Christoph Müller | Sébastien Besson | Antonio Rigozzi (Eds)

New Developments in International Commercial Arbitration 2020

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Preface

This book contains the written contributions of the speakers at the twelfth 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 6 November 2020.

The goal of both the conference and this book is to provide practitioners, academics and students with an in-depth analysis of the latest developments in international commercial arbitration. That is why the *New Developments* conferences are not dedicated to a specific theme. The only common denominator of the different contributions is the novelty of their subject matters.

FELIX DASSER reflects on the revision of Chapter 12 of the Swiss Private International Law Act (PILA), which will enter into force on 1 January 2021. He notably reviews the process of the revision going back to the parliamentary initiative by National Councilor Christian Lüscher of 2008 until the final adoption of the revision of Chapter 12 on 19 June 2020 by Parliament. He analyses the main amendments of Chapter 12 and reflects on lessons learned from the revision process.

MATTHIAS SCHERER examines the Swiss Federal Tribunal's rulings on investment treaty awards and explores, in particular, the reasons for the low rate of success of setting aside investment treaty awards. He presents the salient features of investment treaty annulment proceedings before the Swiss Federal Tribunal, including from a procedural and practical standpoint.

ANTONIO RIGOZZI examines the judgment of the European Court of Human Rights in the case of *Mutu* and *Pechstein*

v. Switzerland of 2 October 2018 and its impact on sports arbitration. He analyses the main issues addressed by the Court, e.g. applicability of Article 6(1) of the European Convention for the Protection of Human Rights and Fundamental Freedoms in arbitration proceedings, the right to a public hearing, and the requirement of independence and impartiality in arbitration proceedings. He makes concrete proposals as to how to ensure that sports arbitration remains compatible with the requirements of human rights both procedurally and substantively.

CATHERINE ANNE KUNZ presents an overview of the arbitration-related rulings handed down by the Swiss Federal Tribunal from August 2018 to July 2020. She highlights the clarifications and evolution of the case law. This survey is particularly helpful for practitioners who wish to bring themselves up-to-date on the most recent developments of the Swiss Federal Tribunal's decisions concerning international arbitration.

MARTIN BERNET & ARUN CHANDRASEKHARAN's contribution reflects on the projects of establishing International Commercial Courts in Geneva and Zurich. They examine the necessary changes to the Code of Civil Procedure that such projects would require, and discuss some of the characteristics the proceedings conducted before International Commercial Courts, including the language of the proceedings, the taking of evidence, and the appellate proceedings. They emphasize that Switzerland - as a leading forum for international commercial arbitrations – should "exhaust all efforts to expand its offer in the area of dispute resolution by creating International Commercial Courts" in its two internationally best-known cities.

FABRICE ROBERT-TISSOT analyses the impact of COVID-19 outbreak on the world of arbitration. He provides an overview of the measures taken notably by the arbitral institutions and arbitral tribunals to adapt the existing procedural rules to

these exceptional circumstances. He presents the pros and cons, and the practical issues, of e-filing and virtual hearings. He also discusses the potential difficulties related to due process and the right to be heard. As an "excursus", he addresses the validity of virtual hearing in forced (sport) arbitration.

The practical bearing and the variety of the topics addressed in this book serve to evidence the dynamic nature of the law and practice of international commercial arbitration, and thus the importance of keeping abreast of significant developments across jurisdictions and practice areas in the field, which is what the *New Developments* conference is all about.

We are grateful to the authors, who have provided their written contributions well before the conference, thus allowing us to distribute this book during the conference itself – a brand label of this arbitration event. Early publication clearly constitutes an added value for a book devoted to recent developments in a constantly evolving field such as that of international arbitration.

The organization of the conference and the timely publication of this book would not have been possible without the valuable administrative support of Carine Magne, of the Secretariat of the Neuchâtel Faculty of Law, to whom we are grateful.

Neuchâtel, October 2020

Christoph Müller Sébastien Besson Antonio Rigozzi

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Revision of Chapter 12 of the PILA or Why and How to Modernize a (Still) Modern Law?

FELIX DASSER*

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I. The Starting Point

Switzerland is looking like a laggard. Over the last 25 years or so, almost all major (and countless minor) jurisdictions have revised, amended, or even radically replaced their arbitration laws. Think of Austria (2006, 2014) England (1996), France (2011), Germany (1998), Hong Kong (2011), Singapore (2007), or Sweden (2019). Our current law on international

* The author would like to thank his research assistant RA Benjamin Clément, LL.M. for his contribution to the preparation of this publication and the editing of the manuscript.

arbitration, Chapter 12 of the Private International Law Act (PILA), was drafted in the early to mid-80ies, when the Cold War was still chilling, and is in force since January 1, 1989. Even the UNCITRAL Model Law on International Commercial Arbitration of 1985 enjoyed a rejuvenating jab in 2006.

The PILA was an outstanding legislative feat – the first[1] federal act on private international law, including jurisdiction, and including international arbitration. It was drafted by an expert commission under the leadership of Prof. Frank Vischer, an eminent expert on private international law who could easily draw upon the European tradition as well as the insights of the American conflicts of law revolution that was in full bloom at the time.

Domestic arbitration remained a cantonal competency and thus subject to the cantonal Concordat[2] until 2011 when the Federal Code of Civil Procedure (CCP) entered into force, which regulates domestic arbitration in its Part 3.[3]

The dualistic system may have constitutional reasons, but it served Switzerland well. The users of domestic arbitration are generally less experienced and need more guidance and protection and, thus, a more detailed regulation including a number of mandatory provisions. International arbitration caters to a different market. A lean and flexible framework with very few mandatory provisions to protect the integrity of the process and a very limited scope for challenges is all that is needed. And that is what Chapter 12 provided already in the late 80ies, when almost any other arbitration law was less liberal, less trusting, more intrusive.

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1 Before there was merely a federal act on the law applicable to certain civil rights and obligations, the *Bundesgesetz betreffend die zivilrechtlichen Verhältnisse der Niedergelassenen und Aufenthalter* (NAG) of June 25, 1891 (SR 211.435.1; no longer in force).

2 *Konkordat über die Schiedsgerichtsbarkeit*, March 27, 1969, AS 1969 1093, SR 279 (no longer in force).

3 SR 272, Articles 353-399.

Among the highlights of Chapter 12 are:

- any dispute of financial interest is arbitrable, including consumer, employment or lease matters;
- evidence by text is sufficient for the form of an arbitration agreement;
- an arbitration agreement is valid if it conforms to just one of up to three different laws;
- the tribunal may order provisional measures;
- the tribunal enjoys competence-competence;
- parties may choose any applicable law on the substance of the dispute, including non-state rules of law; and lacking a choice by the parties, the tribunal may apply any rules of law it deems the dispute to have the closest connection with;
- the sole judicial authority that can set aside an arbitral award is the highest Swiss court, the Federal Tribunal;
- challenges can only be based on five grounds, none of which allows any review of the merits, subject to a very narrow notion of public policy;
- non-Swiss parties may even waive any right of challenge;
- and everything packed into 18 reasonably short articles (plus one article on recognition and enforcement of foreign awards).

In the 80ies, such trust of the legislator in the quality of the arbitral process and the arbitration community was outstanding. Even a quick comparison with the contemporaneous UNCITRAL Model Law – which itself was

instrumental in liberalizing arbitration laws worldwide – shows how courageously modern the Chapter 12 was.[4]

This legislation stood the test of time very well. There were just a few minor amendments since 1989. As of March 1, 2007, a new paragraph 1bis was added to Article 186 PILA as a reaction to the notorious "Fomento"-decision of the Federal Tribunal.[5] It clarified that the tribunal may decide on its jurisdiction – and thus proceed with the case – notwithstanding any parallel claim that may already be pending before a state court or another arbitral tribunal (competence-competence).[6] Two further amendments in the years 2007 and 2011 respectively were of mere technical nature, caused by new federal acts.[7]

No major deficiencies of the legislation became apparent over the years. The Federal Tribunal filled a few gaps through case law, such as by admitting extraordinary revisions of awards outside of challenge proceedings in very limited circumstances where the integrity of the legal proceedings is at stake,[8] or by clarifying the procedure of challenging an arbitrator.[9]

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4 Exhibit A for that proposition is the simple fact that the UNCITRAL Model Law counts double the number of articles. I leave it to the readers to compare the above listed features of Chapter 12 to the corresponding provisions of the Model Law if they still doubt the liberalism of Chapter 12. It must be admitted, however, that the legislative process that led to the Chapter 12 was quite rocky, see BSK IPRG-HOCHSTRASSER/BURLET, Einl. 12. Kap. N 166 ff.

5 SFSCD 127 III 279.

6 For an overview of possible scenarios under Article 186 (1bis) PILA see BSK IPRG-COURVOISIER/JAISLI KULL, Article 186 N 53.

7 A technical amendment to Article 191 PILA entered into force on January 1, 2007, together with the new Federal Tribunal Act (the "FTA", SR 173.110); technical amendments to Articles 176 (2) and 179 (2) PILA entered into force on January 1, 2011, together with the CCP (SR 272).

8 SFSCD 142 III 521, c. 2.1; 134 III 286, c. 2; 129 III 727, c. 1; 118 II 199, c. 2.

9 SFSCD 4A_236/2017, November 24, 2017, c. 3.1.1, 5.4; 138 III 270, c. 2; 128 III 330, c. 2; 118 II 359, c. 3.

II. The Process of the Revision

A. Out of the Blue: Parliamentary Initiative on Article 7 PILA

The current revision of Chapter 12 goes back to a parliamentary initiative by National Councilor Christian Lüscher, submitted on March 3, 2008, regarding a revision of Article 7 PILA on the competence-competence of arbitral tribunals. He proposed to add a second paragraph reading: "*In international matters, the Swiss court seised, irrespective of the seat of the arbitral tribunal, shall not make a decision until the arbitral tribunal has decided on its own jurisdiction, unless a summary examination shows that no arbitration agreement has been concluded between the parties."*[10]

Liberally interpreting Article 7(b) PILA,[11] the Federal Tribunal had already recognized this principle if the arbitral tribunal had its seat in Switzerland, but not if the seat was abroad. In particular, the Federal Tribunal held that, in the first scenario, the Swiss courts could only summarily review the existence of a valid arbitration agreement, because the Swiss courts would still be able to fully review the tribunal's jurisdiction in a challenge against the award pursuant to Article 190(2)(b) PILA.[12] This arbitration-friendly case law makes sense. There was simply no need to extend the limited review by state courts in case of an arbitration seat abroad. It was not clear how the proposed amendment of Article 7 PILA could really

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[10] Parliamentary initiative by Christian Lüscher, March 3, 2008, No. 08.417 "Bundesgesetz vom 18. Dezember 1987 über das internationale [sic!] Privatrecht. Änderung von Artikel 7", https://www.parlament.ch/de/ratsbetrieb/suche-curia-vista/geschaeft?AffairId=20080417, last visited August 31, 2020 [translation by the author].

[11] Article 7(b) reads: "*If the parties have entered into an arbitration agreement with respect to an arbitrable dispute, any Swiss court before which such dispute is brought shall deny jurisdiction, unless: […] b. the court finds that the arbitration agreement is null and void, inoperative or incapable of being performed; […]"*.

[12] SFSCD 122 III 139, c. 2b.

strengthen Switzerland's attractiveness as an arbitration venue.[13]

Accordingly, both Commissions on Legal Affairs of the National Council and the Council of States proposed not to adopt the initiative, although with narrow majorities. Nonetheless, and rather surprisingly in my view, both Councils endorsed the initiative.[14] Also the Swiss Arbitration Association (ASA) was cautiously positive, although the views within ASA were far from unanimous.[15] Still, the initiative failed to get traction in Parliament. The Commission on Legal Affairs of the National Council, which would have had to draft a bill, kicked the can down the road, prolonging the standard deadline of two years for the implementation of parliamentary initiatives twice, and finally, on June 17, 2016, unanimously decided to close the procedure.[16]

B. Thinking Bigger: Opening up the Discussion to the Whole *Lex Arbitri*

The reason for dismissing Mr. Lüscher's initiative was that based on comments by the Federal Office of Justice (FOJ),[17]

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[13] BERGER, Kritische Gedanken zur Revision von Article 7 IPRG im Lichte eines praktischen Beispiels, ASA Bulletin 2011, pp. 33 et seq.; similarly BESSON, Vision critique du projet de révision de l'article 7 LDIP, ASA Bulletin 2011, pp. 574 et seq.; in favor of the initiative: TSCHANZ, De l'opportunité de modifier l'article 7 LDIP, ASA Bulletin 2010, pp. 478 et seq.

[14] AB NR 2009, pp. 1656 et seq.; AB SR 2010, pp. 584 et seq.

[15] WIRTH MARKUS, Vernehmlassung der Schweizerischen Vereinigung für Schiedsgerichtsbarkeit (ASA) zur Parlamentarischen Initiative betreffend die Änderung von Artikel 7 des Bundesgesetzes vom 18. Dezember 1987 über das internationale Privatrecht, ASA Bulletin 2011, p. 585, p. 593; ID., Chapter 12 PILA – Is it Time for Reform? If Yes, What Shall be Its Scope?, in MÜLLER/RIGOZZI (Eds), New Developments in International Commercial Arbitration, Zurich 2011, p. 51, p. 64.

[16] See the various links in https://www.parlament.ch/de/ratsbetrieb/suche-curia-vista/geschaeft?AffairId=20080417 (last visited August 31, 2020).

[17] See Report of the Commission on Legal Affairs of the National Council, No. 08.417l, February 2, 2012, Fn. 3, https://www.parlament.ch/centers/kb/

ASA,[18] cantonal chambers of commerce and Swiss law faculties, the Commission on Legal Affairs of the National Council realized that the objective pursued by the initiative – to strengthen Switzerland's attractiveness as arbitration venue – could not be achieved by means of an isolated revision of Article 7 PILA. Instead, it required a more comprehensive approach, namely a comprehensive brush-up of Chapter 12. To this end, on February 3, 2012, the Commission proposed a motion[19] to the Federal Council. It read as follows:

> *"The Federal Council is instructed to submit a draft to update the provisions on international arbitration of the Federal Act on Private International Law (PILA) with the aim of maintaining Switzerland's attractiveness as an international arbitration center. In particular, certain key elements of the Federal Supreme Court's case law in this area, which has been issued since the PILA came into force more than twenty years ago, are to be incorporated into the law and, if necessary, corrected. Particular attention should be paid to the relationship between state courts and arbitration tribunals."*[20]

At this point, ASA engaged in a broad internal consultation on the revision of Chapter 12. It dedicated its traditional fall conference of September 28, 2012 to this topic, by chance just one day after Parliament endorsed the motion and

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Documents/2008/Kommissionsbericht_RK-N_08.417_2012-02-02.pdf (last visited August 31, 2020).

[18] See WIRTH, ASA Bulletin 2011, p. 593.

[19] Such a motion obliges the Federal Council, in principle, to submit a draft decree to the Federal Assembly (Articles 120 *et seq*. Parliament Act; SR 171.10); see also Article 7 of the Government and Administration Organization Act (SR 172.010).

[20] Motion by the Commission on Legal Affairs of the National Council, February 3, 2012, No. 12.3012, "*Bundesgesetz über das internationale [sic!] Privatrecht. Die Attraktivität der Schweiz als internationalen Schiedsplatz erhalten*", https://www.parlament.ch/de/ratsbetrieb/suche-curia-vista/geschaeft?AffairId=20123012, last visited August 31, 2020 [translation by the author].

instructed the Government to prepare a draft.[21] Under the leadership of Michael Schneider, Elliott Geisinger, Bernhard Meyer, Markus Wirth and Michele Patocchi, ASA prepared a report, which was submitted to the FOJ on May 6, 2013. Its message was clear and stated in the first paragraph:

> *"Our view is that this objective (maintaining Switzerland's attractiveness as an international arbitration venue) should be achieved by means of a gentle revision "toilettage": "as much as necessary and as little as possible". We still consider Chapter 12 of the PILA to be a highly successful piece of legislation. In this sense, nothing should be changed in the basic structure of Chapter 12 and the legislation should be limited to the essentials and not be extended into detailed regulations. No worsening improvements!"*[22]

With that *caveat*, ASA suggested a number of possible improvements.

C. "*Toilettage*": Drafting a Revised Chapter 12

Next, nothing much happened until late 2015, when the FOJ set up a working group with four external experts,[23] who assisted the FOJ in the revision.[24] In its preparatory work, the FOJ consulted a wide range of stakeholders, including the Federal Tribunal, the Court of Arbitration for Sport (TAS), the

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[21] AB SR 2012, p. 921.

[22] Unpublished (Translation by the author). See also SCHNEIDER MICHAEL, President's Message: Some Thoughts on Arbitral Reform and Chapter 12, ASA Bulletin 2012, p. 729, pp. 731 et seq.; WIRTH, in New Developments, pp. 51 et seq.

[23] Prof. Dr. Gabrielle Kaufmann-Kohler, Prof. Dr. Felix Dasser, Prof. Dr. Daniel Girsberger and Elliott Geisinger.

[24] Federal Council Explanatory Report to Parliament, Revision of the PILA (Bundesrat, Erläuternder Bericht zur Änderung des Bundesgesetzes über das Internationale Privatrecht [Internationale Schiedsgerichtsbarkeit]), January 11, 2017 (the "Explanatory Report 2017"), pp. 5 et seq.

World Intellectual Property Organization (WIPO), the Swiss Chambers' Arbitration Institution (SCAI), the Swiss branch of the International Chamber of Commerce (ICC) and ASA.

In the preparatory work it became apparent that the objective of maintaining the attractiveness and competitiveness of Switzerland as an international arbitration venue could indeed best be achieved with a moderate, practice-orientated revision ("*toilettage*") as requested by Parliament. There was nothing seriously wrong with Chapter 12, so the old adage applied: *"If it ain't broke, don't fix it"*. This set the direction for the entire legislative process. The working group of the FOJ tried to change as much as reasonably necessary, but as little as possible.

On January 11, 2017, the FOJ published a preliminary draft together with an explanatory report for consultation by interested organizations and the public.[25] The draft covered the whole Chapter 12, but also ancillary provisions in the FTA[26] as well as some parallel provisions on domestic arbitration in Part 3 of the CCP.

The consultation period ended on May 31, 2017. On August 8, 2018, the FOJ published the results.[27] Over 50 comments had

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[25] The preliminary draft can be accessed here: https://www.ejpd.admin.ch/dam/bj/de/data/aktuell/news/2017/2017-01-11/vorentw-d.pdf.download.pdf/vorentw-d.pdf, and the accompanying explanatory report (see Fn. 26) here: https://www.ejpd.admin.ch/dam/bj/de/data/aktuell/news/2017/2017-01-11/vn-ber-d.pdf.download.pdf/vn-ber-d.pdf (both last visited August 31, 2020). In the consultation procedure, the Cantons, the political parties and interested groups and individuals are invited to express their view (Articles 45(2) and 147 of the Swiss Constitution; SR 101). For the content of the preliminary draft, see STACHER /OETIKER, Kernpunkte der Revision des 12. Kapitels des IPRG, SRIEL 28 (2018) pp. 213 et seq.

[26] See *supra* Fn. 7.

[27] Bundesamt für Justiz, Änderung des Bundesgesetzes über das Internationale Privatrecht (Internationale Schiedsgerichtsbarkeit), August 8, 2018 ("Consultation Report 2018"), https://www.admin.ch/ch/d/gg/pc/documents/2829/Internationale-Schiedsgerichtsbarkeit_Ergebnisbericht_de.pdf, (last visited August 31, 2020). For the individual comments see the links on

been submitted, including those of 19 Cantons, and the overall reception proved positive, with only three participants generally rejecting the revision.[28]

Not unexpectedly, a few innovative proposals proved controversial, namely (i) the unilateral text requirement ("*halbe Schriftlichkeit*"), (ii) the right to use the English language in submissions to the Federal Tribunal and (iii) the authority of an arbitral tribunal to decide on its own costs.[29] Not least the Federal Tribunal objected to these proposals. With regard to the unilateral text requirement it argued that it went against well-established tradition and case law, jeopardized predictability of the law, and risked taking some parties by surprise. It objected to the use of English for various reasons, including potential problems with the handling of challenges by the administration, more work for the drafters of the judgment who cannot copy and paste some passages from the submissions, and the fear that this provision could lead on a slippery slope with the Federal Tribunal eventually being forced to write judgments in English in any case involving international matters. The Federal Tribunal objected against the authority of the arbitral tribunal to decide on its costs by referring to the constitutional principle of *nemo iudex in causa sua*.[30]

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https://www.admin.ch/ch/d/gg/pc/ind2017.html#EJPD (last visited August 31, 2020).

[28] Consultation Report 2018, pp. 5 et seq.

[29] This in reaction to SFSCD 136 III 597, c. 5.2, which held that an international arbitral tribunal may not authoritatively decide on its own costs with *res iudicata* effect.

[30] Incidentally, the Federal Tribunal criticized the solution of the CCP, which, in domestic arbitration, does authorize the arbitral tribunal to decide on its own costs (Article 384(1)(f) CCP), although only subject to review by the Federal Tribunal (Article 393(f) CCP). For the comments of the Federal Tribunal see https://www.admin.ch/ch/d/gg/pc/documents/2829/Internationale-Schiedsgerichtsbarkeit_Stellungnahmen-Organisationen.pdf, pp. 32 et seq. (last visited August 31, 2020).

Following the consultation procedure, the FOJ evaluated the results and implemented constructive suggestions in the draft bill. Out of the three particularly controversial proposals, the FOJ decided to drop two – (i) unilateral text form due to the concerns about legal certainty and (ii) authority to decide on own fees for lack of practical relevance – while maintaining the right to use the English language before the Federal Tribunal.

On October 24, 2018, the Federal Council published the draft bill together with an explanatory report.[31]

D. The Political Test: Debate in the Swiss Parliament

The bill was first taken up by the National Council. On May 2, 2019, its Commission on Legal Affairs held a hearing with experts. The Government, represented by the Federal Councilor Karin Keller-Sutter, itself proposed a few technical improvements. While ASA as well as most stakeholders supported the lean governmental draft with only minor technical amendments, a few individuals urged the Commission to broaden the scope of the revision. Some of these additional suggestions were useful and implemented, although of rather minor relevance, but most were ignored.

The Commission did accept one potentially controversial suggestion, though. To the new Article 77(2bis) FTA on the English language it added an additional sentence requiring the Federal Tribunal to provide a notarized English translation of the judgment on request of a party. Most practitioners consider this to be a "nice to have" but definitely not a "need

[31] Botschaft zur Änderung des Bundesgesetzes über das Internationale Privatrecht (12. Kapitel: Internationale Schiedsgerichtsbarkeit), of October 24, 2018, BBl. 2018, pp. 7163 et seq. ("Chapter 12, Message 2018").

to have" and thus a proposal that might unnecessarily provoke further opposition by the Federal Tribunal.

Another issue that was extensively discussed was how to deal with corruption, a perennial bane of international trade and, thus, also a perennial issue in international arbitration. A minority of the Commission wanted to amend Article 184 PILA to clarify that arbitrators may require additional evidence from the parties if there are indications of corruption. The majority, however, did not perceive a need to legislate as arbitrators already possess the necessary authority to require additional information.

In the National Council, there was general consensus on the importance of international arbitration for Switzerland and the benefits of a liberal and efficient legal framework. There was none of the anti-arbitration furor that had raged in Germany in the wake of the Vattenfall-case with activists and demonstrators in the streets of even small cities.[32] After a rather short discussion, on December 19, 2019, the National Council adopted all proposals of the Commission.[33]

The bill then passed to the Council of States. There, two issues were again in the focus: corruption and English.[34] With regard to corruption, Federal Councilor Karin Keller-Sutter considered an explicit regulation in Chapter 12 to be unnecessary given the broad consensus among arbitration specialists and the legal framework provided by the main arbitration rules on the authority of arbitrators to request additional evidence at any time. A clear majority of the Council agreed.

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[32] In May 2012, Sweden's state-owned power company Vattenfall launched a claim under the Energy Charter Treaty (ECT) against Germany, seeking € 4.7 billion, after Germany had announced the closure of its nuclear power plants in the aftermath of the 2011 Fukushima Daiichi nuclear disaster (ICSID Case No. ARB/12/12, pending).

[33] AB NR 2019, pp. 2405 et seq.

[34] AB SR 2020, pp. 42 et seq.

The use of English proved more divisive. The Commission of Legal Affairs of the Council of States, with decisive vote cast by its president, proposed to reject English before the Federal Tribunal, thus favoring the status quo over the versions of both the Federal Government and the National Council. It based its decision largely on constitutional grounds, but also on concerns as to the Federal Tribunal's organizational capacity in handling English translations as required by the National Council. Reservations were expressed that allowing English in international arbitration cases would eventually lead to English being admitted also in divorce proceedings between English-speakers and even to Spanish or Chinese submissions to the Federal Tribunal.[35] Others pointed to the current success of Switzerland as arbitration venue even without English being admitted before the Federal Tribunal, dismissing the need to introduce it. There were also concerns about a possible impact on the delicate balance of national languages in Switzerland. The discussion was quite emotional. In the end, a clear majority voted against the new Article 77(2bis) FTA. This was the only major difference to the version of the National Council.[36]

This was good news and bad. Good news as both Councils strongly supported international arbitration, recognizing the importance of arbitration for Switzerland and for international trade and also the tradition of Switzerland to serve as a neutral forum for the settlement of international disputes. Bad news, however, as the one amendment that had already caught some international attention at this point, the admission of English submissions, had been deleted and this

[35] Ignoring that any extension of the use of foreign languages would require another amendment of the FTA and thus another act of Parliament.

[36] Two other differences concerned a deadline in Article 180b(2) PILA and an uncontroversial alignment of Article 396(1)(d) CCP to Article 190a(1)(c) PILA. A fourth difference only concerned a spelling issue in Article 388(3) CCP.

partly for reasons that might strike foreigners as rather parochial.

Due to the differences between the versions of the National Council and the Council of States, the bill went back to the National Council. Its Commission of Legal Affairs wisely decided not to insist on its initial expanded version of Article 77(2bis) FTA, but to revert to the original proposal by the Federal Government. In the session of the National Council on June 3, 2020,[37] it was rightly pointed out by the speakers of the Commission that the continuing success of Switzerland as arbitration venue was not guaranteed given the increasing global competition and that the admission of English in challenges under Article 190 PILA did not seriously jeopardize the four official languages in Switzerland. The National Council adopted Article 77(2bis) FTA in the version of the Federal Government unanimously and without further discussion. The very next day, the Commission on Legal Affairs of the Council of States unanimously fell into line, realizing that the practical impact on the Federal Tribunal and Switzerland as a whole was very limited and the proposal helped to strengthen the position of Switzerland as arbitration venue. On June 9, 2020, the Council of States also unanimously adopted Article 77(2bis) FTA without any further discussion.[38]

On June 19, 2020, both Councils definitely adopted the revision of Chapter 12 (and the related amendments in the FTA and the CCP).[39] No referendum was sought within the statutory deadline of 100 days from the publication of the bill in the Official Federal Gazette[40] and the Federal Government

[37] AB NR 2020, pp. 600 et seq.

[38] AB SR 2020, pp. 415 et seq.

[39] AB NR 2020, p. 1179; AB SR 2020, p. 625. For additional details on the deliberations in Parliament, see GIRSBERGER/LORETAN, Internationale Schiedsgerichtsbarkeit: Revision des 12. Kapitels IPRG, SRIEL 30 (2020), pp. 391 et seq.

[40] According to Article 141 of the Swiss Constitution, 50,000 Swiss citizens or eight Cantons can require submitting new legislation to a vote by the Swiss citizens;

decided to enact the revised provisions as of January 1, 2021.[41]

III. The Content of the Revision

Based on the parliamentary mandate to update the statutory law and to aim at maintaining Switzerland's attractiveness for arbitration, the Federal Government defined three specific aims:[42]

(i) Codifying case law and clarifying open issues;

(ii) Strengthening party autonomy; and

(iii) Increasing user-friendliness.

A. What Are the Main Amendments?

The main amendments, in the order of Chapter 12, are the following:

Article 176(1) PILA: Chapter 12 will be applicable if at least one of the parties to the arbitration *agreement* had its seat abroad at the time of its execution. This corrects the case law of the Federal Tribunal according to which an arbitration is only considered international if at least one of the non-Swiss parties to the agreement is also a party to the arbitration *proceedings*.[43] Particularly in multi-party agreements with both Swiss and non-Swiss parties, this change increases legal security as the applicable *lex arbitri* is determined at the outset, not just once a dispute ends up in an arbitration.

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see also Articles 59 et seq. of the Federal Act on Political Rights (SR 161.1) and Article 200 PILA.

41 See https://www.admin.ch/gov/de/start/dokumentation/medienmitteilungen.msg-id-80184.html (last visited August 31, 2020).

42 Chapter 12, Message 2018, pp. 7171 et seq.

43 SFSCD 4P.54/2002, June 24, 2002, c. 3; see also SFSCD 4A_143/2015, July 14, 2015, c. 1.1.

Article 178(4) PILA: Hitherto, Chapter 12 was implicitly based on the standard situation of an arbitration agreement executed between at least two parties. It did not address arbitration clauses in unilateral legal documents, such as last wills, trusts, and in articles of association, the scope of which is intended to cover also third parties who have not consented to arbitration and in particular not in a form documented by text as required by Article 178(1) PILA. While it was considered inappropriate to regulate all aspects of unilateral and statutory arbitration clauses – these issues are to be addressed by the applicable substantive law[44] – Article 178(4) PILA clarifies that such clauses are valid as to their form and that the provisions of Chapter 12 are applicable even if only by analogy.

Articles 179-180b PILA: Appointment, challenge, and removal of arbitrators was only cursorily regulated by the PILA. For most details, Chapter 12 referred initially to cantonal law and then, since 2011, to the CCP. In order to render the Swiss *lex arbitri* more accessible to foreigners, the reference to the CCP was replaced by doubling the number of paragraphs of Article 179 PILA and adding two new articles, 180a and 180b PILA. Article 179(2) PILA contains an innovative element: if the parties had not determined any seat at all in an *ad hoc* arbitration, it was difficult to find a state court that had jurisdiction to assist in the constitution of the tribunal. In such a case, any court first seized in Switzerland has jurisdiction to assist in the constitution, thus avoiding problems of negative international conflicts of jurisdiction.

Article 182(4) PILA codifies the established case law of the Federal Tribunal that a party needs immediately to object to violations of procedural rules; otherwise any right of recourse

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[44] See Chapter 12, Message 2018, pp. 7188-7191; for arbitration clauses in Articles of Association of a Swiss company, see the new Article 697n of the Swiss Code on Obligations ("CO"), according to which the arbitration proceedings are subject to the Part 3 of the CCP, not the PILA.

against such violation will have lapsed. This rule that is strictly applied by the Federal Tribunal prevents parties from tactically delaying challenges.

Articles 183(2) and 184(2) & (3) PILA facilitate legal assistance by the *juge d'appui*. In particular, not just the arbitral tribunal but also a party, albeit only with consent of the arbitral tribunal, may request legal assistance, In addition, the *juge d'appui* may take evidence for use in an arbitration procedure by applying other rules than those of the CCP, such as by allowing cross-examination. The practical impact will likely be small, however. So far, there has been very little need for such legal assistance.

Article 187(1) PILA: The revision amends the German text, which refers to the "law" ("*Recht"*) applicable to the substance of the dispute, rather than the "rules of law" ("*Rechtsregeln"*) as in the French text ("*règles de droit"*). The difference might appear to be irrelevant but it points to a birth defect of Article 187 PILA: the francophone practitioners wanted the applicable laws not to be limited to state laws, but to include also general principles of law and the like, while the germanophone practitioners were by and large more traditional and were, in general, opposed to the inclusion of other than state laws. The dispute was "solved" by different wording in the two languages, although it was soon clear that the French wording prevailed as the "clearer" one.[45]

Article 185a PILA is another innovative and arbitration-friendly provision. It grants jurisdiction to Swiss courts to enforce interim relief ordered by a foreign arbitral tribunal, upon request by a foreign tribunal or party to such proceeding, rendering the troublesome path of international

[45] See further DASSER, Internationale Schiedsgerichte und lex mercatoria, Zurich 1989, pp. 334 et seq.

legal assistance obsolete. Swiss courts may also assist a foreign tribunal in gathering evidence in Switzerland.

Article 189a PILA codifies the generally accepted authority of the arbitral tribunal to correct, interpret, or amend an award based on a timely request by a party or *ex officio*.

Article 190a PILA similarly codifies the established case law that a party may request the revision of an award in certain circumstances outside of the time limits for a challenge pursuant to Article 190 PILA. These circumstances are very limited. It is expected and hoped that the Federal Tribunal will continue its very restrictive practice.[46] A new Article 119 FTA clarifies the procedure of revisions.

Article 77(1) FTA clarifies that challenges of arbitral awards are admissible independent of the value in dispute. To date, the Federal Tribunal has not decided whether the usual threshold value of CHF 30,000 also applies to arbitral awards.

Article 77(2bis) FTA is the most disputed innovation. It allows parties to file submissions to the Federal Tribunal in English. The Federal Tribunal will still use one of the official Swiss national languages and the other party may also use a national language. Given the fact that the deadline of thirty days for filing appeals for setting aside an award is relatively short and many foreign parties are not familiar with the national languages and need to rely on translations, this new right may save time and money in some circumstances. Whether parties will frequently make use of this new possibility remains to be seen. Reducing this language barrier may, nevertheless, render Switzerland more attractive as a venue.

[46] Up until 2017, only three awards had been squashed in a procedure for revision out of 20 request filed, see DASSER/WÓJTOWICZ, Challenges of Swiss Arbitral Awards – Updated Statistical Data as of 2017, ASA Bulletin 2018, p. 276, p. 286.

In addition, certain provisions of the **CCP** concerning domestic arbitration have also been amended. Generally, the revision brought Chapter 12 of the PILA and Part 3 of the CCP closer together, while domestic arbitration still remains more strictly regulated.[47]

B. What Does Not Change?

In essence, Chapter 12 is still the same. The revision was indeed mostly the *toilettage* that it was set out to be and that ASA had recommended back in 2013.

Most importantly, the dualistic concept with a separate, liberal *lex arbitri* for international cases was retained even though very isolated voices called for a uniform law.

This, secondly, allowed doing without special protective norms for employees, consumers, and other groups that in domestic cases are or may be considered to be in need of protection also in the context of arbitration. All provisions of Chapter 12 continue to equally apply to all kinds of arbitration, whether they concern commercial, investment, sports, or employment disputes.

Thirdly, the *juge d'appui* remains cantonal. Proposals to institute a national *juge d'appui* were dismissed, primarily because there does not seem to be any practical need, but also because of concerns about its political feasibility. Neither was it considered to allow English before cantonal courts, as the number of cases is minimal and not all cantonal courts might be able to handle English submissions.

Further, while there is a certain tension between (i) Article 176(1) PILA pursuant to which Chapter 12 applies to proceedings seated in Switzerland and (ii) Articles 179(2)

[47] Part 3 of the CCP contains twice as many articles as Chapter 12, quite a number of them with mandatory effect.

second sentence,[48] 185a,[49] and 194[50] PILA which apply to foreign arbitral proceedings and awards, respectively, it was not deemed necessary, and actually not convenient, to split Chapter 12 into two parts, with a large part covering Swiss arbitration proceedings and a very short one relating to foreign proceedings.

Finally, the competence-competence of arbitral tribunals under Article 7 PILA as interpreted by the Federal Tribunal also remains untouched, in spite of this issue having been the trigger for the revision of Chapter 12.

IV. Lessons from the Revision

Foreigners in particular might wonder about the slow pace of legislation in Switzerland. Almost 13 years passed between the initiation of the parliamentary process by National Councilor Lüscher in early March 2008 and the enactment of the revision on January 1, 2021. Taking time is a time-honored characteristic of Swiss legislation. To put the 13 years into perspective: the drafting of the PILA itself took about 17 years. It was in June 1973 that the Federal Council finally decided to fill the glaring lack of a private international law in Switzerland by mandating a commission of experts with the drafting of a comprehensive act.[51] In December 1987, Parliament adopted the new law and it entered into force two years later, in 1989. Incidentally, on June 19, 2020, Parliament did not just adopt the revision of Chapter 12 but also the revision of the Swiss law on joint-stock corporations

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[48] Addressing situations where the parties had not determined any seat and the tribunal, once constituted, might determine a seat abroad.

[49] Providing for legal assistance by the *juge d'appui* to foreign tribunals and parties in foreign proceedings.

[50] On recognition and enforcement of foreign awards.

[51] See Botschaft zum Bundesgesetz über das internationale Privatrecht (IPR-Gesetz) of November 10, 1982, BBl 1983 I, pp. 273-274.

(Articles 620 *et seqq*. of the Swiss Code of Obligations), which had started twenty years ago.[52]

No legislation is perfect, but taking time helps. The legislative process takes a lot of time mainly because all stakeholders and even the public as a whole are not just included formally, but given sufficient time to consider the proposals and are then taken seriously – which, in politics, is obviously not a matter of course in many countries, but is a necessary ingredient in Swiss legislation as it suffices to gather 50,000 signatures to force a popular referendum on any legislation. The outcome of such a complex process is often a compromise with all the good and bad characteristics of compromises.

In this case and quite exceptionally, everybody was on the same page. Everybody was proud of the outstanding position of Switzerland as a neutral venue to settle international disputes. Politicians from all parties acknowledged the benefits of arbitration. Contrary to some concerns within the arbitration community, the German anti-arbitration furor failed to spill over the border.[53] It certainly helped to have a dualistic system: Concerns about the protection of certain groups such as employees, consumers or tenants had been taken care of to some extent by rules covering domestic arbitration in Part 3 of the CCP and were much less of an issue in international arbitration.[54] A dualistic system has its own

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[52] Botschaft zur Änderung des Obligationenrechts (Aktienrecht und Rechnungslegungsrecht […]) of December 2007, BBl 2008, pp. 1589-1599; Botschaft zur Änderung des Obligationenrechts (Aktienrecht) of November 23, 2016, BBl 2017, p. 399, p. 409. See also the links in https://www.bj.admin.ch/bj/de/home/wirtschaft/gesetzgebung/archiv/aktienrechtsrevision.html (last visited August 31, 2020).

[53] It may have helped that migration gradually replaced arbitration (together with the TTIP and CETA investment treaties) as the focus of the German political discussion during the preparation of the revision.

[54] The Federal Government addressed the lack of a need of special regulations in its Message to Parliament, referring, *i.a.* to an ongoing monitoring of employment matters which also covers arbitration and will allow to revert to the issue in or after 2022 (Chapter 12, Message 2018, pp. 7180-7183).

problems, like deciding which system applies to borderline cases, but it allows regulating international arbitration more liberally and in line with international practice and requirements.

In hindsight, this revision was fortunate. It took a few wrinkles out of the face of an elderly legislation but kept the healthy body intact. Apart from a few and mostly minor hiccups in Parliament, everything went smoothly. An important aspect of this success was to keep the revision low-key. It was informally labelled a "*toilettage*" or brush-up. This revision was not a "need to have". Chapter 12 worked well, it enjoyed an excellent reputation also among foreign specialists who have looked at it with envy. As a liberal bare-bones framework, it turned out to have a few gaps, but the Federal Tribunal filled them in a mostly very judicious way.

In foresight, the revision appeared more delicate. As mentioned: *"If it ain't broke, don't fix it"*. The Swiss *lex arbitri* was definitely not broke, it was up and running smoothly. Touching legislation that works is notoriously risky. The triggering event was wholly unnecessary and unwarranted. There was no need to amend Article 7 PILA and indeed Article 7 was not amended by the revision of the Swiss *lex arbitri*.[55] When asked by the Government what they think of strengthening international arbitration in Switzerland, the arbitration community naturally was in favor. It was a "nice to have", though.

There were indeed a few gripes about Chapter 12. The gap filling case law of the Federal Tribunal was fine, but not easily accessible by foreigners; references to Swiss domestic law (initially to cantonal law, since 2011 to the CCP) also diminished transparency; the relatively ripe age of the

[55] See Chapter 12, Message 2018, pp. 7176-7178.

legislation alone suggested that a brush-up would be indicated if only for promotional purposes on the international level.

The mandate that Parliament gave to the Government was consciously limited to "*update*" Chapter 12, in particular by incorporating some case law and correcting, if necessary, other case law. The FOJ did exactly that. There are a few innovative provisions in the new law, but mainly the revision tried to keep as much of the existing provisions untouched as possible.

V. Conclusion

Why change a still modern law? Here, it was a matter of *carpe diem*. The Swiss Parliament had to address the Swiss *lex arbitri* due to a parliamentary initiative and the arbitration community seized the opportunity to emphasize the importance of Switzerland as arbitration venue and the constant need to protect and strengthen its attractiveness. Attractiveness has many aspects. A *lex arbitri* must be well conceived, but it must also be *perceived* to be well conceived. Given the accelerating global development of arbitration, a law from the times of the Cold War might be perceived as outdated even if it is actually more modern in the sense of attuned to the needs of today's international commerce and international arbitration than many much more recent legislations.

How to change a still modern law? Carefully. Only change what is really needed or useful and do not touch all the other provisions that work quite satisfactorily. It helps if the interested community speaks with one voice. This was not always the case in this process and it may have contributed to the initial backlash in the Council of States. During the whole process, from the outset, ASA played a constructive role and assisted the FOJ by providing practical experience,

international outlook, and specific, well-balanced and reasoned suggestions. The result of the revision is a slightly extended Chapter 12, the 19 articles of the original Chapter 12 – memorably described by Elliott Geisinger as "*the Nineteen Juwels*"[56] – becoming 24,[57] still much less than most arbitration laws.

Time will tell whether the revision of Chapter 12 will achieve the aim of maintaining and even strengthening the attractiveness of Switzerland as venue for international arbitration proceedings. Personally, I am optimistic. It is now a task for all of us to make the refreshed Swiss *lex arbitri* known and put to good use. The Swiss arbitration community cannot simply applaud the successful revision. And what is more: a modern *lex arbitri* is no guarantee for the success of an arbitration venue. It must be embedded in a whole bouquet of selling propositions, selling propositions that are if not unique then at least outstanding: among other factors political and social stability, tradition of neutrality and good services in international disputes, liberal and easily accessible substantive law, arbitration-friendliness of the institutions, quality of arbitration institutions, and quality of the arbitration specialists.

Quality of arbitration specialists: that is about us. If we do not work hard and constantly strive for the best service, even a perfect Chapter 12 will not save Switzerland's attractiveness.

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[56] GEISINGER, President's Message, The Cup Of The Nineteen Jewels, ASA Bulletin 2015, 1; ID., President's Message, The Journey Continues, ASA Bulletin 2017, p. 523.

[57] Sometimes a distinction is made between the 23 articles (Articles 176-193 PILA) of the Swiss *lex arbitri* for arbitration proceedings and Article 194 PILA on recognition and enforcement of foreign arbitral awards.

