

Fabrice Robert-Tissot

Arbitration

Case Law of the Swiss Federal Supreme Court on International and Domestic Arbitration (1 March 2016 to 28 February 2018)

This contribution summarises the case law of the Swiss Federal Supreme Court in international and domestic arbitration issued between 1 March 2016 and 28 February 2018. In the first part, the author has selected the most important decisions. The summary of the factual background and the analysis of the Swiss Federal Supreme Court is followed by a brief commentary on the relevant decision. The second part contains a general presentation of the case law of the Swiss Federal Supreme Court in international and domestic arbitration during the relevant period, following the order of the grievances of Articles 190(2) of the Federal Act on Private International Law (the “PILA”) and 393 of the Swiss Civil Procedure Code (the “CPC”).

Article Categories: Case Law Overview with Commentary
Legal Area: Arbitration

Citation: Fabrice Robert-Tissot, Arbitration, in: Jusletter 3 December 2018

Part I: Most Important Arbitration Decisions of the Swiss Federal Supreme Court – Summary and Commentary)	7
I. International Arbitration	7
A. Decision of the Swiss Federal Supreme Court ATF 142 III 521 (4A_386/2015 of 7 September 2016)	7
B. Decision of the Swiss Federal Supreme Court ATF 143 III 462 (4A_98/2017 of 20 July 2017).....	9
C. Decision of the Swiss Federal Supreme Court ATF 143 III 589 (4A_53/2017 of 17 October 2017).....	11
D. Decision of the Swiss Federal Supreme Court ATF 143 III 55 (4A_500/2015 of 18 January 2017).....	12
E. Decision of the Swiss Federal Supreme Court ATF 143 III 578 (4A_12/2017 of 19 September 2017)	13
F. Decision of the Swiss Federal Supreme Court ATF 142 III 296 (4A_628/2015 of 16 March 2016).....	14
G. Decision of the Swiss Federal Supreme Court ATF 142 III 360 (4A_342/2015 of 26 April 2016)	17
II. Domestic Arbitration	19
A. Decision of the Swiss Federal Supreme Court ATF 142 III 284 (4A_422/2015 of 16 March 2016).....	19
Part II: General Presentation of the Swiss Federal Supreme Court’s Case Law in International and Domestic Arbitration	20
I. International Arbitration	20
A. Admissibility of Appeals in Civil Matters	20
1. Decision of the Swiss Federal Supreme Court ATF 142 III 521 (4A_386/2015 of 7 September 2016)	20
2. Decision of the Swiss Federal Supreme Court ATF 143 III 462 (4A_98/2017 of 20 July 2017)	20
3. Decision of the Swiss Federal Supreme Court 4A_692/2016 of 20 April 2017 (unpublished)	21
4. Decision of the Swiss Federal Supreme Court 4A_600/2016 of 29 June 2017 (unpublished)	21
5. Decision of the Swiss Federal Supreme Court 4A_136/2016 of 3 November 2016 (unpublished)	21
6. Decision of the Swiss Federal Supreme Court 4A_34/2016 of 25 April 2017 (unpublished)	22
7. Decision of the Swiss Federal Supreme Court 4A_312/2017 of 27 November 2017 (unpublished)	22
8. Decision of the Swiss Federal Supreme Court 4A_157/2017 of 14 December 2017	22
9. Decision of the Swiss Federal Supreme Court 4A_600/2016 of 29 June 2017 (unpublished)	23

10. Decision of the Swiss Federal Supreme Court 4A_704/2015 of 16 February 2017 (unpublished)	23
11. Decision of the Swiss Federal Supreme Court 4A_384/2017 of 4 October 2017 (unpublished)	23
12. Decision of the Swiss Federal Supreme Court 4A_490/2016 of 6 March 2017 (unpublished)	23
13. Decision of the Swiss Federal Supreme Court 4A_116/2016 of 13 December 2016 (unpublished)	24
14. Decision of the Swiss Federal Supreme Court 4A_32/2016 of 20 December 2016 (unpublished)	24
15. Decision of the Swiss Federal Supreme Court 4A_188/2016 of 11 January 2017 (unpublished)	24
16. Decision of the Swiss Federal Supreme Court 4A_600/2016 of 29 June 2017 (unpublished)	24
17. Decision of the Swiss Federal Supreme Court 4A_704/2015 of 16 February 2017 (unpublished)	24
18. Decision of the Swiss Federal Supreme Court 4A_692/2016 of 20 April 2017 (unpublished)	25
19. Decision of the Swiss Federal Supreme Court 4A_206/2017 of 6 October 2017 (unpublished)	25
20. Decision of the Swiss Federal Supreme Court 4A_497/2015 of 24 November 2016 (unpublished)	25
21. Decision of the Swiss Federal Supreme Court 4A_600/2016 of 29 June 2017 (unpublished)	25
22. Decision of the Swiss Federal Supreme Court ATF 143 III 55 (4A_500/2015 of 18 January 2017)	26
23. Decision of the Swiss Federal Supreme Court ATF 143 III 589 (4A_53/2017 of 17 October 2017)	27
24. Decision of the Swiss Federal Supreme Court 4A_396/2017 of 23 November 2017 (unpublished)	27
25. Procedural Order of the Swiss Federal Supreme Court 4A_119/2017 of 13 June 2017 (unpublished)	28
B. Improper Appointment of the Sole Arbitrator and Improper Composition of the Arbitral Tribunal (Article 190(2)(a) PILA).....	28
1. Decision of the Swiss Federal Supreme Court 4A_704/2015 of 16 February 2017 (unpublished)	28
2. Decision of the Swiss Federal Supreme Court ATF 142 III 521 (4A_386/2015 of 7 September 2016)	29
C. Jurisdiction (Article 190(2)(b) PILA)	29
1. Decision of the Swiss Federal Supreme Court ATF 143 III 462 (4A_98/2017 of 20 July 2017)	29
2. Decision of the Swiss Federal Supreme Court 4A_616/2015 of 20 September 2016 (unpublished)	31

3.	Decision of the Swiss Federal Supreme Court 4A_492/2016 of February 7 2017 (unpublished)	31
4.	Decision of the Swiss Federal Supreme Court 4A_34/2016 of 25 April 2017 (unpublished)	31
5.	Decision of the Swiss Federal Supreme Court 4A_188/2016 of 11 January 2017 (unpublished)	32
6.	Decision of the Swiss Federal Supreme Court 4A_40/2017 of 8 March 2017 (unpublished)	33
7.	Decision of the Swiss Federal Supreme Court 4A_102/2016 of 27 September 2016 (unpublished)	33
8.	Decision of the Swiss Federal Supreme Court 4A_672/2016 of 24 January 2017	34
9.	Decision of the Swiss Federal Supreme Court 4A_310/2016 of 6 October 2016	34
10.	Decision of the Swiss Federal Supreme Court ATF 143 III 578 (4A_12/2017 of 19 September 2017)	35
11.	Decision of the Swiss Federal Supreme Court ATF 143 III 462 (4A_98/2017 of 20 July 2017)	36
D.	Ultra et infra petita award (Article 190(2)(c) PILA).....	37
1.	Decision of the Swiss Federal Supreme Court 4A_384/2017 of 4 October 2017 (unpublished)	37
E.	Equality of the parties and right to be heard (Article 190(2)(d) PILA).....	37
1.	Decision of the Swiss Federal Supreme Court 4A_668/2016 of 24 July 2017 (unpublished)	37
2.	Decision of the Swiss Federal Supreme Court 4A_40/2017 of 8 March 2017 (unpublished)	37
3.	Decision of the Swiss Federal Supreme Court 4A_220/2017 of 8 January 2018 (unpublished)	38
4.	Decision of the Swiss Federal Supreme Court 4A_692/2016 of 20 April 2017 (unpublished)	38
5.	Decision of the Swiss Federal Supreme Court 4A_668/2016 of 24 July 2017 (unpublished)	39
6.	Decision of the Swiss Federal Supreme Court 4A_704/2015 of 16 February 2017 (unpublished)	39
7.	Decision of the Swiss Federal Supreme Court 4A_592/2017 of 5 December 2017 (unpublished)	39
8.	Decision of the Swiss Federal Supreme Court 4A_34/2016 of 25 April 2017 (unpublished)	39
9.	Decision of the Swiss Federal Supreme Court 4A_80/2017 of 25 July 2017 (unpublished)	40
10.	Decision of the Swiss Federal Supreme Court 4A_277/2017 of 28 August 2017 (unpublished)	40

11.	Decision of the Swiss Federal Supreme Court 4A_616/2015 of 20 September 2016 (unpublished)	41
F.	Public policy (Article 190(2)(e) PILA).....	42
1.	Decision of the Swiss Federal Supreme Court 4A_116/2016 of 13 December 2016 (unpublished)	42
2.	Decisions of the Swiss Federal Supreme Court 4A_536/2016 and 4A_540/2016 of 26 October 2016 (unpublished)	43
3.	Decision of the Swiss Federal Supreme Court 4A_136/2016 of 3 November 2016 (unpublished)	44
4.	Decision of the Swiss Federal Supreme Court 4A_522/2016 of 2 December 2016 (unpublished)	44
5.	Decision of the Swiss Federal Supreme Court 4A_312/2017 of 27 November 2017 (unpublished)	45
6.	Decision of the Swiss Federal Supreme Court 4A_157/2017 of 14 December 2017 (unpublished)	45
7.	Decision of the Swiss Federal Supreme Court 4A_690/2016 of 9 February 2017 (unpublished)	45
8.	Decision of the Swiss Federal Supreme Court 4A_692/2016 of 20 April 2017 (unpublished)	46
9.	Decision of the Swiss Federal Supreme Court 4A_384/2017 of 4 October 2017 (unpublished)	46
10.	Decision of the Swiss Federal Supreme Court 4A_600/2016 of 29 June 2017 (unpublished)	46
G.	Revsion.....	46
1.	Decision of the Swiss Federal Supreme Court 4A_412/2016 of 21 November 2016 (unpublished)	46
2.	Decision of the Swiss Federal Supreme Court ATF 142 III 521 (4A_386/2015 of 7 September 2016)	47
3.	Decision of the Swiss Federal Supreme Court 4A_506/2017 of 3 October 2017 (unpublished)	47
4.	Decision of the Swiss Federal Supreme Court ATF 143 III 589 (4A_53/2017 of 17 October 2017)	48
H.	Other issues	48
1.	Decision of the Swiss Federal Supreme Court 4A_690/2016 of 9 February 2017 (unpublished)	48
II.	Domestic arbitration	48
A.	Admissibility of civil claims	48
1.	Decision of the Swiss Federal Supreme Court 4A_600/2016 of 29 June 2017 (unpublished)	48
2.	Decision of the Swiss Federal Supreme Court 4A_473/2016 of 16 February 2017 (unpublished)	49

3.	Decision of the Swiss Federal Supreme Court 4A_356/2017 of 3 January 2018 (unpublished)	49
4.	Decision of the Swiss Federal Supreme Court 4A_322/2016 of 28 July 2016 (unpublished)	49
5.	Decision of the Swiss Federal Supreme Court 5A_507/2016 of 15 August 2016 (unpublished)	49
6.	Decision of the Swiss Federal Supreme Court 4A_546/2016 of 27 January 2017 (unpublished)	49
7.	Decision of the Swiss Federal Supreme Court ATF 143 III 157 (4A_475/2016 of 28 March 2017).	50
B.	Irregular appointment of sole arbitrator and irregular composition of the arbitral tribunal (Article 393(a) CPC).....	50
1.	Decision of the Swiss Federal Supreme Court 4A_322/2016 of 28 July 2016 (unpublished)	50
C.	Jurisdiction (Article 393(b) CPC).....	51
1.	Decision of the Swiss Federal Supreme Court 4A_473/2016 of 16 February 2017 (unpublished)	51
2.	Decision of the Swiss Federal Supreme Court 4A_407/2017 of 20 November 2017 (unpublished)	51
3.	Decision of the Swiss Federal Supreme Court 4A_546/2016 of 27 January 2017 (unpublished)	52
4.	Decisions of the Swiss Federal Supreme Court 4A_618/2015, 4A_634/2015 of 9 March 2016 (unpublished)	53
D.	Ultra et infra petita award (Article 393(c) CPC).....	53
E.	Equality of the parties and right to be heard (Article 393(d) CPC).....	53
1.	Decision of the Swiss Federal Supreme Court 4A_322/2016 of 28 July 2016 (unpublished)	53
2.	Decision of the Swiss Federal Supreme Court 4A_570/2016 of 7 March 2017 (unpublished)	54
3.	Decision of the Swiss Federal Supreme Court 4A_356/2017 of 3 January 2018 (unpublished)	54
F.	Arbitrariness (Article 393(e) CPC).....	54
1.	Decision of the Swiss Federal Supreme Court 4A_407/2017 of 20 November 2017 (unpublished)	54
2.	Decision of the Swiss Federal Supreme Court 4A_600/2016 of 29 June 2017 (unpublished)	55
3.	Decision of the Swiss Federal Supreme Court 4A_426/2015 of 11 April 2016 (unpublished)	56
G.	Manifestly excessive expenses and arbitrators' fees (Article 393(f) CPC).....	57
H.	Revision (Articles 396 et seq. CPC).....	57
I.	Other issues.....	57

Part I: Most Important Arbitration Decisions of the Swiss Federal Supreme Court – Summary and Commentary)

[Rz 1] This section provides a summary and a brief commentary of the most important decisions of the Swiss Federal Supreme Court in international and domestic arbitration between 1 March 2016 to 28 February 2018.

I. International Arbitration

A. Decision of the Swiss Federal Supreme Court ATF 142 III 521 (4A_386/2015 of 7 September 2016)

[Rz 2] **Areas covered:** international arbitration; admissibility of the set aside application; improper appointment of the sole arbitrator and improper composition of the arbitral tribunal (Article 190(2)(a) PILA); challenge of members of the arbitral tribunal; guidelines on conflicts of interest in international arbitration; revision.

[Rz 3] **Facts:** In 2000, the claimant X (a company incorporated under Italian law) and the respondent Y (a company incorporated under Dutch law, a subsidiary of the Y Group, a German multinational) entered into a contract for the tendering and execution of the construction and installation of a ship's hoist in the port of Livorno, Italy (hereinafter: "**the Contract**"). During the final test in 2007, some of the elevator cables broke, causing the platform to fall. The dispute concerned the financial consequences of this accident, for which the parties were mutually responsible. In 2011, Y filed a request for arbitration against X with the Secretariat of the Court of Arbitration of the International Chamber of Commerce (hereinafter: "**ICC**") pursuant to the arbitration clause in the Contract. In 2012, the ICC Court of Arbitration appointed N, an attorney-at-law with the law firm A in Zurich, as sole arbitrator. The ICC Court of Arbitration rendered its final award in 2015, ordering X to pay Y the sum of EUR 2,272,500 plus interest. X filed a revision application with the Swiss Federal Supreme Court. It sought to set aside the award, to challenge the arbitrator to refer the case to a new arbitral tribunal. In support of its challenge, X argued that there was a connection between the Swiss-based law firm A (of which arbitrator N was a partner) and the Y Group, of which Y was affiliated. In 2015, X's counsel became aware of a 2014 press release stating that the German office of law firm A had advised the German company Z, which was itself affiliated with the Y group. However, this information does not appear to have been disclosed in the declaration of independence signed by arbitrator N in 2012.

[Rz 4] **Law:** In this decision, the Swiss Federal Supreme Court leaves open the question whether the discovery, after the expiry of the time limit for challenging an international arbitral award, of a ground which would have required the challenge of the sole arbitrator or of one of the members of the arbitral tribunal may give rise to a revision application of the award. Since, in the present case, the application for review must in any event be dismissed for the reasons set

out below, the Court considers that it is not appropriate to give a final ruling on that question. Next, the Court points out that an arbitrator, like a state judge, must guarantee a sufficient degree of independence and impartiality, otherwise he will be considered to have been improperly appointed within the meaning of Article 190(2)(a) PILA. These guarantees must be examined in light of the constitutional principles governing the state judiciary, adapted by the specific principles of arbitration. Thus, Article 30(1) of the Federal Constitution of the Swiss Confederation (hereinafter: the “Cst.”) allows a party to request the recusal of a judge whose situation or conduct is such as to give rise to doubts as to his impartiality. In the field of arbitration, the International Bar Association has issued Guidelines on Conflicts of Interest in International Arbitration. These Guidelines do not have the force of law but provide a non-exhaustive list of specific circumstances that may give rise to conflicts of interest. These circumstances are divided into three lists (red; yellow; green) according to their potential of creating conflicts of interest. In the present case, on the grounds that law firm A was the same in Switzerland and Germany, the claimant raised five situations referred to in the above-mentioned IBA Guidelines, namely: (i) non-waivable red list: regular advice by the arbitrator to a party or one of its affiliates from which the arbitrator or his firm derives significant financial income; (ii) waivable red list: a significant business relationship between the arbitrator’s firm and a party or an affiliate of a party; (iii) orange list: within the last three years, the arbitrator’s firm has acted for or against one of the parties, or an affiliate of one of the parties, in a matter unrelated to the matter in dispute and without the arbitrator’s involvement; (iv) the arbitrator’s firm is currently providing services to one of the parties, or an affiliate of one of the parties, without the arbitrator’s involvement; (v) the arbitrator’s firm is currently providing services to one of the parties, or an affiliate of one of the parties, without the arbitrator’s involvement; (v) the arbitrator or the arbitrator’s firm regularly represents a party or an affiliate of a party, but that representation is not related to the matter in dispute. The respondent and the arbitrator argued that the relationship between Firm A (Switzerland) and Firm A (Germany) was only a network relationship between independent firms. The Swiss Federal Supreme Court notes that the growth in the size of law firms is a reality of international arbitration that must be taken into account. An assimilation between an arbitrator and his law firm does not necessarily imply a conflict of interests, as this depends on the specific circumstances. In the present case, the law firm A considers that the circumstances are not so serious as to render the confirmation of the disputed award incompatible with a sense of justice and fairness. On its various websites, the law firm A has certainly emphasised, for advertising purposes, the links between the member firms of its international network and the benefits that potential clients can derive from them. However, the same website also states that “Firm A is in fact an association of ten independent law and tax firms”. According to the Swiss Federal Supreme Court, this legal independence is also reflected in the financial aspect, as there is no sharing of fees between the member firms of the network. It concludes that neither the arbitrator nor his Swiss firm advised the respondent or its sister company Z (it should be noted that the Y Group comprises 340 legal entities). The tribunal concludes that the circumstances of the specific case, which are the only decisive factors, are not so serious that the maintenance of the award on which the revision application is based appears to be incompatible with the sense of justice and fairness, and it therefore dismisses the revision application (insofar as it is admissible).

[Rz 5] **Commentary:** Although it has not definitively settled the issue, the Swiss Federal Supreme Court, while deferring it to the Federal Chambers, which are currently working on a project to update, if not revise, Chapter 12 of the PILA, seems to favour the admissibility of revision application in the event that, after the expiry of the time limit to challenge an international arbitral award, a ground is discovered that would have required the disqualification of the sole arbitrator or of one of the members of the arbitral tribunal. However, the claimant must show that it could not, with the diligence required by the circumstances, have discovered the ground for challenge during the arbitral proceedings. With regard to sufficient guarantees of the arbitrator's independence and impartiality, the Swiss Federal Supreme Court emphasises the importance of the IBA Guidelines on Conflicts of Interest in International Arbitration, as they contain internationally recognised standards, while stressing that the particular circumstances of the case are ultimately decisive. Even if the decision of the Swiss Federal Supreme Court is convincing, one may wonder why the (sole) arbitrator concerned did not disclose such a (potential) conflict. The existence of a network of law firms operating under a separate name (and, a fortiori, whose members do not share profits) should not be sufficient to create such a conflict of interest. On the other hand, if the law firms concerned offer their services under the same corporate name, it seems to us that increased vigilance would be justified. In our view, the mere fact that the members of that network do not share fees should not be sufficient to exclude the appearance of a conflict. In such circumstances, a party may legitimately have doubts as to the independence and impartiality of the arbitrator if a firm in the same network and with the same name as the arbitrator's firm has advised an affiliate of the other party.

