecke-Giammarco et al. (eds), The DIS Rules – A Commentary on International Arbitration in Germany, p. 30 (forthcoming).

[5] *Ibid.,* p. 30.

arbitration.[6] As he rightly points out, arbitral institutions should be aware that they are making policy decisions when drafting and enacting arbitration rules.[7] The authors of the present article submit that the DIS took such responsibility very seriously.

To a certain extent, the DIS even set its course in an opposite direction from the trend towards uniformity.[8] The authors argue that this was the result of a thorough comparative analysis, which confirmed the observation that there are various differences and commonalities in institutional arbitration rules.[9]

Bearing in mind these recent observations in relation to the arbitration market, the outset of the Rules Revision Process will be described below. The reform process concluded when the new DIS Arbitration Rules entered into force on 1 March 2018 ("**DIS Rules 2018**"). It was conducted in a rapidly evolving and challenging arbitration market and thus required courageous choices and manifold changes, in particular because the previous version of the DIS Arbitration Rules dated back to 1998 ("**DIS Rules 1998**").

Another overarching purpose of the reform was meeting the needs of the main users, i.e. corporations.[10] Therefore, this interest group was heavily involved in the Rules Revision Process, which led to the insight that corporations are nowadays searching for flexible rules that either provide for

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6 LANDBRECHT, Over-Codification in Institutional Rules? – Assessing the New Provisions on Measures for Security for Costs in the Vienna Rules 2018, (2018) TDM Vol. 14, Issue 4, p. 1.

7 *Ibid*, p. 8.

8 DE LY, Chapter 2: Paradigmatic Changes – Uniformity, Diversity, Due Process and Good Administration of Justice: The Next Thirty Years, in Brekoulakis/Lew et al. (eds), The Evolution and Future of International Arbitration, 2016, p. 38.

9 PENNICOTT, Why are there so Many Sets of Arbitration Rules? (2018) Asian Dispute Review, HKIAC, Issue 2, p. 70.

10 Cf. MAZZA, *op. cit.,* p. 3.

an extremely cost-efficient and expeditious dispute resolution procedure or a highly qualitative enforceable decision.[11]

Against this backdrop, the drafting of the DIS Rules 2018 was governed by ten guiding principles issued by the DIS' Board of Directors:

> *(1) Non-bureaucratic, flexible and open to party autonomy: The distinctive feature of the DIS shall be a procedure that is flexible, administered in a non-bureaucratic way and open to party autonomy.*
>
> *(2) Need for changes: Only changes that are useful and necessary shall be made.*
>
> *(3) Scope: The new Arbitration Rules shall be suitable for domestic and international arbitration proceedings.*
>
> *(4) User expectations: The changes shall reflect the needs of the users.*
>
> *(5) Transparency & predictability: The internal procedures of the DIS shall be transparent and predictable.*
>
> *(6) Adjustment to the DIS Case Management practice: The new rules shall specifically reflect the Case Management Team practices developed through the course of the years.*
>
> *(7) Efficiency & quality assurance: With regard to their content, the changes shall aim at increasing efficiency and quality assurance.*
>
> *(8) Time and cost efficiency: The new Arbitration Rules shall set additional incentives to increase time and cost efficiency.*
>
> *(9) Official Languages: The DIS Arbitration Rules shall be available as original versions in both English and*

[11] Cf. *ibid*, p. 3.

> *German. This does not exclude the possibility of translations into other languages.*
>
> *(10) Concise provisions: The new provisions shall be worded in a concise manner.*[12]

These guiding principles created a clear pathway for the reform. Since the DIS faced the challenge of transporting the DIS Rules 1998, which had not been updated in 20 years, into the 21th century, several recent trends and developments in international commercial arbitration also had to be considered.

This contribution will elaborate on this journey by highlighting the most important changes made to the DIS Rules 2018 (II.), providing a thorough analysis of the international and German arbitration market (III.) and concluding with an outlook on DIS' possible future role in international arbitration practice (IV.).

II. Changes made to the DIS Rules 2018

The reason why this contribution is entitled "The New DIS Rules: Bucking the Trend to Succeed in a Changing Market?" is twofold.

First, the conference organizers and editors of this book kindly invited the authors to suggest a "catchy" title for their topic. A sensible and often encountered request to which the authors were more than happy to accede.

Second, the members of the drafting committee were repeatedly faced with one decisive question over the course of their 18-month work on the revision of the DIS Rules 2018:

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[12] See <http://ideasfordisrules.com/wp-content/uploads/2016/08/Leitlinien-Reform-DIS-Schiedsgerichtsordnung-1.pdf>, accessed on 6 August 2018.

Should the new DIS Rules (blindly) follow all recent trends among institutional arbitration rules and strictly adhere to the blueprint established by previously revised rules such as the ICC Rules, VIAC Rules, SCAI Rules, FAI Rules, SCC Rules, LCIA Rules etc.?

The drafters of the new DIS Rules chose to tackle this question with a comparative and analytical approach. The drafting process was assisted by memoranda on individual provisions by the "rapporteurs" who were tasked with preparing first drafts thereof. These memoranda served as the basis for discussions at monthly physical meetings of the drafting committee. Therein, the "rapporteurs" conducted a thorough analysis of the benefits and drawbacks of provisions in other institutional arbitration rules comparable to those under revision. Quite frequently, this exercise included a comparative table with the wording of various other institutional rules. On the basis of the rapporteurs' findings and further discussion among the members of the drafting committee, a first draft of the relevant new provision was then devised and later presented to the other committees involved in the Rules Revision Process.

In the authors' view, this workflow necessarily led the DIS and the members of the drafting committee to closely reconsider certain changes to the rules which, although they would have been in line with the ongoing harmonisation and uniformization of institutional rules, might not have generated an added benefit for the prospective user.

A common definition of the idiom "bucking the trend" describes its meaning as "[t]*o develop in an unexpected, surprising, or unforeseen way, especially in a way that contradicts recent history*."[13] To fully understand the authors' use of "bucking the trend", it is important to note that the

[13] See <https://idioms.thefreedictionary.com/Bucking+the+Trend>, accessed on 6 August 2018.

term originates from, and is widely used in, the financial sector. In related research, this phenomenon has also been described by scholars as "*a contrary path to success in a market*".[14]

What sounds like taking a page from WARREN BUFFET's investment playbook has thus, in the authors' view (which will hopefully be corroborated by the following remarks in a convincing manner), impacted the decision-making process of the DIS and its many supporters who were intimately involved in the Rules Revision Process.

A. The Background to the Changes to the DIS Rules 2018

As to the legal framework for arbitration, the German legislator has announced its intention to reform the 10th Book ZPO.[15] Although the prospective changes are not yet predictable, this ongoing reform process obviously affected the Rules Revision Process.[16]

Regarding the European future, the Brexit-Referendum of June 2016 has been discussed vividly by various sectors of the law.[17] For the arbitration market, both for commercial and investor-State arbitrations, legal uncertainty is a concern for

[14] See <http://review.chicagobooth.edu/strategy/2017/article/entrepreneurs-bucking-trend-pays>, accessed on 6 August 2018.

[15] Please refer to the chapter "Reform of the 10th Book ZPO" in this article for more details.

[16] Certain changes, such as the introduction of an emergency arbitrator were not made because the DIS wanted to await the revised 10th Book ZPO, see PÖRNBACHER/LEDERER, Die Reform der DIS-Schiedsgerichtsordnung, 2018, BB, p. 710.

[17] See KRAMME/BALDUS/SCHMIDT-KESSEL (eds), Brexit und die juristischen Folgen, 2016, Nomos.

the time being.[18] Although UK practitioners are praising the possibilities and advantages of London as a hub in the post-Brexit arbitration market, continental practitioners are more sceptic.[19] Any conceivable (or yet unimaginable) problem, e.g. the visa procurement for the post-Brexit era, must be deferred until, hopefully, legal certainty is restored by the conclusion of a Brexit treaty with the EU.[20]

For the DIS, this uncertainty might represent a golden opportunity to increase its local presence and the proliferation of its Rules in the international arena. Germany combines several criteria needed to succeed as a hub for international arbitrations: it is a neutral venue with multiple cities located in large industry-centers and offers an ideal infrastructure for conducting arbitration hearings.[21] Having a modern set of arbitration rules that are in line with current best practices should certainly help to add to Germany's reputation as a safe haven for domestic and international proceedings.

However, international arbitration is evolving into an ever more complex and competitive market. This is shown *inter alia* by a significant increase in multi-party and multi-contract arbitral proceedings in the past two decades.[22] At the same time, users become more and more sophisticated and demand *le beurre et l'argent du beurre*, i.e. they strive for a super

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[18] WILSKE/MARKET/BRÄUNINGER, Entwicklungen in der internationalen Schiedsgerichtsbarkeit in SchiedsVZ 2018/3, p. 137.

[19] *Ibid*.

[20] *Ibid*.

[21] MAZZA/GANTENBERG, Schiedsgerichtsbarkeit, Internationales Renommee -IHK Wirtschaftsforum, Law – Made in Germany, Rechtsordnungen im Vergleich – Bündnis für das deutsche Recht, 12.15/01.16, p. 23.

[22] BOOG/WIMALASENA, The 2018 DIS Rules: New Rules for a Renewed Institution in (2018) ASA Bulletin, Vol. 1, p.21: the ICC caseload in 2016 with more than two parties was 43%, with 23% involving more than five parties.

cost- and time-efficient procedure and a high quality and enforceable decision at the same time.[23]

This development calls for a thorough analysis of users' wishes and their psychology to fully understand the market of modern arbitration. Among scholars there are three ways of assessing the objectives of arbitration.[24] *First*, RISSE introduced the so-called "magic triangle", whose corners represent the simultaneous desires for time efficiency, cost savings and quality of the award.[25] In RISSE's opinion, only two of the desired objectives can be prioritized.[26] *Second*, FORTESE and HEMMI have reformulated RISSE's triangle with criteria such as party autonomy, due process and efficiency.[27] *Third*, KIRBY created the "Iron Triangle"[28] reproduced below emphasizing that it is not an easy task to reconcile the users' main ambitions. BÜHLER and HEITZMANN have even equated this objective to the search for the Holy Grail.[29]

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[23] Cf. MAZZA, *op.cit.,* p. 3.

[24] ARAVENA-JOKELAINEN/WRIGHT, Chapter 16: Balancing the Triangle: How Arbitration Institutions Meet the Psychological Needs and Preferences of Users in Tony Cole, The Roles of Psychology in International Arbitration, International Arbitration Law Library, 2017, Volume 40, p. 395 *et seq*.

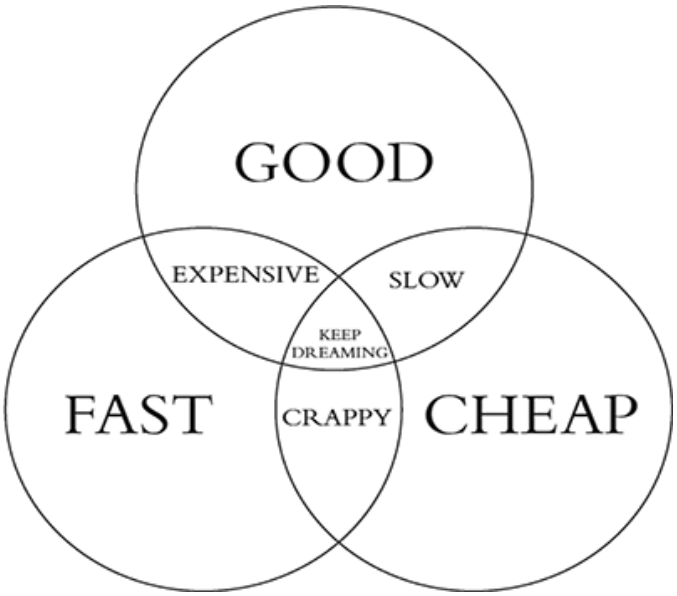
[25] *Ibid*, p. 396.

[26] *Ibid*.

[27] *Ibid*, p. 396 *et seq*., noting that the authors discussed the triangle when assessing tensions between fairness and efficiency in arbitration.

[28] KIRBY, Efficiency in International Arbitration: Whose Duty Is It? (2015) Journal of International Arbitration, Volume 32, Issue 6, p. 690.

[29] BÜHLER/HEITZMANN, The 2017 ICC Expedited Rules: from Softball to Hardball? (2017) Journal of International Arbitration, Volume 34, Issue 2, p. 147.