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Mission Impossible? – Challenging Investment Treaty Awards before the Swiss Federal Tribunal

MATTHIAS SCHERER

Contents

I. Introduction

Switzerland has been a hub for international commercial arbitrations for more than a century. Its role as host of investment treaty arbitrations is less well known. Yet it is important. Recent developments in the European Union are likely to increase the number of investment treaty arbitrations in Switzerland (and/or under Swiss treaties). The European Union has recently banned investment protection treaties among the EU member states.[1]

The Swiss Supreme Court ("**Federal Tribunal**") has issued a number of rulings on investment treaty awards (see table at the end of this paper). It has become apparent that it is exceedingly difficult for plaintiffs to have a treaty award set aside. This paper tries to explore the reasons for this low rate of success by exploring the salient features of investment treaty arbitration and of annulment proceedings before the Federal Tribunal.

[1] Agreement for the termination of Bilateral Investment Treaties between the Member States of the European Union: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:22020A0529(01).

II. Investment treaties and investment treaty awards

Investment treaties are treaties between two states (bilateral) or multiple states (multilateral). Typically, each contracting state undertakes to protect investments by investors from the other contracting state, to not expropriate without compensation, to not discriminate or treat unfairly. Switzerland for instance has entered into over one hundred bilateral investment protection treaties with other States ("**BITs**").[2] Switzerland has also acceded to a number of multilateral investment protection treaties, such as the Energy Charter Treaty ("**ECT**").[3] In the event that a state breaches these undertakings, many bi- and multilateral investment protection treaties afford the investor a right to bring arbitration against the host state. The type of arbitration contemplated in these treaties varies. Most BITs refer to arbitration under the 1966 Convention on the settlement of investment disputes between States and nationals of other States ("**ICSID Convention**"). The ICSID Convention establishes a framework for the settlement of disputes between investors and States by way of arbitration under the ICSID arbitration rules. These rules are self-contained. Awards rendered by arbitral tribunal under the aegis of ICSID cannot be challenged before any national courts. Annulment requests are referred exclusively to annulment committees established on an ad hoc basis. For this reason, none of the annulment decisions by the Federal Tribunal will be based on an ICSID award.

Some BITs and the ECT do not provide or do not exclusively provide for ICSID arbitration. They contemplate ad hoc arbitration, often under the UNCITRAL Rules, arbitration administrated by the PCA, ICC, SCC and other institutions.

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[2] https://icsid.worldbank.org/resources/databases/bilateral-investment-treaties.
[3] RS 0.730.0.

Switzerland is the place of arbitration of many of these non-ICSID arbitrations. Awards rendered in proceedings with their seat in Switzerland can be challenged before the Federal Tribunal under article 190(2) PIL Act. This survey analyses the reported cases where the Federal Tribunal dealt with arbitral awards rendered under investment protection treaties.[4]

It would go beyond the scope of this paper to review the large body of jurisprudence applying Article 190(2) PIL Act. Rather, we will recall what these grounds are and how they were applied in the Federal Tribunal's treaty cases. As we will see, there are notable differences between investment treaty awards and awards rendered in commercial arbitration. While the remedies and annulment grounds available remain the same whatever the type of award involved, it is important to comprehend the characteristics of investment disputes in order to understand fully the Federal Tribunal's approach and the reasons for the low success rates of challenges to treaty awards.

Indeed, in its very first iteration the title of this paper was not a question, but rather a statement. Mission impossible. Full stop. None of the annulment requests against arbitral awards rendered under an investment protection treaty had been successful. A question mark was added out of precaution. A fortunate change as it turned out. On 25 March 2020 the Federal Tribunal set aside a treaty award for the first time (*Clorox v Venezuela*).

[4] See also BERNHARD BERGER, Die Schweiz als Schiedsort für Investitionsstreitigkeiten – Erkenntnisse aus der neueren Rechtsprechung des Bundesgerichts, ASA Bull. 1 and 2/2020 (Two parts); MATTHIAS SCHERER/ANGELA CASEY, Domestic Review of Investment Treaty Arbitrations: the Swiss Experience Revisited, ASA Bull 4/2019, p. 805.

III. Salient features of investment treaty arbitration

Put simply, a claimant faces three hurdles in any arbitration: Jurisdiction-liability-quantum. In commercial arbitration, a claimant's main hurdle in this tryptic is typically liability. While jurisdictional objections are not rare, they are rarely successful. Invariably there will be a contract with an arbitration agreement reflecting the parties' consent to arbitration. Usually such agreement will be construed broadly by the arbitral tribunal.

In treaty disputes, the arbitration agreement is in the treaty itself. The claiming investor is not a party to the treaty. This means that the investors' intentions are not a relevant parameter for determining the scope of the arbitration agreement. The investors accept the states' offer to arbitrate only later, by filing for arbitration under the treaty. This is a fundamental difference to commercial arbitration where the claimant is usually an original party to the contract and its arbitration agreement. If the scope of the treaty is unclear, the investor will have to establish intentions of the Contracting States, not his own.

If parties copy-paste an arbitration agreement in a BIT into a commercial contract this may not necessarily be accepted as a valid arbitration agreement.[5]

[5] SFSCD 4A_418/2019 of 18 May 2020, ASA Bull. 3/2020, p. 690: A Turkish construction group had entered into a trilateral agreement ("TLA") with an Iranian state bank and an Iranian company controlled by the Iranian Ministry of Roads and Urban Development. The Turkish side undertook to build 20'000 housing units. The TLA contained an arbitration agreement that was copied from the Iran-Turkey investment protection treaty. The arbitral tribunal found that the arbitration clause was not applicable, despite the fact that its terms appeared to be clear. In fact, the evidence before the arbitral tribunal showed that the Iranian side had never agreed to arbitrate under the arbitration clause. This dissent was known to the Turkish negotiators. Therefore there was no meeting of minds, and no agreement to arbitrate.

In treaty arbitration, the jurisdictional hurdles are high and omnipresent, making jurisdiction a very complex matter. Bifurcation of jurisdictional issues is the rule. The arbitral tribunal's jurisdiction on all levels (ratione temporis, ratione materiae and ratione personae) is subject to restrictions. There is no pro-arbitration bias. Either the claimant's claim ticks all the right boxes or it will fail at the jurisdictional stage.

Sophisticated parties will select arbitrators in treaty disputes specifically and often primarily with regard to their approaches to jurisdiction. Due diligence on potential arbitrators is easier than in commercial arbitration with its dearth of information about arbitrators' past cases. As many treaties contain similar language, similar issues come up in many arbitrations. Arbitrators are easily challenged or may refuse to sit when they have dealt with an issue in a certain manner before as counsel or arbitrator (issue conflicts). While arbitrators with a counsel practice remain in high demand in commercial arbitration, double hatting has become the exception in investment arbitration.

Treaty disputes are often fought very publicly. Confidentiality is the exception, not the rule. Switzerland has even acceded to the Mauritius Transparency Convention[6] which is an instrument by which Parties to investment treaties expressly consent to applying the UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration. The Rules on Transparency, effective as of 1 April 2014, are a set of procedural rules for making information on investor-State arbitrations arising under investment treaties publicly available. In relation to investment treaties concluded prior to 1 April 2014, the Rules apply, inter alia, when Parties to the relevant investment treaty agree to their application.

[6] UN Convention on Transparency in Treaty-Based Investor-State Arbitration.

There is a large body of precedents which no arbitrator in a treaty dispute can afford to ignore[7] without immediate repercussions on the arbitrator's future career in this field. The seat of the arbitration is of no import in that regard.

IV. Salient features of proceedings before the Federal Tribunal in treaty award annulment cases

A. Deference to specialized arbitrators

In *Recovi v Vietnam* the Federal Tribunal had to assess whether the alleged investment met the criteria set in the France-Vietnam BIT. The Federal Tribunal recalled that there was no single and universally accepted definition of the term investment. In an unusual fit of modesty the Federal Tribunal expressed reluctance to second-guess findings made by specialized arbitrators: « *D'autre part, comme la définition de l'investissement au sens de l'art. 1 (1) du TBI a été le fait de trois arbitres dont l'expérience en la matière et la renommée internationale sont reconnues par les deux parties, le Tribunal fédéral, bien qu'il jouisse à cet égard d'une pleine cognition, ne s'écartera pas sans nécessité de l'opinion unanime émise par des spécialistes de la question au sujet de la notion juridique indéterminée de l'investissement*. »[8]

[7] The Federal Tribunal takes a more relaxed approach to precedents. See section IV. E. below

[8] SFSCD 4A_616/2015 of 20 September 2016 (Recovi v Vietnam), ASA Bull. 4/2019, p. 959, para. 3.4.1.

B. No deference to precedents

On the other hand, the Federal Tribunal rejects the notion of precedents and does not consider to be bound by them when interpreting treaty provisions (see section IV. E. below).

C. No new case law admissible

Since most treaty arbitrations are public, new awards circulate quickly and are often unredacted. It is tempting for a party involved in an ongoing arbitration or annulment proceedings to rely on new cases perceived to be favourable. However, new evidence and new factual allegations are not admissible in annulment proceedings. New pleadings on legal aspects, new legal materials and legal opinions are in principle allowed. But if a party carries the burden of proof for establishing the content of a foreign law, such material can constitute (inadmissible) new evidence. The same goes for decisions produced in support of a factual rather than a legal point.[9] In *Poland v Hortel*[10] the Federal Tribunal struck from the record exhibits containing laws enacted and jurisprudence rendered after the date of the award. Even a few days are fatal. A decision of the *Cour d'appel de Paris* of 21 February 2017 rendered in another matter, five days after the date of the award was not accepted.[11]

In the Czech Solar Tax case, the State tried to introduce the *Achmea* decision of 6 March 2018,[12] where the CJEU found that the arbitration agreement in the Dutch-Slovak BIT was not compatible with EU law. The Czech Republic argued that this decision destroyed whatever jurisdiction the arbitral tribunal may have had. But because the *Achmea* decision was

[9] SFSCD 4A_80/2018 of 7 February 2020, para. 2.4.1.
[10] SFSCD 4A_157/2017 of 14 December 2017, ASA Bull. 4/2019, p. 972, para. 3.3.1.
[11] *Ibid.*
[12] CJEU C-284/16, Slovak Republic v Achmea BV.

issued after the Czech Solar award in December 2017, the Federal Tribunal did not consider *Achmea*. Neither did it consider an arbitral award in another Czech solar arbitration because it also post-dated the challenged award and because the Czech Republic relied on it as a source of facts.[13]

D. Security for costs

According to article 62 of the Law on the Federal Tribunal, plaintiffs who are not domiciled in Switzerland or who are demonstrably impecunious can be asked to provide security for the defendant's legal fees (*cautio judicatum solvi*). International treaties such as the 1954 Hague Convention on Civil Procedure exempt certain plaintiffs from this duty. In *Russia v Ukrnafta*[14], Russia objected to the investor's application for security, arguing that it was a contracting party of the Hague Convention and that the exemption benefited also the states and not only their nationals. The Federal Tribunal confirmed that this is the case. Russia did not have to provide security for Ukrnafta's legal fees. In contrast, India (who has not ratified the Hague Convention) was requested to pay significant security upfront (CHF 250'000.-) before the Federal Tribunal engaged with its application to annul an award in favour of an investor (Germany's Deutsche Telekom).[15]

Ukrnafta further argued that security was required because Russia had notoriously adopted a policy of non-compliance with international awards. The Federal Tribunal ruled that the circumstances listed in article 62 are exhaustive. The

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[13] SFSCD 4A_80/2018 of 7 February 2020, paras. 2.4.2 and 2.4.3.

[14] SFSCD 4A_396/2017, Procedural order of 23 November 2017, ASA Bull. 4/2019, p. 983.

[15] SFSCD 4A_65/2018 of 11 December 2018, ASA Bull. 4/2019, p. 1000, para. C; the parties' names are not published in the decisions of the Federal Tribunal but have been made public here: https://globalarbitrationreview.com/article/1177921/swiss-Federal Tribunal-upholds-treaty-award-against-india.

purported unwillingness of a party to abide by the decision is not mentioned in that list and is not tantamount to demonstrable impecuniosity.[16]

E. Interpretation of the treaty and the arbitration agreement

One of the most important differences between treaty arbitration and commercial arbitration at the Federal Tribunal's level is the method of interpreting the arbitration agreement. The scope of the applicable arbitration agreement is at the heart of many annulment cases. In commercial arbitration, the arbitral tribunal, and in its wake the Federal Tribunal, will typically deal with a clause in a contract entered into by the parties to the arbitration. In line with Swiss law, the parties' real and common intentions are decisive. If this subjective interpretation is not possible, objective interpretation will then be applied. However, in investor-state arbitration, one of the parties, the investor, is never a party to the instrument containing the arbitration agreement, i.e., the treaty entered into by the host state and the investor's home state. Searching for the investor's subjective intentions when he accepted the standing offer to arbitrate is therefore not an appropriate way to interpret the arbitration clause in the treaty.

The Federal Tribunal held repeatedly that treaties are to be interpreted in accordance with public international law, reflected in the **Vienna Convention on the Law of Treaties**. As these rules reflect customary international law, they apply even if one or both Contracting States have not ratified the Convention at the time the investment protection treaty was concluded.[17]

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[16] SFSCD 4A_396/2017, Procedural order of 23 November 2017, para. 3.2.
[17] SFSCD 4P.114/2006 of 7 September 2006, ASA Bull. 1/2007, p. 123, para. 5.4.1.

The most relevant interpretation rules in the Vienna Convention are the following:

> *"Article 31, GENERAL RULE OF INTERPRETATION*
>
> *1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.*
>
> *2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes: (a) Any agreement relating to the treaty which was made between all the parties in connexion with the conclusion of the treaty; (b) Any instrument which was made by one or more parties in connexion with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.*
>
> *3. There shall be taken into account, together with the context: (a) Any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions; (b) Any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation; (c) Any relevant rules of international law applicable in the relations between the parties.*
>
> *4. A special meaning shall be given to a term if it is established that the parties so intended.*
>
> *Article 32, SUPPLEMENTARY MEANS OF INTERPRETATION*
>
> *Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the*

> *interpretation according to article 31: (a) Leaves the meaning ambiguous or obscure; or (b) Leads to a result which is manifestly absurd or unreasonable."*

There is no pro-arbitration bias. In *Hungary v EDF*, Hungary ran the contrary argument that consent to arbitration should not be admitted lightly and in case of doubt, in the manner that is the least onerous for the State (in dubio mitius).[18] The Federal Tribunal rejected this interpretation and recalled that any treaty had to be construed in line with the rule of good faith (Article 31 Vienna Convention).[19]

The Federal Tribunal does not defer to precedents, of ICSID or other arbitral tribunals even where they have addressed the same issue. The finding in *Recovi v Vietnam* on how to assess whether the alleged investment fell in the scope of application of the France-Vietnam BIT illustrates this:

> *« …il s'agit, premièrement, de définir le terme "investissement" tel qu'il apparaît dans le TBI considéré, et non pas tel qu'il a été défini sur la base d'autres traités bilatéraux; deuxièmement, il n'existe aucune règle imposant à un tribunal arbitral de se soumettre à des décisions prises antérieurement par d'autres tribunaux arbitraux sur le même objet, celles-ci n'ayant pas valeur de précédents contraignants; troisièmement, comme le présent arbitrage est conduit conformément aux règles de la CNUDCI, les critères propres à l'arbitrage du CIRDI n'entrent pas en ligne de compte. »*[20]

In *India v Deutsche Telekom*, the Federal Tribunal paid short shrift to a selection of awards and legal writings adduced by India, pointing to the lack of uniformity of treaty

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[18] SFSCD 4A_34/2015 (141 III 495) of 6 October 2015, para 3.5.2.

[19] SFSCD 4A_34/2015 (141 III 495) of 6 October 2015, para 3.5.3.1; also 4A_616/2015 of 20 September 2016, ASA Bull. 4/2019, p. 959, para. 3.2.2.

[20] *Ibid*.

jurisprudence. It noted that even in the framework of ICSID disputes there was no centralized authority to scrutinize the decisions taken by ICSID tribunals, or to handle annulment requests (left to ad hoc committees). This did not further the development of a firm and uncontested jurisprudence:

> *« Plus généralement, force est de constater que l'adage "comparaison n'est pas raison" trouve ici un terreau des plus favorables à son épanouissement, tant il est vrai que le droit de l'arbitrage en matière de traités d'investissement se caractérise par la pluralité des avis exprimés et la diversité des sentences rendues au sujet de la plupart des problèmes juridiques qu'il soulève, l'une des explications à ce manque d'homogénéité étant sans doute à rechercher dans le fait que la juridiction étatique de recours n'exerce qu'un contrôle restreint des sentences rendues par les tribunaux arbitraux dans ce type de conflits et que lui échappent, en particulier, celles qui l'ont été sous les auspices du Centre international pour le règlement des différends relatifs aux investissements (CIRDI/ICSID), lesquelles ne peuvent faire l'objet que d'un recours interne qui sera traité définitivement par un Comité ad hoc de trois membres (cf. art. 52 et 53 de la Convention CIRDI entrée en vigueur le 14 octobre 1966), ce qui n'est pas propice à l'élaboration d'une jurisprudence ferme et incontestée. »*[21]

As of late, the Federal Tribunal at least accepts that this body of awards exists and is influential on specialized publications. This does not alter the standing case law that arbitral awards are not precedents and will be disregarded:

> *« Qui plus est, l'autorité de céans a déjà souligné, dans le domaine de la protection internationale des*

[21] SFSCD 4A_65/2018 of 11 December 2018, ASA Bull. 4/2019, p. 1000, para. 3.2.2.2.1.

> *investissements notamment, que les solutions dégagées dans d'autres affaires arbitrales ne lient pas un tribunal arbitral, de sorte qu'on ne saurait voir dans la jurisprudence arbitrale une source à proprement parler du droit de l'arbitrage (ref omitted). Pour ces motifs déjà, la cour de céans ne tiendra pas compte de la sentence xxx et des commentaires qu'elle a suscités auprès des parties, tous ces éléments étant irrecevables. Par ailleurs, fidèle à sa pratique, elle s'attachera à dégager elle-même le sens des traités en cause, conformément aux méthodes d'interprétation applicables, en tenant compte le cas échéant de la doctrine, mais en toute liberté par rapport aux autres sentences arbitrales rendues en la matière, même si elle n'ignore pas la place importante que celles-ci occupent dans les ouvrages spécialisés. »*[22]

The Federal Tribunal cares little about precedents, but « Travaux préparatoires » fare no better. The Federal Tribunal is most reluctant to rely on them and will not do so if primary interpretation yields a result. While this is indeed the hierarchy established by the Vienna Convention (Article 32), one is left with the impression that the Tribunal speaks out of its own conviction and refers to the former as additional support for the latter:

> *« La recourante objecte que les travaux parlementaires français ayant précédé la ratification du TBI démontreraient que les parties contractantes avaient à l'esprit une définition aussi large que possible de l'investissement. Ce faisant, elle fait fond [sic] sur l'art. 31 al. 4 CV d'après lequel un terme sera entendu dans un sens particulier s'il est établi que telle était l'intention des parties. Relativement à cette objection, il convient de souligner que l'intéressée n'a produit les*

[22] SFSCD 4A_80/2018 of 7 February 2020, para 2.4.3.

> *travaux préparatoires que de l'une des deux parties contractantes. Force est d'observer ensuite et en tout état de cause que les travaux parlementaires français ne suggèrent pas qu'il faille donner un sens particulier au terme "investissement", mais confirment, au contraire, que l'investissement, aussi large que soit cette notion, doit être effectué sur le territoire ou la zone maritime de l'Etat hôte, en conformité avec la législation de cet Etat. En réalité, ces travaux parlementaires ne pourraient tout au plus être assimilés qu'à des moyens complémentaires d'interprétation. Cependant, les conditions auxquelles l'art. 32 CV autorise le recours à de tels moyens ne sont pas réalisées en l'espèce, dès lors que la seule application des principes d'interprétation posés à l'art. 31 CV a permis de donner un sens au terme "investissement" ».*[23]

Even more damning is the one sentence in 4A_398/2017 of 16 October 2018, at the very end of a long section on interpretation of treaties:

> *« Ausführungen zur historischen Auslegung (vgl. Art. 32 VRK) erübrigen sich, zumal die Beschwerdeführerin selber vorbringt, die in das Verfahren eingeführten vorbereitenden Arbeiten (travaux préparatoires) seien unvollständig und damit als ergänzendes Auslegungsmittel unbeachtlich. »*

Other treaties entered into by the contracting states and the travaux pertaining to them are not decisive for interpretation. For the Federal Tribunal, the interpretation of the BIT is mainly self-contained and self-sufficient. The primary mechanism relies on the wording of the BIT at hand as interpreted in light of the Vienna Treaty Convention. A comparatist approach, i.e.,

[23] SFSCD 4A_616/2015 of 20 September 2016, ASA Bull. 4/2019, p. 959, para. 3.2.2.

the comparison with other treaties signed by the two countries in question as a secondary interpretation method is unnecessary, and the result might be random because the provisions of each treaty depend on the specific circumstances governing the relations between the States.[24] In the arbitration with Deutsche Telekom, India had made a belated attempt at introducing the travaux préparatoires regarding the Dutch-Indian BIT. Allegedly it had been unable to locate the travaux any earlier. The arbitral tribunal did not allow it. Before the Federal Tribunal, India depicted this as a violation of its right to be heard. The Federal Tribunal dismissed this ground. First, being a contracting state, India really had no excuse of not producing the materials in due time in the arbitration. Second, the material was useful as secondary means of interpretation at most. The Federal Tribunal added that had recourse to secondary means of interpretation been necessary, India should have put on record the materials regarding the treaty at hand, not those pertaining to a treaty it had with a third State.[25]

The single most important yardstick for treaty interpretation in the Federal Tribunal's view is the *effet utile*, even though the Federal Tribunal states that it is not specifically mentioned in Article 31 of the Vienna Convention.[26] If a treaty provision can be construed in more than one way, it has to be construed in the most efficient manner in light of the purpose of the treaty. The *effet utile* is ensured by the combination of an interpretation in good faith and in accordance with the purpose of the treaty (teleological interpretation).

> *« Die Beschwerdeführerin stellt zu Recht nicht in Frage, dass bei der Auslegung des*

[24] SFSCD 4A_65/2018 of 11 December 2018, ASA Bull. 4/2019, p. 1000, para. 3.2.1.2.5.

[25] *Ibid.*

[26] SFSCD 4A_34/2015 (141 III 495) of 6 October 2015, ASA Bull. 4/2019, p. 941, para 3.5.1.

Investitionsschutzabkommens 1998 die Auslegungsgrundsätze nach Art. 31 ff. VRK zu beachten sind. Insbesondere ist ein Staatsvertrag nach Art. 31 Abs. 1 VRK nach Treu und Glauben in Übereinstimmung mit der gewöhnlichen, seinen Bestimmungen in ihrem Zusammenhang zukommenden Bedeutung und im Lichte seines Zieles und Zweckes auszulegen. Zusammen mit der Auslegung nach Treu und Glauben garantiert die teleologische Auslegung den "effet utile" des Vertrags. Der auszulegenden Bestimmung ist unter mehreren möglichen Interpretationen derjenige Sinn beizumessen, der ihre effektive Anwendung gewährleistet und nicht zu einem Ergebnis führt, das dem Ziel und Zweck des Vertrags widerspricht. »[27]

F. Limited remedies against most treaty awards

Bifurcation is a distinct feature of investment treaty disputes. Most claims are relatively complex. So are the jurisdictional thresholds. As a result, arbitral tribunals will often issue non-final awards deciding issues of jurisdiction, possibly with liability. Quantum is left for a subsequent award.

According to Article 186(3) PIL Act, an arbitral tribunal sitting in Switzerland usually decides on its jurisdiction in an interim award if jurisdiction is controversial. Where jurisdictional objections are intertwined with the merits of the case, the arbitral tribunal can defer the decision on jurisdiction to the merits. However, there is no sanction for a violation of this guideline.[28]

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[27] SFSCD 4A_398/2017 of 16 October 2018, para. 4.4.2. See also SFSCD 4A_65/2018 of 11 December 2018, ASA Bull. 4/2019, p. 1000, para. 2.4.2.

[28] SFSCD 4A_98/2017 (143 III 462) of 20 July 2017, ASA Bull. 4/2019, p. 931, para. A.

A non-final award can only be challenged on the grounds listed in article 190(2)(a) and (b) PIL Act. In *Czech Republic v Saluka* for instance, the Federal Tribunal did not review whether a fair and equitable treatment (**FET**) claim had been properly adjudicated in a partial award ("Vor- oder Zwischenentscheid") on issues of jurisdiction and liability. The challenge brought against the finding did not fall under article 190(2)(a) or (b) PIL Act.[29]

An award that decides on some but not all jurisdictional issues cannot be challenged directly at all. The losing party has to wait until the arbitral tribunal has decided its jurisdiction entirely, be it in a final award or in a further interim award. In *Russia v Yukos* the Federal Tribunal held that the request against an award that only partially decided on jurisdictional objections was premature and therefore inadmissible. The issue had not been decided before and Russia itself considered that its request might be premature (its view was confirmed, at the price of CHF 100'000.- in court fees).[30]

The Federal Tribunal does not, save for exceptional circumstances, suspend the Federal Tribunal proceedings pending final resolution of the jurisdictional issues by the arbitral tribunal.

The Federal Tribunal seems to consider that once a party has challenged an award on jurisdictional grounds, it is not necessary that it reiterates its jurisdictional objections in the further arbitration.[31] This is important. Many annulment requests are dismissed because the plaintiff has failed to raise

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[29] SFSCD 4P.114/2006 of 7 September 2006, ASA Bull. 1/2007, p. 123, paras. 4.2 and 6.5.4.

[30] SFSCD 4A_98/2017 (143 III 462) of 20 July 2017, ASA Bull. 4/2019, p. 931, para. A. The parties' names are not published in the decisions of the Supreme Federal Tribunal but have been made public here: https://investmentpolicy.unctad.org/investment-dispute-settlement/cases/609/yukos-capital-v-russia.

[31] *Ibid.*, para. 3.3.

and maintain its jurisdictional objections throughout the arbitration.

Key issues are fact-specific, for instance whether there was an eligible investment under the applicable treaty. The Federal Tribunal does not review the arbitral tribunal's factual findings. This was fatal to the investor's challenge in *Recovi v Vietnam*:

> *« …la subsomption effectuée par le Tribunal arbitral à partir de son interprétation correcte de la disposition litigieuse du TBI est intimement liée à la constatation des circonstances factuelles de la cause pertinente à cet égard. Comme cette constatation relève du domaine exclusif des faits, elle échappe entièrement à la connaissance du Tribunal fédéral. »*[32]

G. Limited scope of review (*Kognition/cognition*)

The Federal Tribunal's scope of review depends on the grounds for the challenge, which, in turn, is determined by the nature of the award. A non-final award can only be challenged on the grounds listed in article 190(2)(a) and (b) PIL Act, i.e., wrongful composition of the tribunal and wrongful decision on jurisdiction. The Federal Tribunal can freely review legal issues pertaining to jurisdiction, including preliminary questions that are decisive. For example, whether the treaty encompasses contract claims by operation of an umbrella clause, or whether the activities deployed by the investor qualify as investment under the applicable BIT.[33]

If a (final) award is challenged on the ground of public policy, the Federal Tribunal does not review whether the arbitrators

[32] SFSCD 4A_616/2015 of 20 September 2016, ASA Bull. 4/2019, p. 1000, para. 3.4.3.

[33] SFSCD 4A_157/2017 of 14 December 2017, ASA Bull. 4/2019, p. 972, para. 3.3.4.

applied the treaty or established the facts correctly. *Poland v Hortel* involved a finding by the arbitral tribunal that certain tax measures while falling short of a confiscation/expropriation were tantamount to a violation of FET. Poland asserted that the award disregarded its sovereignty in tax matters and was incompatible with public policy. The Federal Tribunal refused to verify whether the arbitrator's application of FET and confiscation provisions were correct, what the state's motives for the tax measures were, or verify the facts that were relevant according to the arbitral tribunal. The Federal Tribunal will review, however, whether the (final) award, in its result, is compatible with public policy. Poland had failed to explain why the award in its result was incompatible with the Federal Tribunal's very narrow definition of public policy in international arbitration:

> *« En tout état de cause, la recourante ne fait pas le lien entre la définition de la violation de l'ordre public matériel à l'aune de laquelle le grief correspondant, fondé sur l'art. 190 al. 2 let. e LDIP, doit être examiné et les reproches qu'elle adresse au Tribunal arbitral à ce titre, si bien que l'on ne discerne pas en quoi ces derniers, fussent-ils fondés, impliqueraient nécessairement que la sentence affectée des vices dénoncés violerait des principes fondamentaux du droit de fond au point de ne plus être conciliable avec l'ordre juridique et le système de valeurs déterminants. Sa compréhension de la nature très restrictive de cette notion d'ordre public, propre à l'arbitrage international, est du reste sujette à caution si l'on en juge par le fait qu'elle reprend à son compte la définition des plus larges de l'ordre public, telle qu'elle apparaît dans le passage suivant d'un ouvrage de doctrine de droit privé (PIERRE ENGEL, Traité des obligations en droit suisse, 2e éd. 1997, p. 113) : "l'ordre public est la somme des*

prescriptions légales édictées dans l'intérêt de la communauté" (réplique, n° 22).

Il suit de là que le présent recours, qui ne satisfait pas à l'exigence de motivation découlant de l'art. 77 al. 3 LTF en liaison avec l'art. 42 al. 2 LTF, ne peut qu'être déclaré irrecevable. »[34]

H. Waiver Agreement (Article 192 PIL Act)

Waiver agreements have been fatal to several annulment requests. In *Republic of Lebanon v. France Télécom* (10 November 2005).[35] The Federal Tribunal found that the waiver agreement contained in the following clause of the parties' arbitration agreement was a valid partial waiver of the ground contained in article 190(2)(b), i.e., wrong jurisdictional decision:

"The Parties undertake that they will not challenge the jurisdiction of the UNCITRAL Tribunal whether before the UNCITRAL Tribunal itself or before any national courts. For the avoidance of doubt, the Parties and Y. do not hereby waive their right to challenge any award in the UNCITRAL Arbitration in the place where the award is made or to resist enforcement thereof in the country or countries where enforcement is sought on the grounds contained in the applicable arbitration laws of those countries, save that the Parties will not do so on the ground that the UNCITRAL Tribunal lacked

[34] *Ibid.*, para 3.3.5.

[35] Two decisions were rendered by the Federal Tribunal in this case, both on 10 November 2005. The first was a judgment on Lebanon's challenge of the main award: SFSCD 4P.98/2005 of 10 November 2005, ASA Bull. 1/2006, p. 92. The second was a judgment on Lebanon's challenge of the tribunal's dismissal of a request for correction of the main award: SFSCD 4P.154/2005 of 10 November 2005, ASA Bull. 1/2006, p. 106.

> *jurisdiction to consider one or more of the issues before it."*

The excluded ground of jurisdiction was clearly identified. This was necessary in the Federal Tribunal's view unless the waiver referred specifically to the ground(s) in Art. 190(2) PIL Act that were not open to challenge.[36]

Since the arbitration agreement in a treaty dispute is most often to be found in the treaty itself, so will the waiver. In *Czech Republic v Saluka*[37], the Federal Tribunal rejected Saluka's argument that article 8(7) of the BIT (which provided that the arbitral tribunal's decision "shall be final and binding upon the parties to the dispute") was an advance waiver. Saluka argued that the contracting States had inserted the same language in the state-to-state dispute resolution clause in article 10. The rationale of both exclusions was to prevent any interference by foreign courts at the seat of the arbitration. This was the rule in the framework of ICSID arbitration, which could not have been adopted by the Czech Republic because it was not yet party to the ICSID Convention. Although the language at hand does not suffice as a waiver agreement in commercial arbitration, it should be applied strictly in the particular context of a BIT dispute. The investor who relies on the arbitration option in the BIT could not have more rights than the contracting States. Hence, the waiver should also bind the investor.

Saluka's arguments were rejected by the Federal Tribunal.[38] The Federal Tribunal found that while the contracting States might have excluded any interference by local tribunals in article 10, the identical language in article 8(7) did not necessarily have the same meaning. The Federal Tribunal considered that, when choosing Switzerland as the venue of

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[36] SFSCD 4P.98/2005 of 10 November 2005, ASA Bull. 1/2006, p. 92, para. 4.1.
[37] SFSCD 4P.114/2006 of 7 September 2006, ASA Bull. 1/2007, p. 123.
[38] *Ibid.*, para. 5.

arbitration, the parties were free to take advantage of the possibility afforded by article 192 PIL Act to exclude challenges to the award, but they did not do so. Moreover, the Federal Tribunal was not persuaded that the contracting States to the BIT had really intended to exclude any challenge to the award rendered in an investor-state dispute. The Federal Tribunal noted that such exclusion would not be possible in most countries and was not contemplated in the ICSID Convention either. The Convention provides for its own review mechanism with grounds for annulment similar to those in article 190(2) PIL Act.[39]

As a take away, plaintiffs should note that even if it means treading on dangerous grounds, any possible waiver must be addressed in their annulment request. While the Federal Tribunal now admits and sometimes even orders, a second exchange, this is strictly limited for rebutting the defendant's answer, not to raise new legal or factual arguments.[40]

As a general rule, any second exchange is a mere rebuttal. *India v Deutsche Telekom* provides a good illustration of the Federal Tribunal's view: In support of its position that indirect investments were not covered by the German-Indian BIT, India relied on a certain legal author. In its reply India added several other doctrinal writings, purportedly to rebut Deutsche Telekom's defence that this author's view was not shared by others. The Federal Tribunal observed that this was not an accurate characterization of Deutsche Telekom's defence. The defendant had merely stated that the annulment request relied on a single author, which was not the same as saying that the author was alone to hold this view. In other words, India's new authorities were not rebutting an argument raised

[39] This is not an entirely apposite analogy. Even though the available grounds are similar, the ICSID system is self-contained and excludes interference of national tribunals.

[40] SFSCD 4A_65/2018 of 11 December 2018, ASA Bull. 4/2019, p. 1000, para. 2.2.

by defendant, but merely trying to complete and add weight to the annulment request which was not permissible.[41]

V. Grounds for annulment used in the Federal Tribunal's treaty award decisions

Arbitral awards rendered in Switzerland can be challenged on five grounds. In addition, the extraordinary remedy of a revision is available[42], but will not be further discussed in this paper.[43]

A. Composition of the arbitral tribunal (Art. 190(2) lit. a PIL Act)

Challenging an award on lack of independence or impartiality is a difficult undertaking. By way of illustration there is only one ICSID precedent where a plaintiff was successful in setting aside an award. The *Eiser v. Spain* case.[44]

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41 *Ibid.*, para. 3.2.1.2.4.

42 In SFSCD 4A_65/2018, para 4.4.3, the Federal Tribunal rejected the argument of purported illegality of the investment (alleged corruption between the local company (in which the investor held an indirect investment) and a state-controlled company). The Federal Tribunal added that if by any chance ("d'aventure") a judgement in criminal proceedings were to find a case of illegality, the State could try to file a request for revision of the arbitral award (if all other pre-requisites for a revision were met). It expressed doubts whether wrong-doings by the Indian company in which the investor/claimant indirectly held shares were automatically attributable to the investor.

43 For further references see the comprehensive survey by Catherine ANNE KUNZ, Revision of Arbitral Awards in Switzerland, ASA Bulletin 2/2020.

44 Eiser Infrastructure Ltd. and Energía Solar Luxembourg S.à r.l. v. Kingdom of Spain, ICSID Case No. ARB/13/36, Decision on annulment of 11 June 2020, Award of 4 May 2017, p. 156 (para. 486), available at https://www.italaw.com /sites/default/files/case-documents/italaw9050.pdf.; see also Maël DESCHAMPS, ICSID Award Annulled for Arbitrator's Failure to Disclose Close Ties with Party Expert, in ASA Bulletin 3/2020, p. 659.

In its challenge of a corrected award, Lebanon pointed out that the presiding arbitrator had not signed the award. For Lebanon, the arbitral tribunal was therefore irregularly constituted pursuant to article 190(2)(a) PIL Act. The Federal Tribunal dismissed the argument. A formal defect is not necessarily a testimony to an irregular constitution of the arbitral tribunal.[45] The Federal Tribunal found that the signature was required to show that the arbitrator had participated in the deliberation. The absence of the signature of the presiding arbitrator was a simple oversight. The president had in fact taken part in the tribunal's decision-making. The original produced by the defendants was signed by the president and the president had pointed out in his comments to the Federal Tribunal that he would hardly have notified the award[46] had he not participated in the deliberations.[47]

B. Jurisdiction (Art. 190(2) lit. b PIL Act)

The vast majority of annulments requests against treaty awards is based on Article 190(2)(b) PIL Act: wrong decision on jurisdiction. Jurisdiction is a broader and more complex concept in treaty disputes than in commercial arbitration. The numerous and varying prerequisites in BITs operate as a narrow entry gate to arbitral jurisdiction. Thresholds apply at all jurisdictional levels: ratione personae (what investors are covered), materiae (what investment and breach) and temporis (time of the breach). They all tie back to the question of the State's consent to arbitration.

[45] SFSCD 4P.154/2005 of 10 November 2005, ASA Bull. 1/2006, p. 105, para. 3.1.
[46] The arbitration was subject to the UNCITRAL Rules.
[47] SFSCD 4P.154/2005 of 10 November 2005, ASA Bull. 1/2006, p. 105, para. 3.2.

1. Investor's consent to arbitrate

Contracting states consent to arbitrate with investors by entering into the BIT. The investor is not a party to the BIT. Only the contracting states are. The question arises whether there is an agreement to arbitrate at all on which the investor can rely. In its decision in *Saar Papier v Poland*[48], the Federal Tribunal found that Poland had proceeded on the merits and accepted to arbitrate the dispute. The question was moot. However, the Federal Tribunal added that conceptually the arbitration agreement in the BIT could be characterized as a contract in favour of a third party (the investor) which the third party subsequently accepted by initiating arbitration. The nascent arbitration agreement falls within the scope of Chapter 12 PIL Act. Referring to Article 177(2) PIL Act, the Federal Tribunal added that arbitrability of an investment treaty dispute is not affected by the fact that one of the parties is a state.

In *Czech Republic v Saluka*[49] the Federal Tribunal still grappled with the question of the conclusion of the arbitration agreement and the parties to it. The identity of the parties to the arbitration agreement is a threshold issue to determine whether the PIL Act applies at all. It does if at least one party is domiciled outside Switzerland at the time the arbitration agreement was concluded. The Federal Tribunal again left open the question of which acts at what given time constituted the arbitration agreement applicable to Saluka. It mentioned again the hypothesis of the treaty being a contract in favour of a third party, with a standing offer to arbitrate, accepted by the investor (Saluka). The question was not decisive because the State did not challenge jurisdiction on this ground, and regardless of the decisive act of the acceptance and when it

[48] SFSCD 1P.113/2000 of 20 September 2000, para. 1c.
[49] SFSCD 4P.114/2006 of 7 September 2006, ASA Bull. 1/2007, p. 123, para. 4.1.

occurred, at least one party (the Czech Republic) was not "domiciled in Switzerland".

In *Hungary v EDF*, the Federal Tribunal noted that under the ECT the investor had to give its consent in writing.[50] Since Hungary did not allege that EDF had disregarded the form requirement or that consent was vitiated, the arbitration agreement was formed.

2. *Jurisdiction ratione temporis*

The *Czech Republic v. Saluka* case arose from the privatisation of a Czech bank (IPB) and its acquisition by a foreign investor, the investment bank Nomura. In October 1998 and February 2000, Nomura transferred its stake in the bank to an affiliate, Saluka Investments BV, a Dutch company. In July 2001, Saluka initiated arbitration proceedings against the Czech Republic under the Czech-Dutch BIT. Saluka asserted that it had not received fair and equitable treatment and had been discriminated by the State who had lent financial support to three large Czech banks, but not to IPB. The arbitral tribunal found that the Czech Republic was in breach of its obligations under Article 3.1 of the BIT ("fair and equitable treatment").

Before the Federal Tribunal the Czech Republic argued that the arbitral tribunal lacked jurisdiction. The treaty violation, a government decree announcing financial aid for the three banks published in May 1998, had occurred prior to the investment (October 1998). Thus it was not covered by the BIT.

The Federal Tribunal noted that this view did not reflect the case as it had been pleaded before the arbitral tribunal. Saluka's claim did not rest on the decree itself, but on its implementation, which occurred after Saluka had made its

[50] SFSCD 4A_34/2015 (141 III 495) of 6 October 2015, ASA Bull. 4/2019, p. 941, para. 3.4.2.

investment. The arbitral tribunal had not violated the principle of non-retroactive effect of treaty protection. Indeed, the Republic's treaty violation had not been completed before IPB's transfer from Nomura to Saluka. The Federal Tribunal considered that although the Government policy had been established before Saluka made its investment, its subsequent implementation constituted a continuing breach of the Czech-Dutch BIT.

3. No treaty breach – No jurisdiction?

In *Poland v Saar Papier*, the plaintiff (Poland) asserted that the arbitral tribunal lacked jurisdiction because there was no treaty breach. Arbitration under the Poland-Germany treaty was only available in the event of expropriation or nationalization. Since, in Poland's view, the measures the investors criticized (import ban) did not breach FET standards or prohibition of discrimination, the arbitral tribunal had no jurisdiction. Poland argued that import of waste paper had been prohibited for everyone, and import licenses wrongfully granted to five competitors of Saar Papier's Polish affiliate had been illegal. The obvious answer to this argument would have been that it is a matter of merits rather than jurisdiction whether there is a breach or not. The Federal Tribunal took another route[51]: the Federal Tribunal cannot review the facts underlying the arbitral tribunal's determination on its own jurisdiction. The award had found a violation of FET and non-discrimination and that was the end of the matter. Moreover, the allegation of purported illegality of licenses had not been raised in the arbitration. The challenge was inadmissible on these formal requirements alone.

[51] SFSCD 1P.113/2000 of 20 September 2000, para. 4.

4. Contract claim v. treaty claim

Normally an investor who enters into a contract with a state or a state-controlled entity cannot bring a claim for breach of contract under a BIT. BITs deal with treaty breaches, not contract breaches. Contract breaches have to be brought before the national court or arbitral tribunal that has jurisdiction pursuant to the applicable forum selection or arbitration agreement (if any). However, some treaties contain clauses, commonly called "umbrella clauses", that elevate mere contract breaches to the rank of treaty breaches. Thus, the Energy Charter Treaty provides in article 10 that "*Each Contracting Party shall observe any obligations it has entered into with an Investor or an Investment of an Investor of any other Contracting Party*". Some contracting States have made reservations regarding this clause.

In the decision between Eléctricité de France International SA ("EDF") and the Republic of Hungary,[52] the Federal Tribunal addressed the distinction between contractual claims and treaty claims. An arbitral tribunal seated in Zurich had ordered Hungary to pay EUR 107 million to EDF following the early termination of a power purchase agreement. Hungary argued that this was a contract claim, not a treaty claim. And as a result of a reservation, the umbrella clause in article 10(1) ECT did not operate to transform the contract claim in a treaty claim. The arbitral tribunal had therefore no jurisdiction according to Hungary.