B. Decision of the Swiss Federal Supreme Court ATF 143 III 462 (4A_98/2017 of 20 July 2017)

[Rz 6] **Areas covered:** International arbitration; admissibility of the said aside application; jurisdiction of the arbitral tribunal (Article 186 PILA); decisions on jurisdiction subject to a set aside application (Article 190(2)(b) PILA).

[Rz 7] **Facts:** In 2013, company Z filed an arbitration case against Federation X, seeking damages of approximately USD 13 billion for an alleged expropriation of Z in country X. A three-member arbitral tribunal has been constituted under the United Nations Commission on International Trade Law Arbitration Rules ("UNCITRAL Arbitration Rules"). In 2014, Federation X challenged the jurisdiction of the arbitral tribunal on five alternative grounds. The tribunal bifurcated the proceedings to preliminarily consider the first three grounds. In 2017, the arbitral tribunal issued an interlocutory award on jurisdiction, dismissing the first three grounds and stating that the remaining two grounds would be dealt with on the merits. Federation X filed a set aside application before the Swiss Federal Supreme Court for violation of Article 190(2)(b) PILA. While leaving the admissibility of the set aside application to the court, it requested that the arbitral award be set aside and that the Swiss Federal Supreme Court declare that the arbitral tribunal lacked jurisdiction to hear Z's claims.

[Rz 8] **Law:** The Swiss Federal Supreme Court first recalls its jurisprudence on the admissibility of a set aside application in international arbitration. The challenged act must be an award,

which may be final, partial or interlocutory. It should be noted, however, that an interlocutory award can only be challenged on the grounds of the improper composition of the arbitral tribunal (Article 190(2)(a) PILA) or its lack of jurisdiction (Article 190(2)(b) PILA). If the arbitral tribunal dismisses a plea of lack of jurisdiction in a separate decision, it renders an interlocutory award (Article 186(3) PILA). Similarly, the arbitral tribunal also makes an interlocutory award if it expressly declares its jurisdiction during the proceedings. However, if the arbitral tribunal first examines its jurisdiction and declares itself without jurisdiction, it shall terminate the proceedings and thus render a final award (Article 190 (2)(b) and Article 190(3) PILA). What these various decisions have in common is that they settle the question of the the arbitral tribunal's jurisdiction once and for all, one way or the other. In other words, in each of these decisions, whether it is a final award, a partial award or an interlocutory award, the arbitral tribunal definitively decides on question, accepting or rejecting its jurisdiction by an explicit decision or by a procedural act which is final and binding on it as well as on the parties. Such a character thus seems to be the essential element of all such decisions, whatever their subject matter and form. This jurisprudence is based, in particular, on reasons of procedural economy, in order to counteract the tactic of “salami slicing”, which could block the normal course of arbitral proceedings by manoeuvres aimed at invoking several grounds of lack of jurisdiction in succession before any defence on the merits, and then attacking each separate decision on this subject before the Swiss Federal Supreme Court. It remains to be seen whether it is appropriate to make this jurisprudence more flexible. In any case, the wording of Article 190(2)(b) PILA is clear: the arbitral tribunal must have “wrongly declared” itself competent. In the present case, however, the arbitral tribunal only ruled on three of the five grounds raised by Federation X to challenge the jurisdiction of the arbitral tribunal, leaving the consideration of the remaining two grounds to a later stage of the proceedings. In doing so, the arbitral tribunal did not make a final determination on its jurisdiction under this provision. Indeed, it cannot be ruled out that the arbitral tribunal will finally declare itself without jurisdiction based on one of the two remaining grounds to be examined. The Swiss Federal Supreme Court concludes that the appeal is inadmissible because the decision of the arbitral tribunal is not final.

[Rz 9] **Commentary:** This judgement was delivered in the context of the “Yukos” saga between this company and the Russian State.¹ It is the first case in which the Swiss Federal Supreme Court has examined the question of whether a “partial” interlocutory decision on jurisdiction can (and must) be challenge immediately under threat of foreclosure (see Article 190(2)(b) and Article 190(3) PILA).² This judgement is convincing: only a decision that decides the question of the arbitral tribunal's jurisdiction "once and for all" is subject to appeal in civil matters.

¹ For more details on this case: see PHILIPPE BÄRTSCH, the Swiss Federal Supreme Court finds that challenge to Yukos Capital jurisdictional award is premature, in: *Practical Law Arbitration*, 2017 Thomson Reuters.

² *Id.*

C. Decision of the Swiss Federal Supreme Court ATF 143 III 589 (4A_53/2017 of 17 October 2017)

[Rz 10] **Areas covered:** International arbitration; admissibility of the set aside application; waiver of appeal (Article 192(1) PILA).

[Rz 11] **Facts:** In 2014, the Republic of X (“X”) initiated arbitration proceedings against the company Z (“Z”) under the UNCITRAL Arbitration Rules. X seeks a declaration that two contracts with Z are void. A three-member arbitral tribunal, including Professor Emeritus N, chosen by X, was established. In 2016, the arbitral tribunal issued its final award dismissing X’s claim. In 2017, X filed a set aside application before the Swiss Federal Supreme Court and, in the alternative, a revision application. It sought to set aside the disputed award and to disqualify arbitrator N. The relevant arbitration agreement contained the following passage: *“Awards rendered in any arbitration hereunder shall be final and conclusive and judgment thereon may be entered into any court having jurisdiction for enforcement thereof. There shall be no appeal to any court from awards rendered hereunder”*.

[Rz 12] **Law:** The admissibility of the set aside application is subject to the fact that the parties have not waived their right to appeal under Article 192(1) PILA. Such a waiver applies to all cases of appeal mentioned in Article 190(2) PILA. Agreements excluding the right to appeal within the meaning of Article 192 para. 1 PILA are accepted by the Swiss Federal Supreme Court in a restrictive manner. However, an express declaration clearly expressing the joint will of the parties to waive any right of recourse is sufficient, even if no express reference is made in Article 190 and/or 192 PILA. Case law has considered the meaning of the term “appeal” on several occasions. In a broad sense, it is a generic term that encompasses a wide variety of legal remedies. In a narrower sense, however, it refers to the appeal, which is the ordinary suspensive, devolutive and reformatory remedy. In determining whether it is one or the other, a generic formulation (e.g. *“all rights of appeal”*) tends to give the term a broad acceptance, as is the case here. Moreover, from the point of view of the useful effect that an objective interpretation should give to any contractual clause, it makes no sense to expressly exclude in the arbitration agreement a remedy (appeal in the strict sense) that does not exist in any relevant legislation. Therefore, the Swiss Federal Supreme Court concluded that in the present case the parties had validly waived their right of appeal under Article 192(2) PILA. As far as the review is concerned, X discovered the alleged ground of challenge before the end of the appeal period. This ground falls within the scope of both Article 190(2) PILA, as a ground for appeal, as well as Article 121(a) of the Swiss Federal Supreme Court Act (hereinafter: “FSCA”) or Article 123(2)(a) FSCA as a possible ground for revision. As the revision is subsidiary to the set aside application in civil matters, it seems difficult to accept that a party who has expressly waived the right to appeal, and thus relies on the ground of Article 190(2)(a) PILA, may nevertheless file an application for revision to the Swiss Federal Supreme Court, otherwise Article 192 PILA would be useless. The Swiss Federal Supreme Court concludes that admitting the right of revision in such a case would be extremely contrary to the rules of good faith. In so doing, it also did not rule on the application for revision.

[Rz 13] **Commentary:** This judgement confirms the case law of the Swiss Federal Supreme Court on the interpretation of waiver clauses (see Article 192(1) PILA). If the parties have excluded any possibility of an “appeal” against the arbitral award, the term “appeal” must in principle be given a broad meaning, so that a set aside application is also excluded. Applying the principle of good faith, the Swiss Federal Supreme Court also states that, in the presence of such a waiver clause, it will not enter into the matter of an application for revision based on the same grounds as those invoked in support of a set aside application. This decision is convincing.

D. Decision of the Swiss Federal Supreme Court ATF 143 III 55 (4A_500/2015 of 18 January 2017)

[Rz 14] **Areas covered:** International arbitration; admissibility of the set aside application; waiver of appeal (Article 192(1) PILA).

[Rz 15] **Facts:** In 2013, the company X (“X”), based in Belize, initiated arbitration proceedings against the Jordanian company Z (“Z”) before the London Court of International Arbitration (hereinafter: “LCIA”), seeking payment of a contractual penalty of USD 93 million from Z. The LCIA appointed a Zurich lawyer as sole arbitrator. Z raised a plea of lack of jurisdiction and dismissed the claim, alleging that the signature of Dr. V (CEO of Z) next to that of X’s representative was forged and that Z itself had no knowledge of the contract before receiving the request for arbitration. However, in a letter dated 20 November 2014, Z tacitly (“*Einlassung*”) accepted the jurisdiction of the arbitrator (“*I. [. . .] that Respondent enters an unconditional appearance.*”). Having done so, Z moved to dismiss the claim on the grounds of forgery of the signature of Dr. V., the alleged co-signer of the contract. After hearing the case, the arbitrator dismissed X’s claim. He found that the contract had not been signed by Dr. V. and that the signature on the document had been forged. X lodged a set aside application before the Swiss Federal Supreme Court for violation of its right to be heard (Article 190(2)(d) PILA), despite the waiver of appeal contained in the relevant arbitration agreement (see Article 192(1) PILA).

[Rz 16] **Law:** The admissibility of a set aside application is conditional on the parties not having waived their right of appeal (Article 190 PILA and 192(1) PILA). Article 192(1) PILA provides that the parties may waive their right of appeal in certain specific cases. In this case, the waiver clause is clear. The problem, however, lies in the fact that X acted in a contradictory manner (*venire contra factum proprium*) by pleading the non-existence of the contract before the Swiss Federal Supreme Court in order to avoid the waiver of recourse clause that it had validly entered into, and its existence before the arbitral tribunal in order to obtain payment of the contractual penalty of USD 93 million. According to the Swiss Federal Supreme Court, this argument is characterised by an “irreducible contradiction” that violates the rules of good faith. As long as the waiver clause is valid, the claim is inadmissible.

[Rz 17] **Commentary:** In this decision, the Swiss Federal Supreme Court also noted a *lapsus calami* affecting the text of Article 192(1) PILA in both the printed and electronic versions of the classic compilation of federal legislation relating to this provision. The classic compilation has since been corrected.

E. Decision of the Swiss Federal Supreme Court ATF 143 III 578 (4A_12/2017 of 19 September 2017)

[Rz 18] **Areas covered:** International arbitration; jurisdiction of the arbitral tribunal (Article 190(2)(b) PILA); objection of lack of jurisdiction (Article 186(2) PILA); action for validation of an attachment order (Article 279 of the Debt Enforcement and Bankruptcy Act (hereinafter: the “DEBA”)); interest worthy of protection (Article 76(1)(b) FSCA).

[Rz 19] **Facts:** The Chinese company Z (“Z” or “the respondent”) initiated arbitration proceedings against the British Virgin Islands company X (“X” or “the claimant”). In 2016, the arbitral tribunal ordered X to pay several sums of money to Z. It also held that the attachment ordered by the competent court of the Canton of Geneva had been duly confirmed by the action for recognition of debt brought before it. X lodged a set aside application against this award, arguing, inter alia, that the arbitral tribunal had wrongly accepted its jurisdiction to validate the attachment order (see Article 190(2)(b) PILA).

[Rz 20] **Law:** According to the claimant, the arbitral tribunal wrongly assumed jurisdiction to rule on the validity of the attachment (Article 190(2)(b) PILA), since the enforcement of a debt is a matter for the State and not for the arbitral tribunal. The arbitral tribunal would have arrogated to itself a power reserved to the prosecution authorities, which would constitute grounds for setting aside the arbitral award. The Swiss Federal Supreme Court first recalled the nature of the attachment, which is an urgent protective measure that must be validated if it is not to lose its effects by operation of law. The action for validation of the attachment (Article 279 DEBA) is a substantive action whose purpose is to establish the existence of the claim that gave rise to the attachment. It must be based on the same claim as the one that led to the attachment. Both case law and doctrine consider that this action can be brought before an arbitral tribunal. However, this jurisdiction must be distinguished from the jurisdiction to rule on a claim for final release of the objection to the summons to pay. The purpose of the arbitration is not to decide on the merits of the claim. It is a matter of debt enforcement law and therefore falls exclusively within the jurisdiction of a state authority and, consequently, outside the jurisdiction of an arbitral tribunal for lack of arbitrability. In any event, the jurisdiction conferred on the arbitral tribunal by the action for validation of the attachment (Article 279 DEBA) does not affect the proceedings as such but can only have the effect of allowing the debtor to freely dispose of his assets that have been sequestered until then. This is one of the consequences of the lack of interdependence between the fate of the attachment (urgent protective measure) and that of the action to validate the attachment (autonomous substantive law action). The plea of lack of jurisdiction (Article 190(2)(b) PILA) must be raised before any defence on the merits (Article 186(2) PILA and Article 2(1) of the Swiss Civil Code (hereinafter: the “SCC”)), otherwise the jurisdiction of the arbitral tribunal is tacitly accepted by a conclusive act (“*Einlassung*”). The exception of the non-arbitrability of the dispute is subject to the same rule as the lack of jurisdiction and must therefore be raised at the outset. In this case, since the question of the arbitrability of the dispute is widely accepted by doctrine and case law, there was no reason not to raise this objection at the outset. Finally, the Swiss Federal Supreme Court held that the claimant had no interest worthy of protection in the

annulment of the award (Article 76(1)(b) FSCA), in particular because the disputed finding (as to whether the attachment had been duly validated) did not affect its legal situation.

[Rz 21] **Commentary:** This judgement is important because it clarifies the relationship between arbitration and bankruptcy law, in particular the attachment procedure (Article 271 et seq. DEBA). First, the Swiss Federal Supreme Court confirms that the action (on the merits) in validation of the attachment of Article 279 DEBA can (and must) be brought before an arbitral tribunal if the contract in question contains an arbitration agreement. On the other hand, due to non-arbitrability of disputes under the DEBA, the arbitral tribunal may neither release the opposition to the order to pay (see Articles 80-84 DEBA; this question had already been decided in a previous judgement 5P.55/1990 of 7 March 1990), nor rule on the validity or execution of the attachment. Consequently, in the present case, the arbitral tribunal was not entitled to find that the attachment had been duly validated within the time limits of Article 279 DEBA. Specifically, once the creditor has obtained the final release of the opposition before the competent (release) judge on the basis of the arbitral award, it is (exclusively) up to the competent prosecution office, to which an application for continuation of proceedings has been filed (see Articles 88 and 279(3) DEBA), to examine whether the time limits of Article 279 DEBA have been observed.

F. Decision of the Swiss Federal Supreme Court ATF 142 III 296 (4A_628/2015 of 16 March 2016)

[Rz 22] **Areas covered:** International arbitration; jurisdiction of the arbitral tribunal (Article 190(2) PILA); alternative dispute resolution as mandatory prerequisite to arbitration; examination of the rules established by the ICC for the amicable settlement of a dispute with the assistance of a mediator within the framework of a framework procedure; good faith.

[Rz 23] **Facts:** Company X (“X” or “the claimant”) and company Y (“Y” or “the respondent”) are companies active in the hydrocarbon sector. In 2002, X and Y signed two association agreements for the exploration and exploitation of oil deposits in two perimeters of the relevant territory. In 2012, the same parties entered into two joint venture agreements for the creation of a joint operating organisation for the management and exaction of oil operations in the relevant oil fields. The two association agreements, to which the two 2012 joint venture agreements referred, contained an arbitration clause which stated: “*Any dispute arising between the Parties in the performance or interpretation of this Agreement which cannot be resolved by the Parties shall, in the first instance, be subject to an attempt at conciliation in accordance with the Alternative Disputes Resolution (ADR) Rules of the International Chamber of Commerce (ICC). Any dispute between the Parties arising out of the performance or interpretation of this Agreement which is not resolved by conciliation shall be finally settled by arbitration in accordance with the UNCITRAL Arbitration Rules by three (3) arbitrators appointed in accordance with such rules. The applicable law shall be the law of [...]. The place of arbitration shall be Geneva, Switzerland. The language of the arbitration shall be French. However, if necessary, English may be used.*”³ After a dispute arose between the two companies, Y

³ In French in the Swiss Federal Supreme Court decision.

submitted a Request for Conciliation with the ICC International Centre for ADR (“the ADR Centre”) pursuant to the ICC ADR Rules of 1 July 2001 (“the ADR Rules”). A conciliation session was initially scheduled, but the parties agreed to postpone it. Y initiated arbitration proceedings against X. In a letter of the same date to the conciliator, Y noted the failure of the conciliation, which it attributed to X. Y informed the conciliator of its intention not to pursue the ad hoc proceedings and that it had filed a notice of arbitration. X objected to the termination of the conciliation proceedings. X informed the conciliator that there was no reason to terminate the conciliation proceedings, as they had not started for reasons beyond its control. By letter of 21 January 2015, the conciliator informed the parties that she could not notify the ICC of the termination of the proceedings without the discussion provided for in Article 5(1) of the ADR Rules having taken place. She therefore proposed new dates for a meeting in Paris in the presence of counsels and representatives of both parties. However, Y maintained that the conciliation proceedings had been terminated. The conciliator therefore informed the parties that she interpreted Y’s behaviour as a withdrawal from the case and informed the ADR Centre accordingly. The conciliator then noted that Y intended to withdraw the Request for Conciliation and invited the parties to submit their comments. After a further exchange between the parties, the ADR Centre confirmed that it considered that Y intended to withdraw the Request for Conciliation. In a further letter, pointing out that Y’s share of the advance on costs had not been paid, the ADR Centre noted that the ADR proceedings had been terminated in accordance with Article 6(1)(f) of the ADR Rules. In the arbitration proceedings, X challenged the jurisdiction of the arbitral tribunal. The latter decided to rule on this issue only in the first phase of the proceedings. It confirmed its jurisdiction, rejected X’s challenge to its jurisdiction and declared Y’s claim admissible. X filed an application before the Swiss Federal Supreme Court to set aside the award and to declare that the arbitral tribunal lacked jurisdiction *ratione temporis* in this case. The Swiss Federal Supreme Court allowed the appeal and set aside the award.