In the authors' view, these forms of triangular analysis seem to have had an important influence on the drafting process of the DIS Rules 2018. To reduce the above-mentioned developments and changes in the arbitration market to a common denominator, the DIS had to tread carefully to preserve its key features and position itself for the future with the DIS Rules 2018.[30]

B. Top 10 Changes and Key Features

As of 1 March 2018, the DIS Rules 2018 apply, without exception, to all new arbitrations commenced under the *aegis*

[30] Please refer to the chapter "Trends in the International Arbitration Market" in this article for further details.

of the DIS.[31] As to the most significant changes and key features of the DIS Rules 2018 the following have to be singled out:[32]

- Clarity and legal certainty are increased by specifying minimum criteria for filing the Request for Arbitration and the commencement of the proceedings.[33]
- Efficiency is enhanced by setting shorter time limits for Notifications, Answers and the constitution of the arbitral tribunal.[34]
- Complex Multi-Contract, Multi-Party situations as well as Joinder of Additional Parties and Consolidation are codified, rendering the DIS' respective practice more transparent.[35]
- Flexibility for smaller disputes is guaranteed by keeping a three-member arbitral tribunal as a default position but allowing for a decision by the DIS in favour of a sole arbitrator.[36]
- Tailor-made procedures are fostered by the introduction of a case management conference (including a mandatory list of issues to be discussed with the parties) within 21 days after the constitution of the arbitral tribunal.[37]

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[31] Section 1.2 DIS Rules 1998.
[32] Introduction by the Assistant Editors, FLECKE-GIAMMARCO et al. (eds), The DIS Rules – A Commentary on International Arbitration in Germany (forthcoming).
[33] Cf. Articles 5 and 6 DIS Rules 2018.
[34] Cf. Articles 4 (9), 5 (3), 5 (4), 7 (1), 7 (2), 7 (3), 9 (5), 12 (2), 13 (3), 15 (2), 15 (3) DIS Rules 2018.
[35] Cf. Articles 8, 17, 18, 19, 20 DIS Rules 2018.
[36] Cf. Article 10 (2) DIS Rules 2018.
[37] Cf. Article 27 (2) and Annex 3 DIS Rules 2018.

- Full understanding of the factual background is safeguarded as the arbitral tribunal shall establish the facts of the case and may make its own investigations.[38]
- Integrity and trust in the procedure is increased as the DIS (and no longer the arbitral tribunal) decides on the challenge and removal of arbitrators.[39]
- Time efficiency is promoted as the arbitral tribunal has to provide a draft award to the DIS within three months after the last hearing or substantive submission.[40]
- Transparency and predictability of costs are achieved by cost scales foreseeing a determination by the DIS (and no longer the arbitral tribunal), with the DIS now also being in charge of administering the cost deposit.[41]
- The arbitral tribunal's liberty of decision is counterbalanced by the DIS' right to make comments regarding formal aspects of the award, without providing for a protracted scrutiny process.[42]

These changes and features exemplify the civil law background of the DIS Rules 2018 which was combined with recent trends in international arbitration. HUNTER points out that the DIS Rules 2018 still have one unique selling point, namely the duty of the arbitral tribunal to consider amicable

[38] Cf. Articles 28 (1), 28 (2), 29 (1) DIS Rules 2018.
[39] Cf. Articles 15, 16 (1), 16 (2) DIS Rules 2018.
[40] Cf. Article 37 DIS Rules 2018.
[41] Cf. Articles 32, 33, 34, 36, Annex 2 DIS Rules 2018.
[42] Cf. Article 39 (3) DIS Rules 2018.

settlement at every stage of the procedure, which is contrary to the trends in other arbitration rules.[43]

C. Reception by Practitioners

According to BOOG and WIMALASENA, the DIS Rules 2018 "*provide a modern, efficient and field-tested set of rules for parties and arbitral tribunals to deal with the challenges facing arbitration today, setting the institutional foundations for an increasingly international German arbitration market*."[44]

CMS HASCHE SIGLE welcomes the constructive changes made by the DIS to its Rules.[45] Two changes are identified to be the most relevant, i.e. the increase in efficiency and the more active role by the DIS. Overall, the DIS Rules have left the impression that they provide a contemporary and flexible framework for improving the efficiency of arbitral proceedings. It is expected that the DIS will become more attractive to users and that the DIS Rules 2018 will be incorporated to a greater extent in contracts, leading to a rise in the number of DIS arbitrations.

Rather neutral is the reception of the DIS Rules 2018 by HERBERT SMITH FREEHILLS.[46] The report is limited to the key features, *inter alia* the promotion of early settlement, efficiency and multi-party as well as multi-contract arbitrations. However, the analysis refers to the heavy criticism of the DIS by many arbitrators as, under the DIS Rules 1998, the arbitral tribunal had to request and administer the advance on costs paid by the parties. It is welcomed that

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[43] HUNTER, *op.cit.,* p. 23.

[44] BOOG/WIMALASENA, *op.cit.*, p.30.

[45] CMS LAW-NOW, New DIS Arbitration Rules, available at <http://www.cms-lawnow.com/ealerts/2018/02/new-dis-arbitration-rules>, accessed on 22 August 2018.

[46] *Ibid*.

under the DIS Rules 2018, the DIS will now assume these duties.

On a positive note, NOERR opines that the DIS Rules 2018 have been successfully modernised, as they facilitate more streamlined and efficient proceedings and ensure increased quality assurance by the DIS.[47] The report notes that the DIS Rules 2018 balance being in line with the standard of other international rules and granting, in a well-tested manner, the parties and the arbitral tribunal a relatively broad discretion on how to organise the arbitral proceedings.

In the report by CLIFFORD CHANCE, the DIS Rules 2018 are held out to be much more than a mere update to the old rules but rather a complete new set of rules which introduce several key changes to enhance procedural efficiency, including the streamlining of deadlines.[48] Their comprehensiveness is pointed out as well as the fact that some of the new provisions and mechanisms are reminiscent of the rules used by the ICC.[49] The report concurs with others in that the main feature is the acceleration of arbitral proceedings under the DIS Rules 2018. It also refers to the nowadays standard practice of case management conferences but highlights that the DIS deliberately decided not to include automatic expedited proceedings for certain amounts in dispute but to leave this decision to the parties.[50] In a neutral manner, it is noted that the DIS Rules 2018 also promote the rather uncommon approach of encouraging amicable settlement and excel at including matters of digitalisation.[51] As a note of precaution, it is stated that the way in which multi-contract arbitrations

[47] *Ibid*.

[48] CLIFFORD CHANCE, The New 2018 DIS Arbitration Rules, available at <https://www.cliffordchance.com/briefings/2018/03/the_new_2018_disarbitrationrules>, accessed on 8 August 2018, p. 1.

[49] *Ibid*.

[50] *Ibid*, p. 3 *et seq*.

[51] *Ibid*, p. 4.

are dealt with may pose issues in cases where there are no explicit agreements.[52] Therefore, it is suggested to individually discuss the issues of multi-contract and multi-party arbitrations at the time of drafting and concluding the contract.[53]

The report of LINKLATERS on the DIS Rules 2018 notes that it was time to modernise the rules.[54] Overall, it states that the modernised rules will better position the DIS among its competitors, i.e. other arbitral institutions and state courts.[55] However, balancing the parties' autonomy, the arbitral tribunal's discretion and the institution's power of intervention still has to prove itself in practice.[56] It is stated that the aim of improving efficiency, transparency and flexibility was an evolution[57] rather than a disruptive revolution.[58]

CLEARY GOTTLIEB's report is split into a positive opinion about some beneficial features, innovations in efficiency, transparency, better predictability and the possibility that the DIS Rules 2018 increase the attractiveness of DIS arbitral proceedings as well as a rather negative assessment regarding possible disadvantageous provisions, suggesting a careful review of the present reform package.[59] The report points out that international players tend to consider DIS arbitral proceedings difficult to predict because of the inherent

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[52] *Ibid*, p. 5.

[53] *Ibid*, p. 5 *et seq*.

[54] LINKLATERS, Arbitration Alert: The new 2018 DIS Arbitration Rules, available at <https://linklaters.de/fileadmin/user_upload/Linklaters_Client_Alert_DIS_Rules_englisch.pdf>, accessed on 22 August 2018, p. 1.

[55] *Ibid*, p. 7.

[56] *Ibid*, p. 7.

[57] *Ibid*, p. 1 et seq.

[58] *Ibid*, p. 7.

[59] CLEARY GOTTLIEB, Alert Memorandum, New DIS Arbitration Rules as of March 1 2018, available at <https://www.clearygottlieb.com/-/media/files/alert-memos-2018/new-dis-arbitration-rules-as-of-march-1-2018.pdf>, accessed on 22 August 2018, p. 6 *et seq*.

liberalism in the DIS Rules 1998 and the fact that without an official repository of DIS awards a less sophisticated body of soft law around the DIS Rules 1998 has evolved.[60] Overall, the report notes that the reform of the DIS Rules 2018 will contribute to the promotion of Germany as a forum for international arbitration.[61]

The report of WHITE & CASE highlights that the DIS Rules 2018 will make DIS arbitral proceedings more attractive for international users and fortify Germany's position as a place of arbitration.[62] It states that the result of the very efficient reform process ended up in a balanced update in line with modern standards aimed at more efficiency, transparency and flexibility.[63] With foresight, the report addresses the increased flexibility as being crucial for the DIS Rules 2018 to be chosen instead of state court litigation in Germany.[64] In parallel, it is mentioned that certain changes, such as to the emergency arbitrator proceedings, might not have been introduced because of the prospective update to the 10th Book ZPO.[65] All in all, it is the reporters' view that the DIS Rules 2018 are well prepared to compete with other arbitral institutions' rules.[66]

PÖRNBACHER and LEDERER of HOGAN LOVELLS consider that the DIS Rules 2018 are a success.[67] Although they introduce various novelties, their character remained substantially unchanged.[68] The reporters stress that the DIS Rules are already the preferred set of rules for domestic arbitrations,

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60 *Ibid*, p. 2.
61 *Ibid*, p. 7.
62 WHITE & CASE, New DIS RULES after 20 years, available at <https://www.whitecase.com/ publications/alert/new-dis-rules-after-20-years>, accessed on 22 August 2018.
63 *Ibid*.
64 *Ibid*.
65 *Ibid*.
66 *Ibid*.
67 PÖRNBACHER/LEDERER, *op.cit.*, p. 712.
68 PÖRNBACHER/LEDERER, *op.cit.*, p. 712.

especially because of their lean and flexible procedure. They commend that the DIS also wanted to meet the needs and interests of international users.[69] The article then elaborates on the key reforms, concentrating *inter alia* on the electronic administration of case files, the constitution of the arbitral tribunal, multi-party as well as multi-contract proceedings, amicable solutions, the role of the DIS Arbitration Council and the case management conference.[70] In conclusion, it is highlighted that the reforms have preserved key procedural characteristics, introduced new practices and international standards, and may therefore be referred to as "ICC light".[71]

Finally, FRESHFIELDS BRUCKHAUS DERINGER rightly points out that the introduction of the new rules is a response to the increasing complexity of domestic and international arbitral proceedings.[72] Accordingly, as mentioned by nearly every practitioners' report, the relevant changes were made in order to improve procedural efficiency, increase transparency as well as integrity.[73] The report concludes that the DIS Rules 2018 will balance the possibility to manage complex issues and reduce the duration and costs of arbitral proceedings.[74] Therefore, this innovative set of rules will provide a modern framework to increase the significance of arbitration in Germany as well as worldwide.[75]

In an article on the impact of the DIS Rules 2018 on typical M&A issues, ELSING and SHCHAVELEV of ORRICK HERRINGTON & SUTCLIFFE refer to the needs of the international arbitration market for efficiency, quality and cost reduction. They find that the DIS, in its new rules, has held high their key features

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[69] PÖRNBACHER/LEDERER, *op.cit.*, p. 707.
[70] PÖRNBACHER/LEDERER, *op.cit.*, p. 708 *et seq*.
[71] PÖRNBACHER/LEDERER, *op.cit.*, p. 712.
[72] DAS GUPTA, *op.cit*.
[73] DAS GUPTA, *op.cit*.
[74] DAS GUPTA, *op.cit*.
[75] DAS GUPTA, *op.cit*.

and did not follow every trend.[76] They conclude that the DIS Rules 2018 offer a relatively low cost, non-bureaucratic proceeding open to party autonomy. Moreover, the DIS offers a high level of confidentiality, paired with a new framework for cost decisions and time as well as cost efficient proceedings.[77]

A post on the Kluwer Arbitration Blog addresses the steps that had to be overcome for the DIS Rules 2018 to see the light of day.[78] According to the report, the rules combine civil law elements, already represented in the DIS' predecessor rules, and changes as well as developments of international arbitration practice of the last two decades.[79] The authors *inter alia* emphasize the promotion of early settlements, the increase of transparency and the efficiency of arbitral proceedings under the DIS Rules 2018.[80] The outlook is seamlessly positive as with the new rules, the DIS has chosen to maintain and enhance distinct features of civil law procedures but, at the same time, has become more attractive to parties from all over the world.[81]

The public reception of the DIS Rules 2018 by practitioners is best summarized - although the spectrum of opinions obviously varies - by highlighting three new key features: efficiency, transparency and quality assurance. Some voices are asking for a cautious practical implementation of the DIS Rules 2018, but the prevailing opinion is overwhelmingly positive.