The Federal Tribunal found that Hungary's argument was misguided. The investor had specifically not brought its claim under the umbrella clause but relied on a violation of FET. It was not up to the defendant to recharacterize the "true

[52] SFSCD 4A_34/2015 (141 III 495) of 6 October 2015, ASA Bull. 4/2019, p. 941. The parties' names are not published in the decisions of the Federal Tribunal but have been made public here: http://investmentpolicyhub.unctad.org/ISDS/Details/364.

nature" of the claimant's claim to remove it from the arbitral tribunal's jurisdiction.[53]

5. Investor nationality and treaty shopping

The investor's nationality is crucial for jurisdiction. The investment must be effectuated in the host state by a national of the other contracting state. This rule can be problematic if the investor is a company but controlled by nationals of the host state. It happens indeed that states face claims brought by foreign companies ultimately owned by their own nationals. In the Solar Tax case, the Czech Republic had argued that investors were controlled by Czech nationals, not by a foreign investor. For this reason they could not rely on the ECT or BIT to bring a claim against their home State. The Federal Tribunal did not accept this view after a thorough analysis of the terms of the treaty which bears out the contracting states' intentions. BITs can limit treaty shopping in a number of ways, for instance by requiring that the investor has a real activity (as opposed to being a shell or mailbox company), must not be controlled or have used funds provided by nationals of the host state, and through similar limitation or denial of benefit clauses. If the treaty provides for no such limitations and relies exclusively on the nationality of the (mostly corporate) investor (as determined by its place of incorporation), claims brought by investors of a contracting state are in principle admissible whoever the controlling individuals are.[54] The Tribunal found that in essence the Dutch-Czech/Cyprus-Czech BITs and the ECT operated with the incorporation principle. Any investor incorporated in a contracting state could bring a claim against the host state.[55]

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[53] *Ibid.*, para. 3.5.5.

[54] SFSCD 4A_80/2018 of 7 February 2020, para. 4.

[55] *Ibid.*, paras. 4.4 - 4.7. Regarding the ECT, the Federal Tribunal noted the award's failure to engage with the question whether the alleged treaty shopping or abuse of process barred the investors' claims. The Federal Tribunal undertook this

Even if the terms of the BIT do not put limits for creative investors, there is a bar to engineered claims: Abuse of law and abuse of process.

Savvy parties involved in cross-border business will in the course of their due diligence also vet a host states investment treaty network before making an investment. It is legitimate to structure an investment in a manner that provides maximum protection. This means that from an investment protection perspective, the investor will want to make the investment out of the state that has the most investor-friendly BIT with the host state. This treaty shopping can be achieved by using an affiliate based in said jurisdiction. It might be an existing or a newly established company. The Federal Tribunal admits that investment optimization in itself is not abusive.[56] It can become problematic if this is done after the alleged treaty breach occurred or was foreseeable. In the Natland case the Czech Republic contended that two of the investors had been established soon after it had become predictable that new tax would be levied, with the sole purpose to bring a claim against the Czech Republic under the BITs with these countries. The Federal Tribunal disagreed and found evidence to the contrary: the levying of the tax had not been foreseeable and the hidden purpose of the creation had not been established.[57]

Barring an investor's claim for abuse of process requires, in the Federal Tribunal's words, "exceptional circumstances"[58]. Or put differently: it would not be open to an arbitral tribunal to stifle an investor's claim on the ground of abusive treaty

analysis itself. Remarkably, it did not rely on article 17 of the ECT. This provision, which contains potentially relevant restrictions, was not put forward by the Czech Republic.

[56] *Ibid.*, para. 4.3: « A l'instar de ce qui prévaut en matière fiscale, le *Treaty Shopping* implique de tracer une limite entre la planification légitime et le procédé abusif. »

[57] *Ibid.*, para. 4.

[58] *Ibid.*, para. 4.8.

shopping in the absence of demonstrated exceptional circumstances or of applicable terms in the BIT limiting treaty shopping.

This leads us to the only case where the Federal Tribunal annulled an investment treaty award, *Clorox v Venezuela*.[59] The arbitral tribunal in that case had found that the Spanish investor had made no eligible investment. The arbitrators denied jurisdiction; wrongfully in the Federal Tribunal's view. By the time the Federal Tribunal issued its ruling in this case (25 March 2020) it was familiar with the problematic of treaty shopping and had a clear test in mind. The same five judges had rendered in the previous month the *Czech Republic v Natland* judgement.

The Spanish investor was an affiliate of the large US household cleaning products company Clorox. Clorox (Spain) had been founded in 2011 by Clorox US who contributed all shares in Clorox Venezuela to the newly constituted company's capital. Clorox (Spain) did not have to pay a consideration for the shares. The arbitral tribunal found that all know how and actual investment in Venezuela had been made by two US companies. Clorox (Spain) had made no such investment and had not paid anything for the acquisition of the investment (Clorox Venezuela). In the circumstances the arbitral tribunal denied that Clorox Spain was an investor under and could invoke the Spain-Venezuela BIT. The Federal Tribunal analysed the terms of the BIT. It concluded that the Spain-Venezuela BIT was of the most open and classic kind. It had no other requirement apart from the nationality of the investor. Likewise, the eligible investments were defined very broadly. The problem of treaty shopping was well known and many States had introduced restrictive language in their BITs, or signed multilateral treaties with restrictions (such as the ECT), including Spain. Thus, absent such language in the

[59] SFSCD 4A_306/2019 of 25 March 2020.

Spain-Venezuela BIT, it was reasonably construed to stipulate no other threshold requirement save for the nationality of the investor. Introducing additional requirements not envisaged in the BIT in order to block a Spanish party's claim was therefore improper. The matter was remanded to the arbitral tribunal.

Where the Federal Tribunal remands a case it typically also finds in the operative part of its judgement (with binding effect for the arbitral tribunal) that the arbitral tribunal has jurisdiction. It could not do so in the Clorox case. The arbitral tribunal had not engaged with Venezuela's fall back argument that the claim was barred not only by the terms of the BIT but also by the prohibition of abuse of process. Before the Federal Tribunal, Venezuela demanded that in the event of an annulment of the award the dispute be remanded to the arbitral tribunal to deal with the State's abuse of process/of law and other objections to jurisdiction. Clorox had not addressed this in its reply. Therefore the Federal Tribunal remanded the case to the arbitral tribunal without stating that it had jurisdiction, in order for the arbitral tribunal to determine the abuse of process.

6. Investor's existence as a legal entity

In *Saar Papier v Poland*, the appellant (Poland) asserted that the investor did not exist as a legal entity. The Supreme Federal Tribunal noted that the investor's purported lack of standing had not been raised in the arbitration. It was not open to the appellant to criticize the arbitral tribunal for not having verified the claimant's standing.[60]

[60] In SFSCD 4P.146/2005 of 10 October 2005, ASA Bull. 2/2006, p. 330, para. 5.2.1, not a treaty case, the Federal Tribunal held, however, that certain procedural defects, such as the lack of standing (existence) of a party can be raised at any stage of the proceedings.

7. Eligible investment under the treaty

All BITs define what investments they consider to be worthy of protection. Not all BITs are generous. This requirement is well illustrated by the decision in *Recovi v Vietnam* based on an arbitral award rendered under the France-Vietnam BIT.[61]

a) Monetary claims

Recofi had imported goods and food into Vietnam. In 2013, the French company initiated arbitration proceedings to recoup outstanding payments. The arbitral tribunal declined its jurisdiction because the monetary claims did not qualify as an investment under the France-Vietnam BIT. The arbitral tribunal held that for the purpose of the BIT, an investment had to meet three cumulative conditions: i) fall into one of the categories mentioned in the BIT, ii) be in conformity with the host state laws, and iii) made in its territory. The arbitral tribunal found that the French company had not demonstrated a contribution to Vietnam's overall economic development, a transfer of capital, technology or know how. Neither was there a significant local establishment. The fact that the company had a local branch did not establish a sufficient presence, as it only provided administrative support.[62]

Recofi filed a motion to set aside the interim award invoking Article 190(2) lit. b PILA (wrong decision on jurisdiction).

First, the Federal Tribunal addressed the question whether Recofi's trade was to be considered an investment according to Article 1(1) of the France-Vietnam BIT. The Federal Tribunal noted that the definition of the term "investment" has been one of the most controversial questions in investment

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[61] SFSCD 4A_616/2015 of 20 September 2016, ASA Bull. 4/2019, p. 959, para. A-C. The parties' names are not published in the decisions of the Supreme Federal Tribunal but have been made public here: https://investmentpolicy.unctad.org/investment-dispute-settlement/cases/554/recofi-v-viet-nam.

[62] *Ibid.*

arbitration[63]. The term had to be interpreted according to the France-Vietnam BIT. It rejected Recofi's reliance on ICSID precedents and legal writings which recognised monetary claims as investments.[64]

In line with the arbitral tribunal's award, the Federal Tribunal held that Recofi's activities did not qualify as an investment in the sense of the France-Vietnam BIT.[65]

b) Indirect investment

Some treaties limit their protection to direct investments in the host state by an investor from the other contracting state, or even exclude "indirect" investments specifically. Many treaties simply cover "investments" generically. The question arises whether this goes to include or exclude indirect investment. In *India v Deutsche Telekom* the state argued that Deutsche Telekom was not an eligible investor. It had not invested directly in India but through an affiliate in Singapore that bought (with funds provided by Deutsche Telekom) shares in an Indian company.[66]

The Federal Tribunal pointed out that most arbitral tribunals who had to deal with this issue have accepted that the absence of exclusion means inclusion. Where a treaty did not expressly include indirect investments they were nevertheless

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[63] *Ibid.*, para 3.2.2 : « Le sens ordinaire du terme en question demeure l'un des plus controversés à ce jour dans le contentieux des investissements internationaux, et l'on ne compte plus les tentatives qui ont été faites par les tribunaux arbitraux appliquant les règles du CIRDI, de la CNUDCI ou d'autres institutions d'arbitrage pour en délimiter les contours. »

[64] *Ibid.*, paras. 3.2.2 and 3.4.

[65] *Ibid.*, para. 3.4.4.

[66] Deutsche Telekom holds a 20% stake in the Indian telecommunication company Devas Multimedia ("Devas"). Devas – via a Singaporean subsidiary – entered into a contract with the Indian state-owned company Antrix to build, launch and operate two satellites and an S-band spectrum. This would have allowed Devas to offer wireless and broadband services in India. In 2011, the contract was cancelled by Antrix because the Indian government ultimately decided to not permit the commercial use of the satellites.

considered covered. According to the Federal Tribunal, this was also the case in the Germany-India BIT.[67]

c) Pre-investment

Certain treaties demand that protected investments must reach a certain duration and intensity. Mere pre-investments or portfolio investments are excluded. India argued this point in its dispute with Deutsche Telekom. The Federal Tribunal flatly denied it, noting that Deutsche Telekom had invested specifically in a company within its core competence (telecom). Moreover the company had already a contract with the Indian Government.[68] This was neither a pre-investment nor a portfolio investment.

8. Essential security interests as a bar to jurisdiction

India invoked a security interest exemption in its treaty with Germany before the Federal Tribunal and argued that the exemption operated as a bar to the arbitral tribunal's jurisdiction. The argument was rejected because in the underlying arbitration, India had never argued that Article 12 BIT could affect the arbitral tribunal's jurisdiction. In accordance with the principle of good faith, India was estopped from doing so retrospectively before the Federal Tribunal.[69]

9. Legality of investment/Investment compliant with law

India challenged the arbitral tribunal's jurisdiction on the basis that the investment itself was unlawful. The Federal Tribunal

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[67] SFSCD 4A_65/2018 of 11 December 2018, ASA Bull. 4/2019, p. 1000, para. 3.2.1.2.4.
[68] *Ibid.*, para. 3.2.2.2.2.
[69] *Ibid.*, para. 3.2.3.3.1.

in principle accepted India's argument that the question of whether an investment was legal (in the sense of a "compliance clause") pertained to the definition of an investment and thus potentially impacted the jurisdiction of the arbitral tribunal. Yet again, India was precluded from challenging the award based on the alleged illegality. It was aware corruption allegations since 2009 and only brought them to the arbitral tribunal's attention in 2016.[70]

10. Tax exemption

Under many BITs and the ECT (Art. 21) the State reserves its fiscal prerogatives. Thus, article 21 ECT provides that "… nothing in this Treaty shall create rights or impose obligations with respect to Taxation Measures of the Contracting Parties". The Czech Republic relied on article 21 to argue that the arbitral tribunal had no power to review a controversial solar tax which the investor considered to be tantamount to a treaty breach. The Federal Tribunal sided with the arbitral tribunal in considering that the tax was not a Taxation Measure, and that the arbitral tribunal had jurisdiction.

11. Territorial application

Two Ukrainian oil and gas companies Ukrnafta and Stabil (and other claimants) brought arbitrations against Russia under the Russia-Ukraine BIT after the seizure of the companies' assets (gas stations and offices) in Crimea during Russia's annexation of the territory in early 2014. In the two decisions of the Federal Tribunal, 4A_396/2017 and 4A_398/2017 dated 16 October 2018,[71] the Federal Tribunal had to decide whether

[70] *Ibid.*, para. 4.4.

[71] SFSCD 4A_396/2017 (144 III 559) of 16 October 2018 (Russian Federation v. Ukrnafta), ASA Bull. 4/2019, p. 983. Also on 16 October 2018, the Federal Tribunal rendered another decision, 4A_398/2017 of 16 October 2018 (Russian Federation v. Stabil et al.) with the same reasoning but with a different fact

the arbitral tribunal had correctly accepted its jurisdiction over the claims brought by the investors. Russia argued that that the relevant territory was the one existing when the treaty was entered into. In 1998, Crimea was part of Ukraine, and the investments were made in Ukraine and not in Russia. The arbitral tribunal was wrong to have accepted jurisdiction since Crimea was not part of Russia when the BIT was concluded.

The Federal Tribunal rejected this view. The relevant point in time for establishing the territory on which the investment was made, was the one at the time of the breach. Similarly, the investor's nationality was the one he had at the time of the alleged breach.[72]

C. *Ultra petita* (Art. 190(2) lit. c PIL Act)

In Saar *Papier v Poland* the investor relied on article 190(2)(c) PILA to contend that the award was *infra petita*. It alleged that the operative part of the award, by dismissing Saar Papier's claim in the amount of DM 31'118'876, omitted to rule on the additional 0.94 DM Saar Papier had originally claimed (Saar Papier had claimed a total of DM 31'118'876.94 DM). As the Federal Tribunal noted, this was quite obviously a mistake, as was also evident from the reference in the award to an interim award where the precise amount of the claim had been mentioned.[73]

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section involving different investors. The investors' names are not published in the decisions of the Federal Tribunal but are in the public domain: https://investmentpolicy.unctad.org/investmentdispute-settlement/cases/654/stabil-and-others-v-russia.

[72] Russia also challenged the final awards in the disputes against Stabil and Ukrnafta, inter alia on the ground that the disputes about borders were not economic and hence not arbitrable (Article 177 PIL Act). The Federal Tribunal found that the investors' claims for damages were monetary and arbitrable, and the arbitral tribunal had not decided the public international law status of the Crimea SFSCD 4A_244/2019 and 4A_246/2019 of 12 December 2019.

[73] SFSCD 4P.200/2001 of 1 March 2002, ASA Bull. 2/2009, p. 325, para 3b.

Saar Papier also took issue with the ruling in the operative part that "[a]ny other or further claims of the Parties are denied". It was noted that the arbitral award did not identify the claims and that they were only identified in a previous award. The Federal Tribunal conceded that the ruling was not easily intelligible (shorthand for perfectly sloppy) but on its terms it only concerned prayers that were actually made and therefore did not go beyond these prayers. "Ultra" and "extra petita" were excluded.[74]

Where an arbitral tribunal is asked to correct or rectify an award, it can also go beyond the prayer and commit ultra petita. In *Lebanon v France Télécom*, Lebanon had asked for a correction of an amount in the operative part of the award to match the reasons section in the body of the award. The arbitral tribunal rejected the request since the error was made in relation to the reasons, whereas the operative part was correct. Changing the reasons rather than the operative part when dealing with a correction is not ultra petita.[75]

D. Right to be heard (Art. 190(2) lit. d PIL Act)

In *Saar Papier v Poland* the investor raised a due process argument. The arbitral tribunal had not acceded to a request to hold a hearing. The Federal Tribunal observed that the arbitral tribunal had closed the proceedings and informed the parties that no new allegations or evidence was admissible without prior leave. This reflected generally accepted principles of an orderly conduct of proceedings and could not be criticized as violation of the right to be heard.

Similarly, India, who had belatedly queried the legality of Deutsche Telekom's investment in the arbitration, could no

[74] *Ibid.*, para. C and 3c.
[75] SFSCD 4P.154/2005 of 10 November 2005, ASA Bull. 1/2006, p. 105.

longer raise a corruption defense in before the Federal Tribunal.[76]

In *Recofi v Vietnam*, Recofi saw a violation of due process in an alleged inversion of the burden of proof. Recofi argued that the arbitral tribunal had found against Recofi for filing the French parliament's *travaux préparatoires* but not those of Vietnam. This was an impossible task because under French law it could not obtain the Vietnamese *travaux* from the French government. The Federal Tribunal found that Recofi was not barred from raising a due process violation because it only learnt of the alleged inversion of the burden of proof when it read the award. It could not have reacted earlier. The Federal Tribunal then rejected the alleged violation of due process because the rules on the burden of proof were not part of the substantive public policy according to Article 190(2) lit. e PIL Act. This is a strange finding in the sense that the Federal Tribunal referred to a ground (i.e. public policy) which was not raised by the plaintiff. The Federal Tribunal then examined whether the argument met the test for a due process violation under article 190(2)(d) and decided to the contrary. Recovi had not been prevented from adducing evidence and had not established that it had relied on Vietnam's *travaux préparatoires* or asked the arbitral tribunal to order the State to produce them.[77]

E. Public policy (Article 190(2) lit. e PIL Act)

1. EU law

In *Hungary v Hortel* Hungary submitted that the award violated substantive public policy pursuant to Article 190(2)

[76] SFSCD 4A_65/2018 of 11 December 2018, ASA Bull. 4/2019, p. 1000, para 4.5.
[77] SFSCD 4A_616/2015 of 20 September 2016, ASA Bull. 4/2019, para. 4.3.2.

lit. e PIL Act.[78] According to the State, the arbitral tribunal's payment order was incompatible with European law. The Federal Tribunal found that it was not certain that EU law was violated at all or that the argument had been properly brought to the arbitral tribunal's attention. Ultimately, the Federal Tribunal rejected the argument on a procedural ground. The State's objection went to due process rather than a public policy violation. The proper basis for the State's argument that the arbitral tribunal had failed to duly consider its position was Art. 190(2) lit. d PIL Act (due process), rather than lit. e (public policy). As the State had not relied on that ground in its annulment request this argument was not admissible.[79]

2. Illegality

Russia belatedly raised the illegality argument against the final award in the Stabil case.[80] The state tried to demonstrate in the Federal Tribunal proceedings that an important shareholder of the claimant owed his wealth to criminal enterprises and that the investment was marred by corruption. The Federal Tribunal rejected the new documents. New evidence is not admissible in annulment proceedings. Moreover, the argument itself was belated. The state did not argue in the arbitration that the investment had involved corrupt practices, and was thus estopped from raising a public policy defense in the annulment proceedings: "*Mit dem erst vor Bundesgericht erhobenen Einwand, die fraglichen Investitionen seien unter betrügerischen Umständen zustande gekommen, ist sie nicht zu hören, weshalb die darauf gestützte Rüge der Verletzung des Ordre public nach Art. 190 Abs. 2 lit. e IPRG von vornherein ins Leere stösst*.»

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[78] SFSCD 4A_34/2015 (141 III 495) of 6 October 2015, ASA Bull. 4/2019, p. 941, para. 5.

[79] *Ibid.*, para. 5.3.2.2.

[80] SFSCD 4A_244/2019 and 4A_246/2019 of 12 December 2019. Reported in GAR, Russia fails to overturn Crimea awards, GAR 18 December 2019.

India also raised an illegality defense. As a bar against jurisdiction, not as a public policy ground (see section V. B. 9. above).

3. *Res judicata*

In *Saar Papier v Poland*, the Federal Tribunal found that the principle of *res judicata* to be a universal doctrine. Its violation could be tantamount to a violation of (procedural) public policy and result in the annulment of the award.[81] However, only final awards can be challenged based on a *res judicata* violation.

In *Lebanon v France Télécom*, Lebanon argued that the arbitral tribunal should have deferred to a decision ("ordre de recouvrement") of a Lebanese administrative body ("conseil des ministers") which ordered the telecom operators to pay US$ 300 million as a preliminary assessment of damages incurred by the State due to the poor performance of the mobile telephone network agreements. The award thus violated *res judicata* and public policy pursuant to article 190(2)(e) PILA. The Federal Tribunal found that it was questionable whether administrative decisions benefited from *res judicata* effect.[82] It also queried whether a tentative damage assessment issued by the State itself could have that effect and bar any subsequent determination. Lastly, the State's *res judicata* argument was doomed to fail because it had agreed to suspend the "ordre de recouvrement" pending the arbitration and to adjust the amount or withdraw the order based on the findings of the arbitral award.

4. *Pacta sunt servanda*

In *Lebanon v France Télécom*, Lebanon claimed that the award was contrary to public policy in that it violated the

[81] SFSCD 1P.113/2000 of 20 September 2000, para. 3.
[82] SFSCD 4P.98/2005 of 10 November 2005, ASA Bull. 1/2006, p. 92, para. 5.1.

principle of *pacta sunt servanda* by admitting the operators' claim to exploit the GPRS network yet rejecting the Lebanese counterclaim for compensation. The Federal Tribunal confirmed that the legal principle of *pacta sunt servanda* was a fundamental one whose violation would be incompatible with the Swiss juridical order.[83] However, it stressed that in order for there to be a violation of the principle, the tribunal must have refused to give effect to a clause while simultaneously admitting that it bound the parties; or conversely, must have given effect to a clause which it recognized did not bind the parties.[84] In the award in question, there was no such contradiction.[85]

5. Expropriation without compensation

In the second *Saar Papier v Poland* case[86], the arbitral tribunal dismissed the German investor's claim for damages based on lost profits. The Federal Tribunal decision does not elaborate on the particulars of the investor's claim or the BIT provision on which it relied (presumably Article 4(2)). Apparently, the investor had calculated its claim as a function of its own lost profits. The arbitral tribunal did not accept this valuation method and instead relied on the direct damage which it found to be the value of the investment, i.e., the local affiliate which had been since liquidated ("*wirtschaftlicher Wert der Investition – der jenem der inzwischen untergegangenen Tochtergesellschaft entpricht", Article 4(2) of the BIT refers to* "*Wert der enteigneten Kapitalanlage*"). Saar Papier argued that this was a violation of the prohibition of expropriation without compensation.

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[83] *Ibid.*, para. 5.2.1.

[84] *Ibid.*, para. 5.2.1; citing SFSCD 4P.71/2002 of 22 October 2002, ASA Bull. 2/2003, p. 376, para. 3.2.

[85] *Ibid.*, para. 5.2.1, 5.2.2, citing SFSCD 4P.12/2000 of 14 June 2000, para. 4a/bb.

[86] SFSCD 4P.200/2001 of 1 March 2002, ASA Bull. 2/2009, p. 325.

The Federal Tribunal confirmed that this is a principle firmly rooted in public policy. Yet the investor had been compensated, and there is no absolute right in public international law to full compensation. In essence, the investor took issue with the arbitral tribunal's interpretation of the BIT. According to the investor, the BIT required compensation for lost profits. A wrong interpretation of a rule of law is not tantamount to a public policy violation ("*reicht jedoch die falsche Auslegung einer Rechtsregel nicht für einen Verstoss gegen den Ordre public aus*").[87]

6. Interference with the State's fiscal prerogatives and sovereignty in tax matters

Three Dutch companies active in the gambling industry in Poland (Hortel Systems BV, Poland Gaming Holding BV and Tesa Beheer BV) sued Poland following steep tax increases on slot machines which ousted them from Poland. The arbitral tribunal ruled that the imposed tax measures did not constitute an expropriation according to the BIT. However, Poland had violated the BIT's fair and equitable treatment clause and ordered the state to pay Zlotys 37 million and interest.[88]

Poland filed a motion to set aside the final award before the Federal Tribunal where it argued that the award violated substantive public policy:

- First, it restricted Poland's fiscal sovereignty which is protected by customary public international law.[89]
- Second, the arbitral tribunal had allegedly disregarded the goal of the tax measures, to protect the population from the dangers of

[87] *Ibid.*, para. 2.
[88] SFSCD 4A_157/2017 of 14 December 2017, ASA Bull. 4/2019, p. 972, para. B.
[89] *Ibid.*, para. 3.2.1.

> gambling; a concern the state shares with other European countries, such as Switzerland.[90]

The Federal Tribunal recalled that it reviews, without restriction, all legal questions relevant to the arbitral tribunal's jurisdiction (pursuant to Article 190(2) lit. b PIL Act). The Federal Tribunal referred to earlier decisions where it had analysed an umbrella clause (*Hungary v. EDF*) or verified whether there was an investment for the purpose of a BIT (*Recofi v. Vietnam).* When an award is challenged on the ground of public policy, however, the Federal Tribunal's review is limited. The Federal Tribunal is not allowed to assess whether the BIT in question was interpreted correctly.[91] Thus, the Federal Tribunal did not review whether the award was right in considering that Poland had violated the FET standard of the BIT, and whether fiscal prerogatives or combatting gambling justified the State's actions. In any event, the Federal Tribunal pointed out that the annulment request failed to connect the Federal Tribunal's definition of public policy and the alleged flaws in the award.[92]

VI. Conclusion

What conclusions can counsel draw from the Federal Tribunal's decisions? They are different in many ways from decisions in commercial arbitration matters. First of all, they are often longer, paragraph numbering running into five digits. The Federal Tribunal has not always been at ease in this area, but appears to be more comfortable with it now. It annulled, in a relatively short decision, a treaty award for the first time, in line with the treaty interpretation rules it had developed over the last couple of years.

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[90] *Ibid.*, para. 3.2.2.
[91] *Ibid.*, para. 3.3.4.
[92] *Ibid.*

Second, the decisions deal primarily with jurisdiction under the treaty at hand. On the one hand, many awards that end up before the Federal Tribunal are awards on jurisdiction. On the other hand, jurisdiction is a very complex and controversial matter in treaty disputes.

Frequently, parties to treaty disputes in Switzerland are represented by foreign counsel. Swiss counsel who were not involved in the underlying arbitration would be engaged for the annulment proceedings before the Federal Tribunal. When the matter reaches the Federal Tribunal, it will often be too late for Swiss counsel to provide guidance on the arbitration itself. Such guidance would typically include raising and maintaining objections to jurisdiction and due process violation throughout the arbitration.

When asked to assist for annulment proceedings Swiss counsel should have a number of reactions specifically based on the Federal Tribunal's decisions in treaty matters:

- Identify the nature of the award (which determines the grounds available for a challenge).
- Verify whether a waiver agreement pursuant to art. 192 PIL Act exists.
- Put all arguments, legal and factual in the annulment request, including a discussion on waiver language (Art. 192 PIL Act). The second round is limited to rebuttal. The Federal Tribunal will not allow the parties to improve on their first round briefs.
- Request security for costs and a stay of the arbitration or the Federal Tribunal proceedings, if applicable and opportune.
- If jurisdiction is an issue, analyse whether the arbitral tribunal strained from the treaty

interpretation rules applied by the Federal Tribunal.

While the success ratio of annulment requests against treaty based awards is very low, lower even than that of challenges to commercial arbitration awards, hope is not lost for plaintiffs. The Federal Tribunal will, however, not allow plaintiffs to introduce arguments they could have used in the underlying arbitration.

ANNEX: LIST OF THE REPORTED FEDERAL TRIBUNAL DECISIONS IN TREATY-ARBITRATION MATTERS

Name of the Parties	Decision number	Date	Applicable treaty
Republic of Poland v. Saar Papier	1P.113/2000/mks	20 September 2000	Germany-Poland BIT
Saar Papier v. Republic of Poland	4P.200/2001/md[93]	1 March 2002	Germany-Poland BIT
Republic of Lebanon v. France Télécom Mobiles International SA & FTLM S.A.L.	4P.98/2005[94] 4P.154/2005[95]	10 November 2005	France-Lebanon BIT
Czech Republic v. Saluka	4P.114/2006[96]	7 September 2006	Czech Republic-Netherlands BIT
Republic of Hungary v. EDF	141 III 495[97] (4A_34/2015)	6 October 2015	ECT

[93] ASA Bull. 2/2009, p. 325.
[94] ASA Bull. 1/2006, p. 92.
[95] ASA Bull. 1/2006, p. 105.
[96] ASA Bull. 1/2007, p. 123.
[97] ASA Bull. 4/2019, p. 941.

Name of the Parties	Decision number	Date	Applicable treaty
Recofi SA v. Socialist Republic of Vietnam	4A_616/2015[98]	20 September 2016	France-Vietnam BIT
Russian Federation v. Yukos Capital Sàrl	143 III 462[99] (4A_98/2017)	20 July 2017	ECT
Republic of Poland v. Hortel Systems BV, Poland Gaming Holding BV & Tesa Beherr BV	4A_157/2017[100]	14 December 2017	Netherlands -Poland BIT
Republic of Serbia v. Mytilineos	4A_507/2017[101]	15 February 2018	Greece-Serbia BIT
Russian Federation v. Ukrnafta & Stabil et al.	144 III 599 (4A_396/2017)[102] 4A_398/2017	16 October 2018	Russia-Ukraine BIT

[98] ASA Bull. 4/2019, p. 959.
[99] ASA Bull. 4/2019, p. 931.
[100] ASA Bull. 4/2019, p. 972.
[101] ASA Bull. 2/2018, p. 454.
[102] ASA Bull. 4/2019, p. 983. A procedural order in the same matter is published in ASA Bull. 2/2018, p. 456.

Name of the Parties	Decision number	Date	Applicable treaty
India v. Deutsche Telekom	4A_65/2018[103]	11 December 2018	India-Germany BIT
Russian Federation v. Ukrnafta & Stabil et al.	4A_244/2019 ; 4A_246/2019	12 December 2019	Russia-Ukraine BIT
Natland Investment Group NV (The Netherlands), Natland Group Limited (Cyprus), GIHG Limited (Cyprus) and Radiance Energy Holding Sàrl (Luxembourg) v Czech Republic	4A_80/2018	7 February 2020	ECT
Clorox España v The Bolivarian Republic of Venezuela	4A_306/2019	25 March 2020	Spain-Venezuela BIT

[103] ASA Bull. 4/2019, p. 1000.

Sports Arbitration and the European Convention of Human Rights – *Pechstein* and beyond

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Contents

I. Introduction

Until recently, the European Court of Human Rights (hereinafter the **ECtHR** or **the Court**) had been only marginally involved in sports matters in general, and even less in matters related to sports arbitration. Since the creation of the Court of Arbitration for Sport (**CAS**), a couple of sports arbitration matters were brought to Strasbourg but nothing really meaningful until the landmark *Mutu & Pechstein* case of 2018.[1] Since then, the sports arbitration case law of the Court has developed to a point where it is worth attempting an analysis, in particular now that the first cases relying on such case law are being brought before the Swiss Federal Tribunal.

II. Pechstein v. Switzerland….

As is apparent from the title of this section, we will discuss the ECtHR' judgment in *Mutu & Pechstein* only in its "Pechstein limb". Indeed, while the Mutu and Pechstein applications were consolidated before the ECtHR, only the case of Claudia Pechstein v. the International Skating Union (ISU) was a typical CAS appeals arbitration case, where a governing body sanctions an athlete based on its sports regulations, which also provide that any dispute about such sanctions shall be finally decided by the CAS. This is also why we will refer to the ECtHR's judgement as the **Pechstein Decision**. For the purposes of the present contribution, in this section, we shall briefly recall the factual and procedural background of the *Pechstein* case (A.), in order to introduce the athlete's claims (B.) and the Court's analysis, including the dissenting opinion

[1] ECtHR, Case of *Mutu & Pechstein v. Switzerland* (Applications nos. 40575/10 and 67474/10), judgment of 2 October 2018, available at http://hudoc.echr.coe.int/eng?i=001-186828 and at https://www.bger.ch/ext/eurospider/live/fr/php/clir/http/index.php?highlight_docid=cedh://20181002_40575_10:fr&lang=fr&type=show_document.

on the central question of the structural independence of the CAS (C.).

A. Factual and procedural background

Following a series of anti-doping controls that showed an anomalous pattern in her blood profile, on 1st July 2009, Claudia Pechstein was found guilty of doping and banned for two years by the ISU. Ms Pechstein and her national federation (the *Deutsche Eisschnelllauf- Gemeinschaft - DESG*) appealed the ISU's decision before the CAS.

During the CAS proceedings, the Panel rejected Ms Pechstein's request for a public hearing, heard testimony from twelve experts, and eventually, by an award dated 25 November 2009, dismissed the appeal (confirming the 2-year ban).

Ms Pechstein then filed an action to set aside the CAS award before the Swiss Federal Tribunal based on the following main contentions:

- the CAS does not constitute an independent and impartial tribunal under Article 190(2)(a) of the Swiss Private International Law Act (**PILA**) given (i) the way in which the arbitrators are appointed, (ii) the fact that the President of the Panel in question was (according to Ms Pechstein) a notorious hardliner in anti-doping matters and (iii) that, again according to Ms Pechstein, the CAS Secretary General had modified the award when conducting his scrutiny prior to the award's issuance.
- By refusing to hold the hearing in public, the CAS breached Ms Pechstein's right to be heard, in violation of Articles 182(3) and 190(2)(d) PILA.
- The award was incompatible with public policy within the meaning of Article 190(2)(e) PILA.

By a decision dated 10 February 2010, the Swiss Federal Tribunal rejected Ms Pechstein's action to set aside the CAS award.[2]

On 11 November 2010, Ms Pechstein filed an application against the Swiss Confederation under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms (the **ECHR** or the **Convention**). As will be further discussed below, Ms Pechstein's complaints related to alleged contraventions of Articles 6(1) and 6(2) of the ECHR.[3]

B. Ms Pechstein's complaints under Article 6(1) ECHR

In its relevant part, Article 6(1) ECHR reads as follows:

> *In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing [...] by an independent and impartial tribunal [...] Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.*

Ms Pechstein claimed in substance that both (i) the Swiss Federal Tribunal's case law acknowledging the CAS as an independent – and thus genuine – arbitral tribunal and (ii) the fact that she was not provided a public hearing (either before

[2] SFSCD 4A_612/2009 of 10 February 2009.
[3] Pechstein Decision, cit. Fn. 1, § 1-4.

the CAS or before the Swiss Federal Tribunal), constituted a breach of Article 6(1) ECHR.[4]

As an aside, it is worth noting that that Ms Pechstein also complained that Swiss law does not provide for any possibility to re-examine the fact-finding process by the CAS and that the Swiss Federal Tribunal has a very narrow scope of review, which would constitute a separate violation of the right to a fair hearing.[5] Curiously, this complaint was not discussed in the Decision, neither in the majority opinion, nor by the minority judges. Interestingly, the issue was addressed in a subsequent ECtHR judgment, in the *Bakker v. Switzerland* case, where the Court held that the complaint based on the limited scope of review by the Federal Tribunal under Article 190 PILA was groundless since (i) the athlete could benefit from a *de novo* hearing before the CAS, with full review of both the facts and the law, and (ii) precisely, the CAS had been deemed an independent tribunal by (the majority of) the Court in *Pechstein*.[6]

C. The Court's analysis

In its Decision, the Court first considered the questions of the applicability of Article 6(1) ECHR to arbitration (1.) and jurisdiction *ratione personae* (2.). The Court then moved on to consider a possible waiver of the applicability of Article 6(1) ECHR in arbitration proceedings (3.), as well as the specific rights and requirements which were alleged by Ms Pechstein to have been breached, namely (i) the right to a public hearing (4.) and (ii) the requirement of independence and impartiality in arbitration proceedings (5.).

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4 Pechstein Decision, cit. Fn. 1, § 52.

5 *Ibid*.

6 *Erwin Bakker v. Switzerland*, application No. 7198/07, judgment of 3 September 2019, § 47.

1. The applicability of Article 6(1) ECHR

As far as the applicability of Article 6(1) ECHR was concerned, the ECtHR rejected the traditional case law of the Swiss Federal Tribunal according to which Article 6(1) ECHR is only "indirectly applicable" in arbitration (i.e. to the extent that some of the protections of Article 6(1) are implemented at the stage of the action to set aside the award). According to the ECtHR, Article 6(1) ECHR is directly applicable to all adjudication proceedings, including arbitration, where they concern the determination of "civil rights and obligations or of any criminal charge".[7] The ECtHR considered that civil rights and obligations were clearly at issue in the *Pechstein* case, which arose from a "disciplinary procedure before the professional bodies and in the context of which the right to carry on an occupation is at stake".[8]

2. Jurisdiction *ratione personae*

The Court acknowledged that it had *ratione personae* jurisdiction to rule on the complaint based on Article 6 ECHR despite the CAS being a private entity and not a state court or another institution of Swiss public law, since CAS awards are given *res judicata* effect in Switzerland by operation of Chapter 12 of the PILA.[9]

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[7] Pechstein Decision, cit. Fn. 1, § 56.

[8] *Id*., § 58.

[9] *Id*., §§ 66-67, where the Court noted that "in certain exhaustively enumerated circumstances, especially as regards the lawfulness of the composition of the arbitral tribunal, Swiss law confers jurisdiction on the [Federal Tribunal] to examine the validity of CAS awards".

3. Possible waiver of Article 6(1) ECHR in arbitration proceedings

The first substantive issue addressed by the ECtHR was the possibility for the parties to the arbitration to (have) waive(d) the guarantees enshrined in Article 6(1) ECHR.

a) Voluntary arbitration v. compulsory arbitration

The Court held that such a waiver is conceivable only in case of "voluntary arbitration" freely agreed upon by the parties, but is excluded "[i]f arbitration is compulsory, in the sense of being required by law". In the latter case "the parties have no option but to refer their dispute to an arbitral tribunal, which [then] must afford the safeguards secured by Article 6 § 1 of the Convention".[10]

b) CAS arbitration in disciplinary matters is compulsory

According to the case law developed by the ECtHR with regard to arbitration matters, a waiver of guarantees under the Convention is compatible with the ECHR only if consent is given "in a free, lawful and unequivocal manner".[11] Applying these principles to CAS arbitration, the Court noted that CAS jurisdiction is often provided for by the applicable sports regulations, which means that athletes are "obliged […] to accept the arbitration agreement in order to take part in competitions". Considering the monopolistic structure of sports-governing bodies, the Court held that the "choice before the [athlete] had not been whether to take part in one competition rather than another, depending on whether or not she had accepted the arbitration clause". Rather, the only choice available to Ms Pechstein was between "accepting the

[10] *Id*., § 95.

[11] *Id*., § 96, referring in particular to *Eiffage S.A. and others v. Switzerland*, application No. 1742/05, judgment of 15 September 2009.

arbitration clause and thus earning her living by practising her sport professionally, or not accepting it and being obliged to refrain completely from earning a living from her sport at that level".[12]

This might appear an obvious conclusion, and indeed the Swiss Federal Tribunal had already acknowledged that.[13] However, the Federal Tribunal only analyzed the issue in connection with the validity of a waiver of the action to set aside under Article 192(1) PILA. The ECtHR's Pechstein Decision is the first instance where a court discussed the consequences that the compulsory nature of CAS appeals arbitration has on the conduct of proceedings before the CAS.

c) Full applicability of Article 6(1) ECHR

Confirming the views of some authors,[14] the Court concluded that "even though it had not been imposed by law but by [sports] regulations, the acceptance of CAS jurisdiction by [the athlete] must be regarded as 'compulsory' arbitration", which means that CAS "arbitration proceedings therefore had to afford the safeguards secured by Article 6 § 1 of the Convention".[15]

4. The right to a public hearing

Public hearings and arbitration are traditionally antonymous notions, as the parties' choice to arbitrate their dispute is deemed to include an explicit or implicit waiver of the right to a public hearing. Until the Pechstein Decision, this was also

[12] Pechstein Decision, cit. Fn. 1, § 113.

[13] SFSCD 133 III 235.

[14] MATHIEU MAISONNEUVE, Le Tribunal arbitral du sport et le droit au procès équitable : l'arbitrage bienveillant de la Cour européenne des droits de l'homme, Revue trimestrielle des droits de l'homme (RTDH), Vol. 30, No. 119, 2019, pp. 687-705; ULRICH HAAS, The Role and Application of Article 6 of the European Convention on Human Rights in CAS Procedures, International Sports Law Review 2012/3, pp. 43-60.

[15] Pechstein Decision, cit. Fn. 1, § 115.

the case in all CAS proceedings (i.e. including in appeals and disciplinary cases). While the awards rendered in such cases are, as a matter of principle, non-confidential (Article R59 CAS Code *in fine*) and to some extent published,[16] Article R57 of the CAS Code in its version in force at the time Ms Pechstein's case was heard by the CAS specifically provided that "[a]t the hearing, the proceedings take place in camera, unless the parties agree otherwise".

As the Court ruled that the compulsory nature of CAS arbitration requires the full applicability of Article 6(1) ECHR, and that "the public character of proceedings constitutes a fundamental principle enshrined in Article 6 § 1 of the Convention",[17] it was inevitable that the guarantee of public hearings would also be declared applicable to CAS proceedings.

According to the Court, the right to a public hearing "protects litigants against the administration of justice in secret with no public scrutiny and is thus one of the means whereby confidence in the courts can be maintained."[18] Moreover, and while Article 6(1) ECHR explicitly provides for exceptions (in particular "where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice"), the Court's jurisprudence also makes clear that such exceptions are to be interpreted narrowly and that hearings "in camera must be strictly required by the circumstances of the case", in particular:

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[16] On the limits of the CAS's policy with respect to the publication (of the non-confidential awards) see ANTOINE DUVAL, Time to go Public? The Need for Transparency at the Court of Arbitration for Sport, in: DUVAL/RIGOZZI (Eds), Yearbook of International Sports Arbitration 2017, pp. 3-27.

[17] Pechstein Decision, cit. Fn. 1, § 175.

[18] *Ibid*.

- "where there are no issues of credibility of contested facts which necessitate a hearing and the courts may fairly and reasonably decide the case on the basis of the parties' submissions and other written material",[19]
- where the proceedings are "devoted exclusively to legal or highly technical questions".[20]

In Ms Pechstein's case, the Court held that given the "stigma[tizing]" nature of the sanctions imposed in anti-doping proceedings, which have an impact on the athletes' "professional honour and reputation", and the fact that the finding of a doping offence was based on the examination of numerous experts, the hearing ought to have taken place in public.[21]

Applying this to the decision(s) in question, and as the Swiss Federal Tribunal had only noted, in its ruling, that a public hearing was "desirable" in the circumstances (to strengthen trust in the independence and fairness of the arbitration), but did not require it on the (ultimately incorrect) ground that "the principle was not applicable to voluntary arbitration",[22] the Court held that Switzerland had breached Article 6(1) ECHR.[23]

5. The requirement of independence and impartiality under Article 6(1) ECHR

With respect to the requirement of independence and impartiality in arbitration proceedings, the Court started by setting out the relevant case law (a.), before considering the specificities of CAS arbitration (b.).