[Rz 24] **Law:** The Swiss Federal Supreme Court first recalls that ADRs are very successful in Europe and in Switzerland. These methods include conciliation and mediation. Like other institutions, the ICC adopted the ADR Rules in 2001 and the Mediation Rules in 2014. The procedure described in the ADR Rules is characterised by the fact that, if the parties have agreed in writing to submit their dispute to the ADR Rules, they may not withdraw from this procedure before the first discussion with the Neutral has taken place, as provided for in Article 5(1) of the Rules. To the extent that the procedure is binding on the parties, the discussion between the parties and the Neutral is important, whether or not it leads to an agreement. The Swiss Federal Supreme Court then analyses the disputed clause in the light of the ADR Rules to which it refers. In this respect, the Court recalled that the interpretation of an arbitration clause is carried out in accordance with the general rules of contract law, by first seeking the real and common will of the parties (Article 18(1) of the Swiss Code of Obligations (hereinafter: the “SCO”)), and then, if that is not possible, by determining, in accordance with the principle of trust, the meaning that the parties could and should have given in good faith to the disputed clause in good faith (Article 18(2) SCO). In the present case, such an interpretation of the disputed clause leads to the conclusion that the validity of the recourse to arbitration is subject to an attempt at conciliation in accordance with the procedure laid down in the ADR Rules. In the present case,

Y had not complied with the mandatory requirement of an attempt at conciliation. Article 5(1) of the ADR Rules reads as follows: “[...] [the] discussion with the Neutral may also [take place] in the form of a telephone conference, a video conference or any other suitable form”. The arbitral tribunal interpreted the term “any other appropriate form” as meaning an exchange of letters or e-mails. However, these means do not allow for the unity of time that a discussion requires. Moreover, in the present case, these e-mail exchanges were only preliminary to the scheduled meeting, insofar as they concerned the postponement of that meeting. Thus, there was no attempt at conciliation under the ADR Rules. The respondent accuses the claimant of having acted inappropriately. However, it is clear from the facts that the appellant has at every stage of the proceedings expressed its willingness to continue the conciliation and to challenge the jurisdiction of the arbitral tribunal. Therefore, the claim of abuse of rights cannot be sustained. The Swiss Federal Supreme Court then turned to the question of how to sanction the breach of a conciliation agreement which obliges the parties not to proceed to arbitration without first having recourse to this alternative method of dispute resolution. After pointing out that it would probably not be possible to find a solution that would be suitable for all cases, the Federal Supreme Court considered that sanctioning with damages the party who refuses to comply with the obligation to have recourse to compulsory preliminary arbitration or to pursue to the end the specific procedure under way for the amicable settlement of the dispute was not a satisfactory solution. It also waived the inadmissibility of the arbitration claim. Following the majority view on this point, it decided to suspend the arbitration and set a deadline for the parties to resume the agreed conciliation procedure.

[Rz 25] **Commentary:** This decision is important because the Swiss Federal Supreme Court has ruled on an issue that is widely debated in the legal literature, namely the effect of non-compliance with an ADR clause on the arbitral proceedings. In summary, in the event of non-compliance with such a clause without a legitimate reason, the arbitral tribunal should suspend the arbitral proceedings until the conciliation process has been completed, if necessary, by setting a time limit for the parties to initiate or resume said process. Although this decision states that it is not easy to give a single answer that could be applied in all cases of non-compliance with an ADR clause as a prerequisite to arbitration proceedings, it seems that such a solution should apply in the vast majority of cases.⁴ Indeed, the solution proposed by the Swiss Federal Supreme Court is pragmatic and should be welcomed. On the one hand, awarding damages to the party invoking the ADR clause is not easy, especially given the difficulties in quantifying such damages. On the other hand, the inadmissibility of the request for arbitration would not be satisfactory from the point of view of the economy of the procedure, since, if the mediation fails, a new arbitral tribunal would have to be constituted, which would have the effect of prolonging the procedure and increasing its costs. Inadmissibility also entails of interruption of the statute of limitations. Suspension of the arbitration proceedings therefore appears to be an appropriate and balanced solution. In the same decision, the Swiss Federal Supreme Court recalls its previous jurisprudence, according to which the respondent cannot improperly invoke the breach of an ADR clause in order to “torpedo” the arbitral proceedings

⁴ See CHRISTOPHER BOOG, Failure to comply with mandatory prearbitral tier can result in stay of arbitration, in: Practical Law Arbitration, 2016 Thomson Reuters.

(see Swiss Federal Supreme Court decision 4A_18/2007 of 6 June 2007; on the question of the effect of an ADR clause on the arbitration proceedings, see also Swiss Federal Supreme Court decisions 4A_46/2011 of 16 May 2011 and 4A_124/2014 of 7 July 2014). However, there are some doubts as to the Swiss Federal Supreme Court's broad interpretation of the concept of “*jurisdiction ratione temporis*”⁵ and, more specifically, as to whether non-compliance with ADR clauses - which is more related to the admissibility of the arbitration claim – falls within the scope of Article 190(2)(b) PILA. If a party initiates arbitration proceedings despite the existence of an ADR clause, the chances of conciliation or mediation, which presuppose a willingness of the parties to cooperate in resolving the dispute, are nevertheless doubtful. In such circumstances, it is not necessarily appropriate to force the parties to resort to ADR proceedings. Nothing should prevent the parties, after the introduction of arbitration, from resuming negotiations, if necessary, in the form of conciliation or mediation. On the other hand, if the ADR clause is mandatory, i.e. if ADR is a (suspensive) condition of the arbitration, the arbitral tribunal is not entitled to take up the case until the conciliation or mediation process has been completed. We therefore find this decision convincing.

G. Decision of the Swiss Federal Supreme Court ATF 142 III 360 (4A_342/2015 of 26 April 2016)

[Rz 26] **Areas covered:** International arbitration; equality of the parties and right to be heard (Article 190(2)(d) PILA); no absolute right to a double exchange of written submissions in arbitration proceedings.

[Rz 27] **Facts:** The claimants (X1, X2, X3 and X4) are companies incorporated under Turkish law, belonging to the same group of companies (the X Group) and active in the electrical appliances sector since the 1950s. In 1995, the respondent (Z), a company incorporated under German law, active in the same business sector and wishing to expand into the Turkish market, acquired shares in the capital of a company (X5) of the X Group and renamed it X6. In 2003, the claimants sold their remaining shares in X6 in their entirety to Z by way of a share purchase agreement (SPA) governed by Turkish law. The SPA required Z, inter alia, to enter into a distribution agreement (DA) with company A (a subsidiary of Group, which had until then manufactured X6's electronic equipment). The DA was signed in the same year. In 2008, X6 terminated the DA for various reasons and demanded payment of USD 10 million. The resulting dispute was brought before to the Turkish courts. In 2013, the claimants, relying on an arbitration clause in the SPA, filed a request for arbitration to declare the SPA terminated due to the termination of the DA. In 2014, an arbitral tribunal, with a seat in Zurich, was constituted. The parties agreed to resolve in advance the issue of the impact of the termination of the DA on the SPA. A procedural timetable was agreed which provided for only one exchange of written submissions (“[...] *the Procedural Timetable provides only for the submission of a Statement of Claim and Statement of Defence* [...]”). Following this (single) exchange of written submissions, the arbitral tribunal closed the first phase of the proceedings. The day after the closure, the claimants requested a second exchange of written submissions, including leave to

⁵ See also in domestic arbitration: the Swiss Federal Supreme Court decision 4A_406/2017 of 20 November 2017, para. 2.4.2.

file additional witness statements and a legal opinion. The arbitral tribunal denied the claimants' request. They argued that the procedural rules were unclear, and that the arbitral tribunal's decision violated the minimum guarantee of the right to be heard (Article 182(3) PILA). The arbitral tribunal subsequently issued a decision stating, *inter alia*, that the termination of the DA had not led to the termination of the SPA. The claimants filed an application before the Swiss Federal Supreme Court seeking a decision to set aside the award on the grounds that the right to be heard had been violated (see Article 190(2)(d) PILA). The Swiss Federal Supreme Court dismissed the set aside application.

[Rz 28] **Law:** The right to be heard in arbitration proceedings (Article 182(3) and 190(2)(d) PILA) has, in principle, the same content as the constitutional right. It is therefore necessary to be able to express oneself on the essential facts of the judgment, to present one's legal arguments or to propose one's means of proof. This right does not, however, include the right to express oneself orally. As regards the reasons for the international arbitral award, there is no obligation to give reasons, but there is a minimum obligation to consider and deal with the relevant issues. In contrast, the right to be heard in Swiss adversarial proceedings is severely restricted in the field of international arbitration. The strict requirements of the Swiss Federal Supreme Court regarding the right of reply, in the light of the case law of the European Convention on Human Rights (hereinafter: "ECHR"), cannot be applied unchanged to arbitration (both domestic and international). Consequently, in this field, the right to be heard does not give rise to an absolute right to a double exchange of written submissions, although this is common practice.

[Rz 29] **Commentary:** In this decision, the Swiss Federal Supreme Court rightly held that the parties may validly waive a second exchange of written submissions. In such a case, in the absence of the consent of the other party, a party is not entitled, after the first exchange of pleadings, to request that a second exchange of submissions be ordered. Nevertheless, from the point of view of the guarantee of the right to be heard, it seems to us that a second exchange of pleadings, or at least the possibility for the plaintiff to produce counter-evidence (including a legal opinion in response to a legal opinion filed by the respondent), could be ordered in exceptional circumstances, in particular where the respondent, in his answer, invokes new means of proof which the claimant could not have foreseen at the stage of the statement of claim. In such cases, the second exchange of pleadings could be limited to rebuttal evidence.⁶

⁶ See e.g., with regard to arbitration before the Court of Arbitration for Sport (CAS), in particular with regard to Article R56 of the CAS Code: ANTONIO RIGOZZI/ERIKA HASLER, Article R56 of the CAS Code, p. 1653 N 14, in: Manuel Arroyo (ed.), *Arbitration in Switzerland – The Practitioner's Guide*, Vol. II, 2nd ed., 2018 Wolters Kluwer and references cited.

II. Domestic Arbitration

A. Decision of the Swiss Federal Supreme Court ATF 142 III 284 (4A_422/2015 of 16 March 2016)

[Rz 30] **Areas covered:** Domestic arbitration; waiver of arbitration; right to be heard; legal nature of an arbitral tribunal's decision to strike out a case and apportion costs following a party's waiver of arbitration (Article 378(2) CPC).

[Rz 31] **Facts:** In 2014, a dispute between X and Y on the one hand, and A and B on the other hand, was referred to arbitration. A and B failed to comply with an order of the arbitral tribunal requiring them to make an advance payment of costs. The arbitral tribunal set a new deadline for them to pay this amount. In vain. When they refused, the arbitral tribunal then gave X and Y time to advance A and B's share of the advance of costs or to withdraw from the arbitration. When X and Y withdrew, the arbitral tribunal closed the arbitration proceedings and struck the case out, stating that its decision was not *res judicata* on the merits. The arbitral tribunal also ordered that each party should bear half of the costs of the arbitration proceedings and set off the costs. A and B filed a set aside application before the Swiss Federal Supreme Court, in particular on the basis of Article 393(d) CPC, mainly requesting that X and Y should be ordered to bear the costs of the arbitration and that the latter be ordered jointly and severally to pay them compensation for the expenses incurred in the arbitration proceedings.

[Rz 32] **Law:** The awards that may be challenged are listed in Article 392 CPC; they may be final, partial or incidental. The arbitral tribunal's decision to strike out the case and terminate the arbitration proceedings (cf. Article 378 CPC) is a decision to strike out, which confirms a decision already made by a party to abandon the arbitration. It is not really a final award, as it does not prevent the initiation of further arbitral or court proceedings. However, this is not the case with an award of costs, which is a true final award. In the present case, the claimants claim in particular a violation of their right to be heard (Article 393(d) CPC). This ground of appeal is taken from the rules governing international arbitration (Article 190(2)(d) PILA) and, therefore, the case law relating to it is in principle applicable to domestic arbitration. Thus, in arbitration proceedings, each party has the right to comment on the facts relevant to the decision, to present its legal arguments, to submit its means of proof on relevant facts and to participate in the meetings of the arbitral tribunal. Given the formal nature of the right to be heard, its violation leads to the annulment of the contested award. The contested decision is similar to that taken by the state court when the case has become moot (Article 242 CPC). In such a case, the doctrine considers that the court must hear the parties before deciding on the costs and expenses of the proceedings which have become moot. An examination of the Message of the CPC and the practice of the Swiss Federal Supreme Court, which applies Article 72 FCPA by analogy, lead to the same conclusion. The Swiss Federal Supreme Court considers that this guarantee also applies before an arbitral tribunal. The claimants were therefore right to complain about the violation of their right to be heard. Accordingly, the Swiss Federal Supreme Court set aside the disputed award.

[Rz 33] **Commentary:** Although this decision was given in the context of domestic arbitration, it is also relevant in the context of international arbitration, as the same requirements apply to the right to be heard (see Articles 393(d) CPC and 190(2)(d) PILA). Unless it infringes upon the parties' right to be heard, the arbitral tribunal cannot determine the costs of the arbitral proceedings without first giving the parties the opportunity to express their views on the costs of proceedings that have become moot.

Part II: General Presentation of the Swiss Federal Supreme Court's Case Law in International and Domestic Arbitration

[Rz 34] The second part of this contribution contains a general presentation of the case law of the Swiss Federal Supreme Court rendered in international and domestic arbitration during the relevant period (1 March 2016 to 28 February 2018).⁷ The decisions are arranged according to the order of the complaints listed in arts. 190 para. 2 PILA and 393 CPC. The author's comments are directly included in the summary of the judgement concerned (in italics).

I. International Arbitration

A. Admissibility of Appeals in Civil Matters

1. Decision of the Swiss Federal Supreme Court ATF 142 III 521 (4A_386/2015 of 7 September 2016)

[Rz 35] **Language of the proceedings before the Swiss Federal Supreme Court.** Even if the contested award was drafted in English, the set aside application and, if applicable, all subsequent pleadings of the parties must be drafted in an official language of the Confederation. In such a case, the Swiss Federal Supreme Court's practice is to conduct the investigation and to deliver its decision in the language of the set aside application.⁸

2. Decision of the Swiss Federal Supreme Court ATF 143 III 462 (4A_98/2017 of 20 July 2017)

[Rz 36] **Challengeable act.** The appeal in civil matters referred to in Article 77(1)(a) FSCA in conjunction with Articles 190 to 192 PILA is only admissible against an arbitral award. The challenged act may be a final award that terminates the arbitral proceedings on a substantive or procedural ground. It may also be a partial award, which deals with a quantitatively limited part of a disputed claim or with one of the various claims in dispute, or which terminates the

⁷ The following decisions and orders have not been summarised in this contribution, as they are not of particular interest (in chronological order): the Swiss Federal Supreme Court decisions 4F_5/2016, 4F_7/2016 of 30 May 2016; 4A_64/2016 of 6 June 2016; 4A_38/2017 of 3 May 2017; orders 4A_172/2017 of 14 June 2017; 4A_624/2016 of 18 November 2016; 4A_526/2017 of 13 October, 2017; 4A_117/2017 of 18 October 2017; 4A_119/2017 of 18 October 2017; 4A_480/2015 of 31 October 2017; 4A_510/2017 of 9 November 2017; 4A_507/2017 of 15 February 2018.

⁸ See in particular, the Swiss Federal Supreme Court decisions 4A_616/2015 of 20 September 2016, para. 1; 4A_116/2016 of 13 December 2016, para. 1; 4A_188/2016 of 11 January 2017, para. 1; 4A_690/2016 of 9 February 2017, para. 1; 4A_40/2017 of 8 March 2017, para. 1; 4A_692/2016 of 20 April 2017, para. 1; 4A_34/2016 of 25 April 2017, para. 1.

proceedings with respect to some of the parties. Finally, the act to be challenged may be a preliminary or interlocutory award, resolving one or more preliminary questions of substance or procedure. On the other hand, a simple procedural order [*such as an order to stay the proceedings provisionally*]⁹ which may be modified or revoked in the course of the proceedings is not subject to a set aside application.¹⁰ The same applies to a decision on provisional measures (see Article 183 PILA).¹¹ What is decisive for the admissibility of the application is not the name of the decision issued, but its content.¹²

3. Decision of the Swiss Federal Supreme Court 4A_692/2016 of 20 April 2017 (unpublished)

[Rz 37] **Challengeable act; Court of Arbitration for Sport.** The challenged act does not necessarily have to be issued by the panel hearing the case; it may also be issued by the President of a CAS Arbitration Division, or even by the Secretary General of the arbitral tribunal. What is decisive for the admissibility of the application is not the name of the decision issued, but its content.¹³ A Termination Order, by which the statement of appeal is deemed to have been withdrawn due to non-payment of the advance on costs (see Article R64.2 CAS Code), is similar to a decision of inadmissibility. It is therefore subject to a set aside application.¹⁴

4. Decision of the Swiss Federal Supreme Court 4A_600/2016 of 29 June 2017 (unpublished)

[Rz 38] **Challengeable act; decision on the validity of an opting out clause (see Article 176(2) PILA; Article 353(2) CPC); foreclosure.** The decision of an arbitral tribunal on the validity of an opting out clause under Article 176(2) PILA or Article 353(2) CPC is subject to a set aside application [*immediately if it is made in the context of a preliminary or interlocutory decision on jurisdiction; see Article 190(3) PILA*].

5. Decision of the Swiss Federal Supreme Court 4A_136/2016 of 3 November 2016 (unpublished)

[Rz 39] **Review power of the Swiss Federal Supreme Court; finding of facts.** The Swiss Federal Supreme Court decides on the basis of the facts stated in the contested award (see Article 105(1) FSCA). It cannot correct or supplement the arbitrators' findings *ex officio*, even if the facts have been established in a manifestly inaccurate manner or in violation of the law (see Article 77(2) FSCA, which excludes the application of Article 105(2) FSCA), even if they

⁹ See in domestic arbitration: the Swiss Federal Supreme Court decisions 4A_555/2016 of 10 October 2016, para. 3.1; 4A_546/2016 of 27 January 2017, para. 1.2.

¹⁰ See also the Swiss Federal Supreme Court decision 4A_30/2018 of 8 February 2018.

¹¹ See also the Swiss Federal Supreme Court decision 4A_524/2016 of 20 September 2016, para. 2.1; 4A_692/2016 of 20 April 2017, para. 2.3.

¹² See also the Swiss Federal Supreme Court decision 4A_524/2016 of 20 September 2016, para. 2.1. See also in domestic arbitration: decision 4A_555/2016 of 10 October 2016, para. 3.1.

¹³ See also the Swiss Federal Supreme Court decision 4A_384/2017 of 4 October 2017, para. 1.2.

¹⁴ See also the Swiss Federal Supreme Court decision 4A_384/2017 of 4 October 2017, para. 1.2.

are established by the evidence in the arbitration file.¹⁵ On the other hand, the Swiss Federal Supreme Court retains the right to review the facts on which the contested award is based if one of the complaints mentioned in Article 190(2) PILA [*respectively, in Article 393 CPC in domestic arbitration*]¹⁶ is raised against these facts or if, exceptionally, new facts or means of proof are taken into consideration in the context of the set aside application.¹⁷

6. Decision of the Swiss Federal Supreme Court 4A_34/2016 of 25 April 2017 (unpublished)

[Rz 40] **Review power of the Swiss Federal Supreme Court; finding of facts; conduct of the procedure.** The findings of the arbitral tribunal on the conduct of the proceedings are binding on the Swiss Federal Supreme Court, subject to the same reservations [*as those relating to the finding of facts*],¹⁸ whether they relate to the submissions of the parties, to the facts alleged or to the legal explanations given by the parties, to the statements made during the course of the proceedings, to the requests for evidence, or even to the content of a witness statement or expert opinion, or even to the information gathered during an ocular inspection.¹⁹

7. Decision of the Swiss Federal Supreme Court 4A_312/2017 of 27 November 2017 (unpublished)

[Rz 41] **Review power of the Swiss Federal Supreme Court; finding of facts set out in the legal part of the award.** [*The Swiss Federal Supreme Court rules on the basis of facts found in the contested award*]. It is irrelevant in this respect that the finding of the relevant facts appears in the legal part of the award, and not in the part reserved for the summary of facts.

8. Decision of the Swiss Federal Supreme Court 4A_157/2017 of 14 December 2017

[Rz 42] **(Non-)Admissibility of new facts and new evidence.** Article 99(1) FSCA, whose application by analogy is not precluded by Article 77(2) FSCA, prohibits that new facts and new evidence are brought in an application to set aside against an arbitral award.