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[76] ELSING/SHCHAVELEV, DIS Schiedsordnung 2018 – Altbewährtes in neuem Gewand, (2018) M&A Review, Issue 4, p. 118.

[77] *Ibid*, pp. 118, 119.

[78] WITTINGHOFER/GAYER/HERTEL/KUPKA, The DIS Rules of Arbitration of 2018, Kluwer Arbitration Blog, February 15 2018, available at <http://arbitrationblog.kluwerarbitration.com/2018/02/15/new-dis-rules/>, accessed on 3 September 2018.

[79] *Ibid*.

[80] *Ibid*.

[81] *Ibid*.

III. Analysis of the International and German Arbitration Market

A. Trends in the International Arbitration Market

In recent times, both loud and harsh arbitration bashing has surfaced in Germany. Going by the derogatory name of *justice parallèle* (*Schattenjustiz*) in news reports, arbitration currently has a difficult standing in the public opinion.[82] Spill-over-effects of criticism connected with investor-State arbitrations on to commercial arbitration are noticeable.[83] Especially when focusing on the question of confidentiality, criticism has emerged, as transparency of the dispute resolution process was part of the debate for the transatlantic TTIP,[84] and for commercial arbitrations as well.[85]

Conversely, users of arbitration seem to specifically welcome the feature of confidentiality. Parties often desire a resolution of their disputes without any media attention and possible

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[82] WIRTSCHAFTSWOCHE, 29.4.2013, p. 46 *et seq*.; see also BREKOULAKIS, Chapter 1: Introduction: The Evolution and Future of International Arbitration, in Brekoulakis/Lew et al. (eds), The Evolution and Future of International Arbitration, 2016, p. 12 *et seq*., where he refers to articles published by *The Guardian* of 2013 and *The Economist* of 2014, *Le Monde* of January 2015, which criticize, with considerable sarcasm, arbitration as a means of dispute resolution.

[83] ELSING/GROTE, TTIP und der Spill-over-Effekt auf die Handelsschiedsgerichtsbarkeit, (2018) RIW, Issue 6, p. 322.

[84] See <https://www.bundestag.de/presse/hib/2015_01/-/354458>; <https://www.deutschlandfunkkultur.de/internationale-schiedsgerichte-wirtschaft-entmachtet-politik.976.de.html?dram:article_id=294365>; being favorable to throw the ICSID-System on the garbage heap of history: <https://www.deutschlandfunk.de/schiedsgerichte-im-freihandelsabkommen-ceta-es-muss.697.de.html?dram:article_id=334365>, all accessed on 8 October 2018.

[85] WIRTSCHAFTSWOCHE, *op.cit.*, p. 46 *et seq*.; ELSING/GROTE, *op. cit*., p. 323 with further references and an in-depth analysis of the arguments of critics as well as their authority.

negative publicity.[86] Confidentiality may also play a role in preserving commercial relationships, allowing parties to maintain their business dealings even after one of them has prevailed in a specific dispute.[87]

However, arbitration is not always welcomed without criticism even in expert circles. It is *inter alia* criticized that awards can only be "appealed" under narrow conditions; international cases are often said to take too long and be too costly. Some even call into question whether the resolution of disputes outside domestic courts is consistent with the rule of law.[88]

Contrary to this trend, ADR, and in particular arbitration, has become even more popular amongst users and practitioners in the recent years for manifold reasons. The systematic growth of a global framework supportive of arbitration, arbitration friendly reforms at the judicial and legislative level in different jurisdictions and the recognition by the end users support this trend.[89]

Arbitral institutions have implemented measures to achieve and maintain a world class reputation in this rapidly evolving and highly competitive field at many levels.[90] Despite the need of arbitral institutions to distinguish themselves from their competitors, it seems that there is a common effort to implement best practices for the standardization of institutional behaviour.[91] This ultimately leads to the point where their rules risk becoming increasingly similar with each successive revision.[92]

The following section will explain on which points the reform commissions for the DIS Rules 2018 consciously decided to

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[86] ARAVENA-JOKELAINEN/WRIGHT, *op.cit.*, p. 394.
[87] ARAVENA-JOKELAINEN/WRIGHT, *op.cit.*, p. 394.
[88] ARAVENA-JOKELAINEN/WRIGHT, *op. cit.*, p. 395 *et seq*.
[89] ARAVENA-JOKELAINEN/WRIGHT, *op. cit.*, p. 391 *et seq*.
[90] ARAVENA-JOKELAINEN/WRIGHT, *op. cit.*, p. 412.
[91] ARAVENA-JOKELAINEN/WRIGHT, *op. cit.*, p. 412.
[92] ARAVENA-JOKELAINEN/WRIGHT, *op. cit.*, p. 412.

differ from regulations in other rules, i.e. by "bucking the trend", and on which points common features can be identified.

1. Essential Differences to other Rules

A close review of recent changes in the international arbitration market, in which the DIS Rules 2018 are entering, shows significant changes to the gold standard for institutional rules.

Contemporary arbitration rules often include summary dismissal, expedited proceedings, scrutiny, and *prima facie* jurisdictional control. However, the drafters of the DIS Rules 2018 consciously decided not to include such features (or only a "light" version thereof).

First, arbitration rules increasingly include provisions on *summary dispositions*.[93] Recent examples are the SIAC Rules[94] and the SCC Rules.[95] Although other arbitration rules do not expressly include such powers for the arbitral tribunal, an analysis of two ICC awards shows that arbitral tribunals have not deemed a specific provision necessary to make summary decisions and dismissals.[96] To clarify this practice, the ICC recently included guidance on the recognition of arbitral tribunals' powers of summary determination in its Note to Parties and Arbitral Tribunals on the Conduct of

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[93] PARTASIDES/PREWETT, Chapter 5: Rediscovering the Lost Promise of International Arbitration in Lévy/Polkinghorne (eds), Expedited Procedures in International Arbitration, Dossiers of the ICC Institute of World Business Law, 2017, Volume 16, p. 113; see also WALTERS, referring to ICSID, ICDR/AAA, JAMS and CPR in WALTERS, Dispositive Motions in International Arbitration: A Move from ´Can We´ to ´Should We´, in Gonzalez-Bueno (ed), 40 under 40 International Arbitration, 2018, p. 114 *et seq*.

[94] Rule 29.

[95] Article 39.

[96] PARTASIDES/PREWETT, *op. cit.*, p. 113.

Arbitration.[97] The DIS' decision not to include a provision on summary dismissal may be explained by reference to German state court traditions. German arbitrators, like judges, regularly use the so-called "*Relationstechnik*", making sure claims which are "*unschlüssig*" can be dismissed without any further taking of evidence or other costly procedures. The DIS Rules 2018 however provide for a possible bifurcation of the proceedings,[98] which may sometimes resemble summary dismissal procedures. In such cases, the arbitral tribunal decides to dispose of a preliminary issue (e.g. jurisdiction, liability or other separable legal issues) early on in a first phase of the proceedings, before entering into a second phase, if any. A decision to bifurcate the proceedings will often be guided by considerations of procedural efficiency but may also be taken if the arbitral tribunal considers a legal argument raised by a party to be manifestly without merit.

Second, mindful that there are two ways for parties to benefit from expedited proceedings, the drafters of the DIS Rules 2018 decided in favor of an opt-in mechanism in Article 27(4) and Appendix 4 DIS Rules 2018. This is contrary to the opt-out solution adopted by other arbitral institutions. Under Article 30 and Appendix VI ICC Rules, notwithstanding contrary terms of the arbitration agreement, all disputes under USD 2 million will be decided in accordance with the Expedited Procedure Provisions, unless their application is excluded by virtue of Article 30(3) ICC Rules. Parties thus automatically profit from features such as a decision by a sole arbitrator, the absence of Terms of Reference, an expedited timetable for the case management conference and the

[97] COSTABILE, Early Dismissal of Unmeritorious Claims and Defences in International Arbitration, in Gonzalez-Bueno (ed), 40 under 40 International Arbitration 2018, pp. 255 and 260.

[98] Article 27(4) in conjunction with Annex 3 (Measures for Increasing Procedural Efficiency) DIS Rules 2018.

award.[99] Similarly, under Article 42(2) SCAI Rules, fast track proceedings will be conducted for disputes under 1 million CHF. Moreover, a general trend to include fast track proceedings in the offering of arbitral institutions over the last twenty years has been underway.[100] The DIS continues to follow this path, which it had started by launching its Supplementary Rules for Expedited Proceedings in 2008, but chose to leave it to the parties and the arbitral tribunal to decide whether it would be reasonable to complete the proceedings within 6 months based on the specific circumstances of the case.[101]

Third, instead of introducing a fully-fledged scrutiny process similar to the one conducted under Article 34 ICC Rules,[102] the DIS decided to follow the practice of other arbitral institutions, such as the VIAC, SCC and SIAC, by providing for a less comprehensive scrutiny of the award. Pursuant to Articles 37 and 39(3) DIS Rules 2018, every draft award must be sent to the DIS for review. The draft award will however not be submitted to the Arbitration Council but analyzed by the Secretariat on an expedited basis, mostly relying on an internal checklist for awards which is focused on formal points. During the Rules Revision Process, the term "light-touch" scrutiny has therefore been coined to describe this practice.

Fourth, as to *prima facie* jurisdictional decisions, as well as multi-party and multi-contract issues, joinder and consolidation, in recent years international arbitration rules have evolved considerably. This area however remains particularly controversial as there is no consensus under the

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99 BÜHLER/HEITZMANN, *op. cit*., p. 132 *et seq*.
100 BÜHLER/HEITZMANN, *op. cit.*, p. 123.
101 PÖRNBACHER/LEDERER, *op. cit.*, p. 710.
102 KÜHNER/FLECKE-GIAMMARCO, Part IV: Selected Areas and Issues of Arbitration in Germany, ICC Arbitration in Germany, in Nacimiento/Kroll et al. (eds), Arbitration in Germany: The Model Law in Practice, 2015, 2nd edition, p. 775.

ICC, SCAI, LCIA, SIAC and HKIAC Rules on the best practice for dealing with complex arbitrations involving multiple parties and multiple contracts.[103]

When tackling this issue during the Rules Revision Process, the drafters of the DIS Rules 2018 came to a fork in the road. There are two principal ways on how to address the above-mentioned issues. For example, Article 17(5) UNCITRAL Arbitration Rules, Article 22(1)(viii) LCIA Rules and Article 4(2) SCAI Rules do not require consent of all initial parties to the proceedings. The decision is a post-constitution of the arbitral tribunal issue.[104] These rules consider that an agreement between a third party and one of the parties to the arbitration may be sufficient for the joinder or voluntary intervention of a party.[105] This is however an exception to the general recognition of the principle of party autonomy.[106]

The DIS Rules 2018 do not include a *prima facie* decision by the Secretariat or the Arbitration Council on these matters. Pursuant to Article 8(1) DIS Rules 2018, the DIS may only consolidate two or more arbitrations conducted under its Rules into a single arbitration if all parties to all of the arbitrations consent to the consolidation. Filing a Request against an Additional Party with the DIS is only possible prior to the appointment of any arbitrator according to Article 19(1) DIS Rules. The arbitral tribunal, and not the DIS, is called upon to deal with multi-contract and multi-party issues under Article 17 and 18 DIS Rules 2018 upon its constitution. The only exception is Article 17(3) DIS Rules 2018 pursuant to which the DIS may, if it considers that an incompatibility of the arbitration agreements with respect to their provisions on

[103] SMITH, Comparative Analysis of Joinder and Consolidation Provisions Under leading Arbitral Rules, (2018) Journal of International Arbitration, Volume 35 Issue 2, p. 202.
[104] *Ibid*, p. 192.
[105] Cf. BORN, International Commercial Arbitration, Kluwer Law International, 2014, 2nd edition, p. 2600.
[106] Cf. *ibid*.

the constitution of an arbitral tribunal prevents the constitution of an arbitral tribunal under the Rules, terminate the arbitration in accordance with Article 42(4)(ii) DIS Rules 2018.