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[19] *Id*., § 177.
[20] *Id*., § 177.
[21] *Id*., § 182.
[22] *Id*., § 178 referring to § 23, which in turn quotes the relevant passages of the Swiss Federal Tribunal's Decision.
[23] *Id*., § 183.

a) The case law of the ECtHR

The requirement of independence and impartiality under Article 6(1) ECHR has often been relied upon by complainants before the Court, which has developed a significant body of case law in this regard.[24] Among the many principles distilled by the ECtHR's case law in this context, the Court considered the following to be of particular relevance in the case at hand:

- A "tribunal" within the meaning of Article 6(1) ECHR must be understood in a "substantive sense", i.e. focusing on its judicial function, "that is to say determining matters within its competence on the basis of legal rules, with full jurisdiction and after proceedings conducted in a prescribed manner", and it must "satisf[y] a number of requirements, such as independence from the executive and also from the parties".[25]
- The independence of a tribunal must be determined taking into account, *inter alia*, "the manner of appointment of its members and their term of office, the existence of guarantees against outside pressure and the question whether the body presents an appearance of independence".[26]
- Impartiality under Article 6(1) ECHR, being "the absence of prejudice or bias", must be determined both subjectively, i.e. "on the basis of the personal conviction and conduct of a particular judge", and objectively, i.e. based on "whether the court offered, in particular through its composition,

[24] For a comprehensive review see EUROPEAN COURT OF HUMAN RIGHTS, Guide on Article 6 of the European Convention on Human Rights - Right to a fair trial (civil limb), available at https://www.echr.coe.int/documents/guide_art_6_eng.pdf.

[25] Pechstein Decision, cit. Fn. 1, § 139.

[26] *Id*., § 140.

guarantees sufficient to exclude any legitimate doubt about [its] impartiality".[27]

- The objective test is particularly important as it might "be difficult to procure evidence with which to rebut the presumption of a judge's subjective impartiality". In this context, the Court emphasized that "justice must not only be done, it must also be seen to be done", as ultimately what is at stake "is the confidence which the courts in a democratic society must inspire in the public".[28]

b) The independence and impartiality of the CAS

The issue of the "structural independence" of the CAS, i.e. its independence as an institution from sports-governing bodies, has been hotly debated since the CAS's creation. The case law of the Swiss Federal Tribunal, acknowledging that the CAS, while certainly "perfectible", was "sufficiently" independent to be considered as a genuine arbitral tribunal did not entirely convince academics, whether in Switzerland[29] or abroad.[30]

The Pechstein Decision was eagerly awaited as it was supposed to bring final clarity on this point. And whilst it did so, to a significant extent, on the questions actually posed by

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[27] *Id*., § 141.

[28] *Id*., §§ 142-143.

[29] ANDREAS BUCHER, commentary to Chapter 12 PILA, *passim*, in A. BUCHER (Ed.), Loi fédérale sur le droit international privé (LDIP)/Convention de Lugano – Commentaire romand, Basel 2011 (online updates, available at http://www.andreasbucher-law.ch/NewFlash/bis.html); MARGARETA BADDELEY, The Extraordinary Autonomy of Sports Bodies under Swiss Law: Lessons to Be Drawn, The International Sports Law Journal (ISLJ), Vol. 20, 2020, pp. 3-17; PIERMARCO ZEN-RUFFINEN, La nécessaire réforme du Tribunal Arbitral du Sport, in : Citius, Altius, Fortius, Mélanges en l'honneur de Denis Oswald, Bâle et al. 2012, pp. 483–537; JÉRÔME DE MONTMOLLIN/DMITRY A. PENTSOV, Do Athletes Have Right to a Fair Trial in Doping Cases, The American Review of International Arbitration 2011/22, No. 2, pp. 187-240.

[30] ANTOINE DUVAL, Time to go Public?, cit. Fn 16.

Ms Pechstein, certain – important – issues were seemingly not put forward in her complaint and were thus not discussed by the Court. It is therefore important to set out exactly Ms Pechstein's complaints and arguments before the ECtHR, as this will also be critical in examining whether the issue of the structural independence of the CAS is indeed settled once and for all.

(i) Ms Pechstein's claims/complaints

The Court set out Ms Pechstein's main[31] grievances as follows:

- Under the CAS Code "the two parties to a dispute could each appoint an arbitrator of their choosing, but […] they had no influence on the appointment of the third arbitrator as president of the arbitral panel, who was in fact appointed by the CAS court office, and in particular by its Secretary General."[32]
- The arbitrators had to be chosen from the CAS List of Arbitrators, compiled by the International Council of Arbitration for Sport (**ICAS**), "the vast majority of whose members would be appointed by the federations", which resulted in an unbalanced "representation of the interests of athletes in relation to those of the federations".[33]
- The obligation to choose the arbitrators from the closed CAS List "showed that the CAS did not

[31] Ms Pechstein also relied on the fact that "CAS was financed by the sports federations and, consequently, this appointment system meant that the arbitrators chosen by the CAS court office were inclined to favour the federations" (§ 124), an argument that the Court summarily dismissed "by analogy" with the fact that "national courts are always financed by the State budget and yet this fact does not imply that those courts lack independence and impartiality in disputes between litigants and the State" (§ 151).

[32] Pechstein Decision, cit. Fn. 1, § 124.

[33] *Id*., § 125.

> constitute a genuine arbitral tribunal, since in [Ms Pechstein's] view the parties to traditional arbitration could choose their arbitrators freely."[34]

(ii) The reasoning of the majority of the Court

As mentioned in the introduction of this analysis, the Court's decision was not unanimous insofar as this question was concerned and a dissenting opinion was issued together with the Decision (see further below, section (iii)).

As far as the majority's reasoning is concerned, the Court first acknowledged that under the CAS rules in force at the time of the relevant facts there was a certain imbalance in the way in which CAS arbitrators were appointed. The Court noted specifically that:

- pursuant to the then applicable version of Article S14 of the CAS Code, "the list of CAS arbitrators was established by the ICAS and was to be composed as follows: three fifths of arbitrators selected from among the persons proposed by the [International Olympic Committee (**IOC**), the International Federations (**IFs**) and the National Olympic Committee (**NOCs**)] chosen from within their membership or outside; one fifth of arbitrators chosen by the ICAS "after appropriate consultations, with a view to safeguarding the interests of the athletes"; and one fifth of arbitrators chosen, again by the ICAS, from among "persons independent" of the above-mentioned bodies.[35]
- In other words, Article S14 of the CAS Code "only required to choose one-fifth of the arbitrators from

[34] *Ibid.*
[35] *Id.*, § 153.

among persons independent of the sports bodies which could be involved in disputes with athletes before the CAS".[36]

- The ICAS itself was composed entirely of figures from the bodies who play a predominant role in proposing the arbitrators to be chosen by the ICAS, "thus revealing the existence of a certain link between the ICAS and organisations that might be involved in disputes with athletes before the CAS, especially those of a disciplinary nature".[37]
- In addition, while the arbitrators are appointed by ICAS "for a renewable term of four years, without any limitation on the number of terms of office", ICAS has the power to "remove, by a decision with 'brief reasons' under Article R35" any arbitrator who refuses to or is prevented from carrying out her/his duties or if she/he fails to fulfil her/his duties pursuant to the CAS Code within a reasonable time.[38]

This notwithstanding, the majority held that the combined effect of (i) the modalities of the appointment of CAS arbitrators by the ICAS and (ii) the organic links between the ICAS and the sports-governing bodies does not constitute a breach of Article 6(1) ECHR, on the ground that:

> *[…] the list of arbitrators drawn up by the ICAS included, at the relevant time, some 300 arbitrators yet the applicant did not submit any factual evidence such as to cast any general doubt on the independence and impartiality of these arbitrators. […]*

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[36] *Ibid*.
[37] *Id*., § 154.
[38] *Id*., § 155.

> *While the Court is prepared to acknowledge that the organisations which were likely to be involved in disputes with athletes before the CAS had real influence over the mechanism for appointing arbitrators, as applicable at the relevant time, it cannot conclude that, solely on account of this influence, the list of arbitrators, or even a majority thereof, was composed of arbitrators who could not be regarded as independent and impartial, on an individual basis, whether objectively or subjectively, vis-à-vis those organisations.*

(iii) The Dissenting Opinion

As noted, the above ruling was a majority ruling, with Judge Georgios A. Serghides form Cyprus and – remarkably – Judge Helen Keller from Switzerland dissenting. In their "Joint Partly Dissenting, Partly Concurring Opinion" (**Dissenting Opinion**), Judges Serghides and Keller noted the following:

> *The majority seem to acknowledge the "influence" of the ICAS on the procedure for selecting arbitrators, yet at the same time they do not believe that this "influence" could have had an impact on the independence and/or impartiality of the arbitrators on the list from which the panels are composed.*[39]

The dissenting judges added that the "majority seem to require that this 'influence' be proven 'on an individual basis' […]", which "goes beyond what the Court requires" in its case law.[40]

Ultimately, the dissenting judges found that the links between the ICAS and the sports-governing bodies were "worrying"[41] and that the "influence" the sports-governing bodies have on

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[39] Pechstein Decision, Dissenting Opinion, § 7.
[40] *Id*., §§ 12-13.
[41] *Id*., § 11.

the composition of the ICAS is not only "not insignificant" as accepted by the majority[42] but indeed "considerable".[43] The dissenting judges also found that the influence of the governing bodies over the procedure for selecting the arbitrators to be included in the CAS List is "disproportionate and unjustified"[44] and concluded that "the structural problems of this arbitration institution should have led the Court to find a violation of Article 6 § 1" in its section on the independence and impartiality of the courts.[45]

It appears from a close reading of the Pechstein Decision that the difference in assessment between the minority and the majority judges was not only due to the emphasis on appearance, but also to the fact that the dissenting judges did not limit their analysis to the way in which the arbitrators were appointed to the List of CAS arbitrators – they also took into account how the actual arbitration panels are constituted under the CAS rules. Indeed, unlike the majority's, the minority's analysis also took into account the fact that:

- the List is closed, "result[ing] in the athletes being obliged to choose their arbitrator from among the individuals selected by the ICAS",[46] and
- the Presidents of the CAS Divisions, who are ICAS members, play a role in the appointment of the president of the panel (an aspect that was totally overlooked in the majority's analysis).[47]

While missing the fact that this latter role goes well beyond appointing the president of the panel when "the parties fail to

[42] *Id*., § 9.
[43] *Id*., § 14.
[44] *Id*., § 11.
[45] *Id*., § 28.
[46] *Id*., § 14.
[47] *Ibid*.

reach agreement",[48] the minority opinion appears to deal with all the grievances of Ms Pechstein in a more comprehensive way than the majority. This brings us to the question of the persuasiveness (and thus the authoritativeness) of the (majority) Pechstein Decision, which will be addressed in the next section.

III. …and beyond

Having considered what was said – and decided – in the Pechstein Decision, the question is: what's next? The even more specific question is: how can we ensure that sports arbitration is compatible with the ECHR – both procedurally and substantively?

- From a procedural perspective, relevant considerations include the modalities for securing the structural independence of the CAS, the right to a public hearing, and the extent to which the analogous application of criminal law guarantees should be taken into account.
- Substantively, we must consider the guarantees under the ECHR, in particular with respect to upholding the athletes' right to their private life and the principle of non-discrimination.

[48] In reality in disciplinary proceedings the president of the panel (or, where applicable, the sole arbitrator) is *always* directly appointed by the President of the CAS Appeals Division (Article R54 CAS Code).

A. Procedural guarantees

1. Article 6 ECHR and the structural independence of CAS

a) The persuasiveness of the Pechstein Decision

Technically, the Pechstein (majority) decision resolved the hotly debated question of whether the CAS is sufficiently structurally independent to be considered as a genuine arbitral tribunal. However, regretfully, the reasoning is not entirely convincing.[49]

At the outset, it is puzzling that such an important (and debated) issue was dealt with in a single paragraph (in a 57 page decision). It is also problematic that the Decision did not address what is generally considered as the main issue, namely that the president of each CAS Panel[50] in appeals cases is appointed by the arbitral institution (i.e. by the member of ICAS who acts as the President of the CAS Appeals Division). In our view, this element alone significantly undermines, if not the authoritativeness, at least the persuasiveness of the Decision.

The CAS may have dodged this first bullet but there could well be others. In order to avoid a fatal blow, it would therefore be wise to proactively acknowledge the limitations of the

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[49] See also CLIFFORD J. HENDEL/GARY SMADJA, A Riff on the Legal Saga of Claudia Pechstein – Litigation as a Sub-Optimal Means of Advancing Transparency and Legitimacy in Sports Arbitration, Spain arbitration review: Revista del Club Español del Arbitraje, No. 35, 2019, p. 118. More uncritical PAOLO MARZOLINI/ DANIEL DURANTE, Legittimità del Tribunale Arbitrale dello Sport: game, set, match? La recente giurisprudenza del tribunale federale svizzero e della corte europea dei diritti dell'uomo, Rivista dell'arbitrato, Vol. 28/4, 2018, pp. 655-677.

[50] Under the CAS Code, the President of the Panel has the casting vote in case a majority decision cannot be reached (Article R46(1) and R59(1) of the CAS Code). He or she also plays a predominant role in the conduct of the proceedings, in particular the hearing (Article R44.2 of the CAS Code) and can decide alone on important issues like the admissibility of new documents (Article R56 of the CAS Code).

Pechstein majority ruling and to make sure that the system is bulletproof when the next shot is fired.

This is even more the case because the majority's analysis was not only based on an incomplete assessment of the CAS rules, but also at times legally unconvincing. For instance, the Court found that there are structural links between the ICAS and the sports-governing bodies and indeed an influence of the latter on the former, but then found that this influence alone does not mean that the list of arbitrators compiled by the ICAS, or even a majority thereof, was composed of arbitrators who could not be regarded as independent and impartial "on an individual basis" *vis-à-vis* those governing bodies.

As noted by the dissenting judges, this reasoning seems to suggest that Ms Pechstein should have proven that these structural links actually resulted in a personal lack of independence of the arbitrators in question. Quite apart from the fact that this would be tantamount to a *probatio diabolica*,[51] the reasoning constitutes a shortcut in the syllogism that would have required to properly apply the law (i.e. the case law set out at § 140 of the Decision and summarized above)[52] to the facts (i.e. the structure of the CAS and the way in which the arbitrators are appointed to the CAS List of arbitrators).[53]

This shortcoming is all the more significant given that the Court itself made clear that Ms Pechstein was challenging "*l'indépendance* […] *structurelle du TAS en raison du mode de*

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[51] MATHIEU MAISONNEUVE, Le Tribunal arbitral du sport et le droit au procès équitable, cit. Fn. 14, p. 700 (speaking of "*une preuve impossible à rapporter*").

[52] See section II.5.a. above.

[53] ANTONIO RIGOZZI, Chronique de jurisprudence arbitrale en matière sportive, Revue de l'arbitrage, 2019/3, pp. 926-927. See also MATHIEU MAISONNEUVE, Le Tribunal arbitral du sport et le droit au procès équitable, cit. Fn. 14, p. 699, who speaks of 'questionable […] legal logic'.

nomination des arbitres"[54] and referred to the so-called doctrine of appearances, reflecting the old adage according to which "justice must not only be done, it must also be seen to be done".[55]

Indeed, the Court correctly emphasized that ultimately "[w]hat is at stake is the confidence which the courts in a democratic society must inspire in the public".[56] However, as we noted elsewhere,[57] readers wishing to be convinced would then have expected the Court to answer the question whether the way in which the CAS is structured and CAS arbitrators are appointed can indeed inspire the confidence of the athletes who are forced to accept CAS arbitration.[58] One can

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[54] Pechstein Decision, cit. Fn. 1, § 100 of the original French version of the decision (the English translation incorrectly omits the adjective "structural").

[55] Id., § 143.

[56] *Ibid*., and the reference to *Oleksandr Volkov v. Ukraine*, application No. 21722/11, judgment of 9 February 2013, § 106 and *Morice v. France* [GC], application No 29369/10, judgment of 23 April 2015, § 78.

[57] ANTONIO RIGOZZI, Chronique de jurisprudence arbitrale en matière sportive, cit. Fn. 53, p. 927.

[58] See also, and more forcefully, MATHIEU MAISONNEUVE, Le Tribunal arbitral du sport et le droit au procès équitable, cit. Fn. 14, pp. 701-702, who frames the question as follows : "*[i]l faut en effet se mettre à la place de l'athlète à qui son avocat annoncerait qu'il pourra certes en principe choisir un arbitre, mais qu'il devra obligatoirement le choisir sur une liste fermée constituée par le CIAS, un organisme composé de membres directement et indirectement désignés par des institutions sportives ; que si cet organisme est maintenant libre de la composition de cette liste, une bonne partie des personnes y figurant ont été choisies avant le 1er février 2012, à une époque où – comme lorsque Madame Pechstein a dû choisir un arbitre – trois cinquièmes d'entre elles devaient l'être parmi des noms proposés par des institutions sportives et où un cinquième seulement devait formellement l'être parmi des personnes indépendantes de ces institutions ; qu'un arbitre figurant sur cette liste peut théoriquement ne pas être renouvelé à l'issue de son mandat de quatre ans, par une simple décision implicite du CIAS, lequel a un "certain lien" avec les institutions sportives ; que rien n'interdit à ce jour à l'institution sportive à laquelle il est opposé de nommer systématiquement le même arbitre lorsqu'elle est partie à une procédure devant le TAS, ce qui, pour certaines fédérations, arrive plusieurs dizaines de fois par an ; que le président de la formation arbitrale, dont la voix est décisive en cas de partage des voix entre les deux co-arbitres, est choisi par le président de la chambre d'appel, lequel est un membre du CIAS élu par ses pairs, une majorité de ceux-ci étant directement désignés par des institutions sportives ; que s'il veut*

only agree with the dissenting judges that "the Court should have carried out a more in-depth analysis as to the legitimate fear of the athletes to be bound by the jurisdiction of a body which has no appearance of independence",[59] an observation which clearly – and legitimately – undermines the persuasiveness of the majority decision.

The reality is that, as noted by the minority in their Dissenting Opinion, the Court extensively presented its case law but did not really apply it.[60] In particular, one cannot help but note that the majority did not discuss in any detail the jurisprudential requirement that due regard should be given to "the manner of appointment of [the tribunal's] members and their term of office, the existence of guarantees against outside pressure and the question whether the body presents an appearance of independence".[61]

The Court did note the renewable nature of the appointment on the CAS List of arbitrators,[62] which indeed suggests some level of protection. However, when the majority referred to the possibility for the ICAS to remove an arbitrator (*from a Panel*) under Article R35 of the CAS Code – a provision that is common in all arbitration rules – it missed the problematic point[63] that CAS arbitrators can be removed *from the List*

demander la récusation d'un arbitre, il devra adresser sa demande à une commission du CIAS ; et enfin, que le secrétaire général du TAS, nommé par le CIAS, a le pouvoir d'attirer l'attention de la formation arbitrale sur des questions de principe fondamentales avant la signature de la sentence" (references to the relevant provisions of the CAS Code omitted).

59 Pechstein Decision, Dissenting Opinion, § 15.

60 *Id*., § 13.

61 Pechstein Decision, cit. Fn. 1, § 140.

62 *Id.*, § 155.

63 The Court's reference to the fact that "the ICAS had the power to remove, by a decision with 'brief reasons' under Article R35 of the [CAS Code], any arbitrator who refused to perform or was prevented from performing his duties, or who failed to fulfil his duties pursuant to that Code" is correct in and of itself – and indeed a general principle of arbitration law – but beside the point.

without reasons, let alone due process (Articles S6(4)[64] and S19[65] of the CAS Code). Also, the reasons why CAS arbitrators are not reappointed to the List (Article S13 of the CAS Code),[66] or on what basis their performance (or lack thereof) has been assessed for re-appointment purposes, are not disclosed. Technically therefore, the way in which the CAS List of arbitrators is compiled and renewed does not provide the required "guarantees against outside pressure" contemplated by the ECtHR's jurisprudence. This is another fundamentally problematic point that was not addressed by the Court and that, in our view, reduces the authoritativeness and persuasiveness of the Pechstein Decision.

Finally, one cannot rule out that further challenges may be brought against the CAS system and that, as contemplated by leading scholars, the analysis might, if not focus on, at least also take into account the right to information enshrined in

[64] Article S6(4) of the CAS Code provides that the ICAS "appoints the arbitrators who constitute the list of CAS arbitrators and the mediators who constitute the list of CAS mediators on the proposal of the CAS Membership Commission. It can also remove them from those lists".

[65] According to this provision, "ICAS may remove an arbitrator or a mediator from the list of CAS members, temporarily or permanently, if she/he violates any rule of this Code or if her/his action affects the reputation of ICAS and/or CAS".

[66] In its relevant part, Article S13 of the CAS Code states that "ICAS reviews the complete list every four years; the new list enters into force on 1 January of the year following its establishment" with no indication of how this "renewal" takes place.

Article 10 ECHR.[67] In our view, transparency is indeed of the essence, in particular when it comes to perception issues.[68]

b) The indirect effect of *Pechstein*

Whilst not discussed in detail above, as noted by the ECtHR in the Pechstein Decision, the CAS had already changed its rules with respect to the compilation of the List of CAS arbitrators pending the outcome of the case.[69] While the way in which the members of ICAS are appointed (Article S4 of the CAS Code) has remained unchanged, under the new article S14 of the CAS Code the ICAS is now free to appoint "personalities to the list of CAS arbitrators with appropriate legal training, recognized competence with regard to sports law and/or international arbitration, a good knowledge of sport in general and a good command of at least one CAS working language, whose names and qualifications are brought to the attention

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[67] ANTOINE DUVAL, Time to go Public?, cit. Fn 16, who notes that "[w]hile major international courts, such as the CJEU, ECtHR or the International Court of Justice regularly report on their judicial activities, the CAS has never published an annual report providing specific information on its operations, including its financial results, detailed statistics on its annual productivity, major decisions by the ICAS or even just the size of its staff. Only scattered sources of information are available on these questions through rare press releases of the CAS, incomplete statistics provided on its website or indirect disclosure in proceedings before the [Swiss Federal Tribunal]" (reference omitted).

[68] ANTONIO RIGOZZI, L'importance du droit suisse de l'arbitrage dans la résolution des litiges sportifs internationaux, Revue de droit suisse (RDS/ZSR), 2013, Vol. 1, pp. 305-306 where, with respect to the approach of the Swiss Federal Tribunal we noted that "[l]*e caractère obligatoire de l'arbitrage sportif requiert qu'il ne puisse exister aucun doute dans l'esprit des athlètes quant à l'indépendance structurelle du TAS (vis-à-vis des fédérations sportives qui leur imposent l'arbitrage). Or, en l'état des textes, il n'est pas aisé de lever la perception de déséquilibre structurel qui résulte du poids prépondérant des organisations sportives dans la nomination des membres du CIAS et donc, par ricochet, sur la composition de la liste d'arbitres imposée aux athlètes. Le fait qu'en pratique ce déficit structurel ne se traduit pas par un problème d'indépendance permet sans doute de supporter la conclusion du Tribunal fédéral quant à l'indépendance du TAS, mais n'est pas nécessairement propre à asseoir la légitimité du système du point de vue de ses utilisateurs et notamment des athlètes*".

[69] Pechstein Decision, cit. Fn. 1, § 38; Pechstein Decision, Dissenting Opinion, § 10.

of ICAS, *including* by the IOC, the IFs, the NOCs and by the athletes' commissions of the IOC, IFs and NOCs".[70] In other words, anyone can now propose arbitrators for appointment to the CAS List, or even spontaneously apply to be listed as a CAS arbitrator.

This has been seen as a significant progress, as the ICAS finally abandoned the wording in the rules requiring that a majority of arbitrators be appointed upon proposals from sports-governing bodies, and for only a minority to be independent from said sports organisations (which might suggest that a large majority could not meet this criterion).[71] The dissenting judges seemed to criticise this choice on the ground that, as a result, "no rule currently provides that athletes *must* be represented, but for the one fifth of members of the ICAS".[72] In our opinion however, this is an issue of only relative importance as the real problem of perception lies in the opacity of the nomination process. Under the old regime, no one knew how the persons independent from sports organisations – or who were supposed to safeguard the interests of athletes – were appointed and what compliance process was in place to make sure that this requirement was respected. The same is true today, under the new rules, and this therefore remains an issue.[73]

Should further challenges be brought also from the perspective of the right to information under Article 10 ECHR,

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[70] Emphasis added.

[71] SFSCD 144 III 120, para 3.4.3 noting that the sports-governing bodies no longer enjoy a "privileged status as, like their athletes' commissions, they can [now] only submit, for ICAS's consideration, the names and qualifications of arbitrators they would contemplate for inclusion in the [L]ist" (free translation of the original passage in French which reads : "*les organisations sportives […] ne jouiss[ent] plus d'un statut privilégié puisque, à l'instar de leurs commissions d'athlètes, elles ne peuvent que porter à l'attention du CIAS les noms et qualifications d'arbitres susceptibles de figurer sur la liste*").

[72] Pechstein Decision, Dissenting Opinion, § 10 *in fine*, emphasis added.

[73] ANTONIO RIGOZZI, Chronique de jurisprudence arbitrale en matière sportive, cit. Fn. 53, p. 929.

it is doubtful that the changes made to Article S14 alone would make a big difference to the assessment of the structural independence of CAS. Until it is possible to determine who proposed the arbitrators for appointment by the ICAS – or indeed which arbitrator(s) applied spontaneously, without being proposed by anyone – and the way in which the newly created CAS Membership Commission evaluates the various candidatures, it remains difficult to see how the change to Article S14 is supposed to increase the confidence of the athletes in terms of how candidates are selected as CAS arbitrators.[74]

The creation of the above-mentioned Membership Commission is also an indirect effect of the Pechstein Decision. This Commission is composed of five members and it is in charge of "review[ing] the lists of CAS arbitrators […], as well as the candidatures of potential new CAS members".[75] The composition of the CAS Membership Commission is interesting as it includes two [of the eight] ICAS Members [who are not directly appointed by the sports-governing bodies[76]] pursuant

[74] This is an opportunity to recall an important aspect of the *Lazutina* decision that tends to be forgotten. When the Swiss Federal Tribunal specified that the CAS was an arbitral institution that could be "perfected" ("*perfectible*"), it noted that it would be desirable, in order to improve the transparency ("*lisibilité*") of the list of arbitrators, to indicate which organization had proposed each arbitrator to ICAS for appointment on the list (SFSCD 129 III 445 cited above, § 3.3.3.2). Not following this recommendation is not conducive to improving the athletes' confidence in the selection process/the manner in which the selection is made.

[75] MATTHIEU REEB, Editorial, CAS Bulletin 2018/2, pp. 4-5. According to Article S7(2)(a) in fine of the CAS Code, "[t]he CAS Membership Commission is responsible to propose the nomination of new CAS arbitrators and mediators to the ICAS. It may also suggest the removal of arbitrators and mediators from the CAS lists".

[76] More precisely, two members shall be appointed among (i) the four ICAS members appointed by the 12 ICAS members directly appointed by the sports-governing bodies "after appropriate consultation with a view to safeguarding the interests of the athletes" (Article S4(d) of the CAS Code) and (ii) the "four members are appointed by the sixteen members of ICAS listed above, chosen from among personalities independent of the bodies designating the other members of the ICAS" (Article S4(e) of the CAS Code).

to Article S4(d) or (e) of the Code, one of them being appointed as commission chair, and by the three Division Presidents" (Article S7(2)(a) *in fine* of the CAS Code).

Apart from the fact that the actual composition of the CAS Membership Commission is not easy to determine,[77] there is still the possibility that the majority of its members are direct appointees of the sports-governing bodies.[78] Moreover, the final decision to appoint an individual to the List of CAS arbitrators still belongs to the ICAS, which means that, when closely scrutinized, the new rules do not do much to reinforce the confidence that athletes should be able to have in the structure of the CAS.

In our view, the most relevant change that occurred while the sports community was waiting for the Pechstein Decision might not be in the CAS rules themselves, but in the actual composition of the ICAS. Indeed, while its members are still appointed directly or indirectly by the sports-governing bodies and the ICAS President is still a member of the IOC, the reality is that the latest election(s) saw the inclusion of a significant number (arguably, a majority) of personalities with no apparent link with the sport movement at all.[79] This improvement is however somewhat diminished by the fact that the ICAS Board, i.e. the ICAS President, Vice President

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[77] The latest communication available indicates that the Membership Commission is "chaired by Federal Judge Yves Rüedi and composed of Ms Tricia Smith and the three Division Presidents" but the webpage devoted to the composition of ICAS does not mention Mr Rüedi and does not indicate which of the ICAS members is the President of the Membership Commission, https://www.tas-cas.org/en/icas/members-2019-2022.html.

[78] According to the CAS Website, "the three Division Presidents" are (i) Ms Carole Malinvaud, President of the Ordinary Division; Ms Corinne Schmidhauser, President of the Appeals Arbitration Division and (iii) Mr Ivo Eusebio, President of the Anti-Doping Division. However, it is not possible to determine by whom they were originally appointed as ICAS members.

[79] FRANK LATTY, Le TAS marque des points devant la CEDH, Jurisport, Vol. 192, 2018, p. 36; the current full list of ICAS members can be found at https://www.tas-cas.org/cias/les-membres-2019-2022.html.

and Division Presidents, is still predominantly composed of persons with significant links to the sport movement.[80] Probably the most significant change is the fact that the President of the Appeals Division, who directly appoints the presidents of the CAS panels in appeals cases without any consultation with the parties,[81] is now a former athlete, and not, as in the past, the Vice President (now the President) of the IOC.[82] The identity of the current CAS Appeals Division President is indeed a positive development[83] but in no case constitutes a guarantee for the future.[84]

c) Conclusion and outlook

In light of the above, we hope that the Pechstein Decision is perceived for what it is – i.e. a dodged bullet – and that the sports arbitration community will continue to push for the changes that are necessary to ensure that the athletes who are forced to accept CAS arbitration can trust its fairness.

Based on the rationale (and the limitations) of the Pechstein Decision, if the CAS intends to implement changes that would put an end to the existing issues of perception and the related questions about the confidence that athletes can have in the system, the following adjustments to its Statutes and procedures could be contemplated:

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80 https://www.tas-cas.org/cias/le-bureau.html

81 In accordance with Article R54 CAS Code.

82 ANTONIO RIGOZZI, L'importance du droit suisse de l'arbitrage, cit. Fn. 68, p. 301 ss, referred to by the Swiss Federal Tribunal in SFSCD 144 III 120, pp. 126-127.

83 That being said, in at least one doping case currently before the CAS that we are aware of, and which will most likely end up before the ECtHR, the athlete complained that the President of the Appeals Division might have been an athlete, but is currently also the President of Antidoping Switzerland, i.e. the Swiss national anti-doping organization.

84 This development also does not address Ms Pechstein's contention and complaint that "the […] president of the arbitral panel, […] was in fact appointed by the CAS court office, and in particular by its Secretary General" (Pechstein Decision, cit. Fn. 1, § 124).

- A majority of the members of ICAS and of its Board, including the ICAS President, should be appointed from among personalities with no link with the sports-governing bodies.
- The CAS Membership Commission – including and in particular its chair – should be composed of a majority of ICAS Members who have no link with the sports-governing bodies.
- The CAS Membership Commission should issue guidelines clarifying the requirements of Article S14 of the CAS Code (i.e. that candidates have "appropriate legal training, recognized competence with regard to sports law and/or international arbitration, good knowledge of sport in general and a good command of at least one CAS working language") and any other criteria it will apply or take into account when reviewing applications for appointment to the List of CAS arbitrators.
- The CAS Membership Commission should inform the relevant candidates of the reasons why their candidature has not been retained for appointment.
- The ICAS should publish the names of the arbitrators who were (re)appointed to the List, the names of those who were removed, and the names of the arbitrators who were put forward by the CAS Membership Commission and who were not elected.
- The CAS Membership Commission should be required to consult an arbitrator before removing him or her from the List of arbitrators, or deciding not to renew his or her appointment to the List

and, where relevant and requested by the arbitrator, render a reasoned decision.

- The ICAS should have its own secretariat and operate independently from the CAS Secretary General.
- The ICAS should publish a yearly report of its activities.
- The President of the Appeals Division should be an ICAS member with no link with the sports-governing bodies.
- The president of the Panel in CAS appeals proceedings should be appointed by the arbitrators appointed by the parties and, only if they cannot agree on a president within a set time limit, by the President of the Appeals Division.

2. Public hearings in CAS arbitration

One of the most notable – and visible – developments following the Pechstein Decision is that related to public hearings at the CAS.

The ECHR provides, in its Article 46 ("Binding force and execution of judgments"), that "[t]he final judgment of the Court shall be transmitted to the Committee of Ministers [of the Council of Europe], which shall supervise its execution". During its Human Rights meeting of June 2020, the Committee of Ministers decided to end the supervision of the execution of the Pechstein Decision on the ground that "the CAS adopted new procedural rules allowing public hearings at the sole request of the athlete if the dispute is of disciplinary

or ethics nature".[85] Indeed, the new Article R57 of the CAS Code (in force as from 1st January 2019) now reads as follows:

> *At the hearing, the proceedings take place in camera, unless the parties agree otherwise. At the request of a physical person who is party to the proceedings, a public hearing should be held if the matter is of a disciplinary nature. Such request may however be denied in the interest of morals, public order, national security, where the interests of minors or the protection of the private life of the parties so require, where publicity would prejudice the interests of justice, where the proceedings are exclusively related to questions of law or where a hearing held in first instance was already public.*

There are several areas where the new wording of Article R57 could still be deemed inconsistent with the guarantee of a public hearing under Article 6(1) ECHR, which have been overlooked by both the Committee of Ministers in its June 2020 decision[86] and the first commentators writing on this addition to the CAS Code:[87]

- The limitation to disciplinary proceedings: as discussed above, in the Court's reasoning, the full

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[85] See https://www.coe.int/en/web/execution/latest-developments, Switzerland: Public hearings allowed in disciplinary proceedings before the Court of Arbitration for Sport, 8 June 2020.

[86] It is worth mentioning in this context that the Committee of Ministers also noted that "[f]ollowing these amendments, a public hearing took place on 14 November 2019 in the case of *World Anti-Doping Agency (WADA) v. Sun Yang and FINA*", which is not entirely on point since WADA did not object to a public hearing in that case (CAS 2019/A/6148, *World Anti-Doping Agency v. Sun Yang & Fédération Internationale de Natation,* award of 28 February 2020, § 65).

[87] GÉRALD SIMON, L'applicabilité de la Convention européenne des droits de l'homme aux arbitrages du TAS : réflexions sur le sens et la portée de l'arrêt de la Cour Européenne des Droits de l'Homme du 2 octobre 2018 Mutu et Pechstein, CAS Bulletin TAS/CAS Bulletin, Special Issue Budapest seminar October 2019, p. 115, according to whom "[l]*a mise en conformité du TAS à l'article 6.1 CEDH ne s'est pas fait attendre !*".

applicability of Article 6(1) ECHR is the result of the compulsory nature of CAS arbitration.[88] While it is true that the ECtHR emphasized the stigma that comes with disciplinary sanctions and the impact that they might have on the professional honour and reputation of an athlete, disciplinary proceedings are not the only CAS cases that are compulsory in nature. Indeed, all CAS proceedings where a party (athlete, official, club, federation) challenges a decision of a sports-governing body are inherently compulsory in nature and should thus be fully governed by Article 6(1) ECHR. Hence, it is submitted that the principle that the hearing must be held in public is applicable to the vast majority of the CAS appeals proceedings within the meaning of Article R47 of the CAS Code.[89]

- The limitation to physical persons: disciplinary cases are not only directed against individuals (athletes, coaches or sports officials) but also against clubs (for instance with respect to the conduct of their supporters or their financial fair play obligations) and international federations. Moreover, such legal entities can also be affected in terms of their honour and reputation. Indeed, under Swiss law both individuals and legal entities are protected by the personality rights enshrined in Article 28 of the Swiss Civil Code. We therefore

[88] See also ANTOINE DUVAL, Time to go Public?, cit. Fn 16.

[89] According to this provision, "[a]n 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 […]". It is submitted that it is only in the (rare) cases where the parties concluded a "*compromis d'arbitrage*" in favour of a CAS appeals proceeding that they can be deemed to have waived the relevant guarantees of Article 6(1) ECHR, including the right to a public hearing.

> fail to see how the ECtHR's Pechstein Decision can support the limitation provided for in the latest iteration of Article R57 of the CAS Code.[90]

With respect to the exceptions provided for by Article 6(1) ECHR and copy-pasted into Article R57 of the CAS Code, it seems obvious that the CAS should apply the same "strict interpretation" applied by the ECtHR, including by restricting public access to some parts of the hearing where necessary and appropriate.[91]

In a case that was initiated under the old CAS rules but decided after the Pechstein Decision, the Panel first held that it was entitled (in accordance with the CAS Code version then in force) to decide that the hearing was not to be held in public. However, "given the recent Mutu and Pechstein judgment", the Panel went on to "conside[r] the question under the aspect of Art. 6 ECHR".[92] In doing so, the Panel first recited certain exceptions to the guarantee of a public hearing in the context of Article 6(1) ECHR (including, *inter alia*, the guarantee of public order, proceedings which relate exclusively to points of law or highly technical questions, proceedings which require the examination of only limited legal issues, and proceedings in which the facts are undisputed and the legal questions not particularly complex).

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[90] This also appears to have been the approach of the Panel in the *Trabzonspor* case discussed below (see Fn. 92 and 93), which was decided before the entry into force of the new wording of Article R57(2).

[91] On this issue see DUVAL, Time to go Public?, cit. Fn. 16, who notes that the ECtHR's case law would require "for example, [that] 'the mere presence of classified information in the case file does not automatically imply a need to close a trial to the public' [*Belashev v. Russia*, application No. 28617/03, judgment of 4 December 2008, § 83]" and that, "[i]nstead, 'courts must consider whether such exclusion is necessary in the specific circumstances in order to protect a public interest, and must confine the measure to what is strictly necessary in order to attain the objective pursued' [*Nikolova and Vandova v. Bulgaria*, application No. 20688/04, judgment of 17 December 2013, § 74]".

[92] CAS 2018/A/5746, *Trabzonspor v. TFF, Fenerbahce & FIFA,* award of 30 July 2019, §§ 99-100.

Applying those considerations to the proceedings in question – which involved both undisputed facts and, in the opinion of the Panel, highly technical and complex legal questions – the Panel ultimately refused to hold a public hearing.[93]

Finally, it is worth noting that it has been contemplated whether in cases of "a broader public interest" hearings should be public even if the accused party does not request this,[94] especially when they are of a quasi-criminal nature. In our opinion, the publication of the award in these cases is sufficient to maintain the confidence of the public at large in CAS arbitration proceedings. Whilst this of course requires systematic publication of decisions (which is another routine criticism of the CAS), it seems to strike a fairer balance between the "public interest" referred to by such authors and the rights of the athlete involved (who is, after all, not charged with a crime – at least as far as the CAS proceedings are concerned).

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[93] *Id.*, §§ 100-105. Interestingly, the CAS Panel distanced themselves from a letter of the CAS Secretary General that they summarized as follows: "Mr Reeb answered the next day, underlining that the modification of Art. R57 §2 of the Code was only applicable to proceedings started after 1 January 2019 and that, for this reason, the request for a public hearing (including video recording and live streaming) should be rejected. In addition, the modified provision of Art. R57 of the Code referred to proceedings involving physical persons, which was not the case in this matter. Furthermore, that provision allowed exceptions in order to protect public order. The Secretary General stressed the fact that Trabzonspor's fans had demonstrated before the CAS during the last hearing involving this club and that they were currently sending emails to the CAS, affecting the serenity of this procedure. He stressed the importance for the CAS that the hearing should not be disturbed and added that, for this reason also, the CAS did not make any particular publicity about the hearing. Finally, Trabzonspor was advised that the CAS did not have an obligation to publish all the hearings on its website" (CAS 2018/A/5746, § 81 and § 106, where the Panel noted that "[h]e wrote for himself, as he was entitled to do, and correctly did not purport to express a view on behalf of the Panel").

[94] ANTOINE DUVAL, Time to go Public?, cit. Fn. 16.

3. Legal aid

Article 6(3) ECHR guarantees the right to free legal aid in criminal proceedings subject to certain conditions. To the contrary, Article 6(1), which makes no reference to legal aid, does not require the State to provide free legal aid for every dispute relating to a "civil right". However, the Convention is intended to safeguard rights which are "practical and effective, in particular the right of access to a court".[95] Hence, Article 6(1) ECHR may in some cases compel the State to provide for the assistance of a lawyer when such assistance proves indispensable for an effective access to court.[96]

We would not be surprised if the question whether the limited scope of the current CAS Legal Aid system is consistent with Article 6(1) ECHR (or indeed Article 6(3) ECHR to the extent that it is applicable based on the severity of the sanction) were also to arise in the near future.

4. Analogous application of criminal law guarantees

The application of criminal law guarantees in CAS arbitration is another matter that has been subject to significant debate, and must be considered in the context of the ECHR. Indeed, under the heading "No punishment without law" Article 7 ECHR reads as follows:

> *1. No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed.*

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[95] Guide on Article 6 of the European Convention on Human Rights – Right to a fair trial (civil limb), cit. Fn. 24, para. 131.

[96] *Airey v. Ireland*, application No. 6289/73, judgment of 9 October 1979, § 26.

> *2. This article shall not prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognized by civilised nations.".*

The applicability of this provision to sports disciplinary sanctions was discussed in the recent case of *Platini v. Switzerland* (the **Platini Decision**).[97]

a) *Platini v. Switzerland* - Article 7 ECHR and sports sanctions

As most will know, Michel Platini is a former professional football player, having been captain and coach of the French national team. He was also an adviser to former FIFA President Mr Joseph Blatter. In 2011, Mr Blatter approved the payment to Mr Platini of an invoice for CHF 2 million, presented by Mr Platini as a salary "supplement" that had allegedly been agreed orally at the time he was acting as an adviser to Mr Blatter.

By way of short summary of the proceedings that led to the Court's decision: following the opening of criminal proceedings against Mr Blatter in connection with the payment, disciplinary proceedings were brought against Mr Platini for breaching the FIFA Code of Ethics. FIFA imposed a sanction consisting of a six-year suspension from any football-related professional activity, at national and international levels, plus a fine of CHF 80,000. The CAS reduced the suspension period from six to four years and lowered the fine to CHF 60,000. Following this, the Swiss Federal Tribunal dismissed the action to set aside the CAS award on the ground

[97] ECtHR, *Platini v. Switzerland* (Application No. 526/18), judgment of 11 February 2020, available at http://hudoc.echr.coe.int/eng?i=001-201734 and at https://www.bger.ch/ext/eurospider/live/fr/php/clir/http/index.php?highlight_docid=cedh://20200211_526_18:fr&lang=fr&type=show_document.

that the sanction against Mr Platini was not arbitrary within the meaning of Article 393(e) of the Swiss Code of Civil Procedure (**CPC**) (Mr Platini being domiciled in Switzerland the CAS arbitration was deemed domestic).