¹⁵ See also the Swiss Federal Supreme Court decision 4A_318/2017 of 28 August 2017, para. 3.3: the Swiss Federal Supreme Court must confine itself to the facts found in the award.

¹⁶ See in domestic arbitration: the Swiss Federal Supreme Court decisions 4A_600/2016 of 29 June 2017, para. 2; 4A_407/2017 of 20 November 2017, para. 1.5.

¹⁷ See in particular the Swiss Federal Supreme Court decisions 4A_116/2016 of 13 December 2016, para. 3; 4A_32/2016 of 20 December 2016 para. 3; 4A_188/2016 of 11 January 2017, para. 3; 4A_704/2015 of 16 February 2017, para. 2; 4A_692/2016 of 20 April 2017, para. 3; 4A_34/2016 of 25 April 2017, para. 2.2; 4A_157/2017 of 14 December 2017, para. 2.2; 4A_492/2016 of 7 February 2017, para. 2.5; see also in domestic arbitration: the Swiss Federal Supreme Court decisions 4A_600/2016 of 29 June 2017, para. 2; 4A_407/2017 of 20 November 2017, para. 1.5; 4A_156/2016 of 23 August 2016, para. 1.3.

¹⁸ See above: the Swiss Federal Supreme Court decisions 4A_136/2016 of 3 November 2016, para. 3.1: the Swiss Federal Supreme Court retains the power to review the facts if one of the grievances mentioned in Article 190 para. 2 of the Federal Act on Private International Law (PILA; SR 291) is raised against the established facts or if new facts or means of evidence are exceptionally taken into consideration in the civil appeal proceedings.

¹⁹ See also Swiss Federal Supreme Court decisions 4A_34/2016 of 25 April 2017, para. 2.2; 4A_50/2017 of 11 July 2017, para. 2.2; ATF 143 III 578, para. 3.2.2.1 (decision 4A_12/2017 of 19 September 2017); see also in domestic arbitration: the Swiss Federal Supreme Court decision 4A_600/2016 of 29 June 2017, para. 2.

9. Decision of the Swiss Federal Supreme Court 4A_600/2016 of 29 June 2017 (unpublished)

[Rz 43] **Admissibility of new arguments concerning the admissibility of the set aside application.** (New) allegations and exhibits relating to the admissibility of the set aside application do not fall within the prohibition on new pleas (see Article 99(1) FSCA, which is not covered by the exclusion clause in Article 77(2) FSCA). The Swiss Federal Supreme Court will examine this question *ex officio*.

10. Decision of the Swiss Federal Supreme Court 4A_704/2015 of 16 February 2017 (unpublished)

[Rz 44] **Requirement to state reasons.** In order to comply with the obligation to state reasons, the claimant must discuss the reasons of the decision and indicate precisely in what respect it considers that the author of the decision has infringed the law.²⁰ This can only be done within the limits of the objections listed in Article 190(2) PILA when the arbitration is of an international nature.²¹ The grounds must be set out in the application alone insofar as the claimant cannot ask the Swiss Federal Supreme Court to refer to the allegations, evidence and offers of proof contained in the submissions contained in the arbitration file.²²

11. Decision of the Swiss Federal Supreme Court 4A_384/2017 of 4 October 2017 (unpublished)

[Rz 45] **Admissible claims; ECHR and Federal Constitution.** In a set aside application brought before the Swiss Federal Supreme Court against an arbitral award or a related decision, a party may not directly invoke a violation of the ECHR or the Swiss Federal Constitution by the arbitral tribunal, even if the principles deriving from these legal instruments may serve, where appropriate, to concretise the guarantees invoked on the basis of Article 190(2) PILA.²³

12. Decision of the Swiss Federal Supreme Court 4A_490/2016 of 6 March 2017 (unpublished)

[Rz 46] **Jurisdiction; exception to the cassatory nature of the appeal.** As an extraordinary legal remedy, the appeal in civil matters is of purely cassatory nature (see Article 77(2) FSCA excluding the application of Article 107(2) FSCA insofar as this provision allows the Swiss Federal Supreme Court to rule on the merits of the case). However, when the dispute concerns the jurisdiction or composition of an arbitral tribunal, the Swiss Federal Supreme Court may,

²⁰ See in particular the Swiss Federal Supreme Court decisions 4A_536/2016, 4A_540/2016 of 26 October 2016, para. 4.2; 4A_522/2016 of 2 December 2016, para. 3.1; see also in domestic arbitration: 4A_600/2016 of 29 June 2017, para. 1.2; 4A_312/2017 of 27 November 2017, para. 3.3.1; 4A_157/2017 of 14 December 2017, para. 2.2; 4A_206/2016 of 20 May 2016, para. 5; 4A_214/2016 of 4 May 2016, para. 3.1.

²¹ See also the Swiss Federal Supreme Court decisions 4A_444/2016 of 17 February 2017; 4A_34/2016 of 25 April 2017, para. 2.2; 4A_50/2017 of 11 July 2017, para. 2.2; 4A_157/2017 of 14 December 2017, para. 2.2.

²² See in particular the Swiss Federal Supreme Court decisions 4A_34/2016 of 25 April 2017, para. 2.2; 4A_50/2017 of 11 July 2017, para. 2.2; see also in domestic arbitration: 4A_600/2016 of 29 June 2017, para. 1.2; 4A_157/2017 of 14 December 2017, para. 2.2.

²³ See also the Swiss Federal Supreme Court decision 4A_80/2017 of 25 July 2017, para. 2.2.

by way of exception, itself determine the jurisdiction or incompetence of the arbitral tribunal, or that it may itself rule on the challenge of the arbitrator.²⁴

13. Decision of the Swiss Federal Supreme Court 4A_116/2016 of 13 December 2016 (unpublished)

[Rz 47] **Rejoinder.** Such a submission cannot be used to supplement, out of time, an insufficient motivation.²⁵

14. Decision of the Swiss Federal Supreme Court 4A_32/2016 of 20 December 2016 (unpublished)

[Rz 48] **Observations on the set aside application; Court of Arbitration for Sport.** A party may not complain that the observations on the set aside application were addressed in the name and on behalf of the Court of Arbitration for Sport or that they were formulated by the Secretary General of CAS, rather than by the Panel that rendered the contested award.

15. Decision of the Swiss Federal Supreme Court 4A_188/2016 of 11 January 2017 (unpublished)

[Rz 49] **Expenses in favour of the arbitrator.** The arbitrator or the arbitral tribunal whose award is challenged is not entitled to expenses for his or her submissions made to the Swiss Federal Supreme Court on the set aside application or on other requests made by the claimant.

16. Decision of the Swiss Federal Supreme Court 4A_600/2016 of 29 June 2017 (unpublished)

[Rz 50] **Dies a quo of the time limit for appeal; award of the Court of Arbitration for Sport.** Notification of a CAS award by fax or e-mail does not start the time limit for a set aside application under Article 100(1) FSCA.

17. Decision of the Swiss Federal Supreme Court 4A_704/2015 of 16 February 2017 (unpublished)

[Rz 51] **Legal holidays.** The 30-day application period (see Article 100(1) FSCA) is suspended during the legal holidays of Article 46(1)(c) FSCA.²⁶

²⁴ See also the Swiss Federal Supreme Court decisions 4A_407/2017 of 20 November 2017, para. 1.4; 4A_492/2016 of 7 February 2017, para. 2.3; 4A_473/2016 of 16 February 2017, para. 1.1.

²⁵ See in particular the Swiss Federal Supreme Court decisions 4A_704/2015 of 16 February 2017, para. 2; 4A_34/2016 of 25 April 2017, para. 2.2; 4A_50/2017 of 11 July 2017, para. 2.2; 4A_492/2016 of 7 February 2017, para. 2.4; see also in domestic arbitration: 4A_600/2016 of 29 June 2017, para. 1.2; 4A_157/2017 of 14 December 2017, para. 2.2.

²⁶ See also the Swiss Federal Supreme Court decisions 4A_444/2016 of 17 February 2017; see also in domestic arbitration: 4A_473/2016 of 16 February 2017, para. 1.2.

18. Decision of the Swiss Federal Supreme Court 4A_692/2016 of 20 April 2017 (unpublished)

[Rz 52] **Compliance with the deadline set by the Swiss Federal Supreme Court to reply.** Under Article 48(1) FSCA, submissions must be delivered either to the Swiss Federal Supreme Court or, for the latter's attention, to the Swiss Post or to a Swiss diplomatic or consular representation no later than the last day of the deadline. Submitting the application by fax is not considered a valid way of meeting the deadline [*the same applies to delivery to a private courier company*].

19. Decision of the Swiss Federal Supreme Court 4A_206/2017 of 6 October 2017 (unpublished)

[Rz 53] **Admissibility; rules of the game in sporting matters.** The admissibility of a set aside application before the Swiss Federal Supreme Court presupposes that questions of law are at issue and not merely the application of the rules of the game, which in principle are not amenable to judicial review.

20. Decision of the Swiss Federal Supreme Court 4A_497/2015 of 24 November 2016 (unpublished)

[Rz 54] **Admissibility; alternative grounds.** Case law requires, on the risk of inadmissibility, that all the grounds of the contested award be argued insofar as each of them is sufficient to determine the outcome of the case.

21. Decision of the Swiss Federal Supreme Court 4A_600/2016 of 29 June 2017 (unpublished)

[Rz 55] **Internationality of the arbitration; objection of inadmissibility contrary to the rules of good faith; waiver of recourse.** Article 77(1) FSCA distinguishes between international arbitration (letter a) and domestic arbitration (letter b). According to Article 176(1) PILA, which uses a formal criterion to determine the internationality of an arbitration, an arbitration is international if the seat of the arbitral tribunal is in Switzerland, and if at least one of the parties was neither domiciled nor habitually resident in Switzerland at the time the arbitration agreement was concluded.²⁷ Conversely, an arbitration is domestic if the seat of the arbitral tribunal is in Switzerland and the Chapter 12 of the PILA is not applicable (Article 353(1) CPC). The time at which the domicile or habitual residence of the parties is determined is the time at which the arbitration agreement is concluded. Consequently, an arbitration can be international even though the case no longer has any foreign element at the beginning of the proceedings, because one of the parties has moved its domicile to Switzerland after the arbitration agreement has been concluded. The parties also have the possibility to opt out, i.e. to choose the application of Part III of the CPC to the exclusion of Chapter 12 of the

²⁷ See also the Swiss Federal Supreme Court decision 4A_206/2016 of 20 May 2016, para. 4.

PILA, when the arbitration is international in nature, and vice versa (see Article 176(2) PILA and Article 353(2) CPC).

[Rz 56] Examination of the decisive moment when the jurisdiction of the arbitral tribunal, in view of the specificities of sports disciplinary arbitration, does not derive directly from the conclusion of an arbitration agreement as such, but is based on another basis, namely the statutes or regulations of the sports body that issued the disputed decision (see Article R47 CAS Code).

[Rz 57] Anyone participating in the proceedings must observe the rules of good faith (see Article 52 CPC). The principle of good faith, thus established for ordinary civil proceedings, is of general application, so that it also governs arbitration proceedings, both domestic and international.

[Rz 58] The respondent cannot challenge the admissibility of the set aside application [*which was based solely on the complaint of arbitrariness under art. 393 let. e CPC*] on the grounds of the international nature of the arbitration proceedings in question, when it did not raise the slightest objection when the Panel [*erroneously*] indicated to the parties, at the start of the hearing, that it believed it was dealing with a domestic arbitration. In doing so, it adopted a contradictory attitude that was contrary to the rules of good faith (*venire contra factum proprium*) and did not deserve protection. The Swiss Federal Supreme Court therefore rejected the respondent's objection of inadmissibility and decided to treat the set aside application as made against an award rendered in a domestic arbitration [*despite the existence of foreign elements with regard to the formal criterion of Article 176(1) PILA*].

[Rz 59] Time and form of the (subsequent) agreement excluding the application of chapter 12 of the PILA in favour of part three of the CPC (see Article 176(2) PILA). The question is left open by the Swiss Federal Supreme Court.

22. Decision of the Swiss Federal Supreme Court ATF 143 III 55 (4A_500/2015 of 18 January 2017)

[Rz 60] **Waiver of recourse.** It is clear from the case law that, in practice, waiver clauses are accepted only restrictively and that an indirect waiver is considered insufficient. As for a direct waiver, it does not necessarily have to include a reference to Article 190 PILA and/or Article 192 PILA. It is sufficient that the express declaration of the parties clearly and unambiguously expresses their joint intention to waive any right of recourse. Whether this is the case is a matter of interpretation. The waiver of recourse covers all the grounds listed in Article 190(2) PILA, including the lack of jurisdiction of the arbitral tribunal, unless the parties have excluded recourse on only one or other of these grounds (Article 192(1) *in fine* PILA).²⁸

[Rz 61] In the present case, the Swiss Federal Supreme Court found that the claimant had engaged in a contradictory conduct which appeared to be incompatible with the rules of good

²⁸ See also the Swiss Federal Supreme Court decision ATF 143 III 589 para. 2.1.1 (4A_53/2017 of 17 October 2017).

faith (Article 2(1) SCC; *venire contra factum proprium*).²⁹ Indeed, the claimant had pleaded both the non-existence of the contract in order to avoid the waiver of recourse clause which it had validly signed and, in support of its request for arbitration, the existence of the contract in order to derive a financial claim against the respondent. The set aside application was therefore declared inadmissible pursuant to Article 192(1) PILA.

23. Decision of the Swiss Federal Supreme Court ATF 143 III 589 (4A_53/2017 of 17 October 2017)

[Rz 62] **Waiver of recourse; interpretation of the waiver clause.** Applying the principles established by the case law, the Swiss Federal Supreme Court held that there was a valid waiver of the right to recourse, because the clause at issue unquestionably demonstrated the parties' common intention to waive any right to appeal any decision of the arbitral tribunal to any state court whatsoever. It found that this intention was clear from the wording of the waiver clause (“[...] *no appeal* [...] *to any court* [...]”) and that it was indirectly reinforced and confirmed by the phrase preceding this passage (“*final*” and “*conclusive*”). Similarly, the clause provided that the award to be rendered could be the subject of exequatur proceedings before the competent state court. The Swiss Federal Supreme Court also held that the term “appeal” should be understood in its generic sense, encompassing a wide range of legal remedies, so that the parties had waived the only legal remedy against a future arbitral award, i.e. set aside application in civil matters within the meaning of Article 77(1)(a) FSCA.

24. Decision of the Swiss Federal Supreme Court 4A_396/2017 of 23 November 2017 (unpublished)

[Rz 63] ***Cautio judicatum solvi*; Hague Convention of 17 July 1905 on civil procedure.** The obligation to provide security for the opposing party's costs (see Article 62(2) FSCA) applies not only to natural persons or legal entities under private or public law, but also to foreign States, provided that they do not have a fixed domicile in Switzerland. Confirmation of case law (decision ATF 77 I 42), according to which Article 17 of the Hague Convention of 17 July 1905 on civil procedure exempts from the *cautio judicatum solvi* not only the nationals of the signatory States, but also those States themselves. The same principles prevail under the aegis of Article 17 of the 1954 Hague Convention. The fact that Article 14 of the Convention on International Access to Justice of 25 October 1980 on facilitating international access to justice refers, expressly, to legal entities in addition to natural persons, without mentioning foreign States, does not imply that the latter cannot avail themselves of the exemption from *cautio judicatum solvi*. In fact, this hypothesis was not expressly regulated in the 1980 Convention, as it is not the most frequent situation that deserved particular. The signatory States may be exempted from the *cautio judicatum solvi* under Article 17 of the 1954 Hague Convention, irrespective of whether the dispute arises from acts performed in the same capacity as a private individual or acts performed in the exercise of the prerogatives of a public authority. The decisive factor is whether the concerned signatory State has brought or has been brought

²⁹ See also the Swiss Federal Supreme Court decision 4A_600/2016 of 29 June 2017, para. 1.1.4.

before the civil courts of foreign jurisdictions in the same capacity as a private individual and, consequently, does not enjoy special advantages.

25. Procedural Order of the Swiss Federal Supreme Court 4A_119/2017 of 13 June 2017 (unpublished)

[Rz 64] **Granting suspensive effect.** New requirements for granting suspensive effect to the set aside application. The fact that the respondent is domiciled abroad is, in principle, a sufficient circumstance to grant suspensive effect to the appeal [*see Article 103(3) FSCA*].³⁰

B. Improper Appointment of the Sole Arbitrator and Improper Composition of the Arbitral Tribunal (Article 190(2)(a) PILA)

1. Decision of the Swiss Federal Supreme Court 4A_704/2015 of 16 February 2017 (unpublished)

[Rz 65] **Independence and impartiality of the arbitral tribunal; (no) binding effect of the arbitral institution's decisions on challenges.** Article 190(2)(a) PILA covers two claims: first, breach of the rules laid down by agreement (Article 179(1) PILA) or by law (Article 179(2) PILA) concerning the appointment of arbitrators (number, qualifications, and method of appointment); second, breach of the rules concerning the impartiality and independence of arbitrators (Article 180(1)(b) and (c) PILA).

[Rz 66] The Swiss Federal Supreme Court is strict in its assessment of the risk of prevention (objective impartiality). Procedural errors or a materially erroneous decision are not sufficient to give rise to the appearance of prevention of an arbitral tribunal, except in the case of particularly serious or repeated errors which would constitute a manifest breach of its obligations.³¹

[Rz 67] Since they are issued by a private body, the (unmotivated) decisions of the arbitration institution on requests for challenge, which cannot be challenged directly to the Swiss Federal Supreme Court, are not binding to the Court.³² The Swiss Federal Supreme Court is therefore free to examine whether the circumstances invoked in support of the challenge are such as to justify the complaint under consideration.

³⁰ See also the Swiss Federal Supreme Court order 4A_12/2017 of 20 February 2017.

³¹ See also the Swiss Federal Supreme Court decision 4A_236/2017 of 24 November 2017, para. 3.3. In this decision, the Swiss Federal Supreme Court held that the mere fact of admitting the late production of documents by the opposing party in the arbitration proceedings was not sufficient to demonstrate the existence of a risk of prevention by the sole arbitrator.

³² See also the Swiss Federal Supreme Court decision 4A_236/2017 of 24 November 2017, para. 5.4. In this decision, the Swiss Federal Supreme Court recalled that the decision of the supporting judge concerning a request for recusal (see Article 180(3) PILA) cannot be challenged with a set aside application.

2. **Decision of the Swiss Federal Supreme Court ATF 142 III 521 (4A_386/2015 of 7 September 2016)**

[Rz 68] **Independence and impartiality of the arbitral tribunal.** Like a state court, an arbitral tribunal must provide sufficient guarantees of independence and impartiality. In assessing whether an arbitrator provides such guarantees, reference must be made to the constitutional principles applicable to state courts, taking into account the specificities of arbitration – especially international arbitration.³³

[Rz 69] The Guidelines on Conflicts of Interest in International Arbitration issued by the International Bar Association do not have the force of law but are a useful working tool that may contribute to the harmonisation and unification of the standards applied in the field of international arbitration for the resolution of conflicts of interest. However, the circumstances of each particular case will be decisive in deciding this question.

[Rz 70] In this case, the sole arbitrator was a lawyer from a Swiss law firm working in a network of law firms in other countries. One of these firms had advised a sister company of the company involved in the arbitration while the arbitration proceedings were pending. The Swiss Federal Supreme Court ruled that such circumstances did not constitute grounds for a challenge.