The DIS Rules 2018 thus provide for rather narrow criteria as set out by Articles 8 and 17 - 19. While some may consider this approach to be too conservative, it does not impose limits on party autonomy and helps to increase legal certainty and the enforceability of awards by focusing on the parties' express or implied consent to arbitrate.[107]

Regardless of the above-mentioned trends, the reform commission ultimately refrained from introducing many of today's standard provisions. This decision might correlate with the DIS' history. Statistics from recent years show that the DIS is still a relatively "German" institution.[108] A comparison between the SCAI and the DIS shows that the clear majority of SCAI cases have an international link and English as language of the proceedings.[109] However, the clear majority of DIS cases were conducted between parties residing in Germany and had German as the language of the proceedings.[110] However the developments between 2016 and 2017 show that English language proceedings are increasing within the DIS caseload.[111] There is also a clear trend between 2016 and 2017 towards more proceedings with one or both

[107] By way of example, Article 17.1 spells out the basic requirement applicable to all Multi-Contract Arbitrations under the Rules: the agreement of the parties that their claims arising out of or in connection with more than one contract be decided in a single arbitration. Articles 17.2 and 17.3 provide for specific additional requirements the parties have to comply with in cases in which two or more arbitration agreements form the jurisdictional basis for multi-contract claims.

[108] BOOG/WIMALASENA, *op. cit.*, p.11.

[109] *Ibid*., SCAI: 89% international cases, with 67% in English / DIS: 68% German cases, with 74.1% (2016) in German.

[110] *Ibid.*

[111] Statistics 2017 (see <http://www.disarb.org/upload/statistics/DIS-Statistics% 202017.pdf>, accessed on 8 October 2018), p.4: German language 67% (2017).

parties residing outside of Germany.[112] These statistics also seem to have influenced the aim of the DIS Rules 2018 to appeal to an increasingly international clientele but stay true to their traditional features.

2. Essential Commonalities with other Rules

To attract more international users, the DIS Rules 2018 did introduce several international best practices which were considered appropriate for proceedings with a German nexus.

First and foremost, the DIS' administrative involvement is now on an equal footing with other arbitral institutions, without, however, becoming overly bureaucratic. The DIS Rules 2018 vest the DIS Secretariat with considerable additional supportive and supervisory powers and ensure that decisions related to procedural issues in DIS arbitrations are taken by the Arbitration Council comprised of highly-experienced and reputed practitioners.[113]

This part of the article will focus on some essential commonalities with other rules, i.e. the administration and final determination of costs by the DIS, the jurisdiction to decide on challenges of arbitrators and stricter time limits for the initial submissions leading up to the constitution of the arbitral tribunal.

First, as the arbitral tribunal's power to determine its own fees and expenses was a controversial topic for some users, the DIS changed its cost system entirely. According to Article 33(1) DIS Rules 2018, only the DIS may henceforth decide on the arbitrators' fees and expenses as well as the institution's administrative fees. The DIS is also in charge of administering

[112] *Ibid*, p.5: showing that, in 2017, 44% of the proceedings were with one or both parties being non-resident in Germany ("foreign party").

[113] The current composition of the Arbitration Council can be seen here: <http://www.disarb.org/en/74/content/dis-rat-fuer-schiedsgerichtsbarkeit-id71>, accessed on 8 October 2018.

the security for the fees and expenses of the arbitrators pursuant to Article 35(1), (2) and (4) DIS Rules 2018, which may be increased or decreased at any time. The DIS Rules 2018 further introduce the possibility for the Arbitration Council to reduce the fees of any arbitrator according to Article 34(2) and 37 DIS Rules 2018 and to reconsider the arbitral tribunal's determination of the amount in dispute pursuant to Article 36(3) DIS Rules 2018. By including a revised Schedule of Costs in its Annex 2, the DIS Rules 2018 also provide a higher level of transparency and predictability for everyone concerned.

Second, contrary to the DIS Rules 1998,[114] challenges of arbitrators are no longer decided by the arbitral tribunal but by the Arbitration Council according to Article 15(4) DIS Rules 2018. The Arbitration Council may also remove an arbitrator from office pursuant to Article 16(2) DIS Rules 2018.

Third, the deadlines for the parties' initial submissions have been reduced when compared to the DIS Rules 1998.[115] Under the old rules,[116] the respondent was only invited by the arbitral tribunal, once constituted, to file its statement of defence. In practice, this sometimes meant that several months would pass before respondent was required to answer to the Request for Arbitration or introduce counterclaims. In order to increase the efficiency of the proceedings, the DIS Rules 2018 introduce fixed time limits of 21 days (for Respondent's Notification pursuant to Article 7(1))[117] and 45 days (for Respondent's Answer pursuant to Article 7(2)) which start to run upon transmission of the Request for

[114] Section 18 DIS Rules 1998.

[115] Cf. chapter "Top 10 Changes and Key Features".

[116] Section 9 DIS Rules 1998.

[117] Under Article 7(1), Respondent's Notification must include (i) the nomination of an arbitrator, if required under the Rules and (ii) any particulars or proposals regarding the seat of the arbitration, the language of the arbitration, and the rules of law applicable to the merits. Requiring Respondent to provide this information after 21 days will help the DIS expedite the constitution of the arbitral tribunal.

Arbitration. These changes will lead to significant time gains with respect to (i) the constitution of the arbitral tribunal since the Respondent must comment early on all pertinent procedural matters and (ii) the DIS fixing the Deposit since the amount in dispute affects the calculation of the Deposit pursuant to the Schedule of Costs (see Articles 35(2), (3), 36(1)) and the Administrative Fee (see Articles 5(3) and 7(6)).

B. Germany as Place of Arbitration

To illustrate the current reality of Germany as a place of arbitration, it is essential to analyse both the local judicial system and the evolution of the arbitration market. Germany's efforts to become even more attractive for international users of dispute resolution mechanisms are growing.[118]

A comparison of the Queen Mary International Arbitration Surveys for 2006 and 2015 shows that the reasons for the users' choice of a seat of arbitration have shifted. In 2006, the choice of a seat was mainly based on legal considerations and convenience.[119] In 2015, the most important reasons for choosing the seat were the neutrality and impartiality of the local legal system, followed by the national arbitration law and finally the jurisdiction's track record for enforcing agreements to arbitrate and arbitral awards.[120]

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[118] Cf. Bundesminister der Justiz und für Verbraucherschutz, MAAS, Den Rechtsstandort stärken, IHK Wirtschaftsforum, Law – Made in Germany, Rechtsordnungen im Vergleich – Bündnis für das deutsche Recht, 12.15/01.16, p. 19.

[119] VIRJEE, Activating Arbitration: Four Delos Principles to Achieve Fair and Efficient International Arbitration, Delos Dispute Resolution, 2017, p. 28.

[120] *Ibid*.

Germany has a longstanding reputation as a favourable place of arbitration. The following three trends show how the legal landscape in Germany has evolved over recent years. The authors examine whether such changes may offer room for additional growth for arbitration.

First, matters brought to court in first instance proceedings in Germany have dropped significantly, i.e. by 22,77% between 2005 and 2015.[121] While the numbers of new first instance cases in civil matters in 2005 amounted to nearly 1.880.000, in 2015 the new caseload hovered around 1.450.000.[122] In the same time span, completed cases in construction disputes and disputes with architects dropped by over 30%;[123] completed cases with a link to corporate law disputes dropped by over 50%;[124] completed cases concerning sales contracts dropped by over 15%;[125] completed cases heard before the special chamber for commercial disputes at regional courts dropped by nearly 35%.[126] These statistics show a downward trend in state court filings, which may create interesting opportunities for arbitration.

Second, the World Bank's annual report on doing business around the world shows, from a German perspective, a rather surprising trend. Although the case study concentrates on enforcing contracts through first instance proceedings in Germany's major city, i.e. Berlin,[127] two trends can be detected: proceedings in Germany have slowed down and Germany's position in the rankings is declining. While the

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[121] WAGNER, Rechtsstandort Deutschland im Wettbewerb, Impulse für Justiz und Schiedsgerichtsbarkeit, 2017, p. 93.
[122] *Ibid*.
[123] *Ibid*, p. 97.
[124] *Ibid*, p. 98.
[125] *Ibid*, p. 97.
[126] *Ibid*, p. 99.
[127] WORLD BANK, Doing Business Report 2018, Reforming to Create Jobs, p. 107 and p. 118.

2005 Report states that proceedings under the case study in first instance cases in Germany would take on average 184 days,[128] in 2018 the same first instance case would take on average 499 days from filing the law suit until payment.[129] Germany also dropped in the rankings for enforcing contracts in first instance cases in the last five years: in 2013, Germany was ranked 5/185, in 2018 22/190.[130]

When comparing these trends, the results are concerning at first sight. However, less cases in first instances and longer proceedings might very well point at a less shocking evolution, namely a higher overall quality of the judicial process. A higher quality of judicial process can be achieved by adopting good practices within the court structure, proceedings, case management, court automation and alternative dispute resolution.[131] Indeed, it can be noted that Germany has obtained an average of 11 points out of 18 in 2018 for the quality of the judicial process,[132] although in 2017 it scored 12 points out of 18.[133] These numbers are above the average of

[128] WORLD BANK, Doing Business Report 2005, Removing Obstacles to Growth, p. 109, p. 79.

[129] WORLD BANK, Doing Business Report 2018, *op. cit.*, p. 162; see <http://www.doingbusiness.org/Methodology/Enforcing-Contracts>, accessed on 29 August 2018; as to the comparability of the case studies in the 2005 and 2018 Report, it must be noted that the underlying "Assumptions about the case" have varied over time. The "Assumptions about the case" are reproduced in WORLD BANK, Doing Business Report 2005, *op. cit.*, p. 86 and WORLD BANK, Doing Business Report 2018, *op. cit.*, p. 107. The authors consider that the *tertium comparationis* lies in the key points, i.e. how the proceeding and the enforcement is followed. In Germany, the disputes of the case studies, with a worth of 200% of the country's per capita income, would always be referred to the Regional Courts (*Landgericht*) because the amount in dispute is greater than 5000 EUR, §§ 71 I, 23 No 1 GVG (the wording of the versions in force in 2005 and 2018 has not changed).

[130] WORLD BANK, Doing Business Report 2013, Smarter Regulations for Small and Medium-Size Enterprises, p. 3 and p. 165; WORLD BANK, Doing Business Report 2018, *op. cit.*, p. 162.

[131] WORLD BANK, Doing Business Report 2018, *op. cit.*, p. 108.

[132] WORLD BANK, Doing Business Report 2018, *op. cit.,* p. 162.

[133] WORLD BANK, Doing Business Report 2017, Equal Opportunity for All, p. 208.

10 points in the region of Europe & Central Asia, and the average of the OECD high income economies to which Germany belongs.[134] Nevertheless, Germany occupies a high rank in the World Justice Project 2017-2018: overall place of 6 out of 113.[135] This report suggests strong reasons for arbitrating in Germany as the civil justice and regulatory enforcement systems are highly functional.[136] Therefore, the overall impression might be more positive than suggested by the above-mentioned trends.

Third, ADR and specifically arbitration may have entered into competition with the German court system between 2005 and 2015, as there were 80% more new DIS proceedings in 2015, then in 2005.[137] However, the overall amount of new cases before the DIS and other arbitral institutions, compared to the numbers of court proceedings, only from a German perspective, remains rather small.[138]

To put the duration of arbitral proceedings and court proceedings into perspective, it must be noted that the average length of arbitral proceedings depends on the method of calculation employed by the respective institution, *i.e.* whether the filing of the Request for Arbitration or the transmission of the file to the arbitral tribunal is used as a point of reference.

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[134] See <http://www.doingbusiness.org/data/exploretopics/enforcing-contracts>, accessed on 29 August 2018 and WORLD BANK, Doing Business Report 2018, *op. cit.*, p. 162.

[135] See <http://data.worldjusticeproject.org/#/groups/DEU>, accessed on 8 August 2018.

[136] *Ibid.*, according to the report Civil Justice (3/113) and Regulatory Enforcement (8/113), further the Constraints on Government Powers (6/113) can play a role when assessing risks of future legislative projects.