Before both the CAS and the Swiss Federal Tribunal, Mr Platini argued that the alleged offence took place in 2007 and 2011 and that the application of the FIFA regulations in force in 2012 was a breach of Article 7 ECHR as the regulations in force at the time of the facts did not provide for an equivalent or similar offence.[98]

In the Court's decision, Switzerland's international responsibility under the ECHR and the ECtHR's jurisdiction *ratione personae* for a breach of Article 7 were accepted, despite the fact that both FIFA and the CAS are private entities, for the same reasons developed in the Pechstein Decision,[99] namely that (i) Swiss law provided for the legal effects of CAS awards and for the jurisdiction of the Swiss Federal Tribunal to examine their validity (here under Articles 387 and 393 CPC) and (ii) the Swiss Federal Tribunal's dismissal of Mr Platini's action to set aside had given the CAS award *res judicata* effect in the Swiss legal order.[100]

With respect to the applicability of Article 7 ECHR, the Court noted that this provision applies to sanctions imposed for "criminal offences" but that the concept of "penalty" set out in Article 7(1) of the Convention is autonomous in scope ("*possède […] une portée autonome*"):[101] "in order to ensure the efficacy of the protection secured under this article, the Court must be free to go beyond appearances and autonomously assess whether a specific measure is, substantively, a 'penalty' within the meaning of Article 7

[98] Platini Decision, cit. Fn. 97, § 34.
[99] Section II.C.2. above.
[100] Platini Decision, cit. Fn. 97, § 38.
[101] *Id.*, § 44.

§ 1".[102] As part of this assessment, the Court may also take into account the specific conditions of execution of the measure, as well its nature and purpose, and its severity.[103]

Comparing the situation of Mr Platini to its previous jurisprudence, the Court excluded the applicability of Article 7 ECHR on the ground that the FIFA Code of Ethics was a private disciplinary regime that resulted in "specific measures taken against a member of a relative[ly] small group of individuals who had a specific status and was subject to specific rules",[104] without really addressing the purpose and the severity of the measure.

b) Outlook

Based on this, rather unclear, language the Platini Decision does not allow any final conclusion on the applicability *ratione materiae* of Article 7(1) ECHR to (for example) anti-doping sanctions, which might be significantly more severe and which, by operation of the World Anti-Doping Code, are applicable to all the athletes around the world.

The issue of the quasi-criminal nature of anti-doping sanctions goes beyond the specific guarantees of Article 7 ECHR as the Court in *Platini* has made clear that the same "autonomous approach" applies to the concept of "criminal charge" in Article 6 of the Convention.[105] This means that sports disciplinary proceedings in general and anti-doping proceedings in

[102] *Ibid*. See also Guide on Article 7 of the European Convention of Human Rights – No punishment without law: the principle that only the law can define a crime and prescribe a penalty, available on the Court's website at https://www .echr.coe.int/Documents/Guide_Art_7_ENG.pdf, paras. 11 et seq.

[103] *Ibid*.

[104] Platini Decision, cit. Fn. 97, § 48.

[105] *Id.*, § 44. See also: *Brown v. the United Kingdom*, application No. 38644/97, decision of 24 November 1998; *Société Oxygène Plus v. France*, application No. 76959/11, decision, § 43; *Žaja v. Croatia*, judgment of 4 October 2016, § 86.

particular might have to comply also with the specific guarantees of Article 6(2) ECHR.[106]

B. Substantive guarantees

1. Article 8 ECHR

Under the heading "Right to respect for private and family life", Article 8 ECHR reads as follows:

> *1. Everyone has the right to respect for his private and family life, his home and his correspondence.*
>
> *2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.*

a) Sanctions affecting private life

In the Platini Decision, the Court also discussed the applicability of Article 8 of the ECHR to sports sanctions. In substance, Mr Platini claimed that given the fact that he was 61 years old and that he had devoted his entire career to football, the ban imposed by the CAS and confirmed by the Swiss Federal Tribunal was a disproportionate and unjustified measure that *de facto* prevented him from exercising any professional activity – in breach of Article 8 ECHR.[107]

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[106] For the scope of Article 6 (criminal aspect) and the concept of a "criminal charge", see the Guide on Article 6 (criminal limb), available on the Court's website (www.echr.coe.int – Case-law).

[107] Platini Decision, cit. Fn. 97, § 55.

(i) The applicability of Article 8 to sports sanctions

The Court first considered the applicability of Article 8 ECHR to sports sanctions.

According to the Court, the concept of "private life" is broad and incapable of exhaustive definition.[108] Article 8 ECHR protects the right to personal development, whether in terms of personality or of personal autonomy, and encompasses the right for each individual to approach others in order to establish and develop relationships with them and with the outside world. The Court found that the case law developed in the area of professional disputes is particularly relevant also to determine the applicability of Article 8 in sports disciplinary disputes. In particular, the Court referred to the test summarized in *Denisov*[109] according to which Article 8 can be applicable if either (i) the grounds for the sanction are related to private life or (ii) the impact of the sanction extends to private life. In the Platini Decision it was the second limb of the Denisov test, also referred to as "*approche fondée sur les consequences*" that was relevant.[110]

Specifically, the Court found that this so-called 'severity test' was met on the ground that the ban from any football-related professional activity, at national and international levels:

- prevented Mr Platini form earning a living from football, his sole source of income throughout his life (a situation aggravated by his age and by FIFA's dominant position or even monopoly in the organisation of football worldwide);
- interfered with the possibility of establishing and developing social relations with others, in view of

[108] Platini Decision, cit. Fn. 97, § 52.
[109] *Denisov c. Ukraine* [GC], application No. 76639/11, judgment of 25 September 2018.
[110] Platini Decision, cit. Fn. 97, § 56.

the very broad nature of the sanction, which extended to "any" football-related activity, given that the applicant was commonly identified with football by the general public and the media;

- had a negative impact on his reputation (as a result of a certain stigmatisation).

Hence, the Court concluded that the sanction imposed by the CAS had to comply with Article 8 ECHR.

(ii) The so-called "margin of appreciation" doctrine

As the sanction was private in nature and was not imposed by the State, the Court examined whether Switzerland "complied with its positive obligations with respect to Article 8 ECHR".[111] Indeed, Article 1 of the ECHR requires member States to "secure" the rights and freedoms included therein. This requirement imposes both negative and positive obligations on the member States.[112]

Such positive obligations might require the adoption of measures aimed at ensuring the respect of private life in the relationships between individuals, it being understood that the State enjoys some discretion ("*l'État jouissant en toute hypothèse d'une marge d'appréciation*")[113] in the way in which it strikes the right balance between the public interest and the interests of the individual.[114]

In the Platini Decision, the Court applied the so-called "margin of appreciation doctrine" by examining whether Switzerland had put in place adequate institutional and procedural

[111] Platini Decision, cit. Fn. 97, § 59.

[112] DANIEL RIETIKER, *The European Court of Human Rights and FIFA – Current Issues and Potential Challenges*, European Convention on Human Rights Law Review 1 (2020), p. 77 and the references at Fn. 66.

[113] On this doctrine see ANDREW LEGG, The Margin of Appreciation in International Human Rights Law (Oxford) 2012.

[114] Platini Decision, cit. Fn. 97, § 60.

safeguards to protect the applicant's private life. Specifically, the Court indicated that the relevant question in the setting of sports sanctions is whether and to what extent Switzerland was required to positively protect Mr Platini's private life, and in particular: (i) if the combined effect of CAS appeals arbitration and of the action to set aside provided a jurisdictional framework that allowed him to put forward his complaints; and (ii) whether the decisions rendered were duly reasoned.

In its analysis, the Court took account of the specificity of Mr Platini's situation, in that he had freely chosen a career in football, first as player and coach, then in official capacities in football's federative governing bodies, which were private entities and thus not directly bound by the Convention. While that career had no doubt endowed him with many privileges and benefits, it had also involved waiving certain rights. In this context, the Court specifically noted that Mr Platini did not claim that he had no choice but to waive the state courts' jurisdiction and to agree to CAS arbitration and that his case was thus different from Ms Pechstein's case.

It is with these peculiarities ("*particularités*") in mind that the Court assessed whether the combination of the CAS Code and of Swiss arbitration law (here Articles 353 *et seq.* CPC) provided adequate institutional and procedural safeguards:

- with respect to the CAS, the Court started by noting that its independence was confirmed in the Pechstein Decision.[115] It added that the CAS Panel hearing Mr Platini's appeal had carefully examined his arguments in a 63-page long award and convincingly balanced the interests at stake taking into account the specificity of CAS arbitration proceedings. In effect, the Court's analysis focused on whether the CAS had addressed

[115] Platini Decision, cit. Fn. 97, § 65.

Mr Platini's argument that the sanction was disproportionate:

> *The CAS had in particular found that a four-year period was reasonable in view of the aim pursued: to impose a sufficiently harsh sanction for the breach, which it deemed serious, of the Code of Ethics, in order to send a "strong signal" to restore the reputation of football and of FIFA. Neither the applicant's current situation nor his outstanding services to football had been overlooked by the arbitrators; on the contrary, the CAS had given due regard to the applicant's senior position in the highest football bodies at the time of the offences of which he stood accused, and also to his lack of remorse.*[116]

- Concerning the Swiss Federal Tribunal, the Court noted that its decision of 6 June 2017 had:

> *[…] upheld the CAS award on the basis of plausible and convincing reasoning. It had taken the view that the duration of the suspension did not appear manifestly excessive in view of the criteria set out by the arbitral tribunal, which had taken account of all the incriminating and exonerating factors in the file before it, and had not disregarded any material circumstance in deciding on that duration.*[117]

On this basis, and noting in passing that the decision confirmed by the Federal Tribunal "pursued not only the legitimate aim of punishing breaches of the relevant rules by a high-ranking official of FIFA, but also the general-interest aim of restoring the reputation of football and of FIFA",[118] the

[116] Platini Decision, cit. Fn. 97, § 67 as translated in the Court's Information Note 238 of March 2020, available at https://www.echr.coe.int/Pages/home.aspx?p=caselaw/analysis/clin

[117] *Id*., § 69 as translated in the Court's Information Note 238, cit. Fn. 116.

[118] *Id.*, § 70 as translated in the Court's Information Note 238, cit. Fn. 116.

Court held that – given the broad margin of appreciation afforded to it – Switzerland had not failed to fulfil its positive obligations under Article 8 ECHR.

(iii) Bearing of the Platini Decision

In substance, the Court held in the Platini Decision that when sports sanctions reach a certain "threshold of seriousness", such that Article 8 ECHR is applicable, Switzerland has the positive obligation to ensure that the governing legal regime produces decisions that are sufficiently reasoned to allow the Court to ensure that the sanctions are proportionate.

The obvious question is whether and to what extent this principle applies to sports sanctions other than those considered in the Platini Decision, in particular anti-doping sanctions. We have already noted that in anti-doping cases the sanctions are at least, or potentially even more severe than the four-year ban imposed on Mr Platini. Hence, Article 8 ECHR requires that Switzerland ensure that the combined effect of the CAS proceedings and the action to set aside before the Federal Tribunal convincingly show that the sanction is proportionate to the offence, taking into account all the interests at stake.

In this respect, there are certain considerations to keep in mind. First of all, the starting point that the *Platini* situation is different from the *Pechstein* situation will not apply. Moreover, given the way in which certain CAS Panels point blank refuse to conduct proportionality analyses in anti-doping proceedings, it is far from certain that the Court would necessarily come to the same conclusion. Furthermore, in the vast majority of cases the arbitration will be international and the action to set aside will be governed by Article 190(2) PILA (and not, as in *Platini*, by Article 393 CPC). With respect to the merits, and as noted by the Swiss Federal Tribunal in the *Platini* case, the ground for setting aside an award in international arbitration (inconsistency with public policy

within the meaning of Article 190(2)(e) PILA) is significantly narrower than the ground available in domestic arbitration (arbitrariness under Article 393(e) CPC,[119] i.e. where the decision is "evidently unsustainable, […] clearly contradicts the factual situation, blatantly violates a provision or well-established principle of law or […] clearly runs contrary to fairness and equity").[120] This means that in the vast majority of disciplinary matters, the Swiss Federal Tribunal will only consider whether the CAS award is consistent with public policy and will not review the *reasoning* of the CAS award.

In *Platini* the Federal Tribunal ruled that it had the power to examine whether not only the application of the law, but also the applicable disciplinary regulations were arbitrary or not, or arbitrarily applied. Indeed, it discussed the CAS award over several pages to conclude that this was not the case. With respect to the proportionality of the sanction, the arbitrariness standard allows the Federal Tribunal to examine whether the CAS has "grossly breached its discretion when imposing severe disciplinary punishment",[121] which is a claim that the Federal Tribunal would not even entertain when the arbitration is international (and the applicable standard of review is the violation of public policy).

In light of the above it is doubtful that in cases governed by Chapter 12 PILA the ECtHR will be in a position to determine whether, like in the *Platini* case, the Federal Tribunal has convincingly and plausibly determined that the sanction was not manifestly excessive taking into account all of the circumstances of the case.

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[119] SFSCD 4A_600/2016 of 29 June 2017, § 1.1.4.

[120] Free translation of the definition of arbitrariness given in SFSCD 132 III 209, 2.1.

[121] SFSCD 4A_600/2016 of 29 June 2017, § 3.7.2 *in fine*, loose translation of the French original "*seule la mise en évidence d'une ou de plusieurs violations crasses de leur pouvoir d'appréciation par les arbitres, qui plus est à l'origine d'une peine disciplinaire excessivement sévère, pourrait justifier l'intervention du Tribunal fédéral*."

As such, it remains to be seen whether the "margin of appreciation doctrine" will be sufficient to rule out a breach of Article 8 ECHR in cases where a severe sanction is imposed without any analysis of its proportionality.

b) Article 8 ECHR - private and family life in anti-doping

As noted by a senior lawyer at the ECtHR,[122] the World Anti-Doping Code raises several human rights issues (beyond the severity of the sanctions), in particular the use of surveillance measures, issues of data protection concerning sensitive information, and interference with privacy by the so-called whereabouts requirements in anti-doping rules and regulations.

This last issue was addressed in a recent judgment following a complaint brought by the Fédération Nationale des Associations et Syndicats Sportifs (**FNASS**) against France with respect to the requirement for certain professional athletes to provide complete quarterly information on their whereabouts and to specify a sixty-minute time-slot during which they would be available for testing every day.[123] The applicants claimed that such requirement amounted to unjustified interference with their right to respect for private and family life and their home under Article 8 ECHR.[124]

The Court found that the whereabouts requirements in question represented an interference with the applicants' rights under Article 8(1) ECHR[125] but that the duties imposed on athletes by these requirements furthered the legitimate

[122] DANIEL RIETIKER, *The European Court of Human Rights and FIFA,* cit. Fn. 112.
[123] *National Federation of Sportspersons' Associations and Unions (FNASS) and Others v. France*, application No. 48151/11 and 77769/13, judgment of 18 January 2018.
[124] *Id.*, §§ 115 and 138.
[125] *Id.*, § 151.

aim of protecting "the rights and freedoms of others".[126] The Court noted in particular that the use of prohibited substances would (i) provide an unfair competitive advantage over other athletes, (ii) operate as an encouragement of amateur athletes, and especially young people, to follow suit thus endangering their health, and (iii) deprive spectators of the fair competition which they legitimately expected.[127] Moreover, the Court noted that to reduce or remove the whereabouts requirements could increase the dangers of doping for the applicants' health and for the health of the whole sports community, running contrary to the European and international consensus on the need for unannounced testing.[128] In short, the Court held that the relevant whereabouts requirements struck a fair balance between these objectives and the rights enshrined in Article 8 ECHR.

In the well-known *Sun Yang* CAS case, there was an interesting debate on the requirements that need to be followed in order to collect blood from an athlete, in particular as to the notification formalities and the qualifications of doping control personnel. A careful reading of the CAS award[129] suggests that there is room for an argument that the way in which the doping control was conducted in the circumstances and the severity of the sanction imposed (an 8 year ban) would allow for scrutiny under Article 8 ECHR. Still with respect to anti-doping controls, Article 8 ECHR is certainly also relevant with regard to night-time testing.

2. Article 14 ECHR – Non-discrimination

In its recent judgment in the *Caster Semenya* matter, the Swiss Federal Tribunal held that the principle of non-

[126] *Id.*, §§ 160–163.
[127] *Id.*, §§ 164-166.
[128] *Id.*, §§ 184 and 191.
[129] CAS 2019/A/6148, *World Anti-Doping Agency v. Sun Yang & Fédération Internationale de Natation,* award of 28 February 2020.

discrimination is encompassed by the concept of public policy within the meaning of Article 190(2)(e) PILA, but primarily in order to protect the individual from illegitimate State interventions. The Federal Tribunal noted that under Swiss constitutional law the principle of non-discrimination does not have "horizontal effects" and thus does not apply to the relationships between private persons, such as those in sports matters.

While recognizing that the "relationship between an athlete and a global sports federation shows some similarities to those between an individual and a State", the Federal Tribunal was not prepared to accept that a prohibition of discrimination originating from such private party could be characterized as part of the essential values that form public policy within the meaning of Article 190(2)(e) PILA.[130]

Legal commentators have pointed out that the ECtHR is more proactive in ensuring compliance with the principle of non-discrimination, even when it is breached by non-State entities, and that it has held the State responsible when the domestic courts did not redress such private discrimination. As noted by the ECtHR:

> *In exercising the European supervision incumbent on it, [the Court] cannot remain passive where a national court's interpretation of a legal act, be it a testamentary disposition, a private contract, a public document, a statutory provision or an administrative practice appears unreasonable, arbitrary or, as in the present case, blatantly inconsistent with the prohibition of discrimination established by Article 14 and more broadly with the principles underlying the Convention.*[131]

[130] SFSCD 4A_248/2019 and 4A_398/2019 of 25 August 2020, § 9.4.

[131] *Pla and Puncernau v. Andorra*, application No. 69498/01, judgment of 13 July 2004.

In light of this case law, one cannot rule out that Article 14 ECHR will be increasingly invoked in CAS proceedings. The interesting question will be the extent to which such arguments are accepted – or even discussed – by the Panels in question.

C. How to ensure compliance with the ECHR?

At this stage, it may be worth considering at least briefly certain practices that may assist in ensuring compliance with the ECHR.

1. Exhaustion of domestic remedies

Under the heading "Admissibility criteria", Article 35(1) ECHR provides that "[t]he Court may only deal with the matter after all domestic remedies have been exhausted, according to the generally recognised rules of international law". The Court has underlined the need to apply this requirement rule with some degree of flexibility and without excessive formalism. In particular, it has held that it is not necessary for a right under the Convention to be explicitly invoked in domestic proceedings, provided that the corresponding complaint is raised "at least in substance".[132]

Indeed, in the Platini Decision, the Court ruled that the fact that the applicant had (only) claimed before the Swiss Federal Tribunal that the sanction at issue breached his personality rights under Swiss law, without mentioning Article 8 ECHR, did not prevent it from examining whether the sanction was proportionate under Article 8 ECHR.[133]

[132] *Castells v. Spain*, application No. 11798/85, judgment of 23 April 1992, § 32.
[133] Platini Decision, cit. Fn. 97, § 51.

2. Breaches of the ECHR as ground to set aside the award?

a) Article 6(1) ECHR

As Article 6(1) ECHR is self-executing, one would think that after the Pechstein Decision the CAS is now under an obligation to apply all the guarantees of Article 6(1) ECHR in appeals cases, and that the Swiss Federal Tribunal ought to ensure that this is indeed the case. The extent to which the CAS will in practice apply the guarantees of Article 6(1) ECHR will of course depend on the way in which the Swiss Federal Tribunal will sanction any relevant breaches.

In a recent decision dated 17 August 2020, the Swiss Federal Tribunal has ruled that even in cases where Article 6(1) ECHR is applicable in CAS arbitration under the so-called *Pechstein* test, a breach of Article 6(1) ECHR does not constitute a separate, *sui generis* ground for setting aside CAS awards.[134]

The Federal Tribunal also held that a breach of Article 6(1) ECHR does not constitute *per se* a breach of procedural public policy within the meaning of Article 190(2)(e) PILA and that the party seeking to have the award set aside must "show how the alleged violation of Article 6(1) ECHR would constitute a violation of procedural public policy".[135]

This approach is difficult to understand since a breach of Article 6(1) would expose Switzerland to a condemnation by the ECtHR, irrespective of whether a party has demonstrated in the action to set aside that the breach of Article 6(1) ECHR would also qualify as a breach of procedural public policy within the meaning of Article 190(2)(e) PILA.

After all, the Swiss Federal Tribunal accepts that federal legislation can be interpreted in accordance with the Swiss

[134] SFSCD 4A_486/2019 of 17 August 2020, § 4.1.
[135] *Ibid*.

Constitution (and arguably the ECHR) when the other rules of interpretation do not dissipate all the doubts as to the meaning of the law. With specific respect to Article 190(2)(e) PILA, the legislator historically contemplated public policy in a substantive sense. It was the Swiss Federal Tribunal that clarified that public policy also has a procedural limb, covering all fundamental and generally recognized procedural principles (i) that are not already covered by Article 190(2)(d) PILA and (ii) the disregard of which contradicts the sense of justice in an intolerable way.[136] This case law was rendered well before the Pechstein Decision. One therefore fails to see why the Swiss Federal Tribunal cannot "go the extra mile" and rule that in sports matters the concept of procedural public policy should be interpreted in such a way as to include all the guarantees of Article 6(1) ECHR that are not already covered by Article 190(2)(d) PILA.

b) Substantive guarantees

When it comes to substantive guarantees, the Swiss Federal Tribunal has consistently held that the principles underpinning the relevant provisions of the ECHR or of the Swiss Constitution can be taken into account to crystallize the concept of public policy under Article 190(2)(e) PILA.

This approach makes sense in sports disputes given the fact that the ECtHR consistently applies the doctrine of the margin of appreciation, which allows the Swiss Federal Tribunal to exercise some level of discretion in determining how and to what extent potential breaches of the ECHR shall be redressed.

[136] SFSCD 126 III 249, § 3b with the reference.

D. Concluding remarks

At the end of this discussion of the relevance of human rights in sports arbitration, one could easily predict that the ECHR will be increasingly relied upon by the parties both before the CAS and before the Swiss Federal Tribunal. Already, there has been a sharp increase in the number of sports-related cases being brought before, and considered by, the ECtHR in recent years.[137] In view of this, one can only hope that Judge Costa, a former President of the ECtHR who is well acquainted with sports law and anti-doping rules in particular, was right when writing, very recently, that "*c'est plus une autodiscipline des procédures arbitrales qui est probable pour l'avenir qu'une multiplication forte des litiges portés dans cette matière à Strasbourg*".[138]

[137] In addition to the *Pechstein* (cit. Fn. 1), *Bakker* (cit. Fn. 6), *Platini* (cit. Fn. 97) and *FNASS* (cit. Fn. 123) cases discussed in this contribution, another recent case was that of *Ali Riza and Others v. Turkey*, applications No. 30226/10 and 4 others, judgment of 28 January 2020. All of the ECtHR rulings in the aforementioned cases were issued between 2018 and 2020.

[138] JEAN-PAUL COSTA, La Cour européenne des droits de l'homme et l'arbitrage, b-Arbitra 2019/2, p. 308.

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

CATHERINE ANNE KUNZ

Contents

I. Introduction

Over the last two years, the Swiss Federal Supreme Court has issued over 100 arbitration-related decisions, a vast majority of which concern challenges brought against international awards rendered by arbitral tribunals seated in Switzerland. While many unsuccessful parties have attempted to challenge the award, only very few challenges have resulted in the annulment or partial annulment of the award by the Swiss

Supreme Court. This is in line with the trend observed in previous years.

This contribution provides an overview of the arbitration-related decisions rendered by the Swiss Supreme Court from August 2018 to July 2020. These decisions have not given rise to any revolution or radical changes in case law and, on the contrary, have provided the opportunity for the Supreme Court to confirm prior findings and well-established principles. A number of these decisions, however, have brought about several welcome clarifications and further developments, which only confirm the pragmatic and pro-arbitration approach adopted by the Swiss Supreme Court when dealing with challenges of arbitral awards.

Amongst the many lessons that can be drawn from the review of the Supreme Court's recent decisions, the following are in the author's view particularly noteworthy:

- The validity of an agreement of the parties to opt out of the rules governing domestic arbitration in favour of the rules governing international arbitration and vice versa are subject to the same requirements. What is the latest moment to opt out of the applicable rules? If the arbitral tribunal consents, parties may agree on such an opting out at any stage before the award is rendered.[1]
- The 30-day time limit to bring a challenge against an award starts running from the notification of the signed original arbitral award and not the advance courtesy electronic copy sent by the ICC.[2]
- *Ex parte* communications between a co-arbitrator and a party or its counsel are admissible if they

[1] SFSCD 145 III 266 (4A_540/2018), 7 May 2019. See Section II.A. below.

[2] SFSCD 4A_40/2018, 26 September 2018; 4A_264/2019, 16 October 2019. See Section II.B.2.a below.

are made for the purposes of selecting the presiding arbitrator and they take place prior to the latter's appointment.[3]

- The Supreme Court confirmed that arbitration agreements signed by State-controlled entities do not automatically extend to the controlling States.[4]
- An arbitration agreement contained in a signed contract was found to apply to disputes arising out of other contracts containing their own dispute resolution clause that were negotiated as part of the same supply relationship but were ultimately never signed.[5]
- If an arbitration clause covers disputes arising out of a contract, it also covers claims for losses incurred by a third party arising from a breach of obligations owed to that third party under that contract (*stipulation pour autrui; Vertrag zugunsten eines Dritten*).[6]
- The Supreme Court annulled for the first time a bilateral investment treaty ("**BIT**") award in which the arbitral tribunal had wrongly declined jurisdiction. The Supreme Court held that, in the absence of express language in the BIT preventing treaty shopping, what was decisive when determining the existence of a relevant "investment" was the investor's nationality not the

[3] SFSCD 4A_292/2019, 16 October 2019. See Section II.C.1 below.
[4] SFSCD 4A_636/2018, 24 September 2019. See Section II.C.2.a below.
[5] SFSCD 4A_342/2019, 6 January 2020. See Section II.C.2.a below.
[6] SFSCD 4A_12/2019, 17 April 2020. See Section II.C.2.a below.

origin of a possible consideration provided in exchange for the investment.[7]

- In two other decisions concerning a BIT award, the Supreme Court ruled that Russia assumed responsibility under the Russia-Ukraine BIT for Ukrainian investments in Crimea made prior to the Russian annexation in 2014.[8]
- An arbitration agreement can extend to a non-signatory under Article II of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards ("**New York Convention**" or "**NYC**") if the non-signatory was actively involved in the performance of the underlying contract.[9]

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

A. International vs. Domestic Arbitration

If at least one party's seat, domicile or habitual residence is outside of Switzerland at the time the parties entered into the arbitration agreement, the arbitration will be considered international in nature and will, as a rule, be subject to Chapter 12 of the Swiss Private International Law Act ("**PILA**"). By contrast, if all parties were seated, domiciled or resided in Switzerland, the arbitration will qualify as domestic and be subject to Part 3 of the Swiss Code of Civil Procedure ("**CPC**"). However, the parties to an international arbitration

[7] SFSCD 4A_306/2019 (planned for publication), 25 March 2020. See Section II.C.2.b below.
[8] SFSCD 144 III 559 (4A_396/2017), 16 October 2018; 4A_398/2017, 16 October 2018. See Section II.C.2.b below.
[9] SFSCD 145 III 199 (4A_646/2018), 17 April 2019. See Section IV below.

may opt out of Chapter 12 PILA and agree instead on the application of the rules governing domestic arbitrations set out in the CPC (Article 176(2) PILA). Conversely, parties to a domestic arbitration may opt to apply the rules of Chapter 12 PILA instead of Part 3 CPC (Article 353(2) CPC).

On two occasions, the Supreme Court had to decide on the **validity of an opting out agreement**, once in favour of Chapter 12 PILA, the other in favour of Part 3 CPC. In both cases, the Supreme Court recalled that for such an opting out to be valid the parties had to agree, in writing, to exclude the application of Chapter 12 PILA, and apply instead Part 3 CPC. The Court held that the same requirements applied by analogy to the opting out of Part 3 CPC in favour of Chapter 12 PILA.[10] The Court clarified that while an express reference to Chapter 12 PILA or Part 3 CPC was not required, the parties' common intent to exclude one set of rules in favour of the other had to result clearly from the terms used in the arbitration agreement itself or in a subsequent agreement.[11]

Applying these principles, the Supreme Court found that the mere reference to the "Rules of the Chamber of Commerce and Industry of Geneva" (subsequently replaced by the Swiss Rules) in the arbitration agreement did not meet the strict requirements to exclude the application of Chapter 12 PILA in favour of the CPC.[12] By contrast, the wording "the provisions of Chapter 12 of the Swiss Private International Law Statute (PILS) shall apply, to the exclusion of any other procedural law" was deemed sufficiently clear and unambiguous to constitute a valid opting out of Part 3 CPC in favour of Chapter 12 PILA.[13]

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[10] Swiss Supreme Court 4A_7/2019, 21 March 2019, para. 1.2.2; 145 III 266 (4A_540/2018), 7 May 2019, paras. 1.3.2 and 1.3.3.
[11] SFSCD 145 III 266 (4A_540/2018), 7 May 2019, para. 1.6.1.3.
[12] SFSCD 4A_7/2019, 21 March 2019, para. 1.2.3.
[13] SFSCD 145 III 266 (4A_540/2018), 7 May 2019, paras. 1.4.1 and 1.6.1.4.

The Supreme Court left open the question as to the latest moment at which parties could reach an opting out agreement without the arbitral tribunal's consent. The situation was found to be different if the arbitral tribunal did consent; in that case, an opting out agreement can be concluded until the award is rendered.[14]

B. Admissibility of Applications to Set Aside

1. Challengeable Awards and Decisions

In several cases, the Supreme Court had to determine whether a decision by an arbitral tribunal should be characterised as a (final, interim or partial) award or as a procedural order. This distinction is of importance since procedural orders cannot, in principle, be directly challenged before the Supreme Court. When determining whether a decision qualifies as a (challengeable) award, the Supreme Court continues to follow its well-established approach that what is decisive is its substance, not its title or form.

The Supreme Court had previously held that decisions regarding the **advance of arbitration costs** by the parties qualify as procedural orders which cannot be directly challenged.[15] By contrast, the Supreme Court recently found that a decision granting a party the **right to recover the share of the advance** on arbitration costs paid for the other party qualifies as a partial award. This was found to be the case even though the arbitral tribunal had reserved its final decision on the amount and allocation of the total arbitration costs.[16]

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[14] SFSCD 145 III 266 (4A_540/2018), 7 May 2019, para. 1.6.2.
[15] See *e.g.* SFSCD 136 III 597 (4A_391/2010, 4A_399/2010), 10 November 2010, para. 4.2.
[16] SFSCD 4A_58/2020, 3 June 2020, para. 1.2 (domestic arbitration).

The Supreme Court also examined whether **decisions taken by the Court of Arbitration for Sport** ("**CAS**") amounted to awards subject to challenge. In one case, the Supreme Court considered that the CAS' refusal to consider a statement of appeal or an appeal brief that was untimely or failed to comply with the formal requirements qualified as a final award that was subject to challenge, regardless of the fact that this decision had been rendered in the form of a letter from the CAS' Vice Director General.[17] In another case, the Court found that the CAS' decision to reject an objection to the admissibility of a statement of appeal that had allegedly been filed too late was not directly challengeable as it did not constitute a final decision on the CAS' jurisdiction but merely concerned a procedural issue.[18]

2. Other Procedural Questions Related to Setting Aside Proceedings

a) Time Limit to Challenge Awards

Challenges before the Swiss Supreme Court must be brought within 30 days of service of the award (Article 100(1) of the Swiss Federal Supreme Court Act ("**FSCA**")). The question arose whether the 30-day time limit starts running from notification of the **courtesy electronic copy of the award** or only upon the service of the hard copy. The Court recalled its established case law pursuant to which the notification of a copy of the award by fax does not trigger the 30-day time limit if the applicable rules provide for the service of a hard copy and held that the same rule should apply to electronic notifications.[19] However, if the applicable rules do not provide

[17] SFSCD 4A_238/2018, 12 September 2018, para. 2.2.

[18] SFSCD 4A_287/2019, 6 January 2020, para. 4; see further, 4A_272/2019, 4 September 2019, para. 3.

[19] SFSCD 4A_238/2018, 12 September 2018, para. 3.1 and 4A_40/2018, 26 September 2018, para. 2; see also, 4A_264/2019, 16 October 2019, para. 1.1.

for the service of a hard copy, the 30-day time limit will be triggered by fax or electronic notification.

Hence, the Court found that the 30-day time limit to challenge an award is not triggered by (i) the ICC's notification of an advance courtesy electronic copy of the award (article 34 ICC Rules);[20] or (ii) the CAS' notification of the award by fax or email.[21] In both cases, the 30-day time limit only starts to run the day following the service of the hard copy. If the hard copy version of the award notified to the parties is incomplete, the parties must raise the issue with the arbitral institution or tribunal immediately as the 30-day time limit will otherwise run from the service of the incomplete version of the award.[22]

b) Language of Setting Aside Application

As a rule, a setting aside application filed before the Swiss Supreme Court in English instead of one of Switzerland's official languages will not immediately be declared inadmissible (Article 42(1) FSCA). Rather, the Court must set a deadline for the applicant to submit a translation of the application in one of the official languages. This rule, however, suffers an exception in the event of an abuse of rights, notably when the applicant was aware that the application had to be filed in one of the official languages and deliberately failed to do so to obtain an extension of the time limit.[23] Whilst setting aside applications in English will become admissible with the entry into force of the revised PILA and related amendments to the FSCA,[24] this rule will continue to apply to applications drafted in other non-official languages.

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[20] SFSCD 4A_40/2018, 26 September 2018, para. 2; 4A_264/2019, 16 October 2019, para. 1.1.
[21] SFSCD 4A_238/2018, 12 September 2018, para. 3.1.
[22] SFSCD 4A_294/2019, 16 October 2019, para. 1.
[23] SFSCD 4A_114/2020, 20 May 2020.
[24] See *de lege ferenda*, Article 77(1)(2bis) FSCA.

c) Application to Set Aside an Unreasoned Award

The Supreme Court found that under the applicable arbitration rules (those of the Basketball Arbitral Tribunal), an unreasoned award containing only the ruling in the operative part of the decision could validly be notified and reasons provided only if a party requested them within 10 days after having been served with the ruling. As reasons are not a prerequisite for an application to set aside the award, an (unreasoned) award can be be challenged, although a party's waiver to request the reasons considerably reduces the chances of success of the challenge.[25]

d) Costs of Setting Aside Proceedings

Several decisions provide insight into the court costs and the compensation for the other side's attorneys' fees that are to be paid by a party who withdraws its setting aside application. The Supreme Court thus found that the withdrawing applicant must bear the costs of the setting aside proceedings as if it had lost the proceedings, and this regardless of the chances of success of the application. The calculation of those costs will take into account the amount in dispute and the fact that the proceedings were terminated by a withdrawal (Article 66(2) FSCA). The withdrawing applicant will, as a rule, also be ordered to pay part of the other side's attorneys' fees.[26]

Similarly, the Court held that the party who withdraws its claims from the arbitration must bear the costs of the setting aside proceedings that became moot as a result (*Verursacherprinzip*).[27]

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[25] SFSCD 4A_298/2018 and 4A_300/2018, 22 August 2018, para. 3.
[26] See *e.g.* SFSCD 4A_294/2017, 25 September 2018; 5A_512/2018, 19 February 2019; 4A_3/2019, 11 April 2019.
[27] SFSCD 4A_118/2014, 5 February 2020.

C. Substantive Grounds for Setting Aside

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

The Supreme Court rendered a decision in which it provided welcome clarification on the **admissibility of *ex parte* communications** between an arbitrator and one of the parties or its counsel. Referring *inter alia* to the IBA Guidelines on Conflicts of Interest, the Court held that unilateral contacts between a party or its counsel and an arbitrator were not always inadmissible. *Ex parte* communications can thus in particular take place for the purpose of the selection and appointment of the presiding arbitrator. The Court found that, unless otherwise agreed by the parties, such *ex parte* communications were admissible provided they took place prior to the appointment of the presiding arbitrator, which was the decisive point in time – as opposed to the prior appointment of the co-arbitrator, as argued by the applicant.[28]

Another decision concerned the **consequences of an arbitrator's resignation on the procedural acts carried out prior to his/her replacement**. These are not specified under the PILA. The rule under the CAS Code of Arbitration is that, unless otherwise agreed by the parties or decided by the arbitral tribunal, the proceedings shall continue without any repetition of any acts carried out prior to the arbitrator's replacement (Article R36). If the newly constituted arbitral tribunal does not manifest any intention to go back on a decision taken prior to the arbitrator's resignation and, on the contrary, even confirms that decision, there is no legitimate interest to challenge that same decision on the ground that

[28] SFSCD 4A_292/2019, 16 October 2019, para. 3; 4A_65/2018, 11 December 2018, paras. 2.2 and 3.2.1.2.5.

the arbitral tribunal in its former composition was not properly constituted.[29]

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

The Supreme Court rendered a number of interesting decisions regarding challenges brought on the ground that the arbitral tribunal had wrongly accepted or denied its jurisdiction.

a) Interpretation of Arbitration Clause

Several of these decisions concern the **interpretation of arbitration clauses** to determine their existence and/or their scope. Consistent with its longstanding case law, the Supreme Court confirmed that it will **not review an arbitral tribunal's subjective interpretation of an arbitration clause based on the parties' actual intent**, which is a question of fact. The only exception is where the factual findings themselves are challenged on one of the grounds of Article 190(2) PILA (*e.g.* public policy or due process). By contrast, the Court will freely review an arbitral tribunal's objective interpretation of the arbitration clause based on the parties' so-called presumed or objective intent based on the principle of good faith, as it is a question of law.[30]

In a recent case, the Supreme Court upheld an arbitral tribunal's decision to **decline jurisdiction** despite the fact that the underlying contract contained an **arbitration clause whose terms appeared to be clear**. The arbitral tribunal first considered that the arbitration clause as such was not decisive to determine the parties' true intent since it had nothing to do with the underlying contract: it did not refer to its parties or to disputes arising out of that particular

[29] SFSCD 4A_287/2019, 6 January 2020, paras. 5.3 and 5.4.
[30] SFSCD 4A_418/2019, 18 May 2020, para. 3.2.1.

agreement but appeared to simply have been copied from the Iran-Turkish investment protection treaty. The arbitral tribunal also found that the evidence from the contract negotiations showed that one of the parties had never agreed to the use of international arbitration and that this was known to the other side. It concluded that there was therefore no agreement to arbitrate. The Supreme Court held that it was bound by the arbitral tribunal's conclusion that the parties did not have a common intention to arbitrate (subjective interpretation) as this was a finding of fact. As a consequence, there was no room for an objective interpretation of the arbitration clause.[31]

In another case, the Supreme Court had to decide **whether a State is bound by an arbitration clause signed by a State-controlled entity**. A joint venture formed by two Turkish companies entered into a contract with a Libyan State-controlled entity for the construction of a water pipe. Following the riots that took place in Libya, the joint venture suspended the works. As no agreement could be reached to resume the works, the joint venture commenced arbitration against the State-controlled entity and the State of Libya. The arbitral tribunal declined jurisdiction with respect to Libya, as the State was not a party to the arbitration agreement.

The Supreme Court upheld the arbitral tribunal's decision. The Court first recalled that it examines legal issues pertaining to jurisdiction freely, including the application of foreign law. In so doing, the Court will follow the prevailing view and, in the event of divergences between the case law and legal scholars, will adopt the approach followed by the highest courts.[32] The Court then rejected the argument that the arbitral tribunal had incorrectly applied Libyan law: that there were cases in which the State had been found liable for actions carried out by State-owned entities under its supervision did not mean

[31] SFSCD 4A_418/2019, 18 May 2020, para. 3.2.5.
[32] SFSCD 4A_636/2018, 24 September 2019, para. 4.1.

that an arbitration agreement can be extended to the State. Indeed, a finding of substantive liability has no bearing on jurisdiction, and in particular does not suffice to exclude the jurisdiction of State courts in favour of arbitration. Turning then to the question of whether Libya could be deemed to be bound to the arbitration agreement as a matter of Swiss law, the Court confirmed the conclusions drawn by the arbitral tribunal from the Westland case[33] that State-owned companies are separate legal entities and, consequently, the arbitration clauses they sign cannot *per se* be considered binding on the controlling State. The Court found that one could not infer any intention of Libya to be bound by the arbitration agreement from the circumstances. That Libya was an authoritarian regime and the project was particularly important to the government did not suffice to create any legitimate expectation that Libya would be a party to the arbitration agreement.[34]

In a further case, the Supreme Court examined whether an arbitration clause providing for ICC arbitration with the seat in Zurich contained in a quality assurance agreement (QAA) covered only disputes under the QAA itself or **extended to disputes under other contracts which the parties had negotiated as part of the same supply relationship** but, unlike the QAA, had ultimately never signed. The Supreme Court upheld the arbitral tribunal's decision to accept jurisdiction as it found that the reference to "contract disputes" in the arbitration clause contained in the QAA showed that the parties intended the arbitration clause to apply to all disputes arising from the supply relationship, including contract disputes not directly related to the QAA. That the other contracts were ultimately not signed was not decisive. The fact that these (unsigned) contracts contained their own separate – but identical – arbitration clause only

[33] SFSCD P 1675/1987, 19 July 1988, in ASA Bull. 1/1989, p. 63.
[34] SFSCD 4A_636/2018, 24 September 2018, para. 4.

confirmed the parties' intention to submit their entire contractual relationship to ICC arbitration with seat in Zurich. Further support was found in the fact that when the purchaser submitted its general terms of sale providing for the jurisdiction of the courts in Stuttgart, the supplier had objected, and requested that the general terms be aligned with the other agreements, which contemplated ICC arbitration. The supplier could not in good faith assume that the other contracts would remain subject to the jurisdiction of the State courts if they were not signed, a possibility neither party had considered at the time.[35]

In another case, the Supreme Court examined whether the arbitral tribunal had **jurisdiction over claims** brought by a licensee under a license agreement **for losses incurred by one of its affiliates**, which was not a party to the license agreement or the arbitration agreement it contained but had been granted a sublicense in accordance with terms of the main license agreement. The Supreme Court held that the arbitral tribunal had jurisdiction over any dispute relating to the license agreement, including any dispute as to the existence of obligations of the licensor towards a third party (*stipulation pour autrui*; *Vertrag zugunsten eines Dritten*) such as the licensee's affiliate. The Court found that since the arbitration agreement covered claims for damages arising out of a contractual breach, the arbitral tribunal had jurisdiction, regardless of whether the claims were based on the claimant's own losses or the losses of a third party.[36]

Finally, the Supreme Court had to decide whether an arbitral tribunal had jurisdiction over the **admissibility and the consequences of the claimant's purported withdrawal of its claims**. The claimant, the holder of a railway concession granted by Spain and France, initiated arbitration proceedings

[35] SFSCD 4A_342/2019, 6 January 2020, para. 3.4.
[36] SFSCD 4A_12/2019, 17 April 2020, paras. 3.2 and 3.4.

before a tribunal seated in Geneva against the two States under the concession contract. Following the termination of the concession contract several months later, the claimant argued that its claims had become moot as a result and attempted to withdraw them as it wanted to bring claims arising from the termination before a new arbitral tribunal seated in Belgium. The States objected to the without prejudice withdrawal of the claims. The arbitral tribunal decided it had jurisdiction in relation to the withdrawal of claims and the claimant was not entitled to withdraw its claims without prejudice. The claimant challenged the award before the Supreme Court on the ground that the arbitral tribunal lacked jurisdiction to decide on the admissibility and consequences of its withdrawal from the arbitration.