C. **Jurisdiction (Article 190(2)(b) PILA)**

1. **Decision of the Swiss Federal Supreme Court ATF 143 III 462 (4A_98/2017 of 20 July 2017)**

[Rz 71] **Jurisdiction; types of decisions (on jurisdiction) that can be challenged; foreclosure.** When an arbitral tribunal, in a separate award, rejects a plea of lack of jurisdiction, it is rendering a preliminary or interlocutory award (Article 186(3) PILA), whatever name it may give to it. Under Article 190(3) PILA, this decision must be challenged immediately before the Swiss Federal Supreme Court, but only on the grounds of irregular composition (Article 190(2)(a) PILA) or lack of jurisdiction (Article 190(2)(b) PILA) of the arbitral tribunal. The complaints referred to in Article 190(2)(c) to (e) PILA may also be raised against incidental decisions within the meaning of Article 190(3) PILA, but only insofar as they are strictly limited to points directly concerning the composition or jurisdiction of the arbitral tribunal.³⁴

[Rz 72] Article 186(3) PILA provides that, as a general rule, the arbitral tribunal shall rule on its jurisdiction by means of a preliminary or interlocutory award. Although this provision expresses a rule, it is neither mandatory nor absolute, and its violation is not subject to sanction. The arbitral tribunal may depart from this rule if it considers that the plea of lack of jurisdiction is too closely linked to the facts of the case to be judged separately from the merits. In fact, as

³³ See also the Swiss Federal Supreme Court decisions 4A_704/2015 of 16 February 2017, para. 3.1; 4A_236/2017 of 24 November 2017, paras. 3.1 and 3.3.

³⁴ See also the Swiss Federal Supreme Court decision 4A_555/2016 of 10 October 2016: in this case, the Swiss Federal Supreme Court ruled that the arbitrator's letter to the parties did not constitute an incidental decision on jurisdiction, but a document containing mere procedural guidelines, which as such could not be challenged before the Federal Court.

the arbitral tribunal is obliged to examine without reservation all the questions on which its jurisdiction depends, it cannot apply the theory of double relevance, as it is impossible to compel a party to suffer that such a tribunal rule on disputed rights and obligations which would not be covered by a valid arbitration agreement.

[Rz 73] If the arbitral tribunal, while examining the question of jurisdiction as a preliminary issue, declares itself incompetent, thus bringing the proceedings to an end, it renders a final award. The expression “rule on its jurisdiction”, which appears in Article 186(3) PILA, is therefore too broad in that it seems to admit the possibility of declaring the arbitral tribunal incompetent by means of a preliminary or interlocutory decision. This expression can therefore only refer to the preliminary or interlocutory decision by which the arbitral tribunal declares itself competent.

[Rz 74] The partial award itself, mentioned in Article 188 PILA, can (and must) be appealed immediately under the same conditions as a final award, under threat of foreclosure (see Article 190(3) PILA).³⁵

[Rz 75] Similarly, a ruling made during the course of the proceedings, by which the arbitral tribunal expressly declares itself competent, meaning that the arbitration will continue, is a preliminary or interlocutory award within the meaning of Article 190(3) PILA, against which an appeal must be lodged immediately, under threat of foreclosure. It is to be equated with a preliminary or interlocutory award in which the arbitral tribunal, without ruling directly on its jurisdiction, nevertheless implicitly and recognizably accepts it by the very fact of settling one or more preliminary questions of procedure or substance.³⁶

[Rz 76] As for the simple procedural order that may be modified or withdrawn during the course of the proceedings, it is not subject to appeal, unless in exceptional circumstances. Indeed, the *ratio legis* of the rules governing preliminary or interlocutory awards is not to oblige the defendant to challenge any procedural order of the arbitral tribunal for the sole purpose of contesting the tribunal’s powers.

[Rz 77] The common denominator of all these decisions, apart from those in the last category, is that they settle once and for all the question of the arbitral tribunal’s jurisdiction, one way or the other. In other words, in each of them, whether it is a final award, a partial award or a preliminary or interlocutory award, the arbitral tribunal definitively settles this question, by admitting or excluding its jurisdiction through an explicit decision or procedural conduct whose finality will be binding on it and on the parties.

[Rz 78] Only a decision – whether preliminary or final - which settles once and for all the question of the arbitral tribunal's jurisdiction can be challenged directly before the Swiss Federal Supreme Court. This is not the case with an incidental decision by which the arbitral tribunal definitively rejects one or more of the alternative grounds put forward by the defendant

³⁵ See also the Swiss Federal Supreme Court decision 4A_102/2016 of 27 September 2016, para. 3.2.5.

³⁶ See also the Swiss Federal Supreme Court decision 4A_524/2016 of 20 September 2016, para. 2.1.

in support of its objection to jurisdiction, while reserving the right to deal with the remaining ground(s) with the case on the merits.

2. Decision of the Swiss Federal Supreme Court 4A_616/2015 of 20 September 2016 (unpublished)

[Rz 79] **Jurisdiction; finding of facts; burden of proof.** The Federal Supreme Court will only review a finding of fact within the usual limits [*i.e. if one of the objections mentioned in Article 190(2) PILA is raised against the said finding of fact, or if new facts or evidence are exceptionally taken into consideration in the context of the civil appeal proceedings*],³⁷ even when examining the plea of lack of jurisdiction of the arbitral tribunal.³⁸

[Rz 80] If the appellant succeeds in establishing, *prima facie*, that the arbitral tribunal is competent, it is then up to the respondent to show that it is not, on closer examination.

3. Decision of the Swiss Federal Supreme Court 4A_492/2016 of February 7 2017 (unpublished)

[Rz 81] **Jurisdiction; arbitration agreement.** An arbitration agreement is an agreement by which two or more specific or identifiable parties agree to entrust an arbitral tribunal, instead of the state court which would otherwise have jurisdiction, with the task of rendering a binding award in respect of one or more existing [*arbitration agreement*] or future [*arbitration clause*] disputes arising out of a specific legal relationship. It is important that the parties' intention to exclude the usual competent State jurisdiction in favor of the private jurisdiction constituted by an arbitral tribunal is apparent.³⁹

4. Decision of the Swiss Federal Supreme Court 4A_34/2016 of 25 April 2017 (unpublished)

[Rz 82] **Jurisdiction; (preliminary) questions of law; substantive validity of arbitration clause.** When faced with a complaint of lack of jurisdiction, the Swiss Federal Supreme Court freely examines the legal issues, including preliminary issues, which determine the jurisdiction or lack of jurisdiction of the arbitral tribunal.⁴⁰ Where necessary, it will also review the application of the relevant foreign law; it will also do so with full cognition, but will adhere to the majority opinion expressed on the point under consideration, or even, in the event of controversy between doctrine and jurisprudence, to the opinion issued by the supreme court of

³⁷ See also the Swiss Federal Supreme Court decision 4A_492/2016 of 7 February 2017, para. 3.1.

³⁸ See also the Swiss Federal Supreme Court decisions 4A_102/2016 of 27 September 2016, para. 3.2.2; 4A_150/2017 of 4 October 2017, para. 3.1; see also in domestic arbitration: decision 4A_473/2016 of 16 February 2017, para 2.1: the Swiss Federal Supreme Court does not, in principle, review the findings of fact in the contested award (Article 77(2) in conjunction with Articles 97 and 105(2) of the FSCA, unless one of the other objections mentioned in Article 393 CPC is raised, or new facts or evidence (Article 99(1) FSCA) must exceptionally be taken into consideration.

³⁹ See also in domestic arbitration: the Swiss Federal Supreme Court decisions 4A_618/2015; 4A_634/2015 of 9 March 2016, para. 4.3.

⁴⁰ See in particular the Swiss Federal Supreme Court decisions 4A_616/2015 of 20 September 2016, para. 3.1.1; 4A_157/2017 of 14 December 2017, para. 3.3.4; see also in domestic arbitration: Swiss Federal Supreme Court decisions 4A_473/2016 of 16 February 2017, para. 2.1; 4A_407/2017 of 20 November 2017, para. 2.1.

the country that enacted the applicable rule of law. However, this does not make it a court of appeal. Consequently, it is not up to the court itself to seek in the contested award the legal arguments that could justify the admission of the grievance based on Article 190(2)(b) PILA [*respectively, in domestic arbitration: art. 393 let. b CPC*].⁴¹ Rather, it is up to the appellant to draw attention to them, in order to comply with the requirement to state reasons under Article 77(3) FSCA.⁴²

[Rz 83] Subject to this reservation, the Swiss Federal Supreme Court, in the context of its free examination of all the legal aspects involved (*jura novit curia*), will be led, if necessary, to reject the complaint in question on the basis of a ground other than that stated in the award, provided that the facts retained by the arbitral tribunal are sufficient to justify this substitution of grounds. Conversely, and subject to the same provision, the arbitral tribunal may accept a claim of lack of jurisdiction on the basis of a new legal argument developed before it by the appellant on the basis of facts found in the contested award.⁴³

[Rz 84] Article 178(2) PILA establishes three alternative connections *in favorem validitatis*, without any hierarchy between them, namely the law chosen by the parties, the law governing the subject matter of the dispute (*lex causae*) and Swiss law as the law of the seat of the arbitration. It also settles the question of the law applicable to the interpretation of the arbitration agreement.

5. Decision of the Swiss Federal Supreme Court 4A_188/2016 of 11 January 2017 (unpublished)

[Rz 85] **Jurisdiction *ratione temporis*.** Article 42(1) of the Swiss Rules of International Arbitration, in the version in force since 1 January 2012 (Swiss Rules), provides that the award must be rendered within six months from the date on which the secretariat transmitted the file to the arbitral tribunal. The decisive date is that of receipt by the arbitrator of the file transmitted to him by the secretariat of the Court of Arbitration of the Swiss Chambers' Arbitration Institution (SCAI).

[Rz 86] Pursuant to Article 2(2) of the Swiss Rules, a time limit under these rules begins to run on the day following that on which the notification, communication or proposal was received.

[Rz 87] The Swiss Federal Supreme Court considered that this case was out of all proportion to the circumstances which gave rise to the intervention of the Swiss Federal Supreme Court in the case dealt with in ATF 140 III 75, where the arbitrator had failed to comply with an agreement made by him with the two parties concerning the end of his assignment, notwithstanding numerous formal notices sent to him to no avail. He therefore considered that

⁴¹ See also in domestic arbitration: the Swiss Federal Supreme Court decision 4A_407/2017 of 20 November 2017, para. 2.1.

⁴² See also the Swiss Federal Supreme Court decision 4A_616/2015 of 20 September 2016, para. 3.1.1; see also in domestic arbitration: the Swiss Federal Supreme Court decision 4A_473/2016 of 16 February 2017, para. 2.1.

⁴³ See also in domestic arbitration: the Swiss Federal Supreme Court decisions 4A_473/2016 of 16 February 2017, para. 2.1; 4A_407/2017 of 20 November 2017, para. 2.1.

the arbitrator's failure to comply with the aforementioned time limit under Article 42(1) of the Swiss Rules did not mean that he had (become) incompetent *ratione temporis*.

6. Decision of the Swiss Federal Supreme Court 4A_40/2017 of 8 March 2017 (unpublished)

[Rz 88] **Usurpation of the power to rule in equity.** Such a grievance constitutes an irregularity which does not affect the jurisdiction of the arbitral tribunal, but which raises the question of the legal principles or method by which the dispute between the parties should be decided. The question of which rules of procedural and substantive law the arbitral tribunal should apply is not a question of jurisdiction under Article 190(2)(b) PILA.

7. Decision of the Swiss Federal Supreme Court 4A_102/2016 of 27 September 2016 (unpublished)

[Rz 89] **Jurisdiction; *extra potestatem*; application of the principle in *favorem validitatis* (Article 178 PILA); validity of arbitration clauses in favor of the Court of Arbitration for Sport; interpretation of pathological arbitration clauses; foreclosure.** An appeal on the grounds set out in Article 190(2)(b) PILA is available when the arbitral tribunal has ruled on claims which it was not competent to examine, either because there was no arbitration agreement, or because the agreement was limited to certain issues which did not include the claims at issue (*extra potestatem*).

[Rz 90] The arbitration agreement must be in the form prescribed by Article 178(1) PILA. Although this requirement cannot be completely disregarded, the Swiss Federal Supreme Court nevertheless examines with a certain "goodwill" the consensual nature of recourse to arbitration in sports matters, with the aim of encouraging the rapid settlement of disputes by specialized tribunals offering sufficient guarantees of independence and impartiality, such as the CAS.

[Rz 91] Incomplete, unclear or contradictory provisions in arbitration agreements are considered to be pathological clauses. Insofar as they do not concern elements that must imperatively appear in an arbitration agreement, in particular the obligation to refer the dispute to a private arbitral tribunal, such clauses do not necessarily lead to the nullity of the arbitration agreements in which they appear. Instead, it is necessary to seek a solution that respects the fundamental will of the parties to submit to an arbitral tribunal, by means of interpretation and, where appropriate, by means of a complete contract in accordance with the general rules of contract law.

[Rz 92] If the real and common will of the parties cannot be established, then, applying the principle of trust, the meaning that the parties could and should have given, according to the rules of good faith, to their mutual expressions of will in the light of all the circumstances must be sought. If the interpretation leads to the conclusion that the parties wished to remove their dispute from the jurisdiction of the state and have it decided by an arbitral tribunal, but that there are still differences of opinion as to the conduct of the arbitration proceedings, the

principle of utility (“*Utilitätsgedanke*”) applies, so that the pathological clause must be given a meaning which allows the arbitration agreement to be upheld.⁴⁴

[Rz 93] In this case, the Swiss Federal Supreme Court found, in particular, that the appellants had tacitly accepted the CAS’s jurisdiction by signing, without raising any objection, the Procedural Order at the start of the arbitration proceedings (“*Einlassung*”; see below), which specified that the Panel had full power of review *de novo* (see Article R57 CAS Code).

8. Decision of the Swiss Federal Supreme Court 4A_672/2016 of 24 January 2017

[Rz 94] **Jurisdiction; pathological clause.** In this case, the Swiss Federal Supreme Court proceeded to interpret a pathological clause stipulating the following: “*Article 6 Arbitration Rules. This Agreement shall be governed by the substantive Civil Law of Switzerland. All disputes arising out of or in connection with this Agreement shall be finally settled in English language by the International Chamber of Commerce of Geneva, under the Rules of Conciliation and Arbitration of the International Chamber of Commerce, by three arbitrators appointed in accordance with said Rules. The language of the arbitration proceeding shall be English. Place of arbitration shall be Geneva, Switzerland*”.

[Rz 95] Applying the principle of trust, the Swiss Federal Supreme Court found that the arbitration agreement provided for the dispute to be submitted to an arbitral tribunal with its seat in Geneva, under the aegis of the ICC Rules.

9. Decision of the Swiss Federal Supreme Court 4A_310/2016 of 6 October 2016

[Rz 96] **Jurisdiction; subjective scope (or extension) of the arbitration agreement; principle of interpretation of arbitration agreements.** By virtue of the principle of the relativity of contractual obligations, the arbitration agreement included in a contract binds only the co-contracting parties. However, in a number of cases, such as the assignment of a claim, the assumption (simple or cumulative) of a debt or the transfer of a contractual relationship, the Swiss Federal Supreme Court has long recognized that an arbitration agreement may be binding even on persons who have not signed it and who are not mentioned in it. In addition, a third party who interferes in the performance of a contract containing an arbitration agreement is deemed to have agreed to it by conclusive acts, if it can be inferred from this interference that he wishes to be a party to the arbitration agreement.⁴⁵ The subjective scope of an arbitration agreement also extends to the beneficiary of a perfected third-party beneficiary, within the meaning of Article 112(2) SCO: if this agreement contains an arbitration clause, the third party

⁴⁴ See also the Swiss Federal Supreme Court decisions 4A_672/2016 of 24 January 2017, para. 3.1.2; decision 4A_150/2017 of 4 October 2017, para. 3.2 (in this decision, the Swiss Federal Supreme Court held that the Arbitral Tribunal had wrongly declared itself competent on the basis of an interpretation of the disputed contracts in accordance with the principle of reliance and, in so doing, annulled the contested award); see also in domestic arbitration: the Swiss Federal Supreme Court decision 4A_407/2017 of 20 November 2017, para. 2.3.2.1.

⁴⁵ See also the Swiss Federal Supreme Court decision 4A_459/2016 of 19 January 2017, para. 2.1.

may rely on it in enforcing his claim against the promisor, unless the arbitration clause excludes it.

[Rz 97] The question of the subjective scope of the arbitration agreement must be resolved in the light of Article 178(2) PILA.

[Rz 98] The interpretation of an arbitration agreement is governed by the general rules of contract interpretation [*see above Rz 24, 92*].⁴⁶

[Rz 99] When it comes to derogating from a guarantee of constitutional rank, one must be careful not to admit too easily that an arbitration agreement has been concluded. On the other hand, once the principle of arbitration has been accepted, it must be assumed that the parties intended to confer a wider jurisdiction on the arbitral tribunal.⁴⁷

10. Decision of the Swiss Federal Supreme Court ATF 143 III 578 (4A_12/2017 of 19 September 2017)

[Rz 100] **Jurisdiction; arbitrability; final release of the opposition; action for validation of sequestration; foreclosure; interest worthy of protection in the annulment of the contested decision.** An action for validation of a sequestration under Article 279 DEBA may be submitted to an arbitral tribunal [*as an action for recognition of debt within the meaning of the aforementioned provision*]. If the arbitral tribunal has not yet been constituted, it is the creditor's responsibility to take all necessary steps to appoint the arbitrators within the ten-day period stipulated in Article 279(2) DEBA. As soon as the arbitral tribunal has been constituted, the creditor must bring his action for recognition of debt within ten days, in order to ensure that the organic link between the sequestration proceedings and the validation proceedings is established in good time.

[Rz 101] Although the arbitral tribunal has jurisdiction to rule on the existence of the claim that is the subject of the action to validate the receivership and to order the debtor to perform, it cannot rule on a claim by the claimant creditor for final removal of the objection to the summons to pay. This is because the purpose of a final removal is not to decide on the merits of the parties' rights, but only to determine the fate of the objection. This is an incident of pure debt collection law, which falls exclusively within the competence of a state authority and, consequently, beyond the jurisdiction of the arbitral tribunal, due to its lack of arbitrability.

[Rz 102] A court of any kind [i.e. state or arbitral], when seized of an action for validation of sequestration, rules solely on the existence of the claim that is the subject of the action. It is not competent to rule on the validity or execution of the sequestration, as these issues fall within the exclusive remit of the enforcement authorities. As a result, the decision handed down by the judge [*or arbitrator*] hearing the action to validate the sequestration is binding on these authorities only insofar as they decide whether or not a procedural act performed by the creditor in due time in accordance with the DEBA was suitable for initiating proceedings under the rules

⁴⁶ See also the Swiss Federal Supreme Court decision 4A_672/2016 of 24 January 2017, para. 3.1.2.

⁴⁷ See also the Swiss Federal Supreme Court decision 4A_150/2017 of 4 October 2017, para. 3.2.

of civil procedure [*respectively, under the rules governing arbitration proceedings*]. On the other hand, it is up to the debt enforcement authorities to decide whether the procedural act, which the judge in the action to validate the receivership [*respectively, the arbitrator in such an action*] has deemed to have had the effect of binding the proceedings, has been carried out in due time with regard to the relevant provisions of debt enforcement law. They alone have the power to declare the sequestration null and void, in particular because the time limits prescribed by Article 279 DEBA (Article 280(1) DEBA) have expired, and to lift this measure, which does not require a formal decision.

[Rz 103] The plea of inarbitrability is governed by the same rule as the plea of lack of jurisdiction. Therefore, like the latter, it must be raised prior to any defense on the merits, under threat of foreclosure (see Article 186(2) PILA). The question is left open as to whether the defendant's unreserved entry into the case on the merits prevents the arbitral tribunal from examining *ex officio* the lack of arbitrability of the dispute when objective inarbitrability results from a legal restriction on the parties' autonomy of will.