[137] WAGNER, *op. cit.*, p. 101.

[138] In 2015: LCIA 326, ICC 801, as explained in Wagner, *op. cit.*, p. 101 *et seq.*; 172 DIS proceedings were intitiated in 2016 and 160 in 2017 (see http://www.disarb.org/upload/statistics/DIS-Statistics%202017.pdf, accessed on 29 August 2018).

The average duration of DIS' cases over the past years, from the filing of the statement of claim with the DIS through to the issuance of the final award, was 14 months.[139] Arbitrations under the ICC Rules are said to take about 16 to 24 months.[140] Proceedings conducted under the SCAI Rules were on average completed in less than 11 months.[141] In case of expedited proceedings, this average reduces to 8 months after the transmission of the file to the arbitral tribunal.[142]

As outlined above, the time required for enforcing contracts by way of German state court proceedings encompasses the time between the filing of the claim and the actual receipt of the adjudicated amount. In Germany, enforcing an award will generally take about six to eight months. In case a party does not voluntarily comply with an award, this additional time period would thus have to be added to the average duration of the arbitrations presented above.

In summary, Germany offers all important features that users look for when choosing a place of arbitration: a high standard of neutrality and efficiency of the local judicial system and an established track record for enforcing agreements to arbitrate and arbitral awards. Generally, it can be noted that Germany is well known for its arbitration friendly law.[143]

The future will show whether the DIS Rules 2018 will help Germany to become even more attractive as a place of arbitration. The German government is becoming increasingly aware of the importance of arbitration for international

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[139] SUH, Part III: Commentary on the Arbitration Rules of the German Institution of Arbitration (DIS Rules), Introduction, in Nacimiento/Kroll, et al. (eds), Arbitration in Germany: The Model Law in Practice, 2015, 2nd Edition, p. 588.

[140] BRUNNER, Chapter 3, Part I: Introduction to the Swiss Rules of International Arbitration, in Arroyo (ed), Arbitration in Switzerland: The Practitioner's Guide, 2013, p. 335.

[141] Swiss Chambers Court of Arbitration and Mediation, Newsletter 1/2009.

[142] BRUNNER, *op. cit.*, 3, p. 335 *et seq*.

[143] PÖRNBACHER/LEDERER, *op. cit.*, p. 712.

commerce. Therefore, the Federal Ministry of Justice and Consumer Protection ("**Ministry**") has undertaken various steps to promote "German" arbitrations: these include a joint campaign with the DIS called "Choosing Germany as a Seat for Your International Arbitration", opting for more transparency and launching a working group to revise the German arbitration law.[144]

In conclusion, the stellar reputation of Germany's economy and its service industry, coupled with state-of-the-art arbitration rules, will hopefully appeal to foreign users and foster Germany's role as a reliable and sought-after place of arbitration.

C. Revision of the 10th Book ZPO

In 2016, the Ministry established a working group for the review of the German arbitration law.[145] As explained above, the local arbitration regime is one of the key features for being chosen as a place of arbitration. It is therefore of utmost importance that proceedings in Germany can be conducted within an ideal regulatory framework.[146] In the case of Germany, such regulatory framework is generally considered to be in good shape, although the German legislator has not yet adopted certain changes made when the UNCITRAL Model Law was amended in 2006.[147]

The current state of affairs of the working group suggests that the reform of the arbitration law may take its course as early

[144] See <https://www.bmjv.de/SharedDocs/Reden/DE/2017/06132017_Buendnis_fuer_das_deutsche_Recht.html>, accessed on 3 September 2018.
[145] WOLFF, Empfiehlt sich eine Reform des deutschen Schiedsverfahrensrechts? (2016) SchiedsVZ, p. 293.
[146] WOLFF, *op. cit.*, p. 293.
[147] WOLFF, *op. cit.*, p. 305 *et seq*.

as in the year 2018.[148] Although the reform seems to be deemed necessary by the Ministry, others are skeptical.[149] It is argued that the prospective changes are mere clarifications regarding formalities and the participation of consumers.[150]

KRÖLL has flagged 2017 to be a mixed bag for arbitration in Germany considering some recent decisions of the German Federal Court of Justice.[151] However he mentions the efforts of the working group under the umbrella of the Ministry as an upside of the year 2017.[152] Hopes are high that the amendment of the 10th Book ZPO will substantially strengthen Germany's standing in the international competition of places of arbitration.[153]

IV. Conclusions

Only time will tell whether "bucking the trend" pays off with respect to the proliferation and acceptance of the DIS Rules 2018 in arbitral practice. The authors submit that the DIS has undertaken monumental efforts to ensure that its arbitration rules are a state-of-the-art, highly efficient and extremely flexible tool that benefit domestic and international users alike. At the same time, it seems that the DIS has consciously taken a "go your own way" approach to avoid over-codification and stay true to its civil law roots.[154] After all,

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148 WILSKE/MARKET/BRÄUNINGER, *op. cit.*, p. 158; KRÖLL, Die Entwicklung des Schiedsrechts in (2018) NJW, p. 839.

149 WILSKE/MARKET/BRÄUNINGER, *op. cit.*, p.158.

150 WILSKE/MARKET/BRÄUNINGER, *op. cit.*, p.158.

151 KRÖLL, *op. cit.*, p. 836, p. 839, referring in particular to the controversial Schiedsfähigkeit III decision (BGH, NJW-RR 2017, 876).

152 KRÖLL, *op. cit.*, p. 836, p. 839.

153 KRÖLL, *op. cit.*, p. 836, p. 839; also refer to the chapter in this article on "Germany as Place of Arbitration".

154 The DIS Rules 2018 approach to efficient case management, which can best be examined by reference to Article 27 and Annex 3 to the Rules, has been aptly

flashy ideas and grandiose plans only take you so far. Instead, legal certainty and predictability remain key features for arbitration users.[155]

Rather than adopting a number of additional provisions, which might certainly be considered as "nice-to-have", but are not essential because the respective practices exist even without an explicit provision or may still develop as the DIS' case management procedures evolve (which will from now on be influenced by the Secretariat's considerable additional supportive and supervisory functions and the Arbitration Council's decisions), the DIS focused on catering to the specific needs and customs of its principal users to foster the strong tradition of dispute resolution in Germany.

To conclude and sum up the extremely positive outlook for the future role of the DIS Rules 2018 in the international arbitration market, the authors once more borrow from the words of wisdom of WARREN BUFFET[156]: "*It is not necessary to do extraordinary things to get extraordinary results*."

described as a "light continental European touch", cf. RABE/BÄDER, 13. Tagung der DAJV-Fachgruppe Arbitration Litigation Mediation: Anwaltsvergütung und Prozessfinanzierung in Zeiten der Digitalisierung sowie die Reformierung des deutschen internationalen Schiedsverfahrensrechts (2017) SchiedsVZ, pp. 312, 315 (quoting DIS' former Deputy Secretary General James Menz).

[155] 43% of respondents in the 2018 International Arbitration Survey published by Queen Mary University and WHITE & CASE mentioned "greater certainty and enforceability of awards" as the number two factor that will have significant impact on the future evolution of international arbitration (only behind "increased efficiency" with 61% of respondents). For the importance of procedural predictability in practice see also KÜHN, Procedural Tools in Support of Predictability in International Arbitration', Austrian Yearbook of International Arbitration, 2017, pp. 191–196.

[156] See <https://www.cnbc.com/2017/05/01/7-insights-from-legendary-investor-warren-buffett.html>, accessed on 8 October 2018.

The evolving investor-State dispute settlement system: between "light" and "heavy" reform proposals

MICHELE POTESTÀ

Contents

I. Introduction

Over the last few years, growing criticism over investor-State arbitration has triggered demands for reform of the existing framework from countries, international organizations and civil society groups. In all recent treaties concluded by the European Union ("**EU**") with its trade partners (the EU-Canada Comprehensive Economic and Trade Agreement ("**CETA**");[1] the EU-Vietnam Free Trade Agreement;[2] the EU-Singapore

[1] Comprehensive Economic and Trade Agreement between Canada, on the one hand, and the EU and its Member States, on the other hand (CETA),2016, available at <http://ec.europa.eu/trade/policy/in-focus/ceta/ceta-chapter-by-chapter/>, accessed on 8 October 2018.

[2] Free Trade Agreement between the EU and the Socialist Republic of Vietnam (EU-Vietnam FTA), Agreed Text as of August 2018, available at < http://

Free-Trade Agreement;[3] and the EU-Mexico Free Trade Agreement),[4] the contracting parties replaced the ad hoc system of investment arbitration with standing bilateral bodies composed of first-instance and appellate tribunals. In a further move, in December 2016, the European Commission launched a public consultation on a "*multilateral reform of investment dispute resolution,*"[5] which was followed by a decision of the Council of the EU to permit the latter to take part in negotiations for a new multilateral investment court.[6] In parallel, since 2016, discussions have been taking place on a global scale at the U.N. Commission on International Trade Law ("**UNCITRAL**"). Following debates in New York in July 2016 and in Vienna in July 2017, UNCITRAL decided to entrust Working Group III ("**WGIII**") with a mandate to work on the topic of "*investor-State dispute settlement reform.*"[7]

The mandate of WGIII has been set out as follows:

> *The Commission entrusted Working Group III with a broad mandate to work on the possible reform of investor-State dispute settlement. […] The Working Group*

trade.ec.europa.eu/doclib/press/index.cfm?id=1437>, accessed on 8 October 2018.

3 EU-Singapore trade and investment agreements (authentic texts as of April 2018), available at < http://trade.ec.europa.eu/doclib/press/index.cfm?id=961>, accessed on 8 October 2018.

4 "New EU-Mexico agreement. The agreement in principle", Brussels, 23 April 2018, p. 11, available at < http://ec.europa.eu/trade/policy/countries-and-regions/countries/mexico/>, accessed on 8 October 2018.

5 See European Commission, European Commission launches public consultation on a multilateral reform of investment dispute resolution, 21 December 2016, at < http://trade.ec.europa.eu/doclib/press/index.cfm?id=1610 >, accessed on 8 October 2018.

6 See Negotiating directives for a Convention establishing a multilateral court for the settlement of investment dispute, 20 March 2017, available at <http://data.consilium.europa.eu/doc/document/ST-12981-2017-ADD-1-DCL-1/en/pdf >, accessed on 8 October 2018.

7 See Official Records of the General Assembly, Seventy-second Session, Supplement No. 17 (A/72/17), paras. 263 and 264.

> *would proceed to: (a) first, identify and consider concerns regarding investor-State dispute settlement; (b) second, consider whether reform was desirable in the light of any identified concerns; and (c) third, if the Working Group were to conclude that reform was desirable, develop any relevant solutions to be recommended to the Commission. The Commission agreed that broad discretion should be left to the Working Group in discharging its mandate, and that any solutions devised would be designed taking into account the ongoing work of relevant international organizations and with a view to allowing each State the choice of whether and to what extent it wished to adopt the relevant solution(s).*[8]

The task of WGIII is thus three-fold. First, the working group will seek to identify and examine any concerns with the investor-State dispute settlement ("**ISDS**") system; second, it will consider whether any reform is desirable in light of any identified concerns; and third, if this is the case, the working group will develop any "relevant solutions" to remedy any identified concerns.

In line with its three-step mandate, the first sessions of WGIII were devoted to the discussion and identification of any concerns with the existing ISDS system. Although the deliberations showed a variety of positions on the existence and extent of these concerns, including on the question as to whether some of these concerns are real or only perceived, States raised a number of wide-ranging problems with the existing system. These include the lack of consistency, predictability and correctness of investor-State arbitral awards; arbitrators' appointments, including conflicts of interest, repeat appointments, and "double-hatting"; costs;

[8] *Ibid*., para. 264.

lack of transparency; third party funding; and limited avenues for States' counterclaims.[9]

WGIII is now expected to delve into the second and third phases of its mandate, namely the discussion of the desirability of any reform in light of the identified concerns and possibly the identification of relevant solutions.

The purpose of this contribution is to explore some of the potential reform options that are being aired – within WGIII and beyond – and analyze some of the main challenges and opportunities these reform options present for the future of ISDS.

In essence, and assuming at least some changes will be made to the existing system, (I thus do not consider the maintenance of the status quo in this contribution which, of course, is also a possible outcome of the discussions), one could identify three broad directions in which ISDS reform may evolve.

First, it is conceivable that the existing arbitration system will be maintained with respect to its main features, whilst adopting targeted reforms aimed at making relatively minor adjustments. I refer to these reform initiatives as "light reform" options (*infra* at section II).