After a detailed examination of the concept of *lis pendens* (*litispendance, Rechtshängigkeit*) and the difference between a withdrawal of claims with prejudice and without prejudice, the Supreme Court upheld the arbitral tribunal's jurisdiction. It considered that, as a rule, if an arbitral tribunal had jurisdiction over the merits of a dispute, it also had jurisdiction over any procedural incidents, including any dispute on the admissibility and effects of a withdrawal of claims from the arbitration. Contrary to the claimant's contention, such a decision should be taken by the tribunal first seized with the dispute and not deferred to another, subsequent, arbitral tribunal. The Court also recalled that, unless the parties have agreed otherwise, *lis pendens* entails a burden on the claimant to proceed with the arbitration until the proceedings are terminated by a final award or otherwise.[37]

[37] SFSCD 4A_394/2017, 19 December 2018, para. 4.

b) Jurisdiction of Arbitral Tribunals under Bilateral Investment Treaties (BITs)

Several decisions relate to the jurisdiction of arbitral tribunals **under bilateral investment treaties (BITs)**. In line with its established case law, the Supreme Court analyses the jurisdiction of arbitral tribunals in investment arbitrations freely, including their interpretation of the terms, investor and investment, umbrella clauses, the scope of reservations, and allegations of illegality.[38] The Court conducts this analysis in accordance with the rules on treaty interpretation of customary international law as reflected in the Vienna Convention on the Law of Treaties.[39]

(i) Clorox España v. the Bolivarian Republic of Venezuela

In a recent decision, the Supreme Court **partially annulled an investment treaty award for the first time** on the ground that the arbitral tribunal had wrongly declined its jurisdiction to hear claims by a Spanish investor, Clorox España ("**Clorox**"), against Venezuela under the **Spain-Venezuela BIT**. In reaching its decision, the arbitral tribunal had interpreted the BIT as requiring an active act of investment made in exchange for consideration. According to the arbitral tribunal, this requirement was not fulfilled since Clorox had been created, as part of a corporate restructuring, by way of a contribution in kind of the shares in a Venezuelan subsidiary that had belonged until then to Clorox' US parent company and Clorox had not provided any consideration in exchange for those shares.

The Supreme Court disagreed with the arbitral tribunal's interpretation. The Court found that the asset-based definition

[38] See *e.g.* SFSCD 144 III 559 (4A_396/2017), 16 October 2018, para. 4; 4A_398/2017, 16 October 2019, para. 4.
[39] See *e.g.* SFSCD 4A_65/2018, 11 December 2018, para. 2.4.1.

of "investment" in the BIT was very broad and contained neither a restriction nor any specific requirement as to the type of investments protected under the BIT. The Court further noted that the contracting States had **not included in the BIT any language**, such as a denial of benefits clause or origin of capital clause, **to avoid treaty shopping**. Accordingly, the Court concluded that only the investor's nationality was decisive and not the origin of a possible consideration in exchange for the investment. The Court, however, considered that treaty protection must be denied if a restructuring amounts to an abuse of rights, for example where a specific dispute is foreseeable and the investment is transferred in view of that specific dispute.[40]

(ii) Russian Federation v. Ukrnafta & Stabil *et al*.

In two landmark decisions, the Supreme Court upheld the arbitral tribunal's jurisdiction over claims brought by two Ukrainian oil and gas companies (Ukrnafta & Stabil *et al*.) against Russia under the **Russia-Ukraine BIT** over the **expropriation of oil and gas assets in the aftermath of Russia's annexation of the Crimea in 2014**. Whilst Russia did not dispute that the BIT could also apply to territory that was *de facto* controlled by a contracting State, it objected to the arbitral tribunal's jurisdiction on the basis that Crimea was not part of Russia when the BIT was concluded and the investments had originally been made in Ukraine, not Russia.

The Supreme Court rejected Russia's static interpretation of the term "territory" as well as its argument that subsequent border shifts would require a further agreement between the contracting States. It found that what was decisive in cases of moving treaty frontiers was that the BIT remained applicable to the entirety of the contracting State's territory, as modified. It therefore concluded that, **following its annexation by**

[40] SFSCD 4A_306/2019 (planned for publication), 25 March 2020, para. 3.4.

Russia, Crimea should be considered part of Russia's territory under the Russia-Ukraine BIT.[41]

The Supreme Court further found that the BIT defined the term "investment" broadly and did not link it to a particular transaction that would subject it to any temporal restriction. The Court considered that the relevant point in time to determine whether an investment was covered by the BIT was thus not when the investment was made but when the alleged breach occurred. The Court therefore found that the **investors could benefit from the protection of the BIT even though the investment had not originally been made on Russian territory but in Ukraine**.[42]

Russia subsequently challenged the final award rendered by the arbitral tribunal in the same case, arguing that the arbitral tribunal had decided on the status of Crimea under the BIT, an issue which it claimed was not arbitrable. The Supreme Court rejected the challenge: the subject matter of the dispute was not the status of Crimea, but the investors' claim for the payment of damages further to Russia's expropriation of their assets, *i.e*. a monetary claim that was perfectly arbitrable. Russia's challenges were found to be nothing else than an attempt to re-open the question of the arbitral tribunal's jurisdiction that could no longer be challenged since it had already been confirmed by the Supreme Court in its previous decisions.[43]

(iii) Republic of India v. Deutsche Telekom

Finally, the Supreme Court also examined the **definition of "investments"** in connection with claims brought by the German telecommunications company Deutsche Telekom

[41] SFSCD 144 III 559 (4A_396/2017), 16 October 2018, para. 4.3; 4A_398/2017, 16 October 2018, para. 4.3.

[42] SFSCD 144 III 559 (4A_396/2017), 16 October 2018, para. 4.4; 4A_398/2017, 16 October 2018, para. 4.4.

[43] SFSCD 4A_244/2019 and 4A_246/2019, 12 December 2019, para. 4.2.

against India under the **German-India BIT**. In its challenge before the Swiss Supreme Court, India unsuccessfully asserted that the arbitral tribunal lacked jurisdiction because Deutsche Telekom's alleged investments were not protected by the BIT. Specifically, India argued that Deutsche Telekom had not made any direct investments in India but had intentionally structured its investment in the form of a contribution of funds to its Singaporean subsidiary, which then in turn purchased a 20% stake in the Indian telecommunication company, Devas. India also argued that Deutsche Telekom had in fact only made "pre-investments", since its activities, carried out through its Singaporean subsidiary, had remained at the preparatory stage. Finally, India availed itself of the national security exception to argue that Deutsche Telekom could not rely on the BIT's provisions.

The Supreme Court considered that in view of the broad language of the BIT and its aim to encourage investments to the greatest extent possible, there was **no basis to exclude indirect investments** from its scope. The Court then rejected India's argument that "pre-investments" were not covered by the BIT on the basis that the distinction drawn by India between BITs based on an "admission clause" model and those based on a "right of establishment" was unsupported. It found that the BIT itself did not limit the protection to preparatory activities, while noting that in this case Deutsche Telekom's contribution was substantial and by far exceeded a mere pre-investment that would have been made in view of a future contract. The Court also found that India was precluded from invoking the national security exception to object to the arbitral tribunal's jurisdiction since this argument – which was in any event factually unsupported – had not been raised in the arbitration itself.[44]

[44] SFSCD 4A_65/2018, 11 December 2018, paras. 2.4, 3 and 4.

3. Decisions *Ultra*, *Extra* or *Infra Petita* (Article 190(2)(d) PILA)

The Supreme Court rendered two interesting decisions on the application of the *ne ultra petita* principle, according to which an arbitral tribunal may not rule beyond the relief sought by the parties.

In one case, the Supreme Court upheld an award although the **declaratory relief granted by the arbitral tribunal deviated from that sought by the claimant**. In its prayers for relief, the claimant had asked the arbitral tribunal to declare that "the IFAF [International Federation of American Football] Congress held in Ohio on 17 July 2015 in which Mr F.__ was elected as interim President was the only legitimate IFAF Congress held on that date" and "any actions by the rogue-IFAF lead by Mr A.__ are null and void". In its award, the arbitral tribunal declared that "Mr F.__ was elected ad interim President of IFAF on 17 July 2015" and "[a]ny and all actions by Mr A.__, either as IFAF President or more generally on behalf of IFAF after 30 April 2015 are null and void." The respondent challenged the award on the basis that it was *ultra / extra petita*.

The Court, taking into account the context of the dispute as well as the arguments made by the parties during the arbitration, found that, even though the arbitral tribunal had used a different formulation in the operative part of the award, it had not gone beyond the object or scope of the relief sought by the claimant.[45] The mere fact that the award departed from the wording used by the parties in their prayers for relief or interpreted those prayers in the light of the parties' submissions did not suffice to constitute a violation of the prohibition of *ultra / extra petita*.

[45] SFSCD 4A_284/2018, 17 October 2018, paras. 3.2 and 3.3.

In another case, the Supreme Court **partially annulled an award** – which was challenged by both parties – on the ground that it was **ultra or extra petita**. The Supreme Court held that the arbitral tribunal, by ordering the payment of damages instead of the requested declaratory relief that the respondents were "liable to compensate Claimant for any and all damages", had decided *ultra* or *extra petita*. The Court also found that while the arbitral tribunal had not decided *extra petita* by setting off the amounts owed by the respondents to the claimant when fixing the amounts of the counterclaims awarded to them, it had gone too far and decided *extra petita* by ordering the respondents to then pay the claimant the balance of the amounts due after set-off although the claimant had not sought any monetary relief.[46]

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

a) Right to be Heard

As in previous years, many challenges have been brought on the ground of an alleged violation of the right to be heard; few have been successful.

One such successful challenge concerns the exceptional situation where the same award was annulled twice in a row. The award was first annulled by the Supreme Court for violation of the parties' right to be heard and the matter remanded to the arbitral tribunal.[47] The arbitral tribunal rendered a new award, which was also annulled on the basis that the **arbitral tribunal** had again violated the parties' right to be heard because it **had failed to follow the findings of the Supreme Court** that had led to the annulment of the first

[46] SFSCD 4A_294/2019 and 4A_296/2019, 13 November 2019, paras. 4 and 6.
[47] SFSCD 4A_532/2016, 30 May 2017.

award and were binding on the arbitral tribunal (*Bindungswirkung des Bundesgerichtsentscheids*).[48]

(i) Minimum Duty to Examine Relevant Arguments and Evidence

Many decisions concern the arbitral tribunal's alleged failure to examine relevant arguments and evidence. Consistent with its well-established case law, the Supreme Court recalled in this regard that arbitral tribunals only have a minimum duty to examine relevant arguments and evidence but are not required to consider and address every single argument or evidence submitted to them. The Supreme Court also recalled that, in order for the challenge to succeed, the applicant must not only demonstrate that the arbitral tribunal disregarded allegations, arguments or evidence but also that those elements would have had an impact on the outcome of the arbitration.[49]

In most cases, the Supreme Court found that there was no violation of the right to be heard and that what was criticized by the challenging party was rather the arbitral tribunal's assessment of the evidence, which is not subject to challenge.[50] The Court also recalled in one instance that it is not its duty to check whether the arbitral tribunal took into account and correctly understood the evidence.[51]

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[48] SFSCD 4A_462/2018, 4 July 2019, para. 3.2.

[49] See *e.g*. SFSCD 4A_494/2018, 25 June 2018, para. 4; 4A_114/2018, 14 August 2018, para. 3; 4A_284/2018, 17 October 2018, para. 4; 4A_308/2018, 23 November 2018, para. 4.

[50] See *e.g*. SFSCD 4A_556/2018, 5 March 2018, para. 4.5; 4A_382/2018, 15 January 2019, para. 3; 4A_318/2018, 4 March 2019, paras. 4.2.1 and 4.2.2; 4A_12/2019, 17 April 2020, para. 4; 4A_422/2019, 21 April 2020, para. 3; 4A_548/2019, 29 April 2020 (para. 6.2); 4A_35/2020, 15 May 2020, para. 2 (domestic arbitration); 4A_93/2020, 18 June 2020, para. 3, SFSCD 4A_494/2018, 25 June 2018, para. 4; 4A_539/2018, 27 March 2019.

[51] SFSCD 4A_114/2018, 14 August 2018, para. 3.4.

In the context of a challenge directed against a CAS award, the Supreme Court recalled that an arbitral tribunal cannot protect itself against a challenge for violation of the right to be heard by simply including in its award a general statement – such as can be found in many CAS awards – that it had taken into account all the allegations, arguments and evidence submitted by the parties or that the parties had acknowledged at the end of the hearing that their right to be heard had been respected.[52]

(ii) Surprise Application of the Law

In accordance with the *jura novit curia* (or rather *jura novit arbiter*) principle, arbitral tribunals are, as a rule, entitled to raise legal issues and apply legal provisions on their own motion without being limited to the legal arguments advanced by the parties. This rule suffers an exception where the parties did not invoke a legal provision or principle ultimately relied on by the arbitral tribunal and could not have reasonably anticipated its application, in which case the parties must be granted an opportunity to address the legal provision or principle in question. This exception aims at protecting the parties against a surprise application of the law.

Consistent with its previous case law, the Supreme Court recalled that it adopts a restrictive approach to this exception.[53] The Supreme Court thus found that there was **no surprise application of the law** by the arbitral tribunal in the following situations:

- An arbitral tribunal upheld a contractor's claim for lost profits but reduced it in equity because of the damages incurred to the employer due to the

[52] SFSCD 4A_536/2018, 16 March 2020, para. 4.2; see also *e.g.*, SFSCD 4A_668/2016, 24 July 2017, para. 3.2.2; 4A_730/2012, 29 April 2013, para. 3.3.2.

[53] See *e.g.* SFSCD 4A_525/2017, 9 August 2018, para. 3.1; 4A_301/2018, 19 November 2018, para. 4.2; 4A_638/2018, 19 June 2019, para. 3.1.2.

contractor's refusal to leave the site. The Court found that contrary to the contractor's contentions, equity had been pleaded extensively and was explicitly mentioned as a factor to be taken into account in the provisions of the applicable law relied on by both parties. The Court also rejected the contractor's argument that it was unforeseeable that the arbitral tribunal would rely on the liquidated damages clause (which had been addressed by both parties) for the assessment of another head of damages, namely the damages arising from the contractor's refusal to leave the site. The Court took the view that the arbitral tribunal had not directly applied the liquidated damages clause but had merely relied on it for guidance when assessing the value of daily damages incurred by the employer. The contractor could also not reasonably assume that his refusal to leave the site would go unsanctioned.[54]

- The finding of an arbitral tribunal that a party's own fault did not prevent it from claiming damages altogether but could lead to a reduction of its damages claim under the applicable (Swiss) law, a legal consequence which the Court found to be foreseeable given the context.[55]
- An arbitral tribunal, in its interpretation of the contractual provisions, relied on the findings of an award rendered in prior arbitral proceedings between the parties relating to the same contract.[56]

[54] SFSCD 4A_525/2017, 9 August 2018, para. 3.3.
[55] SFSCD 4A_301/2018, 19 November 2018, para. 4.4.
[56] SFSCD 4A_638/2018, 19 June 2019, para. 3.3.

- The CAS considered that the burden of proving an allegation rested with a party, when that party had argued that the burden was on the other party. In the same case, the Court rejected the applicant's complaint that there was no legal basis under the applicable law supporting the CAS' conclusion that a formal irregularity in the invitation to attend a general assembly was cured by the unanimous decision reached at that meeting; the Court noted that in reaching its conclusion the CAS had also taken into account the fact that the decision in question had not subsequently been challenged.[57]
- The CAS' finding that the principle of proportionality did not allow it to order a shorter suspension than the minimum period set out in the CAS Rules.[58]

(iii) Taking of Evidence

The Supreme Court rejected a party's argument that its right to be heard had been violated on the basis that it had been deprived of the opportunity of **cross-examining the author of a letter** which the arbitral tribunal had **admitted into evidence** without requesting that its author submit a written witness statement or be heard as a witness at the hearing. The Court found that the arbitral tribunal was under no obligation to hear the author of the letter as a witness and the criticisms were directed against its assessment of the evidence which is not subject to review.[59]

The Supreme Court also denied a violation of the right to be heard in a case where the arbitral tribunal relied on a **document filed late** and produced only with the oral closing

[57] SFSCD 4A_284/2018, 17 October 2018, para. 5.2.
[58] SFSCD 4A_318/2018, 4 March 2019, para. 4.2.3.
[59] SFSCD 4A_74/2019, 31 July 2019, para. 3.2.

submissions. The other side claimed that it had not addressed this document in any detail in its post-hearing submissions since the arbitral tribunal had allegedly declared it to be inadmissible at the hearing as the applicable procedural order prohibited new documents and new arguments. In its award, however, the arbitral tribunal admitted the document on the basis that it was merely an annotated version of a document previously submitted. While the *document* itself was thus not new, the *argument* made on that basis was, and the arbitral tribunal did not explain in the award why this new argument was admissible despite the clear language of the procedural order. However, as the Supreme Court recalled, the mere **violation or arbitrary application by the arbitral tribunal of one of its own procedural rules** is not as such tantamount to a violation of the right to be heard that could justify the annulment of the award.[60]

Finally, in another case, a party challenged an award on the basis that the arbitral tribunal had violated its right to be heard by disregarding its allegations of contract simulation, refusing its requests for the taking of evidence and by **hearing witnesses on questions submitted to them in writing in advance** in a way contrary to the agreed procedural rules. The Supreme Court rejected these arguments. It found that the arbitral tribunal had considered the theory on contract simulation and was entitled to reject the request for the taking of evidence based on its anticipatory assessment of the existing evidence.[61] The Court further considered that the challenging party had forfeited its right to invoke violations of the procedural rules as it had neither requested the right to ask questions to the witnesses at the hearing nor objected to the way in which their examination had been conducted at the close of the hearing or in its post-

[60] SFSCD 4A_308/2018, 23 November 2018, para. 5.3.
[61] SFSCD 4A_550/2017, 1 October 2019, paras. 3 and 4.

hearing submissions.[62] Finally, the Supreme Court also recalled that a party is precluded from relying on due process violations – *in casu*, that the parties could allegedly not ask the witnesses any additional questions during the hearing – that were not raised at all or were not raised clearly enough in the arbitration itself.[63]

b) Equal Treatment of the Parties

The principle of equal treatment aims at ensuring that each party has the same opportunity to present its case during the proceedings. Accordingly, the arbitral tribunal must treat the parties equally at all stages of the proceedings and not grant a party what has been refused to the other.[64]

The Supreme Court denied a violation of the right to equal treatment in a case where the arbitral tribunal **heard a party's witness** at the hearing **although he had not submitted a prior written witness statement**, contrary to the other party's witness. The Supreme Court found that this did not constitute a violation of the right to equal treatment as the procedural rules provided for the possibility for the arbitral tribunal to order a person to give witness testimony at the hearing, from which it could be inferred that a prior written statement was not required in such a case. The Court also considered that there was no due process violation since both parties had been granted the same amount of time to prepare for their cross-examination of that witness during the hearing following his questioning by the tribunal.[65]

In another decision, the Supreme Court recalled that a violation of the principle of equal treatment cannot be based on the arbitral tribunal's alleged disregard of a legal provision

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[62] SFSCD 4A_550/2017, 1 October 2019, para. 5.
[63] SFSCD 4A_550/2017, 1 October 2018, para. 5; see further, 4A_40/2018, 26 September 2018, para. 3.
[64] SFSCD 4A_74/2019, 31 July 2019, para. 3.1.
[65] SFSCD 4A_74/2019, 31 July 2019, para. 3.3.

or a relevant element of fact, as this would amount to introducing a ground for challenge for arbitrariness, which the legislator specifically intended to exclude in the context of international arbitration.[66]

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

The concept of international public policy as defined by the Supreme Court includes substantive public policy and procedural public policy.

a) Substantive Public Policy

An award is contrary to substantive public policy if it violates fundamental principes of substantive law such that it is plainly incompatible with the legal system and its prevailing values.

(i) Violation of Personality Rights

The Supreme Court examined whether a **14-month suspension** imposed on an athlete for violation of the anti-doping rules was incompatible with substantive public policy in that it **infringed the athlete's personality rights** (Article 27 of the Swiss Civil Code, which offers protection against excessive and overly restrictive contractual obligations). The Court restated its longstanding case law pursuant to which violations of personality rights are only contrary to public policy if they amount to a clear and serious violation of a fundamental right. Disciplinary sanctions inflicted on athletes are only contrary to public policy if they are blatantly unfair. In this case, the suspension was not found to be incompatible with public policy given the established violation of the anti-doping rules and the fault of the athlete.[67]

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[66] SFSCD 4A_284/2018, 17 October 2018, para. 6.2.
[67] Supreme Court, 4A_318/2018, 4 March 2019, para. 4.3.

(ii) *Clausula Rebus Sic Stantibus*

In another case, the Supreme Court left open the question of whether the ***clausula rebus sic stantibus* doctrine** formed part of Swiss public policy within the meaning of Article 190(2)(e) PILA. This doctrine representing an exception to the principle of *pacta sunt servanda*, the Supreme Court recalled that the violation of that principle could only be tantamount to a violation of substantive public policy if the arbitral tribunal applied or refused to apply a contractual provision in contradiction with its findings on the existence or content of the contract. By contrast, contract interpretation and the legal consequences drawn from that interpretation are not covered by *pacta sunt servanda*. As a result, nearly all disputes based on a breach of contract fall outside of the protection of *pacta sunt servanda* – and thus public policy.[68]

b) Procedural Public Policy

An award is incompatible with procedural public policy if it violates generally accepted fundamental principles in a manner which is insufferably contrary to the sense of justice, such that the award appears incompatible with the legal system and system of values of civilised States.

(i) *Res Judicata* and *Ne Bis In Idem*

In accordance with the Supreme Court's established case law, an arbitral award is contrary to procedural public policy if it disregards the ***res judicata* effect** of a previous award or court decision.

In one case, a challenge was brought against a CAS award on the basis that the arbitral tribunal had ignored the *res judicata* effect of a prior CAS award rendered between the same parties – a football club and an agent – in a dispute arising

[68] SFSCD 4A_494/2018, 25 June 2019, para. 5.

out of the same contract. Under that contract, the agent was entitled to a commission upon the renewal of a player's contract with the club as well as a financial participation in the event of his transfer to another club. In the first award, the CAS had rejected the agent's claim for payment of a commission on the merits. The CAS had also dismissed his request for a declaration that he was entitled to a financial participation in the event of the player's future transfer for procedural reasons, as it found that the agent had no legitimate interest in the requested declaratory relief. In the second award, however, the CAS granted the agent's claim for the payment of the financial participation on the basis that it had become due, the player having by then been transferred to another club.

The Supreme Court upheld the CAS' second award as it found that it did not violate the *res judicata* principle. The Court recalled its longstanding case law according to which *res judicata* only attaches to the operative part of the decision, not to the underlying findings of fact and legal reasoning which are, therefore, not binding in a subsequent arbitration, even if it raises the exact same issues. As a result, the fact that a tribunal has made findings on certain issues in a first award does not necessarily mean that these findings have a preclusive effect which would be binding on the tribunal in a subsequent arbitration.

The Supreme Court also recalled that when a claim is dismissed on the grounds that it is procedurally inadmissible, the *res judicata* effect only attaches to the admissibility requirement in question, not to the merits of the claim. Accordingly, the Supreme Court found that the CAS' dismissal of the agent's request for declaratory relief in the first award did not prevent the CAS from granting the claim for payment brought by the agent in the second arbitration.[69]

[69] SFSCD 4A_536/2018, 16 March 2020, para. 3.

In another decision, the Supreme Court restated that the **principle *ne bis in idem*** (which is considered the corollary or negative aspect of *res judicata*), pursuant to which no one can be sanctioned more than once for the same conduct, forms part of procedural public policy within the meaning of Article 190(2)(e) PILA. The Supreme Court left open the question of whether this principle of criminal law applies also to disciplinary measures and sanctions imposed in sports law. The Supreme Court nonetheless proceeded to examine the CAS' application of the *ne bis in idem* principle. The applicant, a football club, saw a violation of that principle in the fact that it was first excluded from participating in a competition for a one-year period by way of an administrative decision and, in subsequent disciplinary proceedings, was then excluded from participating in any European competition for ten seasons and ordered to pay a fine. The Court found that even if a sanction was based on the same factual matrix as a previous sanction, the *ne bis in idem* principle was not violated if there existed a sufficiently tight substantive and temporal connection between the two proceedings such that they could be considered as forming two aspects of one and the same system. Such a tight connection was found to exist *in casu* between the administrative proceedings and the subsequent disciplinary proceedings.[70]

(ii) Incorrect Application of Rules on Passive Legal Standing

A Football Federation, D., and two players appealed to the CAS against a decision of a sports confederation to disqualify a football team and award instead a place in the competition to another Football Federation, E. The CAS dismissed the appeals on the basis that the appellants had failed to designate Football Federation E., as co-respondent in the CAS appeal proceedings. Football Federation D. and the two players

[70] SFSCD 4A_462/2019, 29 July 2020, para. 5.

challenged the CAS' decision for violation of procedural public policy. They argued that the CAS had introduced an obligation to sue Federation E. as co-respondent that found no support in the applicable substantive and procedural laws. The Supreme Court rejected the challenge on the basis that an **incorrect application of the procedural rules on passive legal standing** does not in itself amount to a procedural public policy violation.[71]

(iii) Excessive Formalism

The Supreme Court once again left open the question of whether **excessive formalism** could amount to a violation of procedural public policy. The Court, however, ruled on several occasions that there was no excessive formalism in the CAS' dismissal of an appeal when the statement of appeal or appeal brief had only been submitted by fax or email and not also by courier within the first subsequent business day of the relevant time limit as required under Articles R31 and R51 of the CAS Rules.[72]

(iv) Decision Insufficiently Motivated

The Supreme Court, recalling the subsidiary nature of the protection afforded by procedural public policy, found that an arbitral tribunal's **failure to (sufficiently) motivate** its decision on the arbitration costs and the allocation of costs between the parties did not amount to a violation of procedural public policy.[73]

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[71] SFSCD 4A_548/2019, 29 April 2020, para. 7.
[72] SFSCD 4A_54/2019, 11 April 2019, para. 4.2; 4A_556/2018, 5 March 2018, para. 6; 4A_238/2018, 12 September 2018, paras. 5.5 and 5.6.
[73] SFSCD 4A_550/2017, 1 October 2018, para. 7.

III. Decisions on Applications for Revision of Arbitral Awards

The ground for the revision of an international arbitral award that is by far the most frequently invoked in practice – although with limited success – is the discovery of new material facts and/or conclusive evidence after the award has been rendered (Article 123(2)(a) FSCA). Importantly, the facts themselves must have occurred and the evidence created before the award was rendered. The discovery of new facts and evidence is often invoked in the context of sports arbitration, as was the case in the two below decisions rendered in the period under review.

In one decision, the Supreme Court had to deal with a **challenge to the authenticity of the new evidence** relied on by the requesting party in support of its request for revision of a CAS award. Football Club A. initiated arbitration before the CAS in which it claimed that Football Club B. had entered into sham contracts to conceal the true amount of the retransfer fee owed under a player transfer contract. The CAS dismissed the claims of Club A., which subsequently applied for revision of the CAS award on the basis that it had discovered new facts and evidence. In support of its revision request, Club A. produced an email exchange that allegedly demonstrated that Club B. had entered into sham contracts. Club B. contested the authenticity of that email exchange, pointed to several irregularities, claimed its IT system had been hacked as demonstrated by a letter from the competent supervisory authority and produced an anonymous tweet confirming that the email exchange relied on by Club A. had indeed been fabricated.

The Supreme Court held that, under the applicable procedural rules, the party relying on a document must prove its authenticity if it is contested. It found that, whereas Club B. had substantiated its objections, Club A. had not given any

indication as to how it intended to prove the authenticity of the email exchange; a revision of the award on the basis of this new document was, therefore, not justified.[74]

The Supreme Court also denied the requested revision in another decision relating to a CAS award, which sanctioned an athlete for violation of anti-doping regulations. In support of its revision request, the athlete relied on an expert report that had been established in subsequent criminal proceedings. According to the athlete, this report demonstrated that the doping tests on which the award was based had been manipulated. The Supreme Court rejected the request on the ground that revision cannot be based on **evidence created subsequently to the award** or used to remedy any possible limitations to the parties' right to adduce evidence resulting from the expedited nature of the CAS proceedings.[75]

IV. Decisions on the Enforcement of Arbitral Awards

The Supreme Court rendered two interesting decisions relating to the New York Convention.

In a landmark decision, the Supreme Court examined whether an **arbitration agreement can be binding on non-signatories under Article II NYC**. Swiss company A. distributed food products under a distribution agreement, which had been signed by one of its affiliates; A. itself was not a signatory. When the supplier sued A. before the local court at A.'s place of business, A. resisted the court's jurisdiction based on Article II NYC and invoked the arbitration agreement contained in the distribution agreement. The lower court

[74] SFSCD 4A_662/2018, 14 May 2019.
[75] SFSCD 4A_597/2019, 17 March 2020.

declined its jurisdiction and referred the parties to arbitration in accordance with Article II(3) NYC.

The Supreme Court upheld the lower court's decision. It first held that the formal and material requirements of Article II(2) NYC correspond to those of Article 178 PILA. As a consequence, the well-established case law on the extension of arbitration agreements to non-signatories developed under Article 178 PILA was found to apply *mutatis mutandis* to Article II(2) NYC. Accordingly, the Supreme Court held that an arbitration clause can extend to a non-signatory where the non-signatory is involved in the performance of the underlying contract and manifests, by its conduct, an intention to be bound by the contract, including the arbitration clause it contains. The Supreme Court further held that the formal requirements of Article II(2) NYC only apply to the original parties but not to a third party in case of a transfer or an extension of the arbiration agreement. The Supreme Court concluded that although A. was not a signatory, it had performed the contract with the supplier's consent and had, therefore, become a party to the contract.[76]

In another decision, the Supreme Court recalled that the **public policy exception of Article V(2)(b) NYC** had to be intepreted restrictively. The Court held that only a blatant violation of the **right to an independent and impartial arbitrator** can justify refusing the recognition and enforcement of a foreign award and that such violations included, above all, the situations falling under the red list of the IBA Guidelines on Conflicts of Interest. The Court found that the fact that services had been rendered by the arbitrator's law firm to a party in the arbitration did not automatically create a conflict. Rather a case by case analysis of the interests concerned was warranted.[77]

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[76] SFSCD 145 III 199 (4A_646/2018), 17 April 2019, para. 2.
[77] SFSCD 4A_663/2018, 27 May 2019, paras. 3.4-3.6.

International Commercial Courts - the Projects in Zurich and Geneva

MARTIN BERNET & ARUN CHANDRASEKHARAN

Contents

I. Introduction

A. The Emergence of Specialized International Commercial Courts

In recent years, courts specialized in the resolution of international commercial disputes ("**International Commercial Courts**") have sprung up in Asia, the Middle East and Europe.

The best known – and probably most important – examples in the Middle East and Asia are the Dubai International Financial Centre Courts ("**DIFC Courts**", 2006), the Singapore International Commercial Court ("**SICC**", 2015) and the China International Commercial Court ("**CICC**", 2018).

Europe has seen the creation of the Netherlands Commercial Court ("**NCC**", 2018), the International Chamber of the Paris Court of Appeal (2018) supplementing the International Chamber of the Commercial Court of Paris (2010) and the English language Chamber for International Commercial Disputes at the Frankfurt District Court (2018).[1]

The reasons for establishing these courts vary. In some instances, such as for the CICC, the driving factor was the fostering of specific commercial development projects requiring foreign investment for which a reliable dispute resolution mechanism was believed to be conducive. In other cases - the best example of which is the SICC - the International Commercial Courts were set-up as means to generally promote business at the forum in anticipation of such jurisdiction becoming - in due course - a hub for international dispute resolution. Most European projects arose as a consequence of Brexit with the objective of attracting a share of the London market for international commercial dispute resolution. However, they also aim at providing domestic companies engaged in international commerce with a reliable domestic forum capable of resolving international commercial disputes - in the hope that such forum be accepted by foreign business partners in light of its degree of specialization.[2]

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[1] For details, pending projects and a list of further International Commercial Courts, see RUCKTESCHLER/STOSS, pp. 431-436; RÜHL, pp. 1075-1078; WALKER, pp. 3-10.

[2] RUCKTESCHLER/STOSS, pp. 432-435; RÜHL, p. 1078.

B. Juxtaposition of International Commercial Courts and International Commercial Arbitration

Regretfully certain members of the international arbitration community see International Commercial Courts as a potential threat to international commercial arbitration.

A concise and simplified[3] comparison highlighting the pros and cons of International Commercial Courts and international commercial arbitration respectively however shows that the two methods of dispute resolution actually compliment each other.

The advantages of (international commercial) arbitration may be summed up as follows: (a) no party has to bring or defend its case before a state court located on the other party's home turf; (b) the parties may choose their arbitrator and have a say in the selection of the presiding arbitrator; (c) with the agreement of the other party, they can shape the proceedings and determine the applicable language; (d) there is no need for using local lawyers specifically admitted to a certain bar; (e) the proceedings are confidential; (f) the award definitively resolves the dispute because there are usually none or only very limited possibilities of appeal; and (g) the New York Convention allows for enforcement of arbitral awards almost throughout the entire world.

Proceedings before state courts, including International Commercial Courts, cannot offer all these features. However, state court proceedings have their own advantages: (a) the often times consuming and cumbersome process of selecting arbitrators is dispensed with; (b) the "*moral hazard*" of the unilateral appointment of arbitrators[4] by an institution is

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[3] For a detailed analysis of this aspect see WALKER's article.

[4] See JAN PAULSSON, Moral Hazard in International Dispute Resolution; I*CSID Review - Foreign Investment Law Journal,* Volume 25, Issue 2, Fall 2010, pp. 339–355.

disposed of; (c) judges sitting on International Commercial Courts will rarely be conflicted - their independence and impartiality is not a matter of debate; (d) the proceedings as well as the evolution of law as interpreted by state courts are typically public and transparent; (e) published precedent provides legal certainty and predictability of decisions; (f) judgments are subject to appeal; (g) there are established and enforceable mechanisms to deal with third parties involved in the dispute without their consent (joinder and consolidation, compelling third party witnesses to testify), and (h) interim measures are immediately enforceable - at least on the national territory of the forum.

The above analysis demonstrates that arbitration and litigation before state courts offer two different means to resolve a dispute in a binding manner. In the authors' view, this finding does not imply that the growing popularity of International Commercial Courts constitutes a threat to international arbitration. Rather, International Commercial Courts should be seen as an alternative mechanism available to consumers of legal services.[5]

So while it may be too soon to gauge the success of International Commercial Courts, the currently available data suggests that International Commercial Courts are attracting

[5] Regarding the SICC, see LANDBRECHT, p. 124. From a poll conducted amongst members of the Zurich Bar Association's groups of litigation and arbitration practitioners ("*Fachgruppen Zivilprozessrecht und Schiedsgerichtsbarkeit des Zürcher Anwaltsverbands*") in January 2018, both groups showed very strong support for the project of a Zurich International Commercial Court.

a growing number of cases[6] while the number of arbitration cases does not appear to diminish.[7]

C. Why Switzerland should not remain on the Sidelines

Switzerland has long been one of the world's leading locations for international commercial arbitration.[8] According to the statistics on dispute resolution of the International Chamber of Commerce ("**ICC**"), Switzerland was the third most popular seat for ICC arbitrations in 2019, behind the United Kingdom and France,[9] and Swiss nationals ranked second after British citizens in the number of appointments as arbitrators.[10]

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6 The SICC issued 5 judgments in 2016, 11 in 2017, 15 in 2018, 16 in 2019 and 20 from 1 January to 17 July 2020; the NCC has so far decided 6 cases; information obtained from members of the Dutch bar shows they support the NCC and use it when meaningful. As for Paris, the International Court of Appeal has decided 52 cases, including 16 appeals from arbitration awards. The Chamber for International Commercial Disputes at the Landgericht Frankfurt heard 0 cases in 2018, 2 in 2019 and 1 case in the first eight months of 2020. It is difficult to assess how many cases were raised before these courts on the basis of a jurisdiction clause or on other basis. See the courts' websites: https://www.sicc.gov.sg/media/case-summaries, https://www.rechtspraak.nl /English/NCC/Pages/default.aspx, https://www.osborneclarke.com/insights /international-commercial-courts-paris/, https://ordentliche-gerichtsbarkeit. hessen.de/ordentliche-gerichte/lgb-frankfurt-am-main/lg-frankfurt-am-main/ chamber-international, last visited on 2 September 2020.

7 This is what the numbers from leading arbitration instutions suggest: The ICC reports 869 cases in 2019, the second highest number ever. The LCIA registered 406 cases in 2019, representing a considerable increase compared to the previous years. The SCC (Arbitration Institute of the Stockholm Chamber of Commerce) had 175 new cases in 2019, compared to 152 in 2018. The SCAI reported 83 new arbitrations in 2018, 96 new arbitrations in 2019 and 52 new arbitrations so far in 2020. The SIAC (Singapore International Arbitration Centre) had 402 cases in 2018 and 479 in 2019.

8 KAUFMANN-KOHLER/RIGOZZI, paras. 1.86-1.172.

9 In 2019, Switzerland was the seat of ICC arbitrations on 84 occasions, the UK on 115 occasions, and France on 108 occasions.

10 There were 147 appointments of Swiss nationals and 258 of citizens of the United Kingdom.

The authors strongly believe that Switzerland should capitalise on its leading position in international arbitration to expand its offering of legal services through the creation of International Commercial Courts catering to the international commercial community. They note with satisfaction that the Swiss Federal Council appears to share this view. Its bill of 26 February 2020 for a revised Civil Procedure Code ("**CPC**") includes new provisions aimed at enabling the interested cantons to establish courts specializing in international commercial disputes. The Swiss Federal Council considers that such courts not only foster the country's excellent reputation as a neutral and capable "legal hub" but also contribute to Switzerland becoming a centre for legal services.[11] This assessment echoes the one of the government of Singapore when it launched the SICC.[12] Though Switzerland and Singapore are located in different continents, neither country benefits from natural resources and both economies rely on developing technology and services for which intangible assets such as education, language skills, cultural tolerance, the ability to deal with and accommodate international commercial transactions and a reliable judicial system constitute a bedrock.

In addition to its strong position as international arbitration forum, Switzerland can proudly rely on numerous factors that position it to favourably compete in the emerging market for International Commercial Courts.

Switzerland has a sound, independent and expeditious judiciary – recognised internationally in part due to the Federal Court's numerous, readily available and usually well-reasoned decisions in international arbitration. Along with Sweden and Singapore, Switzerland ranks fourth on Transparency International's Corruption Perceptions Index

[11] MESSAGE, pp. 2627 et seq.
[12] RUCKTESCHLER/STOSS, p. 433; LANDBRECHT, p. 113.

2019.[13] Switzerland is a neutral country with no colonial past. It is located in the heart of Europe with excellent connections to all corners of the globe and benefits from first class infrastructure. The Swiss economy is geared to exports and is closely interwoven with the rest of Europe and the world. As a country, Switzerland is multilingual with English as universal business language even within its borders. As a signatory of the Lugano Convention, Switzerland is part of the European network regarding uniform grounds for jurisdiction and the free circulation of judgments. It is anticipated that it will eventually adhere to the Hague Convention on Choice of Court Agreements.[14]

II. The Projects in Zurich and Geneva

A. The typically Swiss Approach: Bottom-Up and Federalistic

Martin Bernet launched the idea of a Zurich International Commercial Court ("**ZICC**") at an event of the "*Europa Institut an der Universität Zürich*" in June 2017.[15] He expressed the view that a counterpart in the French-speaking part of Switzerland would impose itself. Contacts with interested members of the Geneva bar were soon established.

In early 2018, under the auspices of the Zurich Bar Association ("*Zürcher Anwaltsverband*", "**ZAV**"), Martin Bernet formed a working group consisting of six experienced dispute resolution practitioners. The group analysed what changes would have to be made to current legislation in order to establish the ZICC. It soon determined that the current CPC

[13] https://www.transparency.org/en/cpi/2019/results/che#details, last visited on 2 September 2020.

[14] Message, p. 2628.

[15] The presentation of 9 June 2017 was entitled "*Perspektiven und Chancen für den Justizplatz Schweiz*".

lacked a number of required tools. This finding was timely, as the Federal government had just launched the consultation process in relation to its draft revision of the CPC. While the government's draft sought to improve the CPC in matters wholly unrelated to International Commercial Courts,[16] the working group – in the name of the ZAV – nevertheless tendered its submission with further suggestions on 15 June 2018 to the Federal Office of Justice. The suggestions were also specifically endorsed by the Geneva bar.[17]

The sponsors of the projects in Zurich and Geneva were pleased to see that the Federal government included all suggestions in the bill for the revision of the CPC, as mentioned in chapter I.C. above. It would seem that the decision to launch separate cantonal projects in the two Swiss cantons with the strongest international exposure, rather than to suggest the creation of a Federal International Commercial Court, paid off. It reflects the federalist structure of the Swiss judiciary and is as such typically Swiss.

Parliament has just begun examining the bill,[18] and it is hoped that it will accept all of the government's proposals relating to International Commercial Courts.

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[16] Such as costs, instruments for collective redress, coordination of multiple proceedings, right of in-house lawyers to refuse to testify; see Bericht, Table of contents, p. 4.

[17] The Zurich bar's paper and the letter of support can be found at https://www.bj.admin.ch/bj/fr/home/staat/gesetzgebung/aenderung-zpo.html; autres prises de positions.

[18] At the time of writing, a first meeting of the "*Commission des affaires juridiques*" (Commission for Legal Affairs) of the "*Conseil des Etats*" (Council of States) was scheduled for 3 September 2020.

B. The necessary Changes to the Federal Civil Procedure Code

The changes to the CPC - originally proposed by the Zurich and Geneva bars and now part of the government's bill - are the following:[19]

1. Binding Jurisdiction Clauses

The first set of changes seeks to enable parties to international commercial disputes to agree on the future International Commercial Courts in Zurich and Geneva by means of a jurisdiction clause binding not only on the parties but also on the chosen court.

To this end, (i) the proposed new para. 4(c) of Article 6 CPC grants the cantons the right to vest their commercial courts[20] with jurisdiction to hear international commercial cases if (1.) the dispute concerns the commercial activity of at least one party,[21] (2.) the amount in dispute is at least CHF 100'000, (3.) the parties accept the commercial court's jurisdiction,[22] and (4.) at the time of the selection of the commercial court, at least one of the parties had neither its domicile nor its habitual residence in Switzerland[23]. The effect of the new statute is that parties can not only choose the venue of the desired court but also specifically elect the **commercial** court at such venue. This is not yet permitted today; as a general principle parties cannot determine

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[19] See the relevant portions of the Message.