[Rz 104] In this case, the arbitral tribunal had noted, in the operative part of the contested award, that the sequestration had been duly validated (within the time limit of Article 279 DEBA). The Federal Court noted that it was not up to the arbitrators to do this, but, if necessary, to the competent prosecuting authority (see above). It nonetheless found that the appellant did not have an interest worthy of protection in the annulment of the contested decision (see Article 76(1)(b) FSCA)⁴⁸, on the grounds that this excess of power had not had any consequences. In particular, the debtor-appellant had never claimed that the action to validate the sequestration had been filed late. If this was the case, she was free to petition the debt enforcement office responsible for enforcing the sequestration at any time to release the sequestered assets on the grounds that the sequestration had lapsed (see Article 280(1) DEBA).

11. Decision of the Swiss Federal Supreme Court ATF 143 III 462 (4A_98/2017 of 20 July 2017)

[Rz 105] **Objection of lack of jurisdiction; “*vorbehaltlose Einlassung*”.** Under Article 186(2) PILA, a plea of lack of jurisdiction must be raised prior to any defense on the merits. This is a case of application of the principle of good faith, enshrined in Article 2(1) SCC, which governs all areas of law, including civil procedure (see Article 52 CPC). Worded differently, the rule laid down in Article 186(2) PILA, like the more general rule in Article 6 of the same law, implies that the arbitral tribunal, before which the defendant proceeds on the merits without making a reservation, has jurisdiction for this reason alone. Accordingly, a person who enters into the merits of a case without reservation (“*vorbehaltlose Einlassung*”) in adversarial arbitration proceedings relating to an arbitrable case recognizes, by this conclusive act, the jurisdiction of the arbitral tribunal and definitively forfeits the right to argue that the tribunal lacks jurisdiction.⁴⁹ However, the respondent may decide on the merits in the event that the plea of

⁴⁸ See the Swiss Federal Supreme Court decision 4A_620/2015 of 1 April 2016, para. 1.

⁴⁹ See also the Swiss Federal Supreme Court ATF 143 III 578, para. 3.2.2.1 (decision 4A_12/2017 of 19 September 2017); 4A_102/2016 of 27 September 2016, para. 3.2.5; 4A_436/2017 of 20 November 2017.

lack of jurisdiction is not accepted, without this constituting tacit acceptance of the arbitral tribunal's jurisdiction.

D. Ultra et infra petita award (Article 190(2)(c) PILA)

1. Decision of the Swiss Federal Supreme Court 4A_384/2017 of 4 October 2017 (unpublished)

[Rz 106] According to Article 190(2)(c), second hypothesis, PILA, the award may be challenged when the arbitral tribunal has omitted to rule on one of the heads of claim. Failure to rule is a formal denial of justice. The term “heads of claim” (“*Rechtsbegehren*”, “*determinate conclusion*”, “*claims*”) refers to the requests or conclusions of the parties. What is meant here is an incomplete award, i.e. one in which the arbitral tribunal has failed to rule on one of the conclusions submitted to it by the parties. The grievance in question does not allow the arbitral tribunal to claim that it failed to decide an issue that is important for the resolution of the dispute.⁵⁰

E. Equality of the parties and right to be heard (Article 190(2)(d) PILA)

1. Decision of the Swiss Federal Supreme Court 4A_668/2016 of 24 July 2017 (unpublished)

[Rz 107] **Equality of the parties.** Equality of the parties, guaranteed by Article 182(3) and Article 190(2)(d) PILA, implies that the proceedings are regulated and conducted in such a way that each party has the same opportunity to put forward its case.⁵¹

2. Decision of the Swiss Federal Supreme Court 4A_40/2017 of 8 March 2017 (unpublished)

[Rz 108] **Right to be heard; no right to a reasoned decision; minimum duty to examine the relevant issues.** The right to be heard, as guaranteed by Article 182(3) and Article 190(2)(d) PILA, does not in principle have a content different from that enshrined in constitutional law. In arbitration, each party has the right to express its views on the facts essential to the decision, to present its legal arguments, to put forward its evidence on the relevant facts and to take part in the meetings of the arbitral tribunal.⁵² On the other hand, the right to be heard does not include the right to express oneself orally. Similarly, the right to a reasoned decision [*as guaranteed by constitutional law*] does not apply to arbitration.⁵³ However, the arbitral tribunal has a minimum duty to examine and deal with the relevant issues.⁵⁴ This duty is breached when,

⁵⁰ See also the Swiss Federal Supreme Court decision 4A_424/2017 of 23 October 2017, para. 4.1.

⁵¹ See also the Swiss Federal Supreme Court decisions 4A_80/2017 of 25 July 2017, para. 3.1.2; 4A_236/2017 of 24 November 2017, para. 4.1.

⁵² See also the Swiss Federal Supreme Court decisions 4A_497/2015 of 24 November 2016, para. 4.2; 4A_478/2016 of 7 February 2017; 4A_490/2016 of 6 March 2017, para. 3.1.1; see also in domestic arbitration: decisions 5A_294/2016 of 2 November 2016, para. 4.1; 4A_587/2015 of 15 February 2017, para. 3.1.

⁵³ See also the Swiss Federal Supreme Court decision 4A_692/2016 of 20 April 2017, para. 5.2.

⁵⁴ See also in domestic arbitration: the Swiss Federal Supreme Court decision 5A_294/2016 of 2 November 2016, para. 6.1.

through inadvertence or misunderstanding, the arbitral tribunal fails to take into consideration allegations, arguments, evidence and offers of proof presented by one of the parties which are relevant to the award to be made.⁵⁵

3. Decision of the Swiss Federal Supreme Court 4A_220/2017 of 8 January 2018 (unpublished)

[Rz 109] **Right to be heard; no right to a reasoned decision; surprise effect.** In Switzerland, the right to be heard in adversarial proceedings, far from being unlimited, is, on the contrary, subject to significant restrictions in the field of international arbitration. For instance, it does not require an international arbitration award to state the reasons on which it is based. Moreover, a party does not have the right to comment on the legal assessment of the facts or, more generally, on the legal arguments to be adopted, unless the arbitral tribunal intends to base its decision on a legal standard or ground that was not raised during the proceedings, and whose relevance to the case in dispute neither of the parties to the dispute has invoked nor could have assumed.⁵⁶ Nor is the arbitral tribunal obliged to give a party special notice of the decisive nature of a factual element on which it is about to base its decision, provided that it has been alleged and proven in accordance with the rules. Moreover, the complaint of a violation of the right to be heard must not be used by the party complaining of defects in the award's reasoning as a means of triggering an examination of the application of the substantive law.⁵⁷

[Rz 110] In matters of contract interpretation (see Article 18(1) SCO), there is, *a priori*, little room for a surprise effect likely to catch the parties off guard.

4. Decision of the Swiss Federal Supreme Court 4A_692/2016 of 20 April 2017 (unpublished)

[Rz 111] **Right to be heard; no right to a reasoned decision/termination order.** If the award is completely silent on matters that are apparently important to the resolution of the dispute, it is up to the arbitrators or the respondent to justify such omission in their observations on the appeal. The onus is on them to show that, contrary to the appellant's assertions, the omitted elements were not relevant to the resolution of the concrete case or, if they were, that they were implicitly refuted by the arbitral tribunal. However, the arbitrators are not obliged to discuss all the arguments put forward by the parties. Failure to rebut, even implicitly, a plea that is

⁵⁵ See also the Swiss Federal Supreme Court decisions 4A_470/2016 of 3 April 2017, para. 3.1; 4A_692/2016 of 20 April 2017, para. 5.1; 4A_34/2016 of 25 April 2017, para. 4.1.1; 4A_316/2017 of 2 August 2017, para. 3.1; 4A_318/2017 of 28 August 2017, para. 3.1; 4A_424/2017 of 23 October 2017, para. 3.1; 4A_259/2015 of 8 July 2016, para. 3.2; 4A_478/2016 of 7 February 2017, para. 3.1; 4A_430/2017 of 30 November 2017, para. 2.1.

⁵⁶ See also the Swiss Federal Supreme Court decision 4A_34/2016 of 25 April 2017, para. 4.1.2, in which the Swiss Federal Supreme Court rejected the argument based on the unforeseeability of the arbitral tribunal's legal arguments. The Swiss Federal Supreme Court noted that, under the guise of surprise, the appellants were merely questioning the factual findings of the Arbitral Tribunal and the way in which it interpreted the clauses of the various contracts in question, or even the application of the law applicable to the substance of the dispute (in this case, English law). However, the Swiss Federal Supreme Court cannot rule on the merits of the dispute in the context of an appeal in civil matters against an arbitration award. See also Swiss Federal Supreme Court decision 4A_202/2016 of 3 August 2016, para. 3.1.

⁵⁷ See also Swiss Federal Supreme Court decision 4A_136/2016 of 3 November 2016.

objectively irrelevant does not constitute a violation of the right to be heard in adversarial proceedings.⁵⁸

[Rz 112] The right to be heard, as guaranteed by Article 182(3) and Article 190(2)(d) PILA, does not require an international arbitral award to state the reasons on which it is based. This principle also applies, *a fortiori*, to a closure order stating that the pending case has ended *ipso jure* and should be struck out of the list. Arbitrators are nevertheless obliged to deal with all relevant arguments put forward by the parties, at least implicitly.

5. Decision of the Swiss Federal Supreme Court 4A_668/2016 of 24 July 2017 (unpublished)

[Rz 113] **Right to be heard.** The stereotypical formula, found in most CAS awards, by which the Panel declares that it has considered all the arguments of fact and law submitted by the parties, has no more value than a term of art.

6. Decision of the Swiss Federal Supreme Court 4A_704/2015 of 16 February 2017 (unpublished)

[Rz 114] **Right to be heard; requirement that reasons be given for the appeal.** The burden is on the allegedly injured party to demonstrate, in its appeal against the award, how an oversight on the part of the arbitrators prevented it from being heard on an important point. It is up to the aggrieved party to establish, firstly, that the arbitral tribunal failed to examine certain elements of fact, evidence or law that it had regularly put forward in support of its conclusions and, secondly, that these elements were of such a nature as to influence the outcome of the dispute. This will be demonstrated on the basis of the reasons given in the contested award.⁵⁹

7. Decision of the Swiss Federal Supreme Court 4A_592/2017 of 5 December 2017 (unpublished)

[Rz 115] **Right to be heard; requirement that reasons be given for the appeal.** The appellant should have demonstrated how the alleged violation of his right to be heard was likely to influence the outcome of the dispute. To do so, he should have summarized the arguments developed in the award and indicated, at the very least, how he could have changed the arbitrator's mind if he had been able to draw his attention to the evidence allegedly ignored by the arbitrator.

8. Decision of the Swiss Federal Supreme Court 4A_34/2016 of 25 April 2017 (unpublished)

[Rz 116] **Right to be heard; minimum duty to examine relevant issues; ascertainment of facts; assessment of evidence.** It is out of the question for the Swiss Federal Supreme Court to

⁵⁸ See also the Swiss Federal Supreme Court decisions 4A_678/2015 of 22 March 2016, para. 4.1; 4A_173/2016 of 20 June 2016, para. 4.1; 4A_34/2016 of 25 April 2017, para. 4.1.1.

⁵⁹ See also the Swiss Federal Supreme Court decisions 4A_692/2016 of 20 April 2017, para. 5.1; 4A_34/2016 of 25 April 2017, para. 4.1.1; 4A_424/2017 of 23 October 2017, para. 3.1.

extend its review of compliance with the minimum duty to examine and deal with relevant issues, as guaranteed by Article 182(3) and Article 190(2)(d) PILA, especially as it is confronted with a constantly increasing tendency for many appellants to invoke this aspect of the right to be heard in the hope of indirectly obtaining a review of the merits of the contested award. However, the Swiss Federal Supreme Court is not a court of appeal, and the legislator consciously and voluntarily restricted its power of review when entrusting it with the task of ruling on appeals in international arbitration cases.

[Rz 117] As far as the establishment of facts is concerned, the right to be heard certainly allows each party to express its views on the facts essential to the award to be made, to put forward its means of proof on the relevant facts and to take part in the arbitral tribunal's meetings. It does not, however, require the arbitrators to ask the parties to take position on the scope of each of the exhibits produced, nor does it authorize one of the parties to limit the arbitral tribunal's autonomy in assessing a particular exhibit on the basis of the purpose it has assigned to that piece of evidence. Indeed, if each party could decide in advance, for every piece of evidence produced, what evidentiary consequence the arbitral tribunal would be authorized to draw from it, the principle of free assessment of evidence, which is a pillar of international arbitration, would be stripped of its substance.⁶⁰

9. Decision of the Swiss Federal Supreme Court 4A_80/2017 of 25 July 2017 (unpublished)

[Rz 118] **Right to be heard; establishment of facts; assessment of evidence.** Even if the facts have been established in a manifestly inaccurate manner or are contrary to the case file, this is not sufficient to annul an award. The right to be heard does not confer any right to a correct decision on the merits. Anyone claiming a violation of the right to be heard due to a manifest error cannot simply explain how the manifest error led to an erroneous assessment of the evidence, since an arbitrary assessment of the evidence is not sufficient to establish a violation of the right to be heard. On the contrary, the party concerned must establish that the miscarriage of justice prevented him from alleging and proving his position in relation to the issue that is procedurally relevant to the proceedings.

10. Decision of the Swiss Federal Supreme Court 4A_277/2017 of 28 August 2017 (unpublished)

[Rz 119] **Right to be heard and equality of the parties; advance assessment of evidence.** Under Article 190(2)(d) PILA, an arbitral award may be challenged where the equality of the parties or their right to be heard in adversarial proceedings has not been respected. This ground for appeal sanctions only the imperative procedural principles reserved by Article 182(3) PILA, in particular the right to be heard proper, the content of which is no different from that enshrined

⁶⁰ See also the Swiss Federal Supreme Court decision 4A_50/2017 of 11 July 2017, para. 4.3.2: in a civil action against an arbitral award, the Swiss Federal Supreme Court cannot review the arbitral tribunal's assessment of the evidence.

in Article 29(2) Cst. This provision guarantees the parties, among other rights, the right to have relevant evidence administered, offered in due time and in the required form.⁶¹

[Rz 120] In international arbitration, and in particular in arbitration under the ICC Rules, the Swiss Federal Supreme Court recognized the right to have an expert appraisal carried out under certain conditions, long before the PILA came into force on 1 January 1989. On several occasions under this law, it confirmed the existence of such a guarantee, linked to the right to evidence and, more generally, to the right to be heard within the meaning of Article 182(3) PILA. The right to obtain expert evidence in international arbitration proceedings is subject to the following conditions. Firstly, the party intending to avail itself of this right must have expressly requested the administration of an expert opinion. Secondly, the ad hoc request must have been submitted in due form and in good time, and the party must have agreed to advance the costs. Lastly, the expert opinion must relate to relevant facts, i.e. facts likely to influence the award, be capable of proving these facts and appear necessary. This will only be the case if, on the one hand, the facts are of a technical nature or otherwise require special knowledge, such that they cannot be proven in any other way, and if, on the other hand, the arbitrators themselves do not have this knowledge.

[Rz 121] The arbitral tribunal may refuse to administer evidence, without violating the right to be heard, if the evidence is unsuitable as a basis for a conviction, if the fact to be proved has already been established, if it is irrelevant or if the tribunal, by proceeding to an anticipated assessment of the evidence, comes to the conclusion that its conviction is already made and that the result of the evidentiary measure requested can no longer modify it. The Swiss Federal Supreme Court may not review an advance assessment of evidence, except from the extremely limited standpoint of public policy.⁶²

11. Decision of the Swiss Federal Supreme Court 4A_616/2015 of 20 September 2016 (unpublished)

[Rz 122] **Right to be heard; foreclosure.** A party who complains of a violation of his right to be heard or of another procedural defect must raise it from the outset in the arbitration proceedings, under threat of foreclosure. It is contrary to the principle of good faith to invoke a procedural defect only at the stage of recourse against the arbitral award, when the defect could have been pointed out during the proceedings.⁶³

⁶¹ See also the Swiss Federal Supreme Court decisions 4A_616/2015 of 20 September 2016, para. 4.3.2; 4A_497/2015 of 24 November 2016, para. 4.2; 4A_42/2016 of 3 May 2016, para. 4; 4A_532/2016 of 30 May 2017, para. 4.1; see also in domestic arbitration: the Swiss Federal Supreme Court decision 4A_156/2016 of 23 August 2016, para. 1.3.

⁶² See also the Swiss Federal Supreme Court decisions 4A_497/2015 of 24 November 2016, para. 4.2; 4A_80/2017 of 25 July 2017, para. 3.1.1; see also in domestic arbitration (though without reference to the public policy reservation): Swiss Federal Supreme Court decision 4A_587/2015 of 15 February 2017, para. 3.1.

⁶³ See also the Swiss Federal Supreme Court decisions 4A_690/2016 of 9 February 2017, para. 3.1; 4A_668/2016 of 24 July 2017, para. 3.1.

F. Public policy (Article 190(2)(e) PILA)

1. Decision of the Swiss Federal Supreme Court 4A_116/2016 of 13 December 2016 (unpublished)

[Rz 123] **Public policy (material); protection of personality rights (Article 27 SCC).** An award is incompatible with public policy if it disregards the essential and widely recognized values which, according to the prevailing conceptions in Switzerland, should form the basis of any legal order. A distinction is made between procedural and substantive public policy.⁶⁴

[Rz 124] An award is contrary to substantive public policy when it violates fundamental principles of substantive law to such an extent that it can no longer be reconciled with the determining legal order and system of values; these principles include, in particular, contractual fidelity, respect for the rules of good faith, the prohibition of abuse of rights, the prohibition of discriminatory or spoliating measures, and the protection of legally incapable persons.⁶⁵

[Rz 125] As is clear from the adverb “in particular”, the list of examples drawn up by the Swiss Federal Supreme Court to describe the content of substantive public policy is not exhaustive. Indeed, it would be delicate, even dangerous, to attempt to list all the fundamental principles that would undoubtedly have a place in it, at the risk of forgetting one or other. It is therefore preferable to leave it open-ended. Other fundamental principles, such as the prohibition of forced labour, also fall under the heading of substantive public policy. Similarly, an award that infringes the cardinal principle of respect for human dignity would violate substantive public policy, even if this principle is not expressly listed.⁶⁶

[Rz 126] While it is not easy to positively define substantive public policy, or to define its contours with precision, it is easier to exclude certain elements from it. In particular, this exclusion applies to the whole process of interpreting a contract and the consequences that are logically drawn from it in law, as well as to an arbitral tribunal’s interpretation of the statutory provisions of a private law body. Similarly, for there to be incompatibility with public policy, a concept more restrictive than that of arbitrariness, it is not enough for the evidence to have been wrongly assessed, for a finding of fact to be manifestly false, or for a rule of law to have been clearly violated.⁶⁷

⁶⁴ See in particular the Swiss Federal Supreme Court decisions 4A_32/2016 of 20 December 2016, para. 4.1; 4A_690/2016 of 9 February 2017, para. 4.1; 4A_692/2016 of 20 April 2017, para. 6.1; 4A_312/2017 of 27 November 2017, para. 3.1; 4A_157/2017 of 14 December 2017, para. 3.1.

⁶⁵ See also the Swiss Federal Supreme Court decisions 4A_536/2016, 4A_540/2016 of 26 October 2016, para. 4.3.1; 4A_136/2016 of 3 November 2016, para. 4.1; 4A_522/2016 of 2 December 2016, para. 3.2; 4A_690/2016 of 9 February 2017, para. 4.1; 4A_50/2017 of 11 July 2017, para. 4.1; 4A_312/2017 of 27 November 2017, para. 3.1; 4A_157/2017 of 14 December 2017, para. 3.1; 4A_478/2016 of 7 February 2017, para. 4.1.