Second, a mid-way option would be to maintain the existing arbitration system as the first layer of dispute resolution process and complement it with an appeal mechanism (in lieu of the existing review system based on annulment grounds). I will refer to the arbitration + appeal option as a "medium reform" option (*infra* at section III).

[9] See Possible reform of investor-State dispute settlement (ISDS). Note by the Secretariat (draft), U.N. Doc. A/CN.9/WG.III/WP.149, available at <http://www.uncitral.org/uncitral/en/commission/working_groups/3Investor_State.html >, accessed on 8 October 2018.

Third, in what would be a "heavy" reform option compared to the two previous ones, the existing arbitration system would be replaced entirely with a multilateral investment court ("**MIC**") composed of tenured judges (*infra* at section IV).

Despite the obvious differences, both conceptual and practical, between these three reform options, they all have one fundamental aspect in common: they all maintain the basic element of ISDS as it has developed in the last decades, namely the possibility for an investor to sue directly the host state before an international forum (whether an arbitral tribunal (with or without an appeal) or an international court).

By contrast, given the space limitations, this contribution will not consider those reform options which would entirely eliminate the international direct remedy in favour of investors.[10] These possibilities are in theory conceivable if States – as the masters of the treaty network on which ISDS rests – were to be convinced that direct access by individuals to an international remedy is no longer appropriate for the settlement of investment disputes and that, as a result, investors should only (a) be granted recourse to domestic courts and/or (b) be entitled to seek the espousal of their home State through the "classic" mechanism of diplomatic protection, which has fallen somewhat out of date in the last decades as a result of the success of ISDS.

II. Light reform options

While the heavier reform options (especially the MIC) have attracted a lot of attention recently, it should not be overlooked that a number of States and other stakeholders are unlikely to be convinced of the need to move away from

[10] Indeed, some States (for instance, Brazil) never signed up to the investment treaty system providing for investors' direct access to investment treaty arbitration.

the basic features of arbitration as it has developed in the last decades. Proponents of more limited reform options, in particular, contend that the critics of the system have not made out a sufficient case for the elimination of arbitration as a neutral, and relatively efficient, mechanism for the resolution of investment disputes and argue that any shortcomings with the existing system can be remedied through targeted improvements. They warn against "throwing the baby out with the bathwater".

In this section, I review two examples of "light reform" initiatives, namely (A) the ongoing amendment process carried out by ICSID - the institution that has administrated the majority of investment arbitration cases to date - of its own Rules, and (B) the new Dutch draft Model BIT, released in May 2018. Whilst both initiatives are pursued outside and independently of the deliberations in WGIII, they reflect the widespread efforts from various investment treaty arbitration actors to respond to the challenges posed to the current system through targeted reforms.

A. Ongoing amendment of the ICSID Rules

ICSID launched the current amendment process in October 2016 and invited both its Member States and the public to suggest topics that merit consideration. After a review of the comments received, in August 2018, the Secretariat released a Working Paper to inform further discussions on the possible amendments.[11] Additional consultations, with both ICSID Member States and the public at large, are foreseen in the course of the fall and winter 2018. The Secretariat's intention is, depending on the extent and nature of the feedback

[11] See ICSID Secretariat, Proposals for Amendment of the ICSID Rules — Working Paper, 2 August 2018, available at <https://icsid.worldbank.org/en/Documents/Amendments_Vol_Three.pdf>, accessed on 8 October 2018.

received, to "*propose a package of amendments for further consideration and potential adoption in 2019 or 2020.*"[12]

In sum, with regard to the ICSID Arbitration Rules,[13] ICSID proposes the following most noteworthy innovations:

- **Obligation to Disclose Third Party Funding.** The proposed rules introduce an obligation by the parties to disclose whether they have third party funding, and if so, the source of the funding. The name of an involved funder will also be provided to potential arbitrators prior to appointment to avoid possible conflicts of interest.[14]
- **Enhanced Transparency**. Given that the ICSID Convention requires the consent of both parties to publish an award and that there is no attempt to amend the ICSID Convention at this time (which would in any event be very difficult to achieve given the unanimity requirement in the Convention), this rule stays in place. However, a new provision deems that a party has given consent to publish awards, decisions and orders unless it objects in writing within 60 days. If a party does object, the proposed rules permit ICSID to publish legal excerpts of the award, with an established process and timeline to do so.[15]
- **New Rule on Security for Costs**. A new, stand-alone rule would allow an arbitral tribunal to order

[12] *Ibid*., para. 14.

[13] The ongoing amendments also envisage modifications to the ICSID Administrative and Financial Regulations, Institutional Rules, Additional Facility Rules, Conciliation Rules. Further, an entirely new set of rules on mediation is proposed.

[14] ICSID Secretariat, Proposals for Amendment of the ICSID Rules — Synopsis, 2 August 2018, available at <https://icsid.worldbank.org/en/Documents/Amendments_Vol_One.pdf>, accessed on 8 October 2018, para. 27.

[15] *Ibid*., paras. 41-49.

security for costs. The rule states that the tribunal must consider the relevant party's ability to comply with an adverse decision on costs and any other relevant circumstances.[16]

- **Disqualification of Arbitrators.** The proposed amendments provide for an enhanced declaration of independence and impartiality for arbitrators and an expedited schedule for parties filing a challenge.[17]
- **Timing of Awards.** New timelines are proposed for issuing awards. Awards must be rendered within 60 days after the last submission on an application for manifest lack of legal merit, 180 days after the last submission on a preliminary objection, and 240 days after the last submission on all other matters.[18]
- **Expedited Proceedings.** Parties may opt to use newly drafted rules for expedited proceedings featuring additional and shortened timelines.[19]

An in-depth review of what the proposed amendments entail, especially for the practice of ICSID arbitration - which is likely to be rendered more efficient, streamlined, and transparent as a result of the amendments - is beyond the scope of this contribution. For the purposes of the present discussion, it is important to note, however, that while the changes envisioned in this amendment process constitute "*the most extensive review to date*" in the history of the ICSID Rules,[20] they purport to implement targeted reforms that to do not seek to fundamentally alter the existing investor-State

[16] *Ibid*., para. 51.
[17] *Ibid*., paras. 33-35.
[18] *Ibid*., paras. 54-55.
[19] *Ibid*., paras. 56-59.
[20] See ICSID Rules and Regulations Amendments Process, at <https://icsid.worldbank.org/en/amendments >, accessed on 8 October 2018.

arbitration framework. In other words, they consciously shy away from addressing any more "dramatic" changes to the arbitral process, no doubt also considering the constraints posed by the ICSID Convention itself and its unanimity rules on amendment. For instance, significantly, the proposed changes do not revive the idea of an optional appeal facility which had been raised by the ICSID Secretariat itself in the prior amendment round in 2006.[21]

B. The 2018 Dutch draft Model BIT

A second example of a targeted reform initiative to the *arbitration* model used for the adjudication of investor-State disputes is the draft Model BIT which the Dutch Government released for public consultation in 2018, which, if approved, will replace the 2004 Dutch Model BIT.[22] The Dutch investment treaty practice is particularly important because the Netherlands has concluded more than 100 BITs and these treaties were invoked by Dutch investors in numerous investment disputes.

The 2018 Dutch draft Model BIT contains interesting innovations both with respect to the substantive standards of investment protection and the dispute settlement provisions. With regard to the latter, which are of more direct concern for this contribution, the new text contains numerous innovations which have found their way into "second generation" arbitral rules and treaties (such as a procedure for the early dismissal of frivolous claims, see Article 21(2)) or which are likely to be incorporated in "third generation" rules and treaties, such as the disputing parties' obligation to disclose the presence of a third party funder (Article 19(8), discussed above in

[21] See *infra* at III.

[22] See 2018 Dutch draft Model BIT, available at <https://www.internetconsultatie.nl/investeringsakkoorden > accessed on 8 October 2018.

connection with the proposed ICSID amendments). Beyond these, a number of provisions contain remarkable departures from arbitration's traditional features.

In particular, Article 21 provides as follows in its first two paragraphs:

> *1. All Members of the Tribunal under this Agreement shall be appointed by an appointing authority. In the event that the claimant chooses arbitration pursuant to the ICSID Convention or the Additional Facility in accordance with Article 19, paragraph 1, subparagraph a, the Secretary-General of ICSID shall serve as appointing authority for arbitration under this Agreement. In the event that the claimant chooses arbitration pursuant to the UNCITRAL Arbitration Rules in accordance with Article 19, paragraph 1, subparagraph b, the Secretary-General of the Permanent Court of Arbitration shall serve as appointing authority for arbitration under this Agreement.*
>
> *2. The appointing authority shall appoint Members of the Tribunal that fulfill the conditions set out in paragraphs 5 and 6 of this Article, after thoroughly consulting the disputing parties. For greater certainty, in making appointments the Secretary General of ICSID is not limited to the Panel of Arbitrators.*

The most noteworthy innovation provided in Article 21 is the elimination of the institution of party-appointment, which is one of the features normally associated with arbitration. Opinions over the merits and demerits of party-appointment, in both commercial and investment arbitration, diverge. On the one hand, the proponents of party-appointment stress that the right of a disputing party to select "its" arbitrator confers legitimacy on the arbitral process, as it fosters the

trust of such disputing party in the adjudicatory body.[23] Furthermore, it normally ensures that individuals with experience, reputation and competence are selected to adjudicate these disputes, which is also a guarantee of their independence.[24] On the other hand, the system of party-appointment is said to negatively impact on the impartiality of arbitrators.[25] With specific regard to investment arbitration, a study by ALBERT JAN VAN DEN BERG on dissenting opinions in investment arbitration shows that party-appointed arbitrators almost always dissent in favour of the party who appointed them, which has revived the discussion on the impact of appointment by the disputing parties on arbitral decision-making and whether it should therefore be limited or eliminated.[26]

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[23] See BROWER/SCHILL, Is Arbitration a Threat or a Boon to the Legitimacy of International Investment Law? (2009) Chicago Journal of International Law, Vol. 9(2), pp. 471–498, at p. 494; FRANCK, The Legitimacy Crisis in Investment Treaty Arbitration: Privatizing Public International Law Through Inconsistent Decisions (2005) Fordham Law Review, Vol. 73(4), pp. 1521–1625, at p. 1596; PAULSSON, Avoiding Unintended Consequences *in* Sauvant/Chiswick-Patterson (eds.), Appeals Mechanism in International Investment Disputes, 2008, Oxford University Press, pp. 241–265, at p. 262.

[24] KAUFMANN-KOHLER/POTESTÀ, Can the Mauritius Convention serve as a model for the reform of investor-State arbitration in connection with the introduction of a permanent investment tribunal or an appeal mechanism? Analysis and roadmap, 3 June 2016, available at <http://www.uncitral.org/pdf/english/CIDS_Research_Paper_Mauritius.pdf >, accessed on 8 October 2018 and <www.cids.ch> (hereinafter "KAUFMANN-KOHLER/POTESTÀ, CIDS Report"), para. 33 with further references.

[25] See PAULSSON, Moral Hazard in International Dispute Resolution (2010) ICSID Review – Foreign Investment Law Journal, Vol. 25(2), pp. 339–355.

[26] See VAN DEN BERG, Dissenting Opinions by Party-Appointed Arbitrators in Investment Arbitration, in Arsanjani, (ed.), Looking to the Future: Essays on International Law in Honor of W. Michael Reisman, 2010, Brill Nijhoff, pp. 821-843, 834. For the debate regarding party-appointed arbitrators that was generated as a result, see PAULSSON, The Idea of Arbitration, 2013, Oxford University Press, p. 162; BROWER/ROSENBERG, The Death of the Two-Headed Nightingale: Why the Paulsson-van den Berg Presumption That Party-Appointed Arbitrators Are Untrustworthy Is Wrongheaded (2013) Arbitration International, Vol. 29(1), pp. 7-44, esp. p. 8 *et seq.*; VEEDER, The Historical Keystone to

Concerns over party-appointment appear far from being purely theoretical. In a recent ICSID case, a dissenting arbitrator reflected on the role of party-appointed arbitrators within the ICSID system, describing the "*true ethical burden*" placed on party-appointed arbitrators "*to separate themselves from the interest of those who have selected them to serve*", and concluding that the "*appointment by a party of a judge to rule on the party's claim creates an unnecessary barrier to pure objectivity*" and "*an uncomfortable aura of conflict which permeates* […] *the proceedings.*"[27]

Clearly weighing in on this ongoing debate, the 2018 Dutch draft Model BIT removes the appointment of arbitrators from the hands of disputing parties and places the selection of *all* members of the arbitral tribunal in those of the arbitral institution (respectively the ICSID and PCA Secretary-Generals, depending on the choice of the arbitral rules). However, the proposed text specifies that the appointing authority must pick the arbitrators "after thoroughly consulting the disputing parties", which could be read as encouraging the various types of "list procedures" that have been developed in practice by both institutions and disputing parties.