[20] At present, only four cantons have a commercial court, i.e., Zurich, Bern, St. Gallen and Aargau.

[21] There is no requirement that one of the parties be registered in a Swiss or foreign commercial register; Message, p. 2639.

[22] This includes the "*acceptance*" by way of a jurisdiction clause in a contract; see Message, p. 2639.

[23] The requirement as per the proposed Article 6(4)(c) CPC is symmetrical to the one for international arbitration used by Article 176(1) of the Private International Law Act, Message, p. 2639.

jurisdiction *ratione materiae* ("*sachliche Zuständigkeit*"; "*en raison de la matière*").[24] In order to ensure that the parties' agreement is binding on the court in all international commercial cases, the government's bill proposes to amend Article 5(3)(c) of the Private International Law Act ("**PILA**"),[25] since this statute affords the Swiss courts the discretion to disregard a jurisdiction clause in cases with only a tenuous connection to Switzerland, i.e., where no Swiss party is involved or where a foreign law applies to the merits of the case.[26]

2. English as Procedural Language

The second set of proposed changes concerns the language of the proceedings before the future International Commercial Courts. In order for such courts to attract international commercial disputes, the parties must be allowed to conduct the proceedings in English. The current version of Article 129 CPC provides that the proceedings before the cantonal courts are to be conducted in the official language of the respective canton. For legal commentators, this implies that the cantons are not allowed to accept other languages.[27] While many judges today already accept evidence in English without translations and a few judges – mostly of a younger generation – will even conduct evidentiary hearings and settlement conferences in English, they are under no obligation to do so. The government's bill now proposes to amend Article 129 CPC in order to allow the cantons to introduce English as a language of proceedings before their

[24] See e.g. OBERHAMMER/DOMEJ/HAAS, edts., Kurzkommentar Schweizerische Zivilprozessordnung, 2nd. ed., Basel 2014, Article 4 note 2.

[25] Message, pp. 2686 and 2687.

[26] Pertinent international conventions override Article 5(3) PILA. Most importantly, jurisdiction clauses falling under the auspices of the Lugano Convention are binding on Swiss courts irrespective of Article 5(3) PILA.

[27] See e.g. Berner Kommentar, ZPO, 1st ed., Bern 2012, Article 129 N 5; Message, p. 2654.

courts. Additionally, the government proposes to add a paragraph to Article 42 of the Law on the Federal Court so that the parties are allowed to submit their appeals before the Federal Court in English if the proceedings before the lower courts were conducted in English. This will allow parties to conduct cases before the future International Commercial Courts in Zurich and Geneva to conduct possible appeal proceedings in English too. As matters currently stand, the Federal Court's judgments would still be rendered in an official Swiss language, i.e. German, French, Italian or Rhaeto-Romanic.

3. The Taking of Evidence

Finally, the third set of changes deals with the taking of evidence.

The proposed new Article 170a, 187(1), third sentence, and 187(2) as well as 193 CPC should allow for the hearing of witnesses, parties and experts through video conference or similar technical means.

Independently from the submission of the Zurich and Geneva bars in the consultation process set out in chapter II.A. above, but also highly relevant for International Commercial Courts, the bill admits reports by party-appointed experts (and their oral examination) as full-fledged means of evidence. Currently, though courts accept reports prepared by party-appointed experts, legally, they are considered to be allegations made by a party and not expert reports. Only the reports of court-appointed experts are accepted as evidence susceptible of proving matters requiring expert knowledge. The revised Article 177 CPC will allow for party-appointed expert reports to be considered as a proper means of evidence.

C. Court of Appeal

Celerity is key if the future Swiss International Commercial Courts are to be competitive.

It is therefore important that not only the proceedings before the International Commercial Courts themselves are resolved expeditiously but that the appellate proceedings are equally swift.

In the authors' view, it is a key feature – a marked difference to arbitration awards – that an avenue of appeal be available against judgments of the International Commercial Courts. Since, as the authors believe, proceedings before the International Commercial Courts should constitute an alternative to arbitration, a court of appeal must be able to review the judgement of International Commercial Courts.

The CPC institutes the principle of a "*double instance*", according to which there must be a possibility of an appeal at the cantonal level. In addition, there is a further appeal at the federal level before the Federal Court – Switzerland's Supreme Court. It is obvious that this appellate process significantly delays the time until a judgment becomes final. This is not desirable for international commercial disputes. Rather, the authors submit that in such cases, there should only be one appeal available before the Federal Court.

This is already the case where parties litigate before a **commercial** court of a canton. Those courts act as a single instance ("*instance unique*") for disputes for which they have jurisdiction. As a consequence, where a cantonal commercial court will in future act as an International Commercial Court – as should be the case in **Zurich** – such court's decisions are only subject to an appeal to the Federal Court.

Considering the current record of the Commercial Court of the Canton of Zurich (the "**Zurich Commercial Court**"), it is anticipated that the combined duration of the proceedings

before the ZICC and of a possible appeal to the Federal Court will be remarkably expeditious and thus internationally competitive.

Based on 2019 figures, 71% of the cases before the Zurich Commercial Court are concluded within less than a year and 86% of the cases within less than two years.[28]

The appeal proceedings before the Federal Court are equally fast. Based on their statistics for 2019, 93% of the appeals are decided within less than a year and 99% within less than two years.[29]

Summed up, a party to proceedings before the Zurich Commercial Court may expect to get a final judgment – after an appeal before the Federal Court – within a time frame of 1.5 to 2.5 years. There is no reason why cases before the future ZICC should take longer.

The fact that the draft bill proposes to allow for briefs to be filed in English before the Federal Court[30] further enhances the interest of proceedings before the ZICC.

Geneva does not have a commercial court. As will be explained in detail below in chapter II.H., discussions in Geneva whether to create – or designate within the current Court of First Instance – a court acting as International Commercial Court are still ongoing. It is nevertheless important to underscore that Article 8 CPC already allows parties to opt for the cantonal court of appeal to hear their case as an "*instance unique*" if (i) the dispute is of a financial nature; and (ii) the amount in dispute exceeds CHF 100'000. Provided there is a political will to properly equip the Geneva court of appeal – the "*Cour de Justice*" – to act as an

[28] "*Rechenschaftsbericht des Obergerichts des Kantons Zürich für das Jahr 2019*" (Annual Report of the Superior Court of the Canton of Zurich for 2019), p. 159.

[29] "*Geschäftsbericht 2019 des Bundesgerichts*" (Annual Report 2019 of the Federal Court), p. 20.

[30] See chapter II.B.2 above.

International Commercial Court, the option afforded by Article 8 CPC could constitute a competitive alternative for Geneva to handle international commercial cases, pending the creation of a new commercial court.

D. Costs

As far as court costs and party costs are concerned, federalism allows for each canton to levy its court fees. These are generally calculated *ad valorem*. Before the Federal Court, in financial disputes, court costs range between CHF 200 and CHF 100'000[31] and counsel costs are compensated by the losing party by the award of amounts between CHF 600 and 2% of the litigation amount.[32]

These costs are certainly higher than in the Netherlands,[33] and possibly also higher than in other European jurisdictions with which the International Commercial Courts in Zurich and Geneva will compete.[34] Yet, the authors consider them reasonable, in view of the efficiency of the proceedings before the Federal Court and the predominantly thorough motivation of its decisions.

The costs of the future International Commercial Courts in Zurich and Geneva, which are cantonal courts, will be fixed by the two cantons. As will be set out in chapter II.G. and H.

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[31] The Federal Court can double the amount as per the tariff if special circumstances justify this; see "*Tarif für die Gerichtsgebühren im Verfahren vor Bundesgericht*" (Tariff of Court Costs in Proceedings before the Federal Court) of 31 March 2006, as amended.

[32] "*Reglement über die Parteientschädigung und die für amtliche Vertretung im Verfahren vor Bundesgericht*" (Regulation on Compensation for Legal Costs and for Legal Aid Representation in Proceedings before the Federal Court) of 31 March 2006, as amended. The Federal Court can again go above these amounts in cases requiring an extraordinary amount of work.

[33] The costs of the NCC are EUR 15'000 per party and EUR 20'000 per party for the second instance court. See RUCKTESCHLER/STOOSS, p. 441.

[34] For details regarding the costs of other International Commercial Courts see RUCKTESCHLER/STOSS, pp. 441 et seq.

below, given the need for the CPC to be amended as a preliminary step, the projects in both Zurich and Geneva have not yet reached a stage where the appropriate court costs have been discussed. It will be important for the success of the projects that they remain reasonable and competitive with other European International Commercial Courts.

E. Admission of Foreign Lawyers

Lawyers admitted in EFTA and EU member states that reside and practice in Switzerland on a permanent basis have a right to be admitted in Switzerland, are listed in the so-called EU/EFTA list and can appear **on a regular basis** before the Swiss courts.[35] Based on the bilateral agreements between Switzerland and the EU, even lawyers admitted in an EU or EFTA member state but not residing and practicing in Switzerland may plead before the courts of Switzerland in **individual cases**.[36]

While this is rather uncommon in practice, the same rules will also apply before the ZICC and its counterpart in Geneva. Currently enacted law would thus allow for European parties to avail themselves of foreign lawyers if they so desire.

F. The Expected Cases

It is difficult to predict what type of cases the ZICC and its Geneva counterpart will attract. Nevertheless, the authors shall attempt to assess the Swiss International Commercial Courts' potential.

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[35] Articles 27-29 of the "*Bundesgesetz über die Freizügigkeit der Anwältinnen und Anwälte*" of 23 June 2000, as amended ("BGFA"; Federal Act on the Free Movement of Lawyers).

[36] For the details concerning the admission of European foreign lawyers, see Articles 21-26 BGFA.

It is unlikely that continental European courts, including the future Swiss International Commercial Courts, will capture a significant number of cases that today are headed to London. Due to its common law tradition, the Commonwealth ties and its standing, London probably boasts a unique ecosystem for cases that are unlikely to be plead before continental European courts. The future Swiss International Commercial Courts are more likely to appeal to commercial actors in continental Europe.

Geographically, the ZICC and its Geneva counterpart will be of interest to different regions. The ZICC probably will cater as a dispute resolution option to commercial actors in Northern and Eastern Europe, with Germany being a potentially important market. The court in Geneva is more likely to be chosen by parties in France, southern Europe and potentially also West Africa.

With regard to the nature of the parties potentially electing to litigate before the Swiss Commercial Courts, the authors expect that they will typically be small to medium-size enterprises that are active internationally but only sporadically involved in disputes which cannot be resolved amicably. Today, these cases usually go to arbitration – not because arbitration was the desired method of resolution but often because the template used for the contract contained an arbitration clause that no-one questioned or because the parties were unable to choose between jurisdiction in either party's country. When a contentious dispute arises, the parties are frequently surprised by the costs of arbitration and time that needs to be devoted for witness statements, briefing and document production that often are disproportionate to the amount in dispute. For these users of legal services, International Commercial Courts will be an interesting alternative to arbitration.

G. The Project in Zurich

Following the launch of the idea of a ZICC,[37] local politicians initiated legislative action before the Zurich cantonal parliament. Given the necessity of changes at the federal level – specifically the amendments to the CPC set out above in chapter II.B. – the initiative was later put on hold.[38] It is expected that it will be reactivated as soon as the federal parliament has adopted the revision of the CPC.

While no concrete legislative steps have thus been taken, initial contacts of representatives of the ZAV with the government and with the Presidents of the Zurich Superior and Commercial Courts showed encouraging support for the project.

It is foreseen that the ZICC will be established as a new chamber of the Zurich Commercial Court. Unlike Singapore where the bench consists of judges recruited from all over the world, the ZICC will be a Swiss court staffed by Swiss judges availing themselves of substantial experience in international commercial cases and fluent in English.

The Zurich Commercial Court already has a system whereby three out of the five judges who eventually render the judgment, are selected from a list of specialized judges. For example, in an insurance dispute, there will be three insurance experts on the bench; in an accounting dispute, there will be accounting experts on the bench, etc. The system

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[37] See chapter II.A. above.

[38] The initiative was originally in the form of a "*Motion*", dated 24 September 2018 and signed by three members of parliament representing three major political parties, i.e. FDP, CVP and SP. A "*Motion*" requires the Zurich cantonal government to respond to parliament within three months as to whether it accepts the "*Motion*" or not. In light of the time the amendments to the CCP were going to require, the sponsors of the "*Motion*" decided on 4 March 2019 to transform it into the milder form of a "*Postulat*" which does not set in motion a defined timeline and only requires the government to examine whether to prepare the required legislation or not.

provides for in-house expertise of the court and makes it often superfluous for the court to appoint its own expert. This makes for efficient proceedings in commercial cases. The Zurich International Commercial Court is expected to avail itself of the same system.

It is intended that the ZICC continue the long-standing tradition of the Zurich Commercial Court seeking to assist the parties in reaching an amicable resolution of their dispute. Today, the ZICC routinely summons the parties to a conciliation conference that can be described as a combination of a preliminary assessment of the case and guidance by the court to the parties with regard to finding an appropriate settlement. This conciliation conference takes place after a careful reading by the court of the first round of written briefs and documentary evidence. In practice, this hearing takes place some four to six months after the filing of the statement of claim. Roughly 60% of the cases before the Zurich Commercial Court settle at such juncture.[39]

Lawyers and commercial parties from jurisdictions that are unfamiliar with such settlement assistance by the courts may have strong reservations. The authors however are of the opinion that this custom, the high number of settlements and the business need for a rapid resolution of a dispute constitute a unique competitive advantage. Parties who do not care for the concept will not choose the ZICC; others will precisely opt for the ZICC in the hope of a prompt resolution of the dispute.

The implementation of the ZICC will require certain changes to cantonal legislation, mostly regarding the organization of the ZICC. The ZAV's working group has identified all the relevant provisions but work on the revision has not yet

[39] "*Rechenschaftsbericht des Obergerichts des Kantons Zürich 2019*" (Report by the Superior Court of the Canton of Zurich for 2019), p. 50. The report does not specify at which stage the proceedings settled but in practice, this occurs in the vast majority at the conciliation conference.

started, since it is contingent upon the adoption by the federal parliament of the revised CPC.

H. The Project in Geneva

When the Geneva parliament tackled the implementation of the CPC in the fall of 2009, the creation of a Commercial Court in Geneva was debated at length. While there were important proponents[40] favourable to the creation of a Commercial Court[41], both the Judicial and Executive Powers considered "*the excessive specialization of the civil justice*" would reduce its attractivity for magistrates.[42]

Against the background of a political divide[43] the suggestion of creating a section within the Court of First Instance to deal with complex cases[44] lead to the introduction of an Article 87 into the Cantonal Law on the Organisation of Justice ("**LOJ**"). Article 87 LOJ foresees that all judges of the Civil Court at the Tribunal of First Instance acting jointly shall designate one or several judges for commercial cases in charge of handling economic, financial or complex proceedings.

Article 87 LOJ was applied from 1 January 2011 to 1 June 2015, when the Court of First Instance independently decided that the dedication of specialised judges within the Court was no longer manageable in the absence of additional financing, with the consequence that the 160 complex cases were dispatched to all the 21 judges of the Court of First Instance.

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40 In particular the Association of Geneva Employers, the Chamber of Commerce and the Geneva Bar Association.

41 Rapport de la Commission ad hoc Justice 2011 chargée d'étudier le projet de loi du Conseil d'Etat sur l'organisation judiciaire (the "Rapport"), pp. 10, 14 and 21.

42 Rapport, pp. 6 and 11.

43 Only the Swiss People's Party and the Democrat Christian Party fully endorse the creation of a Commercial Court whereas the Socialist Party opposed the creation (Rapport, pp. 29 and 30).

44 Rapport, p. 30.

Little more than three years later, the Executive Power suggested to purely and simply abolish Article 87 LOJ thereby doing away with the specialised Chambers of the Court of First Instance. Despite the Geneva Bar Association's strong opposition to Article 87 LOJ not being applied – recalling that it was particularly problematic for a Court not to apply existing laws – the specialised Chambers of the Court of First Instance in Geneva continue to remain but a mirage.

Considering the current international legal climate favouring the creation of specialised international Commercial Courts (see chapter I.A.), the Geneva Bar Association created a working group in 2018 with the intention of establishing an International Commercial Court in Geneva. Indeed, the Federal Office of Justice in its report on the amendment of the CPC considered that the impetus for the creation of International Commercial Courts using the English language had to come from the cantons.[45]

The working group of the Geneva Bar Association that has the support of both the Geneva Chamber of Commerce and the Federation of Local Employers has met with the judiciary on two occasions in an effort to advance the creation of an International Commercial Court in Geneva.

Compelling reasons that justify the creation of an International Commercial Court in Geneva may be summed up as follows:

- The current absence of an appropriate jurisdiction for international commercial disputes with Article 87 LOJ being simply not applied;
- The current provisions of the CPC which are poorly suited for international litigations with witnesses domiciled abroad;

[45] Bericht, p. 15.

- An important number of international cases before the Geneva Courts;
- The wish to have more specialised judges with industry experience;
- An important number of international companies active in the Lake Geneva region;
- The competing offers of international commercial courts in Paris, Dubai, London and soon Zurich.

The Geneva proposal – as currently considered – foresees the creation of a specialised section for international commercial litigation within the Court of First Instance and the Court of Appeal – although a single cantonal instance such as the Zurich Commercial Court has not been excluded. It is the aim for such an international commercial court to be able to proceed in English relying on the most modern technology for transcript establishment and witness interrogation.

III. Conclusion

The landscape of the resolution of international commercial disputes has changed with the emergence of International Commercial Courts around the globe. These courts complement the offering of sophisticated jurisdictions to commercial parties seeking appropriate fora for the efficient resolution of their disputes. Switzerland – as a leading forum for international commercial arbitrations – with its heritage of neutrality and its multilingual background should exhaust all efforts to expand its offer in the area of dispute resolution by creating International Commercial Courts in its two internationally best-known cities: Zurich and Geneva. Simply observing what the competition does will leave Switzerland on the sidelines of the legal trade when in fact the export of legal

services perfectly tallies with, complements and fosters the foundations of the Swiss economy.

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How Will the COVID-19 Pandemic Change Arbitral Proceedings?

FABRICE ROBERT-TISSOT[1]

Contents

I. Introduction

There is no doubt that this year 2020 has been very peculiar.

With the COVID-19 outbreak, the world has faced a major health and economic crisis.

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[1] I would like to thank Ms Léa Steudler, Bachelor of Law (University of Geneva) and candidate to the MLaw (University of Zurich), for the assistance in the preparation of this paper.

Many measures had to be taken to contain this pandemic. All sectors have been affected and everyone had to (and must still) adapt quickly in these challenging times.

During the lockdown, the vast majority of companies implemented teleworking,[2] schools developed online teaching and video-conferencing platforms saw a phenomenal increase in the number of users. The well-known Zoom platform grew from 10 million users at the end of 2019 to over 200 million at the beginning of April 2020![3]

The development of technology was thus at the forefront to avoid (mitigate) the collapse of the economy. This IT breakthrough became highly visible on the stock market. While most stock market quotations fell sharply, the Nasdaq jumped by more than 4% in April alone.[4]

The COVID-19 pandemic also had a significant impact in the field of law. Justice could not stop in mid-March 2020 and wait that everything went back to normal before resuming the proceedings.[5] Justice must be done *at any time*.

The courts and the counsels nonetheless encountered an unprecedented situation which severely hampered the efficient conduct of the proceedings. The courts around the world had to close their doors to minimize the risk of contamination. Several mechanisms were put in place during the lockdown to ensure the access to justice.

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2 DELOITTE, L'impact du COVID-19 sur notre quotidien, ou comment un virus démultiplie le travail à domicile, https://www2.deloitte.com/ch/fr/pages/press-releases/articles/wie-covid-19-unseren-alltag-beeinflusst-home-office-schub.html (31.07.2020).

3 SZADKOWSKI/LELOUP.

4 RUCHE.

5 SFC, Ordinance introducing coronavirus-related measures in the field of justice and procedural law, Commentaire des dispositions, p. 2.

The COVID-19 outbreak did not only have an impact on court proceedings. There is no doubt that it also affected international arbitration.

While the vast majority of hearings in person had to be postponed,[6] several mechanisms were swiftly put in place by the arbitration institutions to ensure the proper conduct of arbitral proceedings, in particular e-filing and virtual hearings. These steps enabled tribunals and the parties/counsel to overcome the delays caused by the COVID-19 pandemic.

This paper will first examine the various mechanisms, in particular e-filing and virtual hearings, that were put in place during the COVID-19 pandemic in arbitration (and court) proceedings and how it may change arbitral proceedings in the future (see *infra* Section II.), while keeping in mind that virtual hearings may entail possible risks for the enforcement of the award (see *infra* Section III.). As an *excursus,* this paper will then briefly address the validity of virtual hearings in forced (sports) arbitration (see *infra* Section IV.).

II. E-Filing and Virtual Hearings

A. Overview

COVID-19 had a major impact on arbitral proceedings. Since the lock-down, the pandemic primarily affected the means of filing submissions (and the notification of the awards), as well as the conduct hearings. Since there was an urgent need to avoid human contacts, it was clear that counsel could not be asked to file hard copies of their submissions. Moreover, in-person hearings had to be avoided.

[6] WILSKE, p. 12.

The most effective way to avoid significant delays of the proceedings was obviously to facilitate e-filing and the conduct virtual hearings.

Arbitration has shown great flexibility and a capacity to adapt to these exceptional circumstances.[7] One must pay tribute to the arbitral institutions which were very reactive and efficient in implementing the above-mentioned mechanisms.

These mechanisms are not new though and the arbitral institutions implemented existing tools in order to deal with the challenges related to the pandemic.[8] Indeed, it is well-known that arbitration can be paperless[9] and take place remotely.[10]

Already before the crisis, several institutions were offering online services. For example, the Stockholm Chamber of Commerce (hereinafter: "SCC") already offered an e-filing system before the pandemic via a dedicated SCC-platform.[11] The Swiss Rules enacted by the Swiss Chambers' Arbitration Institution (hereinafter: "SCAI") also allow the parties to file their written submissions by email. Indeed, Article 2 para 1 of the Swiss Rules provides that any notice is deemed to have been received if it is delivered to the addressee postal or electronic address.[12]

The vast majority of the rules enacted by the major arbitration institutions provide for flexibility in the organisation of the hearing, including the case management conference.[13] This is for instance the case under Article 25 para 4 of the Swiss

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7 DE VITO BIERI/RENNINGER, paras 1, 6.
8 DE VITO BIERI/RENNINGER, paras 7-8.
9 LEON KOPECKÝ; DE VITO BIERI/RENNINGER, paras 6, 13.
10 SHOPE, p. 77; DE VITO BIERI/RENNINGER, para 6.
11 SCC, SCC Platform – Simplifying Secure Communication From Request To Award, (undated), https://sccinstitute.com/scc-platform/ (31.07.2020).
12 DE VITO BIERI/RENNINGER, para 25.
13 DE VITO BIERI/RENNINGER, para 28.

Rules.[14] The same flexibility applies in arbitrations administered by the London Court of International Arbitration (hereinafter: "LCIA") (see Article 19 para 2 of the LCIA Rules).[15] The Singapore International Arbitration Centre (hereinafter: "SIAC") frequently conducts case management conferences by video/teleconference.[16]

Moreover, several states, such as France, had already enacted statutory provisions on online arbitration, requiring inter alia that the (certified) service provider implement measures for data protection.[17]

Virtual hearings are also not completely new, although it was rather used before the pandemic for case management conferences and for the testimony of witnesses/experts in certain cases where they could not testify in person.

The Korean Commercial Arbitration Board ("KCAB") published the "Seoul Protocol on Video Conferencing in International

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[14] Article 25 para 4 of the Swiss Rules reads as follows: *"At the hearing, witnesses and expert witnesses may be heard and examined in the manner set by the arbitral tribunal. The arbitral tribunal may direct that witnesses or expert witnesses be examined through means that do not require their physical presence at the hearing (including by videoconference)."*

[15] Article 19 para 2 of the LCIA Rules reads as follows: *"The Arbitral Tribunal shall organise the conduct of any hearing in advance, in consultation with the parties. The Arbitral Tribunal shall have the fullest authority under the Arbitration Agreement to establish the conduct of a hearing, including its date, duration, form, content, procedure, time-limits and geographical place (if applicable). As to form, a hearing may take place in person, or virtually by conference call, videoconference or using other communications technology with participants in one or more geographical places (or in a combined form). As to content, the Arbitral Tribunal may require the parties to address specific questions or issues arising from the parties' dispute. The Arbitral Tribunal may also limit the extent to which questions or issues are to be addressed."*

[16] CHAWLA.

[17] LOI n° 2019-222 du 23 mars 2019 de programmation 2018-2022 et de réforme pour la justice (1), https://www.legifrance.gouv.fr/jorf/id/JORFTEXT000038261631 (22.09.2020); DE VITO BIERI/RENNINGER, para 18.

Arbitration" (hereinafter: the "Seoul Protocol") in March 2020, i.e. just before the COVID-19 outbreak.[18]

The pandemic nevertheless gave a great boost to these procedural mechanisms.

At the start of the pandemic, a joint statement was released by the major arbitration institutions stressing that collaboration was particularly important in order to ensure the **best use of digital technologies** for working remotely.[19]

Accordingly, several arbitration institutions quickly implemented an online dispute resolution (hereinafter: "ODR") system at the beginning of the pandemic. This was the case in particular for the International Centre for Settlement of Investment Disputes (hereinafter: "ICSID") which proposed that new arbitration requests, post award applications, request for mediation or fact-finding proceedings be filed electronically.[20]

The International Chamber of Commerce (hereinafter: "ICC"),[21] the SCAI,[22] the LCIA[23] strongly advised (or even asked the parties) to submit any communication (including requests for arbitration) by email only.

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[18] KCAB, Seoul Protocol on Video Conferencing in International Arbitration http://www.kcabinternational.or.kr/user/Board/comm_notice.do?BD_NO=172&CURRENT_MENU_CODE=MENU0015&TOP_MENU_CODE=MENU0014 (22.09.2020).

[19] ICC ET AL., Arbitration and COVID-19, (undated), https://iccwbo.org/content/uploads/sites/3/2020/04/covid19-joint-statement.pdf (22.09.2020).

[20] ICSID, Message Regarding COVID-19 (Update), 19 March 2020, https://icsid.worldbank.org/en/Pages/News.aspx?CID=361 (31.07.2020).

[21] ICC, Urgent COVID-19 Message to DRS Community, 17 March 2020, https://iccwbo.org/media-wall/news-speeches/covid-19-urgent-communication-to-drs-users-arbitrators-and-other-neutrals/ (31.07.2020).

[22] SCAI, Important information, (undated), https://www.swissarbitration.org/ (31.07.2020).

[23] LCIA, LCIA Services Update: COVID-19, 18 March 2020, https://www.lcia.org/lcia-services-update-covid-19.aspx (22.09.2020).

With respect to the notification of awards, in all but exceptional cases, the LCIA transmitted awards to parties electronically during the pandemic, with originals and certified copies to follow, once the LCIA office re-opened.[24] The ICC encouraged the parties to agree, whenever possible, to the electronic notification of the award. However, the ICC Secretariat did in principle not proceed with an electronic notification of the award unless explicitly agreed by the parties.[25]

The American Arbitration Association (hereinafter: "AAA") and the International Center for Dispute Resolution (hereinafter: "ICDR") jointly published a communication entitled "AAA-ICDR® COVID-19 Resource Center" proposing a vast variety of dispute resolution tools during the pandemic, including Bankruptcy ADR during the COVID-19.[26]

The ICC also released the "ICC Guidance Note on Possible Measures Aimed at Mitigating the Effects of the COVID-19 Pandemic" (hereinafter: the "ICC COVID-19 Guidance Note"). This note contains a very detailed and useful guidance to parties, counsel and tribunals on possible measures that may be considered to mitigate the adverse effects of the COVID-19 pandemic on ICC arbitrations.[27] Annex I to the ICC COVID-19 Guidance Note further includes a checklist for a protocol on virtual hearings. Annex II contains suggested clauses for cyber-protocols and procedural orders dealing with the organisation of virtual hearings.

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[24] *Id.*

[25] ICC, ICC Guidance Note on Possible Measures Aimed at Mitigating the Effects of the COVID-19 Pandemic, 9 April 2020, pp. 3-4 para 15, https://iccwbo.org/content/uploads/sites/3/2020/04/guidance-note-possible-measures-mitigating-effects-covid-19-english.pdf (31.07.2020).

[26] AAA & ICDR, AAA-ICDR® COVID-19 Resource Center, (undated), https://go.adr.org/covid-19-resource.html (22.09.2020).

[27] ICC, ICC COVID-19 Guidance Note, *supra* note 25.

The Court of Arbitration for Sport (hereinafter: "CAS") implemented "Emergency Guidelines" (valid until 30 June 2020), by which it amended inter alia Article R31 §3 of the Code of Sports-related Arbitration, in force as from 1 January 2019 (hereinafter: "CAS Code"). The revised Article R31 § 3 provides that written submissions (including statements of appeal[28] and appeal briefs)[29] may be filed by facsimile or email provided that the written submission and its copies are also filed by courier or uploaded to the CAS e-filing platform within the first subsequent business day of the relevant time limit.[30]

Another means that was frequently used to pursue arbitration during the pandemic was the holding of virtual hearings. Again, several institutions were already offering online hearing services. However, COVID-19 boosted the development of this technology during the few months of complete shutdown. For instance, the Hong Kong International Arbitration Centre (hereinafter: "HKIAC") offers a full range of online hearing services[31] and issued specific guidelines to that effect.[32]

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[28] See Article R48 of the CAS Code.

[29] See Article R51 of the CAS Code.

[30] CAS, The Court of Arbitration for Sport (CAS) Emergency Guidelines, https://www.tas-cas.org/fileadmin/user_upload/CAS_Guidelines_COVID-19_15.05.20.pdf (31.07.2020), valid until 30 June 2020. Article R31(4) of the CAS Code already provides that written submissions (including the request for arbitration, the statement of appeal and any other written submissions) may be filed by electronic mail under the conditions set out in the CAS guidelines on electronic filing. Said Guidelines provide that *"The e-filing service can only be activated after the opening of arbitration proceedings by the CAS Court Office. This implies the prior filing of a Request for Arbitration (Article R38 of the CAS Code) or a Statement of Appeal (Article R48) by email, facsimile or courier, within the deadline set out in Article R49 of the CAS Code, as well as the allocation of a case number for the arbitration proceedings in question*.", https://www.tas-cas.org/en/e-filing/e-filing-depot-en-ligne.html (31.07.2020).

[31] HKIAC, Virtual Hearings, (undated), https://www.hkiac.org/content/virtual-hearings (22.09.2020).

[32] HKIAC, Convenient and Efficient: HKIAC E-Hearing, last update: 14 May 2020, https://www.hkiac.org/sites/default/files/ck_filebrowser/HKIAC%20Guidelines%20for%20Virtual%20Hearings_3.pdf (31.07.2020).

Arbitral tribunals also played a crucial role during this challenging period of time. The flexibility provided by the applicable arbitration rules enabled tribunals to find pragmatic and tailormade solutions to continue the arbitral proceedings in good conditions during the pandemic.

For instance, pursuant to Article 24 para 3 of the 2017 ICC Arbitration Rules (the "ICC Rules"), the arbitral tribunal, after consulting the parties by means of a further case management conference or otherwise, may adopt further procedural measures or modify the procedural timetable to ensure continued effective case management. There is no doubt that such procedural steps were taken by several ICC tribunals in order to take the appropriate steps to ensure the swift conduct of the proceedings during the pandemic. Such measures may take the form, for example, of written documents only or the use of audio or video conferencing instead of an in-person hearing.[33] This was illustrated for instance in a recent ICC case between J&F Investimentos SA and Paper Excellence: the first week of the hearing was conducted in person. However, due to the pandemic, the tribunal continued the hearing during the second week in virtual mode via the Zoom platform.[34]

There is no doubt that the flexibility offered by arbitration in these challenging times was much appreciated by the users. The pandemic may very well be the turning point in finally bringing ODR to the world of international arbitration.[35] In this respect, it is interesting to make a comparison with the way state courts dealt with the pandemic in these challenging times.

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[33] ICC, ICC COVID-19 Guidance Note, *supra* note 25, pp. 2-3 para 8.
[34] MOLOO/RITWIK/TAQUI/TIEU/SAUL, p. 3.
[35] BENTON; DE VITO BIERI/RENNINGER, paras 14 et seq.

B. Virtual Hearings Before State Courts During the COVID-19 Pandemic (an Overview)

Video-conferencing is not completely new before state courts – although it was rather limited to the gathering of evidence until recently. Some jurisdictions (such as the United Kingdom) were more adamant than others in moving to virtual hearings during the pandemic.

In the United Kingdom, the Code of Civil Procedure also allows the use of video-conferencing for the testimony of witnesses.[36] Video conferencing can also be used for interim applications, case management conferences, and pretrial reviews.[37] During the pandemic, the UK government *"… put in place arrangements to use telephone, video and other technology to continue as many hearings as possible remotely"*.[38] These provisions were included in the Coronavirus Act 2020[39] to amend existing legislation and to enable the UK courts to move to entirely virtual hearings.[40] For instance, in the case *National Bank of Kazakhstan & Another v The Bank of New York Mellon & Ors*, the first virtual hearing was ordered by the Commercial Court to secure the continuation of the trial despite COVID-19.[41]

In France, the COVID-19 pandemic also slowed down procedures. In fact, as of the 20 March 2020, the courts closed

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[36] Civil Procedure Rules, Part. 32, Rules 32.3; Virtual Civil Trials, p. 19.

[37] Civil Procedure Rules, Practice Direction 32; Virtual Civil Trials, p. 19.

[38] MESSAGE FROM LORD CHIEF JUSTICE, Courts and Tribunals Judiciary, Review of Court Arrangements due to COVID-19 dated 23 March 2020, https://perma.cc/36KL-ECKT (25.08.2020).

[39] Coronavirus Act 2020, 25 March 2020, https://www.legislation.gov.uk/ukpga/2020/7/contents/enacted (25.08.2020).

[40] https://www.loc.gov/law/help/virtual-civil-trials/england.php (25.08.2020).

[41] See *e.g. "The first virtual trial in the commercial court: Stewarts secures continuation of trial despite COVID-19",* https://www.stewartslaw.com/news/the-first-virtual-trial-in-the-commercial-court-stewarts-secures-continuation-of-trial-despite-covid-19/ (25.08.2020).

their doors. To counter this decline, the French government enacted three ordinances concerning civil, administrative and criminal law disputes. In the three cases, the civil, administrative and criminal courts could hold their hearings by video-conference.[42] It should be noted that in criminal proceedings, the consent of the parties to the use of video-conferencing was not required,[43] while the use of videoconferencing cannot be appealed in administrative law matters[44] and civil matters.[45] In practice, the choice of a virtual hearing was left to the heads of courts (so-called *"chefs de jurisdiction"*).[46] The French courts resorted swiftly to remote hearings. For example, the commercial courts of Lilles and Caen used video-conferencing in several proceedings.[47]

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[42] Article 7 para 1 of the *Ordonnance n° 2020-304 du 25 mars 2020 portant adaptation des règles applicables aux juridictions de l'ordre judiciaire statuant en matière non pénale et aux contrats de syndic de copropriété* (Ordinance n°2020-304 of 25 March 2020 adapting the rules applicable to the courts of law ruling in non-criminal matters and to co-ownership syndicate contracts dated 25 March 2020) (hereinafter: "Ordonnance n°2020-304*"*); Article 7 para 1 of the *Ordonnance n° 2020-305 du 25 mars 2020 portant adaptation des règles applicables devant les juridictions de l'ordre administratif* (Ordinance n°2020-205 of 25 March 2020 adapting the rules applicable before the administrative courts dated 25 March 2020) (hereinafter: "Ordinance n°2020-305*"*); Article 5 para 1 of the *Ordonnance n° 2020-303 du 25 mars 2020 portant adaptation de règles de procédure pénale sur le fondement de la loi n° 2020-290 du 23 mars 2020 d'urgence pour faire face à l'épidémie de covid-19* (Ordinance n°2020-305 of 25 March 2020 adapting the rules of criminal procedure on the basis of the Law n° 2020-290 of 23 March 2020 as a matter of urgency to deal with the COVID-19 pandemic dated 23 March 2020) (hereinafter: "Ordinance 2020-303").

[43] Article 5 para 1 Ordinance 2020-303.

[44] Article 7 paras 1 and 3 Ordinance 2020-305.

[45] Article 7 paras 1 and 3 Ordinance 2020-304.

[46] FLATRÈS/POIRSON/COUSTEAU, COVID-19: des audiences toujours possibles par visioconférence, 22 April 2020, https://www.lemondedudroit.fr/decryptages/69662-covid-19-audiences-toujours-possibles-visioconference.html (23.08.2020).

[47] LE BRETON, Confinement. À Caen, le tribunal de commerce va tester l'audience virtuelle, 31 March 2020, https://www.ouest-france.fr/sante/virus/coronavirus/coronavirus-caen-un-tribunal-teste-l-audience-en-mode-confine-6796472 (23.08.2020); MORLANS, Coronavirus: des audiences pourraient se tenir par visioconférence au tribunal de Lille, 1 April 2020, https://www.francebleu.fr/infos/faits-divers-justice/coronavirus-des-audiences-

While virtual hearings were permitted, in-person hearings were maintained for certain types of disputes. For example, this was the case for criminal hearings ("*audiences correctionnelles*"), pre-trial detention and judicial review measures and hearings concerning educational assistance.[48]

With regard to international courts, the Court of justice of the European Union preferred the solution of suspending hearings until 11 June 2020.[49] After this deadline, hearings in person resumed. Nevertheless, if a party cannot be present on the day of the hearing in Luxembourg, only this party will be able to participate in the hearing via video-conference, subject to certain conditions. Another possibility of replacing the hearings is a written Q&A session instead of the oral arguments.[50] The Court of justice has also set up a dedicated platform allowing e-filing for the filing and service of procedural documents.[51]

The European Court of Human Rights (hereinafter: "ECtHR") took exceptional measures including the extension of the 6-month deadline for lodging an application (extended for a one-month period from 16 March 2020, and then extended for a further two-month period from 16 April 2020 to 15 June 2020 inclusive). In addition, it set up a system of remote hearings

pourraient-se-tenir-par-visioconference-au-tribunal-de-lille-1585671414 (23.08.2020).

48 MINISTÈRE DE LA JUSTICE, Information Coronavirus COVID-19 – Le fonctionnement de votre tribunal, 8 April 2020, https://www.justice.fr/info-coronavirus (23.08.2020).

49 COURT OF JUSTICE OF THE EUROPEAN UNION, Covid-19 – Informations, 15 July 2020, https://curia.europa.eu/jcms/jcms/p1_3012067/fr/ (23.08.2020).

50 COURT OF JUSTICE, Important messages for parties, 5 May 2020, https://curia.europa.eu/jcms/jcms/P_97552/en/ (25.08.2020); COURT OF JUSTICE, Covid-19 – Information - Parties before the Court of Justice, 15 July 2020, https://curia.europa.eu/jcms/jcms/p1_3012064/en/ (25.08.2020).

51 COURT OF JUSTICE, The Court of Justice of the European Union adapts in order to guarantee the continuity of the European public administration of justice, 3 April 2020, https://curia.europa.eu/jcms/upload/docs/application/pdf/2020-04/cp200046en.pdf (25.08.2020).

to avoid any delays.[52] In order to guarantee the principle of publicity, all hearings are broadcasted on the website of the European Court of Human Rights the day after.[53] Three virtual hearings have been held since the beginning of the health crisis until the start of July 2020.[54]

Even before the health crisis, Swiss law already provided for the testimony of parties and/or witnesses by video-conference. This is the case for federal administrative proceedings conducted under the Federal Administrative Procedure Act dated 20 December 1968 (hereinafter: "PA").[55] The Swiss Criminal Procedure Code dated 5 October 2007 (hereinafter: "CrimPC") also allows the use of video-conferencing for witnesses' testimonies in criminal proceedings.[56] However, the CrimPC does not provide that the entirety of the proceedings (e.g. oral submissions) may be conducted by video-conference.[57]

In addition to the suspension of the deadlines to appeal before Swiss courts,[58] the COVID-19 outbreak led the Swiss Federal

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52 ECTHR, Extension of exceptional measures at the European Court of Human Rights, 9 April 2020, https://www.ccbe.eu/fileadmin/speciality_distribution/public/documents/PD_STRAS/EN_PDS_20200316_ECHR-is-taking-exceptional-measures.pdf (25.08.2020).

53 ECTHR, La Cour européenne des droits de l'homme prend des mesures exceptionnelles, 16 March 2020, https://hudoc.echr.coe.int/fre-press#{"itemid":["003-6666763-8866144"]} (25.08.2020).

54 ECTHR, https://www.echr.coe.int/Pages/home.aspx?p=hearings&c (25.08.2020).

55 RS 172.021. However, several scholars opine that the testimony of witnesses cannot be conducted by video-conference. See Ordonnance du 16 avril 2020 instaurant des mesures en lien avec le coronavirus dans le domaine de la justice et du droit procédural (Ordonnance COVID-19 justice et droit procédural), Commentaire des dispositions dated 16 April 2020 (hereinafter: "Ordinance COVID-19 – Commentary"), p. 3, in French: www.ejpd.admin.ch/erlaeuterungen-covid19-justiz-f.pdf; in German: file:///C:/Users/frt/Downloads/erlaeuterungen-covid19-justiz-d.pdf (31.07.2020).

56 Article 144 CrimPC, RS 312.0.

57 SFC, Ordinance COVID-19 – Commentary, *supra* note 55, p. 3.

58 See Article 1 para 1 of the *Ordonnance sur la suspension des délais dans les procédures civiles et administratives pour assurer le maintien de la justice en lien avec le coronavirus (COVID-19)* (Ordinance on the Suspension of Time Limits in

Council (*Conseil fédéral*; hereinafter: "SFC") to enact a special Ordinance dated 16 April 2020 introducing measures relating to coronavirus in the field of justice and procedural law (hereinafter: the "Ordinance COVID-19")[59] which only applies in civil matters.[60]

The Ordinance COVID-19 provides that the virtual hearings can be held by videoconference or teleconference until 30 September 2020 in cases where the health recommendations of the Federal Office of Public Health (hereinafter: "FOPH") cannot be complied with.

However, specific requirements must be met:[61]

(i) The use of videoconference for the conduct of hearings must remain the **exception**.[62] Indeed, it is necessary that **all parties consent to it**. The parties do not need to give any ground for their refusal to accept a virtual hearing. However, in view of the duty of good faith (Article 52 of the Swiss Civil Procedure Code [CPC])[63] and the duty to cooperate (Article 164 CPC), it is nonetheless advisable for the parties to briefly explain the reasons for their refusal and/or to suggest alternative options (such as the limitation of the

Civil and Administrative Proceedings for the Maintenance of Justice in Relation to Coronavirus (COVID-19)), dated 20 March 2020, RS 173.110.4. By virtue of said ordinance, the SFC extended the suspension of civil time limits until 19 April 2020. This included the 30-day deadline to file setting aside applications against arbitral awards before the Swiss Federal Tribunal (*Tribunal fédéral*; hereinafter: "SFT").