⁶⁶ See also decisions 4A_32/2016 of 20 December 2016, para. 4.1; 4A_312/2017 of 27 November 2017, para. 3.1; 4A_157/2017 of 14 December 2017, para. 3.1.

⁶⁷ See also the Swiss Federal Supreme Court decisions 4A_32/2016 of 20 December 2016, para. 4.1; 4A_312/2017 of 27 November 2017, para. 3.1; 4A_157/2017 of 14 December 2017, para. 3.1.

[Rz 127] It is not enough that a reason given by the arbitral tribunal is contrary to public policy; the result of the award must itself be incompatible with public policy.⁶⁸

[Rz 128] Violation of Article 27 SCC is not automatically contrary to public policy; it must be a serious and clear case of violation of a fundamental right.⁶⁹ A contractual restriction of economic freedom is excessive under Article 27(2) SCC if it leaves the obliged party to the arbitrariness of his co-contractor, suppresses his economic freedom or limits it to such an extent that the basis of his economic existence is endangered.⁷⁰ This provision also applies to commitments which are excessive by reason of their subject matter, i.e. those relating to certain personal rights whose importance is such that a person cannot bind himself for the future with regard to them.⁷¹

[Rz 129] In this case, the Swiss Federal Supreme Court declined “[...] *to enter the minefield of the relationship between football and money [...] so much so that this relationship seems to escape comprehension, given the astronomical sums involved and the opacity of the relationships established by the various parties [...]*”. It also refused to recognize the existence of good morals specific to the field of sport in general and soccer in particular as a matter of substantive public policy [*notwithstanding FIFA’s ban on TPO-type operations as of 1 May 2015*].⁷²

2. Decisions of the Swiss Federal Supreme Court 4A_536/2016 and 4A_540/2016 of 26 October 2016 (unpublished)

[Rz 130] **Substantive public policy; penalty clause and punitive damages.** The fact that Article 163(3) SCO is a norm of public policy is not sufficient to hold that its violation would contravene the public policy of Article 190(2)(e) PILA. Unlike punitive damages, which are imposed on the debtor, a contractual penalty is valid because it has been accepted by the debtor. In this case, the question was left open as to whether an arbitration award, which would condemn a party to pay punitive damages, would be contrary to substantive public policy.

⁶⁸ See also decisions 4A_32/2016 of 20 December 2016, para. 4.1; 4A_312/2017 of 27 November 2017, para. 3.1; 4A_157/2017 of 14 December 2017, para. 3.1; 4A_478/2016 of 7 February 2017, para. 4.1.

⁶⁹ See also the Swiss Federal Supreme Court decision 4A_132/2016 of 30 June 2016, para. 3.2.

⁷⁰ See also the the Swiss Federal Supreme Court decision 4A_668/2016 of 24 July 2017, para. 4.2.

⁷¹ See also Swiss Federal Supreme Court decisions 4A_32/2016 of 20 December 2016, para. 4.1; 4A_312/2017 of 27 November 2017, para. 3.1.

⁷² See also Swiss Federal Supreme Court decision 4A_312/2017 of 27 November 2017, para. 3.1. For a similar reasoning: see also decision 4A_32/2016 of 20 December 2016, para. 4.3. In this judgement, the appellant had argued that the joint and several liability between the new club and the player imposed by article 17 para. 2 of the FIFA Regulations on the Status and Transfer of Players (RSTJ) was contrary to substantive public policy. More specifically, he argued that this liability constituted a serious violation of the personal rights of the club concerned. The Swiss Federal Supreme Court declined to intervene in an “*area which is above all a matter of sports policy, and one in which world football governing bodies are better equipped than it to intervene effectively, with a level head*” (in French in the decision). See also Swiss Federal Supreme Court decision 4A_668/2016 of 24 July 2017, para. 4.2: the mere fact of disregarding a FIFA regulation, even if it is imperative in relation to the persons concerned and the subject matter, does not yet imply a violation of the public policy referred to in Article 190(2)(e) PILA.

3. Decision of the Swiss Federal Supreme Court 4A_136/2016 of 3 November 2016 (unpublished)

[Rz 131] **Substantive public policy; bribery.** According to Swiss law, promises to pay bribes are contrary to public morality and therefore void due to the defect in their content. They are also contrary to public policy. Even so, the arbitral tribunal must have refused to take them into account, corruption notwithstanding.⁷³

[Rz 132] Mere “compliance rules” cannot be elevated to the normative level, i.e. to that of the notion of substantive public policy. It is unthinkable to leave it to a subject of private law, not based in Switzerland, to determine the contours of substantive public policy, according to the Swiss concept.⁷⁴

4. Decision of the Swiss Federal Supreme Court 4A_522/2016 of 2 December 2016 (unpublished)

[Rz 133] **Substantive public policy; rules on the burden of proof; *pacta sunt servanda*.** Rules on the burden of proof are not part of substantive public policy. They are therefore not subject to the Swiss Federal Supreme Court’s review in the context of civil proceedings against an international arbitration award.⁷⁵

[Rz 134] The principle of contractual fidelity (*pacta sunt servanda*), in the restrictive sense given to it by the case law relating to Article 190(2)(e) PILA, is violated only if the arbitral tribunal refuses to apply a contractual clause while admitting that it binds the parties or, conversely, if it imposes on them compliance with a clause which it considers not binding on them. In other words, the arbitral tribunal must have applied or refused to apply a contractual provision by contradicting the result of its interpretation of the existence or content of the disputed legal act. On the other hand, the process of interpretation itself, and the legal consequences logically drawn from it, are not matters of contractual fidelity. Consequently, these issues cannot be the subject of a complaint of breach of public policy. Virtually all litigation arising from breach of contract is therefore excluded from the protection of the *pacta sunt servanda* principle.⁷⁶

[Rz 135] A plea based on the intrinsic inconsistency of an award’s recitals does not fall within the definition of substantive public policy.

⁷³ See also the Swiss Federal Supreme Court decision 4A_50/2017 of 11 July 2017, para. 4.3.2.

⁷⁴ See also the Swiss Federal Supreme Court decision 4A_50/2017 of 11 July 2017, para. 4.3.3.

⁷⁵ See also the Swiss Federal Supreme Court decisions 4A_616/2015 of 20 September 2016, para. 4.3.1; 4A_668/2016 of 24 July 2017, para. 4.3.2.

⁷⁶ See also the Swiss Federal Supreme Court decisions 4A_50/2017 of 11 July 2017, para. 4.2.1; 4A_318/2017 of 28 August 2017, para. 4.2; 4A_497/2015 of 24 November 2016, para. 5.2; 4A_532/2016 of 30 May 2017, para. 3.2.2.

5. Decision of the Swiss Federal Supreme Court 4A_312/2017 of 27 November 2017 (unpublished)

[Rz 136] **Substantive public policy; penalty clause.** Article 163(3) SCO requires the judge to reduce penalties that he considers excessive. This provision is a matter of Swiss public policy, in the sense that the judge must apply this mandatory provision even if the debtor of the contractual penalty has not expressly requested a reduction in the amount of the penalty. This does not mean, however, that its violation would contravene the public policy of Article 190(2)(e) PILA. In this case, the Court refused to set a certain percentage of the worker's salary (*in casu*, a player) above which a commission (*in casu*, claimed by a player's agent) would become excessive in the brokerage business.

6. Decision of the Swiss Federal Supreme Court 4A_157/2017 of 14 December 2017 (unpublished)

[Rz 137] **Substantive public policy; interpretation of topical provisions of a bilateral investment treaty (“BIT”).** While it is called upon to verify the compatibility of the contested award with substantive public policy (Article 190(2)(e) PILA), the Swiss Federal Supreme Court will not, on this basis, sanction an erroneous, or even arbitrary, interpretation of a clause of a bilateral investment treaty, nor will it sanction a hypothetically untenable finding of the relevant facts in this regard.

7. Decision of the Swiss Federal Supreme Court 4A_690/2016 of 9 February 2017 (unpublished)

[Rz 138] **Procedural public policy; excessive formalism.** Procedural public policy is only a subsidiary guarantee. It assures the parties the right to an independent judgment on the conclusions and state of facts submitted to the arbitral tribunal in a manner consistent with the applicable procedural law; there is a violation of procedural public policy when fundamental and generally recognized principles have been violated, leading to an unbearable contradiction with the sense of justice, so that the decision appears incompatible with the values recognized in a state governed by the rule of law.⁷⁷

[Rz 139] In view of the principle of equal treatment and from the point of view of legal certainty, strict compliance with the provisions of the CAS Code concerning time limits for appeals is essential, without there being any contradiction between such a requirement and the prohibition of excessive formalism.⁷⁸

⁷⁷ See also the Swiss Federal Supreme Court decisions 4A_692/2016 of 20 April 2017, para. 6.1; 4A_668/2016 of 24 July 2017, para. 4.1; 4A_236/2017 of 24 November 2017, para. 5.1.

⁷⁸ See also the Swiss Federal Supreme Court decisions 4A_692/2016 of 20 April 2017, para. 6.2; 4A_384/2017 of 4 October 2017, para. 4.2.3.

8. Decision of the Swiss Federal Supreme Court 4A_692/2016 of 20 April 2017 (unpublished)

[Rz 140] **Procedural public policy; excessive formalism.** The erroneous or even arbitrary application of arbitration rules does not in itself constitute a violation of public policy.

[Rz 141] Since a guarantee as important as the prohibition of arbitrariness in the application of the rules of arbitral procedure does not fall within the scope of Article 190(2)(e) PILA, should disregard of the prohibition of excessive formalism be equated with a violation of procedural public policy? The question was left open by the Swiss Federal Supreme Court. It points out, however, that in order to prevent any abuse of this means, it might be appropriate, from the point of view of procedural public policy, to consider only cases where the prohibition of excessive formalism has been clearly breached.

[Rz 142] The sanction of inadmissibility of the appeal for failure to pay the advance on costs on time does not involve excessive formalism or a denial of justice, provided that the parties have been given adequate notice of the amount to be paid, the time limit for payment and the consequences of failure to comply with this time limit. In the light of these principles, the Swiss Federal Supreme Court considered in this case that the Closing Order, by which the CAS had declared that the statement of appeal was deemed to have been withdrawn due to non-payment of the advance on costs within the time limit set (see Article R64.2 of the CAS Code), was not excessive formalism.

9. Decision of the Swiss Federal Supreme Court 4A_384/2017 of 4 October 2017 (unpublished)

[Rz 143] **Procedural public order; dual jurisdiction.** The requirement of a double instance or a double degree of jurisdiction does not fall under procedural public policy within the meaning of Article 190(2)(e) PILA.

10. Decision of the Swiss Federal Supreme Court 4A_600/2016 of 29 June 2017 (unpublished)

[Rz 144] **Public policy; arbitrariness.** The incompatibility of the award with public policy (see Article 190(2)(e) PILA) is a more restrictive concept than that of arbitrariness.⁷⁹

G. Revision

1. Decision of the Swiss Federal Supreme Court 4A_412/2016 of 21 November 2016 (unpublished)

[Rz 145] **Revision of an award; admissibility.** The PILA does not contain any provisions on the revision of arbitral awards within the meaning of Articles 176 et seq. PILA. According to the case law of the Swiss Federal Supreme Court, which has filled this gap, parties to

⁷⁹ See also the Swiss Federal Supreme Court decision 4A_206/2016 of 20 May 2016, para. 5.

international arbitration proceedings may have recourse to the extraordinary remedy of revision, which falls within the jurisdiction of the Swiss Federal Supreme Court. If it accepts a request for review, it does not itself rule on the merits, but refers the case back to the arbitral tribunal that ruled on the case, or to a new arbitral tribunal to be set up.

[Rz 146] The grounds for review are now covered by Article 123 FSCA.

[Rz 147] The only grounds for review under Article 123(2)(a) FSCA can only be justified by facts which occurred up to the time when, in the main proceedings, allegations of fact were still admissible, but which were not known to the applicant despite all his diligence and were only discovered by him after the Swiss Federal Supreme Court's judgement; these facts must, moreover, be relevant, i.e. of such a nature as to alter the state of facts on which the contested judgement is based and to lead to a different judgement on the basis of a correct legal assessment.

2. Decision of the Swiss Federal Supreme Court ATF 142 III 521 (4A_386/2015 of 7 September 2016)

[Rz 148] **Revision of an award; recusal.** Can the discovery, after the expiry of the time limit for appealing an international arbitral award, of a reason that would have required the sole arbitrator or one of the members of the arbitral tribunal to be challenged, give rise to a request for revision of the award before the Swiss Federal Supreme Court? The question is left open.⁸⁰

3. Decision of the Swiss Federal Supreme Court 4A_506/2017 of 3 October 2017 (unpublished)

[Rz 149] **Revision; applicability of Article 48(3) FSCA.** Request for review addressed to an incompetent cantonal authority.

[Rz 150] If the document sent to the Swiss Federal Supreme Court by the incompetent cantonal authority is an appeal, within the meaning of Article 77(1)(a) FSCA, against the final award rendered by the sole arbitrator, Article 48(3) FSCA, which requires the timely transmission to the Swiss Federal Supreme Court of a memorandum sent to an incompetent cantonal authority, does not apply by virtue of Article 77(2) FSCA. Consequently, the time limit for lodging an appeal (under Article 100(1) FSCA) is not observed if the appeal is lodged with an incompetent cantonal authority.

[Rz 151] However, these principles do not apply to an application for review, which is not subject to the rules of Article 77 FSCA and Articles 190 to 192 FSCA, but to the provisions governing the review of judgements by the Swiss Federal Supreme Court. Article 48(3) FSCA is therefore applicable. Consequently, the time limit within which the request for review must be submitted to the Swiss Federal Supreme Court will be deemed to have been observed,

⁸⁰ See also the Swiss Federal Supreme Court decision ATF 143 III 589, para. 3.1 (decision 4A_53/2017 of 17 October 2017).

provided that the brief sent to the Swiss Federal Supreme Court was sent to the relevant cantonal authority before the deadline.

4. Decision of the Swiss Federal Supreme Court ATF 143 III 589 (4A_53/2017 of 17 October 2017)

[Rz 152] **Revision; waiver of appeal; rules of good faith.** In this case, the appellant discovered, before the end of the appeal period, the alleged challenge against one of the arbitrators falling both within the provisions of Article 190(2)(a) PILA, as grounds for appeal, and Article 121(a) FSCA or Article 123(2)(a) FSCA, as possible grounds for review. According to jurisprudence, review is in principle subsidiary to appeal in civil matters. It therefore seems difficult to accept that a party who has expressly waived the right to appeal, and therefore the right to invoke the ground provided for in Article 190(2)(a) PILA, can refer the matter to the Swiss Federal Supreme Court by invoking the same ground, discovered before the expiry of the time limit for appeal, in the context of an application for review. Otherwise, Article 192 PILA would become a dead letter. A litigant who, together with his opposing party, has waived the right to lodge an appeal with a view to denouncing the irregular composition of the future arbitral tribunal, including in the event of a challenge, cannot circumvent this obstacle by filing an application for review. Such a procedure is contrary to the rules of good faith.

H. Other issues

1. Decision of the Swiss Federal Supreme Court 4A_690/2016 of 9 February 2017 (unpublished)

[Rz 153] **Legal aid.** Legal aid is excluded in arbitration (see in domestic arbitration: Article 380 CPC, which is a provision of mandatory law). On the other hand, the parties may adopt other solutions, such as leaving these costs to be borne by an arbitration institution, as the CAS does.

[Rz 154] On the other hand, appeal proceedings against an arbitral award before the Swiss Federal Supreme Court (Article 389 CPC and Article 191 PILA) or an arbitral tribunal (Article 390 CPC) are state proceedings which fall within the scope of Article 29(3) Cst. Consequently, the right to legal aid also applies to appeals in civil matters against awards made in domestic or international arbitration.

II. Domestic arbitration

A. Admissibility of civil claims

1. Decision of the Swiss Federal Supreme Court 4A_600/2016 of 29 June 2017 (unpublished)

[Rz 155] **Admissible grievances; requirement to state reasons.** An appeal in civil matters against a domestic arbitral award differs in part from an appeal against a state judgment. In particular, only the complaints listed exhaustively in Article 393 CPC are admissible. In addition, the Swiss Federal Supreme Court only examines grievances that have been raised and

substantiated (Article 77(3) FSCA), the requirements in this respect corresponding to those laid down for grievances concerning the violation of fundamental rights (see Article 106(2) FSCA).⁸¹

2. Decision of the Swiss Federal Supreme Court 4A_473/2016 of 16 February 2017 (unpublished)

[Rz 156] **Admissible complaints.** Only the grievances listed exhaustively in Article 393 CPC are admissible.⁸² It is therefore irrelevant to argue, in such an appeal, that the award violates federal law, within the meaning of Article 95(a) FSCA, whether it concerns the federal Constitution or federal legislation.

3. Decision of the Swiss Federal Supreme Court 4A_356/2017 of 3 January 2018 (unpublished)

[Rz 157] **Erroneous or arbitrary application of procedural rules.** Any violation, even arbitrary, of a procedural rule is not sufficient to annul an arbitral award.⁸³

4. Decision of the Swiss Federal Supreme Court 4A_322/2016 of 28 July 2016 (unpublished)

[Rz 158] **Minimum amount in dispute.** Is an appeal in civil matters against an arbitral award subject to the requirement of a minimum amount in dispute of CHF 30,000 (see Article 74 FSCA)? The question is left open.

5. Decision of the Swiss Federal Supreme Court 5A_507/2016 of 15 August 2016 (unpublished)

[Rz 159] **Restitution of the appeal period.** Conditions for restitution of appeal time under Article 50(1) FSCA. Refusal to restore time in the present case. The non-culpable impediment ceases as soon as the party is in a position either to perform the procedural act itself, or to entrust it to a suitable third party.

6. Decision of the Swiss Federal Supreme Court 4A_546/2016 of 27 January 2017 (unpublished)

[Rz 160] **Internal arbitration; applicability of Part 3 of the CPC.** The arbitration proceedings were initiated on the basis of an arbitration agreement, the parties to which were domiciled in Switzerland at the time the contract was concluded. Neither the arbitration

⁸¹ See also the Swiss Federal Supreme Court decisions 4A_156/2016 of 23 August 2016, para. 1.2; 4A_356/2017 of 3 January 2018, para. 1.2. In the latter decision, the Swiss Federal Supreme Court noted that the mere reference in the appeal to a dissenting opinion of one of the members of the arbitral tribunal is not sufficient to satisfy the requirement to state reasons.

⁸² See also the Swiss Federal Supreme Court decision 4A_156/2016 of 23 August 2016, para. 1.2.

⁸³ See however in international arbitration: ATF 129 III 445, 464 para. 4.2.1. In this case, the Swiss Federal Supreme Court specified that only the violation of a rule essential to ensure the fairness of the proceedings can be taken into consideration in relation to a procedural public policy complaint.

agreement nor the subsequent agreement provided that the provisions on international arbitration (see Articles 176 et seq. PILA) would apply (Article 353(2) CPC). Consequently, the provisions on domestic arbitration contained in Part 3 of the CPC (Articles 353 et seq. CPC) are applicable.⁸⁴

7. Decision of the Swiss Federal Supreme Court ATF 143 III 157 (4A_475/2016 of 28 March 2017).

[Rz 161] **Waiver of appeal.** Validity of a waiver to appeal expressed after a domestic award has been made. The waiver may be validly declared to the arbitral tribunal or to the opposing party. Interpretation of the waiver according to general principles of contract interpretation.