Finally, with regard to appointments by the ICSID Secretary General, the new provisions specify that he/she is not limited to the so-called "Panel of Arbitrators", i.e. the lists of arbitrators nominated by States and the Chairman of the ICSID Administrative Council. This should ensure that the ICSID Secretary General has a larger amount of discretion as well as the pursuit of greater diversity in appointments.

International Arbitration: The Party Appointed Arbitrator – From Miami to Geneva, American Society of International Law, Proceedings of the Annual Meeting, 2013, Vol. 107, pp. 387-405, 402.

[27] See *Supervision y Control S.A. v. Republic of Costa Rica*, ICSID Case No. ARB/12/4, Dissenting Opinion by Joseph P. Klock of 18 January 2017, pp. 13-14.

Furthermore, in setting out the requirements that the tribunal members must possess, Article 21(5) of the draft Model BIT provides that:

> *…Members of the Tribunal shall not act as legal counsel or shall not have acted as legal counsel for the last five years in investment disputes under this or any other international agreement.*

This proposed text squarely addresses the so-called "double-hat" issue, i.e., an arbitrator's prior or concurrent service as counsel (or expert) in other proceedings involving the same or similar legal issues as those which may arise in the dispute at stake. In investment treaty arbitration, concerns are sometimes voiced about inappropriate "predispositions on issues" in a specific case as a result of an adjudicator's "double hat", as the fear is that in adjudicating a certain issue the arbitrator might be influenced by his/her role in advocating that same issue in a different proceeding.[28]

The proposed Dutch Model BIT prohibits individuals from acting as arbitrators in disputes under the treaty if they have acted as counsel under any investment treaty for the past five years. Rules prohibiting double-hatting are not unknown in dispute resolution settings. For instance, at the Court of Arbitration for Sport ("**CAS**"), "*CAS arbitrators* […] *may not act as counsel for a party before the CAS*" (Code of Sports-Related Arbitration, Rule S18(2)). In investment treaty arbitration, introducing a prohibition on double-hatting would have both advantages and disadvantages. On the one hand, it would certainly enhance the perceptions of impartiality by eliminating one possible factor that may call into question an arbitrator's "open mind" vis-à-vis a potentially determinative

[28] See ASIL-ICCA, Report of the ASIL-ICCA Joint Task Force on Issue Conflicts in Investor-State Arbitration, ICCA Reports No. 3 (17 March 2016), paras. 125-133; LANGFORD/BEHN/HILLEREN LIE, The Revolving Door in International Investment Arbitration (2017) Journal of International Economic Law, Vol. 20, pp. 301–331.

issue. On the other hand, its implementation would have its own challenges and the risk would be that it may entail a further restriction of the pool of arbitrators. Indeed, only few individuals on the "arbitration market" exclusively act as arbitrators. If a rule of this type were to have widespread application, only those individuals could continue to receive appointments, in addition perhaps to academics and retired judges. The rule would thus come at the expense of the efforts to enhance diversity in the arbitrator market, the lack of which is often lamented as one of the criticisms of the existing system.

In conclusion, with regard to the ISDS-related provisions, the 2018 Dutch draft Model BIT constitutes an example of a reform initiative which, while solidly grounded in the arbitration paradigm – at least as long as a MIC is not created[29] – envisages rather significant deviations from the traditional arbitral model.

III. Medium reform option: arbitration + appeal

The reform option which centers around the creation of an appeal mechanism ("**AM**") envisages that investor-State arbitration will maintain most of its basic features, whilst being complemented with an appeal. In this sense, it can be deemed to constitute a "medium" reform proposal among those that are currently contemplated. The presence of an AM essentially addresses demands for (a) greater consistency in

[29] See Article 15 of the 2018 Dutch draft Model BIT, entitled "Multilateral investment court": ("*1. Upon the entry into force between the Contracting Parties of an international agreement providing for a multilateral investment court applicable to disputes under this Agreement, the relevant provisions set out in this Section shall cease to apply. 2. The Contracting Parties shall, if necessary, adopt transitional arrangements taking into account the legitimate expectations of investors in ongoing disputes under the procedures set out under this Section*.").

the decisions of investor-state arbitral tribunals and (b) legal correctness, the two traditional purposes that are associated with the presence of an appellate level.

The creation of an appellate mechanism for investor-State arbitral awards has been contemplated on several occasions during the last decade, without ever reaching any concrete outcome. In 2004, as already mentioned, the ICSID Secretariat proposed the creation of an appeals facility, intended to "*foster coherence and consistency in the case law emerging under investment treaties*",[30] and to "*enhance the acceptability of investor-to-State arbitration.*"[31] Creating a facility under the ICSID framework could have also avoided the creation of "multiple mechanisms" and would therefore have best served objectives of efficiency, economy, coherence and consistency.[32] To this end, the new facility would have been designed so as to be compatible with any type of investment arbitration (under the ICSID Convention and Rules, the UNCITRAL Arbitration Rules or other rules).[33]

The proposal envisaged an appeal panel of 15 individuals with different nationalities constituted by the Administrative Council of ICSID upon the nomination of the Secretary-General. Members of the panel would have served for terms of three or six years. Adjudicative panels of three members would have been appointed by the Secretary-General "*after consultation with the parties as far as possible.*"[34]

Awards could have been challenged for the grounds provided in Article 52 of the ICSID Convention, but also for "*a clear*

[30] ICSID Secretariat, Possible Improvements of the Framework for ICSID Arbitration, Discussion Paper, 2004, pp. 14 *et seq*.
[31] *Ibid*., p. 15.
[32] *Ibid*., pp. 15 *et seq*.
[33] *Ibid.*, Annex, p. 1.
[34] *Ibid.*, Annex, pp. 3 *et seq*.

error of law" or for "*serious errors of fact.*"[35] The appellate body could thus have reconsidered the merits of the disputes and would have been empowered to uphold, modify, reverse or annul (in whole or in part) awards.[36] It could have remanded disputes to original arbitral tribunals or submitted them to new ones.[37]

The Secretariat paper was made publicly available and interested parties were invited to comment.[38] This consultative process showed that many "*doubted the wisdom of the suggestion*" and that "*most considered it premature at best.*"[39] A year later, the Secretariat concluded that there was insufficient support for this initiative to be carried any further.[40] The proposal was thus put to one side, although the Secretariat indicated that it would "*continue to study such issues to assist member countries when, and if, it is decided to proceed towards the establishment of an ICSID appeal mechanism*."[41] As already noted above, the appeal proposal has not been taken up in the most recent round of ICSID revisions.

Meanwhile, language referring to the possibility of creating appellate mechanisms surfaced in recent bilateral and multilateral investment treaties. The U.S., in particular, have contemplated the establishment of a single appellate body in investment treaties for more than a decade.[42] The 2002 Trade Promotion Authority Act set as a trade negotiating objective

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35 *Ibid*., Annex, p. 4.
36 *Ibid*., Annex, p. 5.
37 *Ibid*., Annex, p. 6.
38 PARRA, Advancing Reform at ICSID (2014) Transnational Dispute Management, Vol. 11(1), p. 9.
39 *Ibid*., p. 9.
40 ICSID Secretariat, Suggested Changes to the ICSID Rules and Regulations, 2005, Working Paper, p. 4.
41 *Ibid*., p. 4.
42 PARRA, Advancing Reform at ICSID, (2014) Transnational Dispute Management, Vol. 11(1), p. 4.

the improvement of the investor-state arbitration regime "*through* […] *providing for an appellate body or similar mechanism to provide coherence to the interpretations of investment provisions in trade agreements.*"[43]

Accordingly, virtually all investment treaties concluded by the U.S. since that date have referred to a possible appellate body through programmatic, non-binding language.[44] Article 28(10) of the 2012 U.S. Model BIT, for instance, reads as follows:

> *In the event that an appellate mechanism for reviewing awards rendered by investor-State dispute settlement tribunals is developed in the future under other institutional arrangements, the Parties shall consider whether awards rendered under Article 34 should be subject to that appellate mechanism. The Parties shall strive to ensure that any such appellate mechanism they consider adopting provides for transparency of proceedings similar to the transparency provisions established in Article 29.*[45]

In addition to the U.S. investment treaties, treaties concluded by other countries, such as Canada, Australia and China, contain similar "declarations of intent" in favour of the establishment of an appeals mechanism.[46]

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[43] Trade Promotion Authority Act (2002), P.L. 107-210, Section 2102(b)(3)(g)(iv), 19 U.S.C § 3802(b)(3)(G)(iv).

[44] SAUVANT, The Evolving International Investment Law and Policy Regime: Ways Forward, 2016, Policy Options Paper, ICTSD & WEF, p. 30. See for instance Singapore-U.S. FTA (2003), Article 15.19(10); Chile-U.S. FTA (2004), Article 10.19(10); Dominican Republic-Central America-United States FTA (CAFTA-DR) (2004), Article 10.20(10); Uruguay-U.S. BIT (2005), Article 28(10) and Annex E.

[45] U.S. Model BIT (2004), Article 28(10), was similar.

[46] For example, the Canada-Korea FTA of 2014 contains the following provision: "*Annex 8-E: Possibility of a Bilateral Appellate Mechanism. Within three years after the date this Agreement enters into force, the Parties shall consider whether to establish a bilateral appellate body or similar mechanism to review awards*

It should be highlighted that under all of these provisions, the Contracting States have merely undertaken to "consider" whether to establish or join a bilateral or multilateral appellate facility for the review of investor-State arbitral awards. So far these provisions have remained dead letter and no action has been taken towards the establishment of such bodies under any of those agreements.

The question is whether, in light of these rather unsuccessful attempts, there is, or will be, a new momentum towards the creation of an appeal mechanism. The discussions within the UNCITRAL WGIII are at a too early stage to speculate on whether a political consensus may be achieved around this "mid-way" reform proposal. However, it cannot be excluded that, if the supporters of the "heavier" MIC option (on which see *infra* at IV) were to fail to convince a sufficient number of trade partners of the merits of their proposal, the appeal mechanism solution might become a compromise between those advocating for minimalist reforms and those interested in changing the system more fundamentally.

Whether or not this reform option might see the light eventually, one can already highlight what will be the main architectural and institutional issues that would arise in the designing of an AM for investor-state arbitral awards. In particular, any reform initiative geared towards the creation of an AM will have to address, *inter alia*, the delineation of the grounds of appeal (only limited to issues of law or also of fact?), standard of review (will the AM's review be limited *to manifest or serious* errors?), the question of the composition of AM, and the interaction with annulment remedies against

rendered pursuant to Article 8.42 in arbitrations commenced after they establish the appellate body or similar mechanism." Canada-Korea FTA (2014), Annex 8-E. See also TPP, Article 9.22(11); Australia-China FTA (2014), Article 9.23; Australia-Korea BIT (2014), Article 11.20.13 and Annex 11-E; Korea-New Zealand FTA (2015), Article 10.26.9.

investor-State arbitral awards (whether at the seat or within the ICSID self-contained system).[47]

Assuming a sufficient number of States were to make investor-State awards issued under their investment treaties subject to the new AM, one could also ask whether an appellate mechanism will be able to achieve a true consistency in the case law, as its proponents argue. Strictly speaking, the AM could only achieve consistency in respect of the *particular investment treaty* which the AM is to interpret. This makes such an AM different from a body like the WTO AB, which is called to interpret either the same agreement or agreements which are linked in a comprehensive treaty regime under the umbrella of the WTO Agreement.[48] As a result, an equivalent level of coherence in the interpretation of the substantive obligations could not be achieved here. However, it is to be expected that even in the absence of a multilateral regime of substantive investment protection, a single multilateral AM would "*develop a body of legally authoritative general principles*"[49] which would transcend the single investment treaty at issue. The AM's broader "vision" on certain issues (does MFN apply to dispute settlement? what are the limits of fair and equitable treatment (FET) clauses? is an expropriation rendered unlawful by mere lack of payment of compensation? just to name a few) would likely permeate the investment treaty regime beyond the specificities of a particular treaty.