59 RS 272.81.

60 The SFC renounced to issue specific rules for criminal proceedings because of delicate issues arising from the need to have public deliberations, the difficulty to ensure the "immediacy" in evidence gathering ("*l'immédiateté des débats dans l'administration des preuves*"), the risks that the presumption of innocence may be affected in case of non-authorised access to the audio recordings and several practical difficulties, such as the sequestration/protection of witnesses. See SFC, Ordinance COVID-19 – Commentary, *supra* note 55, p. 3.

61 SFC, Ordinance COVID-19, Article 2(1).

62 SFC, Ordinance COVID-19 – Commentary, *supra* note 55, p. 5.

63 RS 272.

virtual hearings to specific procedural steps, technical arrangements, etc.).[64]

(ii) In the absence of consent, a virtual hearing would be possible only if there are **justified grounds** ("*justes motifs*") for doing so, e.g. in case of emergency.

By contrast, the testimony of witnesses and experts may be conducted by videoconference,[65] even in the absence of the parties' consent.[66]

For data protection purposes,[67] Swiss law further requires the use of an end-to-end encrypted platform as well as the presence of the server in the European Union or Switzerland for virtual hearings conducted by Swiss state courts.[68] However, the vast majority of virtual platforms (such as Skype, Zoom, Whatsapp, …) do not seem to fulfil such requirements.[69]

In a very recent decision, the Swiss Federal Tribunal held that (currently) the CPC does not empower state courts to impose virtual hearings (saved in case of justified grounds; see below) even during the pandemic.[70]

It must be noted that some of the (provisional) mechanisms included in the Ordinance COVID-19 have been implemented in the ongoing revision of the CPC. In particular, the rule according to which the testimony of witnesses and experts

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64 BASTONS BULLETI, Crise du Covid-19 et évolution des audiences en procédure civile, in: « Justice – Justiz – Giustizia » 2020/2, Weblaw 2020, p. 7 para 17.

65 SFC, Ordinance COVID-19, Article 2(2).

66 SFC, Ordinance COVID-19 – Commentary, *supra* note 55, p. 5.

67 See BECKER/CHUFFART-FINSTERWALD/HARI/GIROUD/GÜNEY KING/SOHRABI, Procédures par vidéoconférence et justice digitale: l'exemple genevois, in: Revue de l'avocat, 09/20, pp. 357 et seq.

68 SFC, Ordinance COVID-19, Article 4 lit. c and the Ordinance COVID-19 – Commentary, *supra* note 55, p. 6.

69 BASTONS BULLETI, *supra* note 64, p. 9 note 44.

70 See SFSCD 4A_180/2020 dated 6 July 2020, para 3. See also SFSCD, press release, 7 August 2020, https://www.bger.ch/files/live/sites/bger/files/pdf/fr/4A_180_2020_2020_08_07_T_f_14_19_58.pdf (19.08.2020).

may be conducted by videoconference, even in the absence of the parties' consent (Article 170a of the revised CPC).[71] Moreover, the ongoing "Projet Justitia 4.0" is also aimed at furthering the digitalisation in the field of justice in Switzerland.

It seems that the Swiss courts are rather reluctant to conduct virtual hearings. For instance, in Geneva, there have been many difficulties in setting up the required technological equipment and adopt the necessary user protocols allowing virtual hearings. Above all, it is necessary to have the authorization of the judge. Once his/her consent has been obtained, the lawyers and their party must in turn decide whether or not they want a virtual hearing. Only a few hearings have been able to be held remotely.

In view of the foregoing, while remote testimonies can be carried out before state courts, (Swiss) courts are rather reluctant to conduct virtual hearings. As a result, the state justice system has taken a considerable backlog which will take several months before it is completely absorbed.

C. Right to an In-Person Hearing?

It stems from the above that, in certain jurisdictions (in particular Switzerland), virtual hearings can take place provided that all parties involved consent to it.

[71] See the SFC's "Message" and the draft bill dated 26 February 2020 on the amendment of the CPC, FF 2020 2607 et seq., pp. 2628, 2658, https://www.admin.ch/opc/fr/federal-gazette/2020/2607.pdf (21.08.2020). Pursuant to the new Article 170a of the CPC, the parties may also be heard by videoconference. With respect to the digitilisation in the field of justice in Switzerland (the so-called "Projet Justitia 4.0"): see https://www.justitia40.ch/fr/ (21.08.2020).

According to certain authors, in international arbitration, the right to an oral hearing is a fundamental principle.[72]

By contrast, the Swiss Federal Tribunal ruled that the parties do not have a right to an oral hearing under Swiss arbitration law.[73] If a right to be heard orally is not guaranteed, *a fortiori* a right to an in-person hearing is even less guaranteed.

In any event, it is undisputed that the parties may waive the right to an oral hearing. Accordingly, several institutions have set up a system for resolving disputes solely on the basis of written documents.[74]

One must therefore examine what situation prevails in arbitration and, in particular, whether there is a right for an in-person hearing (i.e. when the parties have not agreed to resolve the dispute solely based on written documents).

The answer is negative: save where the parties have agreed otherwise and/or a contrary provision in the applicable arbitration rules and/or in the *lex arbitri*, there is **no right for an in-person hearing in international arbitration**.

Accordingly, although the arbitral tribunal will generally consult the parties, there is no rule requiring that the parties must consent to virtual hearings. As a matter of principle, the arbitral tribunal has a broad procedural authority with respect to the conduct of the arbitral proceedings (see e.g. Article 22 para 2 of the ICC Rules; Article 15 of the Swiss Rules).[75]

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[72] SCHERER, p. 4; BORN, p. 2264, referring inter alia to Article 17 para 3 of the 2010 UNCITRAL Rules.

[73] SFSCD 117 II 346, para 1 (b) (aa); 4A_199/2014 of 8 October 2014, para 6.2.3; 4A_404/2010 of 19 April 2011, para 5 and the references; 4A_220/2007 of 21 September 2007, para 8.1; KAUFMANN-KOHLER/RIGOZZI, p. 281 para 6.31.

[74] Article 15 Swiss Rules; Article 25 para 6 ICC Rules.

[75] See also ICC, ICC COVID-19 Guidance Note, *supra* note 25, p. 4 paras 21-22: "*If the parties agree, or the tribunal determines, to proceed with a virtual hearing, …*"; "*If a tribunal determines to proceed with a virtual hearing without party agreement, or over party objection,…*" (emphasis added).

The arbitral tribunal has the duty inter alia to ensure that the proceedings are conducted in an "expeditious and cost-effective manner" (Article 22 para 1 of the ICC Rules). Accordingly, it may "impose" virtual hearings to the parties to ensure that the proceedings are conducted swiftly, typically in case of exceptional circumstances such as the COVID-19 pandemic and where is it is impossible to meet in person.[76]

The English version of Article 25 para 2 ICC Rules may be confusing in this respect as it expressly requires the arbitral tribunal to hear the parties together "*in person*" after the exchange of written submission. However, this does not mean that there is an obligation for the arbitral tribunal to hear the parties in a physical hearing. As explained in the ICC COVID-19 Guidance Note, the term "*in person*" should be interpreted broadly to mean that a live oral exchange between the different parties is sufficient.[77] Whether in person or virtual is therefore irrelevant. As stated in the French version of the ICC Rules, what matters is that the hearing is held "*contradictoirement*".[78] Such requirement may also be satisfied through virtual hearings.

Finally, before deciding to impose a virtual hearing, the arbitral tribunal will also have the duty to make sure that the arbitral award will be enforceable (see Article 42 of the ICC Rules).[79]

Arbitral tribunals may conduct (or even impose) virtual hearings, provided that such hearing ensures equal treatment of the parties and their right to be heard (see Articles 182 para 3 of the Swiss Private International Act ("PILA"); 373 para 4 CPC; see also Article 15 para 1 of the Swiss Rules).

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[76] ICC, ICC COVID-19 Guidance Note, *supra* note 25, p. 4 paras 21-22.
[77] *Id.*, p. 5 para 23.
[78] *Id.*, p. 5 para 24.
[79] *Id.*, p. 4 para 22.

Notwithstanding the above, the general expectation is that there will be an in-person hearing.[80] Accordingly, virtual hearings must meet the same requirements as an in-person hearing. In particular, the parties must be able to present their case, i.e. they must have the opportunity to submit their arguments orally during the hearing.

Virtual hearings are not without risks, in particular with respect to witness testimonies/cross-examination.[81] Technological problems may be encountered and, in order to preserve the parties' right (and the enforcement of the award),[82] specific protocols must be put in place.

D. The Emergence of Virtual Hearings' Protocols

In order to ensure the swift conduct of virtual hearings, it is crucial that the arbitral tribunal put in place user protocols and guides ahead of the hearing.

During the pandemic, the world of arbitration has seen quickly the emergence of soft laws on the conduct of virtual hearings. Indeed, several arbitral institutions published protocols and guides on the conduct of virtual hearings to assist the arbitration community during the COVID-19 pandemic.

As an example, the ICC published the ICC COVID-19 Guidance Note. First and foremost, it aims to reduce delays caused by COVID-19 through improved efficiency of parties, counsels and tribunals. Secondly, it is a guide for the practical organization of virtual hearings to avoid problems as much as possible.[83]

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[80] BORN, p. 2264.
[81] SCHERER, p. 4.
[82] See *infra* Section III.
[83] ICC, ICC COVID-19 Guidance Note, *supra* note 25, p. 1 para 2.

The Australian Centre for International Commercial Arbitration (hereinafter: "ACICA") also issued the Online Arbitration Guidance Note.[84] It is a "*form of a checklist of relevant considerations for parties to take into account in preparing for an online arbitration*".[85] It is of course not binding. Its purpose is to facilitate the conduct of the hearing and avoid problems during the hearing.

The HKIAC has done the same with the HKIAC Guidelines for Virtual Hearings.[86]

The ICSID has also issued a brief guide to online hearing at ICSID.[87]

The Chartered Institute of Arbitrators also issued a dedicated note on virtual hearing during the COVID-19 pandemic, i.e. the so-called "Guidance Note on Remote Dispute Resolution Proceedings".[88] In preparation of the hearing, the practitioners will also find it useful to resort to the "Delos checklist on holding arbitration and mediation hearings in times of COVID-19".[89]

It is also advisable to agree upon a specific protocol with the parties ahead of the hearing setting out key issues for the success of the virtual hearings, such as the technical requirements to ensure the smooth proceedings without

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[84] ACICA, Online Arbitration Guidance Note, (undated), https://acica.org.au/wp-content/uploads/2020/05/ACICA-Online-Arbitration-Guidance-Note.pdf (31.07.2020).

[85] *Id.*, p. 1.

[86] HKIAC, *supra* note 32, p. 1.

[87] ICSID, A Brief Guide to Online Hearings at ICSID, 24 March 2020, https://icsid.worldbank.org/news-and-events/news-releases/brief-guide-online-hearings-icsid (25.08.2020).

[88] CIARB, Guidance Note on Remote Dispute Resolution Proceedings, (undated), https://www.ciarb.org/media/8967/remote-hearings-guidance-note.pdf (25.08.2020).

[89] DELOS, Delos checklist on holding arbitration and mediation hearings in times of COVID-19, 20 March 2020, https://delosdr.org/index.php/2020/03/12/checklist-on-holding-hearings-in-times-of-covid-19/ (25.08.2020).

disruption and distraction, the choice of video conferencing platform and any security concerns, the appropriate behaviour rules (including the necessity for the parties/counsel to put their microphone on mute when there are not talking!), the method of document sharing, the examination process (including sequestration of witnesses) and fall-back plans in case of any disruption of the hearing.[90]

For instance, the CAS frequently ask the parties to agree to a specific protocol setting out these key issues prior to the hearing.

E. Filing and Virtual Hearings: Pros and Cons

E-filing and virtual hearings are cost and time effective and even necessary in these times of pandemic. There is no doubt that e-filing and virtual hearings will be used more frequently in arbitration (and in court proceedings?), even after the COVID-19 pandemic, for the simple reason that the users will very soon realise that they can save significant amount of money and time.[91]

However, one must also bear in mind that virtual hearings are not universal panacea. In particular, they may not be necessarily suitable for all kinds of disputes.

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[90] See VON WUNSCHHEIM/RONEY, webinar jointly organised by the ASA and the SCAI entitled "Virtual Hearings in International Arbitration: Key Challenges and Emerging Best Practices", 18 June 2020, https://www.youtube.com/watch?v=7NCK_nxZklE (25.08.2020).

[91] See the statement made by the CAS's Director General, Mr Matthieu Reeb, on 20 August 2020: *"The CAS users will probably realize that they can save significant money with the use of electronic filing and with hearings by video-conference"*, in: Football Legal, https://www.football-legal.com/content/matthieu-reeb-the-cas-users-will-probably-realize-that-they-can-save-significant-money-with-the-use-of-electronic-filing-and-with-hearings-by-video-conference (25.08.2020).

1. Advantages

The first advantage of using e-filing and virtual hearings is reduced costs, speed of the procedure and positive ecological impact.[92] Of course, it will be necessary to invest in an efficient technological system for both secured e-filing and virtual hearings. However, this additional cost will be offset by reductions in the parties' travel and accommodation costs and the rental of premises for the hearing.[93]

Arbitration is meant to be fast and flexible, but an in-person hearing can be very long. Witnesses or experts may not be available or able to travel to another country on the day of the hearing for several weeks or months. The in-person hearing may be scheduled months later. A virtual hearing can avoid all these delays. It is more flexible because each party, lawyers and arbitrator do not have to travel to a common location. The waiting time is thus considerably reduced.[94]

There is no doubt that e-filing and virtual hearing have a positive ecological impact. Avoiding flying and printing thousands of pages reduces our (i.e. arbitration's) carbon footprint

Another important advantage of virtual hearings is the need for discipline (which nonetheless also applies in in-person hearing!). In case of virtual hearings, lawyers must respect their colleagues' speaking time without interrupting them incessantly. The use of the mute-unmute function allows for some discipline in the hearing "room". In addition, to keep the attention of all parties during a virtual hearing, it is necessary for counsel to be clear, concise and to get straight to the point.

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92 WILSKE, p. 29.
93 SCHERER, p. 11.
94 *Id.*

They need to focus on what is important, and therefore this may improve the efficiency of the hearing.[95]

Finally, the possibility of reviewing the video of a witness statement is a considerable advantage for the arbitrators before making their decision.[96]

2. Drawback

Nevertheless, virtual hearings have some downsides, some of which can be avoided and some of which cannot.

The first disadvantage is the platform used for the hearing. Indeed, the fact that the procedure is entirely on the net makes it much more likely that confidentiality and data protection problems may arise. During an in-person hearing, the confidentiality of the dispute is respected because everything is said orally without a microphone or camera. However, during a virtual hearing, everything that is said or shown passes through the web platform with the risk of hacking and/or hijacking.[97]

Moreover, since the data is stored by the platform owner, several questions arise. Where is this data stored? What is the holder going to do with it? When choosing the platform, one must be aware of this risk, i.e. the problem of secured data and confidentiality, potential sales of the data, etc.[98]

Virtual hearings are also exposed to the risks of cybercriminality, such as the unauthorized access by third parties ("Zoombombing") that can interfere with the

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[95] See e.g. LAWINSPORT, *"The Impact of COVID-19 on procedures in Sport Disputes Resolution"* – First Report 12 June 2020 (hereinafter: LawInSport's First Report), para 13, https://www.lawinsport.com/topics/covid19-impact/item/the-impact-of-covid-19-on-procedures-in-sport-disputes-resolution-first-report-12-june-2020 (25.08.2020).

[96] SCHERER, p. 9.

[97] LO, p. 90.

[98] SCHERER, p. 12; DE VITO BIERI/RENNINGER, para 42.

hearing.[99] Passwords may be hacked and unrelated third parties may enter into the e-room and take part in the discussions and thus disrupt the smooth running of the hearing, something that is very rare in an in-person hearing.

As an example, the Zoom platform (used for example by the International Centre for Dispute Resolution division of the American Arbitration Association (hereinafter: "AAA-ICDR"))[100] has been criticized throughout the pandemic for its confidentiality problems.[101] Indeed, Zoom was accused of having sent its users' data to Facebook without their consent. Zoom also lacks end-to-end encryption, a mechanism that ensures the confidentiality of its users' data.[102] It should be noted that all these allegations quickly led the platform's managers to take action. As of 1st April 2020, Zoom has put in place a 90-days plan to address all these issues. Following these 90-days, Zoom assures in a report that *Zoombombing* was placed under control and that encryption was strengthened. Nevertheless, there are still several points that need to be improved, such as the publication of a transparency report by the platform.[103]

Moreover, as the data (notably Zoom data) is stored in the United States or Europe,[104] this could have an impact on the willingness to proceed with a virtual hearing if one of the parties refuses to allow their data, which may be sensitive, to be handed over to a specific country. In this respect, it is interesting to note that the Commercial Court of Zurich

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[99] WILSKE, p. 15; WAKEFIELD. See also DE VITO BIERI/RENNINGER, paras 42 et seq.

[100] AAA-ICDR, AAA-ICDR Virtual Hearing Guide for Arbitrators and Parties Utilizing ZOOM, (undated), https://go.adr.org/rs/294-SFS-516/images/AAA269_AAA%20Virtual%20Hearing%20Guide%20for%20Arbitrators%20and%20Parties%20Utilizing%20Zoom.pdf (31.07.2020).

[101] SCHERER, p. 12; WILSKE, p. 15.

[102] WAKEFIELD.

[103] YUAN.

[104] ZOOM, Zoom Privacy Statement, last updated: July 2020, https://zoom.us/privacy (25.08.2020).

(*Zürcher Handelsgericht*) entered into a special agreement with Zoom for data protection[105] (the so-called Global Data Processing Addendum with Zoom).[106] An example that may be followed by arbitration institutions.

Nevertheless, Zoom does not have a monopoly on video conferencing platforms. Microsoft Teams or Maxwell Chambers ADRE Hearing Solutions have been used by SIAC.[107] As for the CAS, it uses the Cisco-Webex platform.[108] The privacy of video-conferencing appears to be better safeguarded with these platforms.

In any event, arbitral tribunals generally seek the parties' approval with respect to the choice of the specific platform to be used and may warn them of the specific risks that it entails, in particular with respect to the confidentiality of the proceedings. Annex II to the ICC COVID-19 Guidance Note contains suggested clauses for cyber-protocols and procedural orders dealing with the organisation of virtual hearings.[109]

A more pragmatic solution would be to create/install dedicated platforms for hearings to enhance the security of the video recordings and ensure proper and secured data storage. This is the case, for example, with ACICA, which offers a virtual room rental service.[110]

A second negative point is that virtual hearings entail specific challenges in respect of the so-called immediacy in the gathering of evidence ("*l'immédiateté dans l'administration*

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[105] DE VITO BIERI/RENNINGER, para 48 and the references.

[106] ZOOM, Zoom Video Communications, Inc. Global Data Processing Addendum, https://zoom.us/docs/doc/Zoom_GLOBAL_DPA.pdf (22.09.2020).

[107] CHAWLA, International Arbitration During COVID-19: A Case Counsel's Perspective.

[108] LAWINSPORT, LawInSport's First Report, *supra* note 95, para 57.

[109] ICC, Annex II to the ICC COVID-19 Guidance Note, *supra* note 25.

[110] ACICA, Important Information for ACICA Users – COVID-19 Update, (undated), https://acica.org.au/important-information-for-acica-users/ (31.07.2020).

des preuves").[111] In particular, the effectiveness of the cross-examination may be compromised in certain instances.

Firstly, it is difficult to interrogate a witness/expert in case of a technical problem, i.e. video or sound constantly interrupted because of a bad internet connection, bad equipment, etc.[112] It is absolutely imperative that each party is furnished with adequate equipment and a flawless (wifi) connection. If problems occur, the losing party may challenge the award on the ground(s) of a violation of its right to be heard and/or for the breach of the right of equal treatment in the (rather exceptional) circumstances that will be detailed below.[113]

Secondly, an arbitration procedure, especially in international disputes, between several parties from different states requires translators/interpreters. Many witnesses or experts are not fluent in English and prefer to express themselves in their mother tongue, hence the need for translators. However, simultaneous translation may be difficult to implement in virtual hearings. Consecutive translation may be used but it may also entail a considerable waste of time during the cross-examination as the message is said twice in a row.[114]

Thirdly, a virtual audience allows everyone to be alone in a quiet place. A witness could then be helped and influenced by a person, which could put at risk the evidentiary value of the testimony and the integrity of the proceedings (and, possibly, the enforceability of the award).[115]

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[111] It must be noted however that, as a matter of Swiss law, the principle of "immediacy and oral proceedings" ("*principe de l'immédiaté et de l'oralité*") rather applies in criminal proceedings. See e.g. SFSCD 6B_24/2015 of 2 December 2015, para 2; 6B_845/2014 of 16 March 2015, para 2.1; 1B_302/2011 of 26 July 2011, para 2.2.1 and the references.

[112] LO, p. 90; WILSKE, p. 15.

[113] See *infra* Section III.

[114] LO, p. 90.

[115] See *infra* Section III.

Moreover, the client will be most likely alone in a room without his/her lawyer. The client may therefore stand on his/her own in front of the court, while the presence of his/her lawyer may be reassuring, for instance during the cross-examination of said client. A virtual hearing may therefore not be appropriate in such circumstances.

Fourthly, during a virtual cross-examination, the body language is much less perceptible than in reality. Voice intonation and stress are more difficult to detect. The gestures can be more easily hidden, as the screen allows only the upper body to be seen. The "human touch" is missing. The arbitral tribunal and the parties must be able to "feel the witness" in order to fully grasp his/her credibility.[116]

In view of the above, virtual hearings may not be appropriate in all instances to hear witnesses/experts. In the near future, the technology may however considerably improve image and sound quality, i.e. to create a complete immersive video-conferencing system incorporating virtual reality (VR), such as holoportation.[117]

III. Risks for the Enforcement of the Award?

One of the main reasons for the recourse to arbitration is that the award will be recognised and enforced (nearly) worldwide through the New York Convention on the Recognition and Enforcement of Foreign Arbitral Award (hereinafter: "NY Convention").[118]

[116] Wilske, p. 14; De Vito Bieri/Renninger, para 42.
[117] See https://spatial.io/ (04.10.2020).
[118] RS 0.277.12.

Another reason for choosing arbitration is speed and flexibility in the conduct of the proceedings.[119]

However, the arbitral tribunal must, at the same time, ensure that the right to be heard of the parties is fully respected (see Articles 182 para 3 PILA; 373 para 4 CPC).

There will be inevitably a tension between the principle of celerity and these fundamental guarantees. During the pandemic, virtual hearings has made it possible to avoid a postponement of several hearings to an undetermined date in view of the uncertain situation.[120] The principle of celerity is then guaranteed as well as the right to be heard, which would not be the case if the hearing is postponed indefinitely, as the parties do not have the opportunity to present and defend their case.

One must nevertheless examine whether the fact that the arbitral tribunal decided to have (or even imposed) a virtual hearing may put at risk the arbitral award.

Indeed, the losing party may seek to challenge the award and/or to oppose the enforcement of the award on the ground that it was not able to defend its case properly, i.e. it may invoke a violation of its right to be heard (see Articles 190 para 2 lit. d PILA; 393 lit. d CPC).[121]

As stated above, the arbitral tribunal should therefore carefully assess the situation before ordering a virtual hearing in order to ensure that the award to be rendered will be enforceable (see Article 42 of the ICC Rules).[122]

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[119] KAUFMANN-KOHLER/RIGOZZI, p. 14 paras 1.43-1.44.

[120] SCHERER, p. 15.

[121] See also Article V para 1 lit. b NY Convention, which provides that the award shall not be recognised if "*[t]he party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case*".

[122] ICC, ICC COVID-19 Guidance Note, *supra* note 25, p. 4 para 22.

Two main grounds may be raised by the losing party against an award in case the arbitral tribunal ordered a virtual hearing: *(i)* the violation of the right to be heard and *(ii)* the violation of the principle of equal treatment.[123]

A. Violation of the Right to Be Heard

The right to be heard includes the right to present one's case. It includes the right "to make fact allegations and legal submissions, to submit the necessary evidence, to attend the hearing, and to be represented or assisted in front of the court".[124]

The violation of the right to be heard in case of a virtual hearing can take several forms.

First, a party may argue that its right to be heard was breached on the ground that it was entitled to an in-person hearing.[125] However, as mentioned above, while the parties have the right to be heard, this does not require that the hearing be conducted in person (at least under Swiss arbitration law).[126] It is therefore unlikely that an award may be set aside on this ground.

Secondly, the losing party may claim that it could not properly present its case through the witnesses and experts it brought on the ground that they would have been more persuasive/effective at an in-person hearing.[127] Their testimonies/findings could have been better heard in person than virtually, as the arbitrators could better observe them and analyse their behaviour. This line of argument may be

[123] SCHERER, pp. 13 et seq; SHOPE, p. 77.
[124] SFSCD 133 III 139, para 6.1; KAUFMANN-KOHLER/RIGOZZI, p. 481 para 8.174.
[125] SCHERER, p. 14.
[126] See *supra* Section II.C.
[127] SCHERER, p. 14.

valid but it may be difficult to set aside the award based on this objection.

Indeed, despite the formal nature of the right to be heard, the Swiss Federal Tribunal held that the applicant must not only establish that its right to be heard was violated in connection with an important issue of the case, but also show that such violation was likely to have an adverse impact on the outcome of the case.[128] Evidencing such causal nexus[129] between the violation of the right to be heard and the (hypothetical) outcome of the case is very difficult to prove: how can the applicant establish that the outcome of the testimonies/expert evidence (and/or the assessment of such evidence) would have been different in case of an in-person hearing? This may be tantamount to a probatio diabolica – which will be difficult (if not impossible) to satisfy before the Swiss Federal Tribunal.

Thirdly, the losing party may argue that there were technical/computer problems such as a bad connection, video or audio that constantly cut off. It is true that in these circumstances, a party's right to be heard may be violated if the court does not stop the hearing.[130] Nevertheless, such a problem can be avoided by means of protocols or guides explaining the procedure to be followed in the event of technical problems. The CAS, for example, sends a "Cisco Webex Protocol" to the parties before the hearing to inform them about the use of the platform.[131] Finally, if anything was unclear during the hearing, the arbitral tribunal may consider alternative means to grant the parties the opportunity to clarify this point, for instance by ordering the filing of post-hearing briefs.

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[128] See e.g. SFSCD 4A_424/2018 of 29 January 2019, para 5; 4A_247/2017 of 18 April 2018, para 5.1.3.
[129] See in state courts' proceedings: BASTONS BULLETI, *supra* note 64, p. 67 para 35.
[130] LO, p. 93.
[131] LAWINSPORT, LawInSport's First Report, *supra* note 95, para 57.

In any event, the party invoking a violation of its right to be heard must have duly objected to the conduct of the virtual hearing during the arbitral proceedings. Otherwise, it will be deemed to have forfeited its right to complain about the violation of its right to be heard.[132] In particular, in the event of a connection problem, the lawyers must object immediately. If they do not do so, they cannot later challenge the decision on the grounds of a violation of the right to be heard.[133]

B. Violation of the Right to Be Treated Equally

A violation of the right to be treated equally may be invoked to challenge the award (see Articles 190 para 2 lit. d PILA; 393 lit. d CPC)[134] and/or oppose the enforcement of the award. Indeed, while not being expressly incorporated in the NY Convention, this guarantee is an integral part of Article V para 1 lit. b.[135]

For instance, the violation of this principle could be invoked in cases where a witness was helped/manipulated by a party during the virtual hearing. The testimony would be distorted and therefore one party would find itself at an advantage over the other.[136]

In any case, as stated above, for an award rendered to be neither recognised nor enforced, the violation of the due process rights must have changed the outcome of the

[132] See e.g. SFSCD 4A_40/2018 of 26 September 2018, para 3.3; 4A_247/2017 of 18 April 2018, para 5.1.2; 119 II 386, 388 para 1a.
[133] See also in state courts' proceedings: BASTONS BULLETI, *supra* note 64, pp. 13-14 para 34, referring to the "*respect préalable du devoir de réaction immédiate*".
[134] SFSCD 133 III 139, para 6.1.
[135] SCHERER, NY Convention Commentary, p. 310 para 170.
[136] SCHERER, p. 16.

award.[137] This requires a **serious** "*denial of a reasonable opportunity to present arguments or evidence*" (and of the corresponding right to be treated equally).[138]

In view of the above, it will be difficult to set aside an award (respectively to oppose the enforcement thereof) based on the above-mentioned grounds. In particular, the applicant must satisfy the "*but for*" test, i.e. it must show that, in case of an in-person hearing, the arbitrators would have radically changed their assessment of the case and/or of the evidence brought by the parties. The threshold is obviously high.

IV. Validity of Virtual Hearings in Forced (Sports) Arbitration (*Excursus*)

What about the possibility to impose virtual hearings in a **forced arbitration**?

One must examine whether the situation is similar to traditional (voluntary) arbitration (discussed above). Indeed, since arbitration is of a conventional nature, the parties voluntarily agree to waive their right to be heard by a state court within the meaning of Article 30 para 1 of the Swiss Federal Constitution (hereinafter: "Fed. Cst.")[139] and Article 6 § 1 of the European Convention on Human Rights (hereinafter: "ECHR").[140] Moreover, the right to have a public hearing does not apply in traditional arbitration (being noted that said arbitrations may also be confidential).[141] In accordance with the principle of the parties' autonomy, the parties are free to organise the arbitral proceedings as they

[137] See SCHERER, NY Convention Commentary, p. 298 para 142; BORN, pp. 3535 et seq.
[138] BORN, p. 2158.
[139] RS 101.
[140] RIGOZZI/ROBERT-TISSOT, p. 63.
[141] DE VITO BIERI/RENNINGER, para 20.

deem fit (Articles 182 para 1 PILA; 373 para 1 CPC), including providing for virtual arbitration.

The situation may however by different in the field of sports arbitration. Indeed, as stated by the Swiss Federal Tribunal in the landmark *Cañas* case,[142] the athletes have no other choice than to submit to the procedure before the CAS based on the arbitration clauses contained in the regulations of sports federations.[143] Accordingly, CAS arbitration (more specifically, CAS appeal proceedings under Articles R47 et seq. of the Code of Sports-related Arbitration (hereinafter: "CAS Code")) is mandatory for athletes, i.e. there is no voluntary waiver of the guarantees set out in Article 30 para 1 of the Fed. Cst and in Article 6 § 1 ECHR.[144]

According to the Swiss Federal Tribunal, forced arbitration before arbitral tribunals is nonetheless valid provided that the arbitral tribunal concerned is independent and impartial. The CAS is deemed to be as independent and impartial as a state court. Secondly, a procedure before the CAS will be faster than proceedings before state courts.[145] Accordingly, athletes renounce to state justice in exchange of a similar procedure before an arbitral tribunal, i.e. there is a valid *quid pro quo*.[146] Therefore, the arbitration clauses in favour of CAS contained in the regulations of sports federations are valid and enforceable.

In the *Mutu & Pechstein* case, the ECtHR confirmed that the fundamental guarantees enshrined in Article 6 § 1 ECHR fully apply in arbitral proceedings before the CAS, unless the parties have waived **freely, lawfully and in an unequivocal**

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[142] SFSCD 133 III 235.

[143] SFSCD 133 III 235, para 4.3.2.2.

[144] See also the very recent decision issued in the seminal *Caster Semenya* case: SFSCD 4A_248/2019 & 4A_398/2019 of 25 August 2020, para 5.

[145] SFSCD 133 III 235, para 4.3.2.3.

[146] RIGOZZI/ROBERT-TISSOT, pp. 66 et seq.; KAUFMANN-KOHLER/RIGOZZI, p. 120 para 3.96; BEFFA/ROBERT-TISSOT, p. 234.

manner their rights to the guarantees provided for by Article 6 § 1 ECHR.[147] Accordingly, in case where there is no voluntary arbitration *per se* (such as in the case at hand), the guarantees set out in Article 6 § 1 ECHR **directly** ("*pleinement*")[148] apply to the proceedings.

This principle was recently confirmed by the ECtHR in another (sports) case:[149] *"… a distinction must be drawn between voluntary arbitration and compulsory arbitration. If arbitration is compulsory, in the sense of being required by law, the parties have no option but to refer their dispute to an arbitral tribunal, which must afford the safeguards secured by Article 6 § 1 of the Convention…*".

As stated above, although the parties have a right to be heard, the right to be heard orally is not part of it under Swiss arbitration law.[150] However, one must examine whether the situation is different in sports (forced) arbitration by virtue of Article 6 § 1 ECHR.

In several decisions, the ECtHR has recognized a **right to an oral hearing** before single instances or trial courts, except in exceptional circumstances.[151] An oral hearing is also required

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[147] ECTHR, *Mutu and Pechstein v. Switzerland*, applications nos. 40575/10 and 67474/10, judgement of 2 October 2018, para 95.

[148] HIRSCH, Commentaire de l'arrêt Mutu et Pechstein, L'arbitrage sportif encadré par la Cour européenne des droits de l'homme, in: Jusletter of 11 March 2019, p. 4 para 15, p. 6 para 26 and the note 24.

[149] ECTHR, *Ali Riza et al v Turkey*, applications nos. 30226/10 and 4 others, 28 January 2020, para 174.

[150] SFSCD 117 II 346, para 1 (b) (aa); 4A_199/2014 of 8 October 2014, para 6.2.3; 4A_404/2010 of 19 April 2011, para 5 and the references; KAUFMANN-KOHLER/RIGOZZI, p. 281 para 6.31.

[151] ECTHR, *Selmani and others v. the former Yugoslav Republic of Macedonia*, application No. 67259/14, judgement of 9 February 2017, para 37; ECtHR, *Göç v. Turkey*, application No. 36590/97, judgement of 11 July 2002, para 47. See also SFC, Ordinance COVID-19 – Commentary, *supra* note 55, pp. 6-7: *"Le droit à une audience orale publique au sens de l'art. 6, ch. 1 de la Convention de sauvegarde des droits de l'homme et des libertés fondamentales (CEDH) doit être garanti dans tous les cas…*". In free translation: "*The right to a public oral hearing*

in **disciplinary proceedings** because of the importance of the sanctions taken against a party (financial penalties, end of professional career, etc.).[152]

In the *Mutu & Pechstein* case, the ECtHR further held that the athlete is entitled to request a **public hearing** in disciplinary proceedings before CAS under Article 6 § 1 ECHR (a waiver of this principle by one of the parties being perfectly possible).[153]

Accordingly, one must distinguish to distinct issues:

(i) Is there is a right to an in-person hearing before CAS under Article 6 § 1 ECHR? Can the CAS impose virtual hearings upon the athletes?

(ii) Does a virtual hearing before CAS fulfil the requirements of a public hearing?

In our opinion, provided that the above-mentioned due process requirements are fulfilled (i.e. right to be heard and equal treatment of the parties), there is **no reason to conclude that virtual hearings do not enable a party to present its case under Article 6 § 1 ECHR.**

Nor is there any reason to conclude that the CAS (similarly to arbitral tribunals in voluntary arbitration) is not empowered to impose virtual hearings without the parties' consent.

As stated above, the duty to conduct an oral hearing does not entail that said hearing must necessarily take place in person. What matters is that the hearing is held "*contradictoirement*"[154] which is also the case for virtual hearings.

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pursuant to Article 6, para 1 of the Convention for the Protection of Human Rights and Fundamental Freedoms must be guaranteed in all instances".

[152] ECtHR, *Ramos Nunes de Carvalho E Sà v. Portugal*, applications nos. 55391/13, 57728/13, 74041/13, judgement of 6 November 2018, para 208.

[153] ECtHR, *Mutu and Pechstein v. Switzerland*, applications nos. 40575/10 and 67474/10, judgement of 2 October 2018, paras 175-184.

[154] See *supra* Section II.C.

Moreover, the principles of orality and immediacy only apply *stricto sensu* in criminal proceedings, i.e. they do not directly apply in arbitration, including before CAS.[155]

Therefore, virtual hearings before CAS can be considered as proper/valid oral hearings which fulfil the requirements of Article 6 § 1 ECHR.

This is further confirmed by the ECtHR's case law, according to which Article 6 ECHR does not give a right to be personally present at the hearing but rather an effective right to present one's case.[156]

The ECtHR further addressed the question of the compatibility of a videoconference with the fair trial provided for in Article 6 ECHR mainly in the criminal field. It concluded that videoconferencing is not incompatible with Article 6 §§ 1 & 3 ECHR,[157] provided that the use of videoconferencing "*pursues a legitimate aim and that the manner in which it is conducted is compatible with respect for the rights of the defence, as provided for in Article 6 ECHR*".[158] However, it is necessary that the parties can confer with their counsel in an effective and confidential manner and that no technical problems hinder the smooth running of the hearing.[159]

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[155] Pursuant to the CAS's jurisprudence, the CAS panels are not bound by the procedural rules of the Swiss civil and criminal courts. See e.g. CAS 2009/A/1879 *Alejandro Valverde Belmonte v. Comitato Olimpico Nazionale Italiano*, award of 16 March 2010, paras 99 et seq.; CAS 2011/A/2426 *Adamu*, award dated 24 February 2012, paras 62 et seq.

[156] ECTHR, *Yevdokimov and Others v. Russia,* applications nos 27236/05, 44223/05, 53304/07, 40232/11, 60052/11, 14919/12, 19929/12, 57043/12, 67481/12, judgement 16 February 2016, para 22.

[157] ECTHR, *Marcello Viola v. Italy*, application No. 45106/04, judgement of 5 October 2006, para 67; ECtHR, *Sakhnovski v. Russia*, application No. 21272/03, judgement of 2 November 2010, para 98.

[158] ECTHR, *Marcello Viola v. Italy*, application No. 45106/04, judgement of 5 October 2006, para 67.

[159] ECTHR, *Sakhnovski v. Russia*, application No. 21272/03, judgement of 2 November 2010, para 98.

With regard to civil proceedings, the ECtHR stated in *Yevdokimov and Others v. Russia* that the use of video-links is not contrary to Article 6 ECHR as long as the parties can be heard without technical issues.[160]

In *Igranov and Others v. Russia*, the ECtHR even stated that if an in-person hearing cannot be conducted and the courts do not consider the option of a virtual hearing, the parties' right to a fair trial under Article 6 para 1 ECHR is violated.[161]

In view of the above, in both civil and criminal matters, the use of videoconferencing is possible to guarantee the right to a fair trial. The very fact of not considering it in circumstances where in-person hearing is not possible (typically during the COVID-19 pandemic) may even lead to a violation of Article 6 ECHR. Put differently, under this provision, **there might even be a duty for the court to conduct virtual hearings** in order to guarantee the parties' right to a fair trial.

In this respect, one must distinguish the issue of whether the parties are entitled to an in-person hearing (which is not the case) on the one hand, and the issue of whether they have the right to a public hearing as per Article 6 § 1 ECHR on the other hand.

As stated above, the ECtHR held that the athlete is entitled to request a public hearing in disciplinary proceedings before CAS.[162]

In our view, this does not prevent the CAS to conduct virtual hearings. In particular, the parties' right to (request) a public hearing is not breached if the full video recordings are re-

[160] ECtHR, *Yevdokimov and Others v. Russia,* applications nos 27236/05, 44223/05, 53304/07, 40232/11, 60052/11, 14919/12, 19929/12, 57043/12, 67481/12, judgement 16 February 2016, para 43.

[161] ECtHR, *Igranov and Others v. Russia*, applications nos. 42399/13 and 8 others (see appended list), judgement of 20 March 2018, para 35.

[162] ECtHR, *Mutu and Pechstein v. Switzerland*, applications nos. 40575/10 and 67474/10, judgement of 2 October 2018, paras 175-184.

transmitting through live-streaming or immediately after the hearing (as this is the case before the ECtHR itself).[163]

To sum up, the CAS is perfectly empowered to resort to virtual hearings. In fact, the CAS may even have the duty to conduct virtual hearings in certain cases, in particular to ensure the swift conduct of the proceedings. If requested by the parties, the (virtual) hearing can be broadcasted in order to guarantee the right to a public hearing.

V. Conclusion

COVID-19 had a considerable impact in the world of arbitration.[164]

It certainly demonstrated that arbitration was an extremely flexible means of dispute resolution that could adapt to exceptional circumstances. The various arbitral institutions were able to respond quickly to the new needs of arbitration by allowing, in particular, the use of e-filing and e-hearing. To avoid wasting invaluable time, the arbitral institutions did not hesitate to issue users' guides and protocols to provide maximum assistance to the parties and the tribunals. COVID-19 has created an impetus for cooperation amongst the arbitration community.

The pandemic demonstrated that many of the steps in a procedure could now be carried out through video-conferencing platforms, including virtual hearings. We believe that virtual arbitration will (and should) continue to develop thanks to technological developments.

However, not all cases are suitable for virtual hearings. Cases of low complexity and urgency, and possibly oral submissions, can undoubtedly be conducted online. Nevertheless, for cases

[163] See *supra* Section II.B.
[164] SCHERER/BASSIRI/MOHAMED [to be published].

in which witnesses and/or experts are involved, online hearings can be difficult. It is imperative that the arbitrators be able to analyse the credibility of the persons being heard, which is more difficult when they are not in the same room. It is also crucial to guarantee that the parties' right to be heard is preserved and the counsel can provide the necessary assistance to their clients.

Once the health crisis will be behind us, COVID-19 will leave its print on arbitration. It will have succeeded in accelerating the efficiency of an arbitration procedure (which is meant to be fast and flexible) without changing the fundamental aspects that characterise international arbitration, i.e. a fair, impartial, independent and balanced decision.[165]

But should we go further?

What is the next step?

There will be a time when the arbitration community will have to consider E-justice, i.e. the administration of justice via artificial intelligence.

Indeed, one cannot exclude that judges and arbitrators may sooner or later be replaced by robots, at least for certain types of claims.

Two studies have been done on the ability of artificial intelligence to make judgments similar to those of a human judge. The first was conducted by the United States Supreme Court on more than 7,700 decisions. The result is that 70.9% of the judgments rendered by artificial intelligence are identical to those of the Supreme Court.[166] The second was conducted by the ECtHR: in this study 79% of the judgments rendered by artificial intelligence are comparable to those rendered by the ECtHR's judges.[167] One may expect that this

[165] WILSKE, p. 33.
[166] KATZ/BOMMARITO/BLACKMAN, p. 2.
[167] ALETRAS/TSARAPATSANIS/PREOTIUC-PIETRO/LAMPOS, p. 2.

percentage will be even higher in the next future with the development of artificial intelligence.

Estonia, for its part, has passed the stage of the study and is in the process of setting up a system in which artificial intelligence will render justice for minor offences whose damage will not exceed 7,000 Euros.[168]

Fiction is beginning to overtake reality.

The robotization of justice is developing faster than one might think and COVID-19 could speed up the process. And robots do not fall sick…

However, with the ever-increasing developments in technology and the digitalisation of the law, are we not heading towards a dehumanisation of justice? This might be the next challenge that will arise with the irruption of technology in the field of justice.

[168] ZORAB, p. 1.

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