B. Irregular appointment of sole arbitrator and irregular composition of the arbitral tribunal (Article 393(a) CPC)

1. Decision of the Swiss Federal Supreme Court 4A_322/2016 of 28 July 2016 (unpublished)

[Rz 162] **Procedure for appointing sole arbitrator.** Article 393(a) CPC corresponds to Article 190(2)(a) PILA applicable to international arbitration. The correctness of the appointment of the sole arbitrator means that the arbitrator has been appointed in the proper manner and that there are no grounds for challenge; in particular, a challenge is possible if the arbitrator does not meet the qualifications agreed by the parties (see Article 180(1)(a) PILA). Anyone who, by entering into an arbitration agreement, renounces in advance the right - of constitutional and conventional rank - to have his case heard by a court established by law, can reasonably expect that the members of the arbitral tribunal or the sole arbitrator, not only offer sufficient guarantees of independence and impartiality, but also meet the requirements which the parties have set by mutual agreement (number, qualifications, method of appointment) or which result from arbitration rules adopted by them, or even legal provisions applicable in the alternative.

[Rz 163] In this case, there was no dispute as to the appointment procedure or the arbitrator's independence; only the arbitrator's qualifications were in question. More specifically, the appellant argued that a civil engineer or geotechnician should have been appointed to settle the dispute, and not a lawyer, even one specializing in construction and real estate law (FSA), like the arbitrator appointed in this case. The Swiss Federal Supreme Court rejected this claim, since the parties had not agreed on any such qualification requirements for the arbitrator. Furthermore, it was not apparent from the applicable arbitration rules or legal provisions that the arbitrator appointed had to meet such training requirements.

⁸⁴ See the Swiss Federal Supreme Court decisions 4A_156/2016 of 23 August 2016, para. 1.1; 4A_618/2015, 4A_634/2015 of 9 May 2016, para. 3.1; see also in international arbitration: the Swiss Federal Supreme Court decision 4A_206/2016 of 20 May 2015, para. 4.

C. Jurisdiction (Article 393(b) CPC)

1. Decision of the Swiss Federal Supreme Court 4A_473/2016 of 16 February 2017 (unpublished)

[Rz 164] **Jurisdiction; applicable principles; subjective scope (and extension) of the arbitration agreement.** The ground of jurisdiction or lack of jurisdiction of the arbitral tribunal in Article 393(b) CPC corresponds to that of Article 190(2)(b) PILA applicable to international arbitration, so that the case law issued in relation to the latter provision is applicable.⁸⁵

[Rz 165] In this case, the Swiss Federal Supreme Court found that the conditions for a subjective extension of the arbitration agreement to a third party, based on the theory of “interference”, had not been met.

2. Decision of the Swiss Federal Supreme Court 4A_407/2017 of 20 November 2017 (unpublished)

[Rz 166] **Jurisdiction *ratione temporis*; challengeable act; admissible grievances; no appeal against the decision by which the supporting judge appoints an arbitrator; absolute nullity of the decision appointing the arbitrator? Non-exhaustive nature of the cases of appointment under Article 362(1) CPC.** When an arbitral tribunal accepts jurisdiction by means of a separate award, it renders an incidental award (Article 359(1) and Article 383 CPC). Under Article 392(b) CPC, such an award may only be challenged before the Swiss Federal Supreme Court on the grounds of the irregular appointment of the sole arbitrator or the irregular composition of the arbitral tribunal (Article 393(a) CPC), on the one hand, and the lack of jurisdiction of the arbitral tribunal (Article 393(b) CPC), on the other.

[Rz 167] According to recent case law, however, contentions based on Article 190(2)(c)-(e) PILA may also be raised against such decisions, notwithstanding the wording of Article 190(3) PILA, provided they are strictly limited to points directly concerning the composition or jurisdiction of the arbitral tribunal. The same situation prevails in domestic arbitration, so that it is now possible to invoke against an incidental decision (on jurisdiction), subject to the same reservation and notwithstanding the wording of Article 392(b) CPC, the grounds drawn from Article 393(c)-(e) CPC.

[Rz 168] On the other hand, it should not be possible to appeal directly to the Swiss Federal Supreme Court against an incidental award relating to the composition or jurisdiction of the arbitral tribunal on the grounds that the expenses and arbitrators’ fees fixed by the arbitral tribunal - if a decision on them has not been deferred until the final award has been made, as is generally the case - are manifestly excessive (see Article 393(f) CPC), since it is not clear in what way this decision would be likely to influence the decision concerning the constitution or jurisdiction of the arbitral tribunal.

⁸⁵ See also the Swiss Federal Supreme Court decisions 4A_407/2017 of 20 November 2017, para. 2.1; 4A_82/2016 of 6 June 2016, para. 2.2.

[Rz 169] Unlike the decision by which the supporting judge refuses to appoint an arbitrator or declares the ad hoc request inadmissible - a decision that can be submitted directly to the Swiss Federal Supreme Court by way of appeal in civil matters - the decision by which the supporting judge appoints an arbitrator, in accordance with Article 362 CPC, is not subject to appeal, either directly or indirectly, i.e. in conjunction with an appeal in civil matters against the subsequent award, incidental or final, by which the sole arbitrator appointed (or the arbitral tribunal constituted) with the assistance of the supporting judge accepts his competence without being bound by the reasons given in the state decision appointing him.

3. Decision of the Swiss Federal Supreme Court 4A_546/2016 of 27 January 2017 (unpublished)

[Rz 170] **Jurisdiction; challengeable act; arbitrator appointment decision issued by an arbitration institution.** A decision taken by a private body designated by the parties, such as an arbitration institution (i.e. ICC or SCAI) concerning the appointment of an arbitrator, is not challengeable. As such a decision is not an arbitral award, it cannot be appealed. The same applies to a decision by an arbitration institution to challenge an arbitrator. The appointment or composition of the arbitral tribunal may, however, be reviewed in the context of an appeal against the subsequent (voidable) award.

[Rz 171] Absolute nullity of the appointment decision remains a possibility. The absolute nullity of an arbitration decision, which can be declared at any time, will only be pronounced in extreme cases, such as the lack of arbitrability of the dispute, and must remain the exception. Thus, an award, even if seriously flawed, is not in principle null and void, but only voidable. This applies in particular to flaws that the law establishes as grounds for setting aside an award, such as the arbitral tribunal wrongly declaring itself competent or incompetent (Article 393(b) CPC). In this case, the Tribunal rejected the argument that the state decision appointing the arbitrator was absolutely null and void.

[Rz 172] The cases of intervention by the supporting judge listed in Article 362(1) CPC are not exhaustive. The supporting judge is empowered to intervene when the third party, entrusted with this task by the parties, has failed to appoint one of the arbitrators.

[Rz 173] When the supporting judge, seized of an ad hoc request, appoints an arbitrator, his decision, given in a non-contentious procedure, does not enjoy the authority of *res judicata*, so that the appointed arbitrators still have the possibility of independently examining the competence and the regularity of the composition of the arbitral tribunal. This principle also applies, *mutatis mutandis*, where a sole arbitrator has been appointed to settle the dispute. An incidental ruling on this point (Article 359(1) CPC) by the appointed arbitrators, or by the sole arbitrator appointed, is therefore subject to immediate appeal to the Swiss Federal Supreme Court (Article 392(b) CPC) on the grounds set out in Article 393(a) and (b) CPC.

[Rz 174] The contention that an arbitral tribunal has violated the contractual mechanism constituting a mandatory prerequisite to arbitration is tantamount to criticizing it for failing to declare itself incompetent *ratione temporis*.

[Rz 175] When an arbitral tribunal, in a separate award, rejects a plea of lack of jurisdiction, it is rendering an incidental decision which the defendant must take immediately, under risk of foreclosure.⁸⁶

4. Decisions of the Swiss Federal Supreme Court 4A_618/2015, 4A_634/2015 of 9 March 2016 (unpublished)

[Rz 176] **Nullity of an arbitral award; form of arbitration agreement.** An arbitral award is null and void when it contains a defect of such gravity that there is no element to support the existence of a valid award in form so that it appears as a usurpation, if an arbitral tribunal declares itself competent.

[Rz 177] Under Article 358 CPC, the arbitration agreement must be concluded in writing or by any other means that can be evidenced by a text. Similarly to Article 178(1) PILA, this is a condition for the validity of the arbitration agreement. The declaration of intent by all parties to the arbitration agreement must be in writing. A mere oral declaration or acceptance by conclusive acts of a written offer to arbitrate is not sufficient to satisfy the requirement of written form. In this case, a decision on jurisdiction and an arbitral award were declared null and void, since the sole arbitrator had based his jurisdiction on the mere acceptance, by conclusive acts, of the offer to arbitrate by the appellant.

D. Ultra et infra petita award (Article 393(c) CPC)

[Rz 178] The Swiss Federal Supreme Court did not issue any judgement on this complaint during the period in question.

E. Equality of the parties and right to be heard (Article 393(d) CPC)

1. Decision of the Swiss Federal Supreme Court 4A_322/2016 of 28 July 2016 (unpublished)

[Rz 179] **Equality of the parties; right to be heard.** Article 393(d) CPC specifies that the award resulting from a domestic arbitration may be challenged if the equality of the parties or their right to be heard in adversarial proceedings has not been respected. This ground for appeal has been taken over from the rules governing international arbitration. Consequently, the case law relating to Article 190(2)(d) PILA is, in principle, also applicable in the field of domestic arbitration.⁸⁷

[Rz 180] In this case, the Swiss Federal Supreme Court held that the arbitrator had not violated the appellant's right to be heard by refusing to grant a request for late evidence.

⁸⁶ See Swiss Federal Supreme Court 4A_156/2016 of 23 August 2016, para. 2.1.

⁸⁷ See also the Swiss Federal Supreme Court decisions 5A_294/2016 of 2 November 2016, para. 4.1; 4A_570/2016 of 7 March 2017, para. 2.1; 4A_356/2017 of 3 January 2018, para. 2.1.

2. **Decision of the Swiss Federal Supreme Court 4A_570/2016 of 7 March 2017 (unpublished)**

[Rz 181] **Right to be heard; apportionment of procedural costs.** The judge may waive the requirement to invite the parties to state their views when the costs of the proceedings will be apportioned as usual or if the parties, in view of the provisions and the course of the proceedings, should have known that they could decide on the apportionment of the costs of the proceedings and the costs. However, where the question of apportionment is unclear, the parties have the right to determine this point in advance. This applies in particular where a party requests that costs be apportioned.

[Rz 182] Given the formal nature of the right to be heard, a breach of this guarantee will, in principle, result in the annulment of the contested award.⁸⁸ However, a minor violation may be remedied if the party concerned has been given the opportunity to state its case before the previous authority, which must be able to review the facts and the law. A referral of the case may also be dispensed with where such a referral would be formalistic and lead to unnecessary delays.

[Rz 183] Application by analogy of these principles to arbitration. Award annulled on the grounds that the arbitral tribunal should have given the appellant the opportunity to determine the fate of the arbitration costs following the respondent's waiver to continue the arbitration.

3. **Decision of the Swiss Federal Supreme Court 4A_356/2017 of 3 January 2018 (unpublished)**

[Rz 184] **Right to be heard; no absolute right to a double exchange of pleadings in arbitration proceedings.** The guarantee of the right to be heard does not imply an absolute right to a double exchange of pleadings [*as long as the claimant has the opportunity to determine itself in one form or another on the pleas articulated by the defendant secondarily, in particular on possible counterclaims*].⁸⁹

F. **Arbitrariness (Article 393(e) CPC)**

1. **Decision of the Swiss Federal Supreme Court 4A_407/2017 of 20 November 2017 (unpublished)**

[Rz 185] **The Swiss Federal Supreme Court's power of review; finding of facts; arbitrariness.** Unlike in international arbitration (see the grievances listed exhaustively in Article 190(2) PILA), in domestic arbitration, the appellant may directly attack the establishment of facts by the arbitral tribunal or sole arbitrator. Article 393(e) CPC punishes an award that is "arbitrary in its result because it is based on findings that are obviously contrary to the facts", among other grounds. However, case law has significantly reduced the scope of this complaint. It follows that a finding of fact is arbitrary within the meaning of the

⁸⁸ See also the Swiss Federal Supreme Court decision 5A_294/2016 of 2 November 2016, para. 4.1.

⁸⁹ See the Swiss Federal Supreme Court decision, ATF 142 III 360, 362 para. 4.1.2.

aforementioned provision only if the arbitral tribunal, as a result of an oversight, has placed itself in contradiction with the documents in the file, either by losing sight of certain passages in a given document or by attributing to them a content other than that which they actually have, or by mistakenly admitting that a fact is established by a document when the latter in fact gives no indication in this respect. The scope of the complaint of arbitrariness in matters of fact is limited: it does not concern the assessment of evidence and the conclusions drawn therefrom, but only findings of fact that are clearly refuted by documents in the file. The manner in which the arbitral tribunal exercises its discretion cannot be the subject of the appeal; the claim of arbitrariness is limited to findings of fact that do not depend on an assessment, i.e. those that are irreconcilable with the evidence in the case file.⁹⁰

2. Decision of the Swiss Federal Supreme Court 4A_600/2016 of 29 June 2017 (unpublished)

[Rz 186] Notion of arbitrariness; manifest violation of law within the meaning of Article 393(e) CPC. The award resulting from a domestic arbitration may be challenged, among other grounds, when it is arbitrary in its outcome because it is based on findings that are manifestly contrary to the facts arising from the case file or because it constitutes a manifest violation of law or equity (Article 393(e) CPC). This ground for appeal was taken from Article 36(e) of the Arbitration Concordat of 27 March 1969 (hereinafter the “**Concordat**”).

[Rz 187] According to the case law on Article 36(f) Concordat, which retains its value under the CPC, a finding of fact is arbitrary only if the arbitral tribunal, through inadvertence, has contradicted the documents in the file, either by losing sight of certain passages in a particular document or by attributing to them a content other than that which they actually have, or by mistakenly admitting that a fact is established by a document when the latter in fact gives no indication in this respect. The object of the complaint of arbitrariness in matters of fact provided for in Article 36(f) Concordat is therefore restricted: it does not concern the assessment of evidence and the conclusions drawn therefrom, but only findings of fact that are clearly refuted by documents in the file. The manner in which the arbitral tribunal exercises its discretion is not subject to appeal; the claim of arbitrariness is limited to findings of fact that do not depend on an assessment, i.e. those that are irreconcilable with the evidence in the case file.⁹¹ In other words, the error sanctioned in the past by Article 36(f) Concordat and today by Article 393(e) CPC is more akin to the notion of manifest inadvertence used in Article 63(2) of the Federal Law on the Organization of the Judiciary of 16 December 1943 (OJ) than to that of a manifestly inaccurate establishment of the facts, which appears in Article 105(2) FSCA and corresponds to arbitrariness.

[Rz 188] The arbitrariness proscribed by Article 393(e) CPC also derives from the fact that the arbitral award constitutes a manifest violation of the law. Only substantive law is concerned, to the exclusion of procedural law. By analogy with the jurisprudence relating to Article 190(2)(e)

⁹⁰ See also the Swiss Federal Supreme Court decisions 5A_294/2016 of 2 November 2016, para. 5.1; 4A_587/2015 of 15 February 2017, para. 3.2; 4A_156/2016 of 23 August 2016, para. 3.1; 4A_356/2017 of 3 January 2018, para. 3.1; 4A_322/2016, of 28 July 2016, para. 4; 4A_355/2016 of 5 August 2016, para. 3.1.

⁹¹ See also the Swiss Federal Supreme Court decision 4A_322/2016 of 28 July 2016, para. 4.1.

PILA, procedural faults which infringe procedural public policy remain reserved.⁹² In accordance with the general definition of arbitrariness, a decision only merits this label, as far as the application of the law is concerned, if it seriously disregards a clear and indisputable legal standard or principle. It is therefore not enough that an alternative solution seems conceivable, or even preferable.⁹³

[Rz 189] As for the manifest violation of equity, sanctioned by the same provision, it presupposes that the arbitral tribunal was authorized to rule in equity or that it applied a standard referring to equity.⁹⁴

[Rz 190] Should the case law of the Swiss Federal Supreme Court be re-examined, according to which the scope of application of Article 393(e) CPC is limited to substantive law (to the exclusion of procedural law; see *supra*)? The question is left open.

[Rz 191] Should it be considered that only the arbitrary application of substantive law, i.e. state law, can be sanctioned as a manifest violation of the law under Article 393(e) CPC? The Swiss Federal Supreme Court answers in the negative. Disciplinary regulations adopted by a sports federation [*in this case, arts. 19 and 20 of the FIFA Code of Ethics, which set out the conditions under which it may be concluded that a conflict of interest exists, or that gifts and other benefits have been accepted or distributed*] are not rules of a procedural nature but derive from substantive law concerning disciplinary sanctions adopted by a private body.

[Rz 192] The same reasoning can be applied, *mutatis mutandis*, to the request for annulment of decisions of the association enshrining a violation of the law or statutes (Article 75 SCC). Such request can be used to sanction a violation (in addition to “legal provisions”) not only of the association’s articles of association as such, but also of other rules adopted by the association. Consequently, a person who feels aggrieved by a disciplinary penalty imposed by the association on the basis of pre-established ad hoc rules must be able to report such a violation under Article 75 CC. However, in the context of an appeal against an arbitral award rendered in a domestic arbitration procedure and based on Article 393(e) CPC, a person could only complain of a clear violation of these “rules of law” by the arbitral tribunal hearing the case.

3. Decision of the Swiss Federal Supreme Court 4A_426/2015 of 11 April 2016 (unpublished)

[Rz 193] When the award is set aside, the arbitrators are bound by the judgement of cassation (Article 395(2) CPC). This principle already prevailed under the Concordat. If the arbitrators deviate from the recitals of the judgement of cassation, this constitutes a clear breach of law

⁹² See also the Swiss Federal Supreme Court decision 4A_587/2015 of 15 February 2017, para. 3.2.

⁹³ See also the Swiss Federal Supreme Court decisions 4A_621/2015 of 28 March 2017, para. 3.3.1; 4A_156/2016 of 23 August 2016, para. 3.1 (which refers to the notion of arbitrariness in Article 9 Cst.; 4A_356/2017 of 3 January 2018, para. 3 (in this case, the Swiss Federal Supreme Court held, among other things, that the arbitral tribunal had not arbitrarily applied the rules on the burden of proof in Article 8 SCC; see also decision 4A_110/2016 of 3 August 2016, para. 2 (which also refers to the notion of arbitrariness in Article 9 Cst.).

⁹⁴ See also Swiss Federal Supreme Court decision 4A_587/2015 of 15 February 2017, para. 3.2.

within the meaning of Article 393(e) CPC. Grievance upheld in the present case, and contested award set aside.

G. Manifestly excessive expenses and arbitrators' fees (Article 393(f) CPC)

[Rz 194] The Federal Supreme Court did not issue any judgement on this complaint during the period in question.

H. Revision (Articles 396 et seq. CPC)

[Rz 195] The Swiss Federal Supreme Court did not issue any judgement concerning this grievance during the period in question.

I. Other issues

[Rz 196] The Swiss Federal Supreme Court did not issue any judgement concerning this grievance during the period in question.

FABRICE ROBERT-TISSOT, Doctor of Law, LL.M. (Columbia), attorney-at-law (Geneva and New York), is a partner at Bonnard Lawson in Geneva. He specializes in international arbitration (commercial arbitration and sports arbitration), as well as litigation and corporate restructuring.

The author gratefully acknowledges the assistance of Ms Aline Boitelle-Petermann and Mr Marc Fiorellino in the drafting of this article, as well as Ms Sumin Jo, Mr Patrick Pithon and Ms An Ting Koh for the translation of this paper.