In the author's view, because of its very function (a "higher" body reviewing decisions of a "lower" body) and its nature (a standing or at least semi-standing body as opposed to ad hoc panels; its continuity beyond the single dispute; the strive for

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[47] On all of these issues *see* extensively KAUFMANN-KOHLER/POTESTÀ, CIDS Report, section VI.

[48] See in particular MCRAE, The WTO Appellate Body: A Model for an ICSID Appeals Facility? (2010) Journal of International Dispute Settlement, Vol. 1(2), pp. 371–387, pp. 382–387.

[49] SAUVANT, The Evolving International Investment Law and Policy Regime: Ways Forward, 2016, Policy Options Paper, ICTSD & WEF, p. 29.

a common purpose and judicial task; a sense of institutional belonging), an AM would naturally endeavour to pursue coherency and consistency across separate investment treaties. Certainly, it would always be bound to the specific text of the treaty before it and parties would always be free to seek to distinguish their case from previous AM decisions. However, an AM would be able to require de facto adherence to its own rulings, since an investor-State tribunal would, even in the absence of a formal rule of *stare decisis*, expect the AM to apply the same principles to any new award that is appealed.

Obviously, the introduction of an AM for investor-State awards would not come without any drawbacks. It has been underlined that the introduction of an appeal procedure would increase the costs and the length of proceedings,[50] which are already criticized as being overly slow and costly.[51] The "*delicate balance between the search for finality and the search for quality*" could be disturbed by opening the door to an appeal.[52] It has been further argued that the introduction of an AM would undermine one key advantage of arbitration, the finality of awards, which "*represents a guarantee that further unnecessary litigation and potential costs and delay*

[50] SAUVANT, *op. cit.*, p. 29. See also BUCHER, Is There a Need to Establish a Permanent Reviewing Body, in Gaillard (ed.), The Review of International Arbitral Awards, IAI Series No. 6, 2010, JurisNet, pp. 285–296, at 290; LEE, Introduction of an Appellate Review Mechanism for International Investment Disputes: Expected Benefits and Remaining Tasks, in Kalicki/Joubin-Bret (eds.), Reshaping the Investor-State Dispute Settlement System: Journeys for the 21st Century, 2015, Brill | Nijhoff, pp. 474–495, p. 483; TAMS, An Appealing Option? The Debate about an ICSID Appellate Structure, Essays in Transnational Economic Law, 2006, No. 57, p. 15.

[51] See KAUFMANN-KOHLER/POTESTÀ, CIDS Report, para. 31, with further references.

[52] KAUFMANN-KOHLER, Annulment of ICSID Awards in Contract and Treaty Arbitrations: Are there differences?, in Gaillard/Banifatemi (eds.), Annulment of ICSID Awards: The Foundation of a New Investment Protection Regime in Treaty Arbitration, 2004, IAI Series No. 1, JurisNet, pp. 189–221, at p. 220 et seq.

and prolonged public exposure in State courts can be avoided."[53]

Two further risks associated with the presence of an appeal procedure have been identified. First, if appeals were possible, they would soon become the rule,[54] as States and investors who have lost a case could not afford not to file an appeal, be it only for reasons of internal accountability.[55] Second, "[a]*s ICSID experience with ad hoc annulment committees show, even corrective mechanisms intended to be severely restricted (indeed allowing no appeal even on points of law) have a tendency to duplicate the arbitral process itself in terms of duration, cost, complexity and - dare one say it? - decisions exposed to debate and criticism*".[56] This could prove especially detrimental for States and investors with limited resources.[57] It may even "*affect the access of small and medium enterprises to arbitral proceedings.*"[58] More generally, it is said that "[a]*lthough both sides would face the increased logistical burden, respondent states, already struggling within the confinement of the budgetary*

[53] AMELI/BANTEKAS/CIURTIN/FONTANELLI/LAVRANOS/RUBINO-SAMMARTANO/SPITERI GONZI, Task Force Paper regarding the proposed International Court System (ICS), EFILA, Draft, 2 January 2016, p. 23.

[54] GONZÁLEZ GARCÍA, Making Impossible Investor-State Reform Possible, *in* Kalicki/Joubin-Bret, *Reshaping the Investor-State Dispute Settlement System*, Journeys for the 21st Century, 2015, Brill | Nijhoff, pp. 424–436, at p. 430.

[55] KAUFMANN-KOHLER, In search of transparency and consistency: ICSID Reform proposal (2015) Transnational Dispute Management, Vol. 2(5), p. 6.

[56] PAULSSON, Avoiding Unintended Consequences, *in* Sauvant/Chiswick-Patterson (eds.), Appeals Mechanism in International Investment Disputes, 2008, Oxford University Press, pp. 241–265, p. 260; along the same lines GANTZ, An Appellate Mechanism for Review of Arbitral Decisions in Investor-State Disputes: Prospects and Challenges (2006) Vanderbilt Journal of Transnational Law, Volume 39(1), pp. 39–76, 59.

[57] AMELI ET AL., *op. cit.*,p. 57.

[58] AMELI ET AL. *op. cit.*, p. 57.

constraints, are likely to find this increased burden more challenging."[59]

Advantages and disadvantages will thus have to be carefully weighed by States and other stakeholders when considering the AM reform option.

IV. Heavy reform option: a multilateral investment court

In what would be the most radical departure from the mechanism for resolving investment disputes known heretofore, the EU Commission (supported by the EU Member States) is advocating the replacement of the current system of *ad hoc*[60] tribunals with a multilateral investment court composed of tenured judges.

The establishment of such a court would have to master a number of challenges in order to be successful.[61]

In particular, the composition of the new court is a critical aspect, both from an objective and a subjective point of view. Objectively, the quality of the justice rendered will largely depend on the people who compose the MIC, and thus on the requirements for, and the process leading to, their selection.

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[59] LEE, *op. cit.*, p. 483.

[60] The term "*ad hoc*" is used here to mean that the dispute is not brought before a permanent body, but before a tribunal (whether or not under the auspices of an arbitral institution) constituted to hear that particular dispute (with no mandate beyond that dispute). It is not used in the different sense of non-institutional arbitration.

[61] See *extensively* KAUFMANN-KOHLER/POTESTÀ, CIDS Report, section V, and KAUFMANN-KOHLER/POTESTÀ, The Composition of a Multilateral Investment Court and of an Appeal Mechanism for Investment Awards, CIDS Supplemental Report, 15 November 2017, available at <http://www.uncitral.org/pdf/english/workinggroups/wg_3/CIDS_Supplemental_Report.pdf>, accessed on 8 October 2018 and <www.cids.ch> (hereinafter "KAUFMANN-KOHLER/POTESTÀ, CIDS Supplemental Report").

Subjectively, the composition will also have a significant impact on the perception by States, investors, and the public of the new dispute settlement mechanism as a fair and legitimate one. In other words, the design of the composition of the MIC may well be instrumental to its success.

More specifically, the shift from a system centered on *disputing* party appointment to a framework based on treaty party appointment (i.e. appointment mainly in the hands of the State contracting parties) poses important theoretical and policy questions, as well as technical issues, as the procedure to select adjudicators in a permanent or semi-permanent body is by far more complex than leaving the selection in the hands of the disputing parties. In designing the mechanism for selection of the judges, their numbers, qualifications, and terms of office, States will have a range of possibilities which should be carefully considered.

In particular, the definition of the *individual* requirements for the MIC members and the criteria for its composition *as a whole* seems crucial. In this respect, it appears essential that the MIC should be comprised of members possessing certain individual qualities and qualifications, including the expertise and experience to discharge their functions, i.e. their *competence*.[62] The composition of the adjudicatory body *as a whole* should further reflect high standards of *diversity* (in particular, but not limited to, regional and gender diversity). Diversity is essential because it ensures that judicial thinking is not dominated by a single perspective. Diversity also enhances legitimacy provided the composition is a reflection of those for whom the adjudicatory body renders justice.[63] Finally, the MIC must be endowed with strong guarantees of *independence* both structurally and for the concrete exercise

[62] See KAUFMANN-KOHLER/POTESTÀ, CIDS Supplemental Report, section III.B.2.
[63] See KAUFMANN-KOHLER/POTESTÀ, CIDS Supplemental Report, section III.B.3.

of the members' adjudicatory functions. In this respect, a number of guarantees should be in place to shield the institution collectively and the judges individually from external influences.[64]

Furthermore, the design of the process for selecting MIC judges is a key factor in ensuring their independence and building the credibility, authority and integrity of the adjudicatory body. The experience of recent international courts and tribunals may be instructive in this respect. Keeping in mind the peculiar structure of investor-State dispute settlement, in which one of the disputing parties is a private person, any selection process that will be devised by States should be seen as legitimate by all stakeholders. In this context, mechanisms could be put into place in order to minimize risks of political considerations in the appointment and to ensure that the choice of the adjudicators can be made from a large number of highly qualified candidates. Mechanisms such as the use of consultations and expert screening by independent supra-national bodies may contribute to a rigorous, transparent, and meritocratic selection.[65]

Another challenge in the design of a future MIC will be to ensure the new system's ultimate effectiveness, i.e., the enforceability of its decisions. Presently, parties can rely on the enforcement rules contained in the ICSID and New York Conventions. The question arises whether the New York Convention will be available for the enforcement of the MIC's decisions. The answer will largely depend on the nature of the new dispute resolution process. If it is considered to be an arbitration, it will benefit from the New York Convention system. If not, the treaty creating the court will have to provide for an enforcement regime which is binding on

[64] See KAUFMANN-KOHLER/POTESTÀ, CIDS Supplemental Report, section III.B.4.
[65] See KAUFMANN-KOHLER/POTESTÀ, CIDS Supplemental Report, section III.C.

contracting States. Enforcement in non-contracting States will by contrast be uncertain, as it will depend on national law as no international rules exist ensuring the enforcement of judgments of *international courts*.[66]

Finally, other questions that will have to be addressed in the discussions and possible negotiations of a statute establishing the new MIC will include the law governing the proceedings (will MIC proceedings be subject to a national *lex arbitri* or be entirely self-contained as to the procedure?);[67] the type of control mechanisms, if any, against first-instance decisions (for example annulment or appeal proceedings);[68] the seat of the court; and the ways of financing its functioning.

V. Conclusion

The range of options available to States who wish to reform the existing ISDS regime are multiple. They range from relatively minor adjustments to the existing *arbitration* regime to institutionalizing that regime further through the creation

[66] See more extensively KAUFMANN-KOHLER/POTESTÀ, CIDS Report, sections V.B and V.E; POTESTÀ, Chapter IV: Investment Arbitration, Challenges And Prospects For The Establishment Of A Multilateral Investment Court: Quo Vadis Enforcement?, in Klausegger/Klein et al. (eds), Austrian Yearbook on International Arbitration 2018, pp. 157 – 178. See also REINISCH, Will the EU's Proposal Concerning an Investment Court System for CETA and TTIP Lead to Enforceable Awards? The Limits of Modifying the ICSID Convention and the Nature of Investment Arbitration, Journal of International Economic Law, 2016, p. 19, pp. 761–786; WUSCHKA, Ein Investitionsgerichtshof – Der große Wurf der EU-Kommission?, Zeitschrift für Europarechtliche Studien, 2016, pp. 153–175, esp. pp. 167–174; HAPP/WUSCHKA, From the Jay Treaty Commissions Towards a Multilateral Investment Court: Addressing the Enforcement Dilemma (2017) Indian Journal of Arbitration Law, Vol 6, Issue 1 pp. 113–132.

[67] See KAUFMANN-KOHLER/POTESTÀ, CIDS Report, section V.C.

[68] *Ibid.,* at section V.D.

of permanent adjudicatory bodies.[69] Possible adjustments to the existing framework may include, *inter alia*, the design of alternative methods for the appointment of arbitrators; the establishment or strengthening of ethical requirements for arbitrators (for instance, through codes of conduct); and the formulation of rules to address concurrent proceedings.[70] More radical reform options would entail the establishment of permanent adjudicatory bodies, either in the form of an appeal mechanism for investor-State arbitral awards or a multilateral investment court.[71] This contribution has sought to review some of the legal and policy challenges that each of these reform options would face.

It remains to be seen on which of the above-sketched reform "poles", if any, the political consensus of States will converge. The UNCITRAL WGIII has only recently started its work and is likely to keep the discussions open for the next few years to come.

[69] See also UNCITRAL, Possible reform of investor-State dispute settlement (ISDS). Note by the Secretariat, U.N. Doc. A/CN.9/WG.III/WP.142, para. 50.

[70] *Ibid*., para. 51.

[71] *Ibid*., paras. 51-52.