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Arbitration

Overview of the Swiss Federal Supreme Court's Case Law in Arbitration (1 March 2018 to 31 December 2022)

This contribution summarises the case law of the Swiss Federal Supreme Court and the European Court of Human Rights (hereinafter: «ECtHR») in international and domestic arbitration issued between 1 March 2018 and 31 December 2022. In the first part, the authors have 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 rendered 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 (hereinafter: «PILA») and 393 of the Swiss Civil Procedure Code (hereinafter: «CPC»).

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

[1] This section provides a summary of and a brief commentary on the most important decisions of the Swiss Federal Supreme Court in international arbitration from 1 March 2018 to 31 December 2022.

I. Decision of the Swiss Federal Supreme Court ATF 144 III 559 (4A_396/2017 of 16 October 2018)

[2] **Areas covered: admissibility of the set aside application; jurisdiction of the arbitral tribunal (Article 190 (2) (b) PILA); scope of application of a bilateral treaty on investment protection.**

[3] **Facts**: The claimant in the arbitration (respondent in the setting aside proceedings) filed a claim against the Russian Federation (respondent in the arbitration; applicant in the setting aside proceedings) on the basis of Article 9 of the 1998 Bilateral Investment Treaty (hereinafter: the «BIT»), before the Permanent Court of Arbitration (hereinafter: the «**PCA**»), under the Arbitration Rules of the United Nations Commission on International Trade Law 1976 (hereinafter: the «UNCITRAL Rules») in the context of the annexation of Crimea in 2014. The claimant claimed that it had been expropriated of facilities belonging to twelve Ukrainian companies in breach of the BIT, which in turn contained an arbitration clause. The arbitral tribunal, seated in Geneva, asserted jurisdiction in a decision dated 26 June 2017 (hereinafter: the «**Award on Jurisdiction**»). The Russian Federation appealed to the Swiss Federal Supreme Court against the Award on Jurisdiction on the ground that the arbitral tribunal had wrongly accepted its jurisdiction (Article 190(2)(b) PILA). Firstly, the claimant argued that the border displacements that occurred after the conclusion of the BIT should not have been considered. It claimed that the BIT was not applicable in the present case because there was no agreement between the parties on the application of the BIT to the territory of Crimea. Secondly, the Russian Federation considered that the investor status was not met. Finally, it claimed that the facilities concerned were not investments.

[4] **Law:** The Swiss Federal Supreme Court first recalled that it freely examines the scope of the plea of lack of jurisdiction in Article 190(2)(b) PILA. It then examined the following requirements to be met under the BIT for the arbitral tribunal to have jurisdiction: the dispute must fall within the (a) territorial and (b) temporal scope of the BIT; the claimant must be (c) an investor and must have made (d) an investment in the territory of the host country in accordance with its laws. Regarding the claim that the BIT does not apply to the territory of Crimea, the Swiss Federal Supreme Court considered that there was no indication in the BIT that the term «territory» should be interpreted in a dynamic way. Therefore, had the «parties'» intent been to change the territorial scope of the BIT, an agreement on this would have been necessary. This was not the case in this instance. The Swiss Federal Supreme Court held that the concept of territory should not be understood restrictively as regards the territorial scope of the BIT: a territory de facto controlled by a Contracting State is also covered by the territorial scope of the BIT. The Russian Federation did not dispute this point. Indeed, it did not contend that Crimea was not a territory within the meaning of the BIT, but only that it was part of the Ukrainian territory at the time of the conclusion of the BIT. The Swiss Federal Supreme Court considered that the arbitral tribunal interpreted the concept of territory correctly, in the light of Article 29 of the Vienna Convention on the Law of Treaties (RS 0.111). Indeed, the BIT does not only refer to investments that were originally made in the territory of the other State, but also to those that came to be in the territory of the other State due to a border shift. As to the concept of investment, the Swiss Federal Supreme Court concluded that, although the BIT requires a cross-border element, the Russian Federation's restrictive interpretation of it could not be followed. The arbitral tribunal was therefore right to assume jurisdiction and the Russian Federation's appeal was consequently dismissed by the Swiss Federal Supreme Court.

[5] **Commentary:** While each BIT should be interpreted separately, this decision is interesting as it defines the concept of «investment» in case of a border shift, with a particular focus on the «cross-border» element. The Swiss Federal Supreme Court relied inter alia on the principle of «*effet utile*» enshrined in the Vienna Convention on the Law of Treaties (see Article 31(1)) when interpreting the scope of the BIT concerned. It is worth mentioning that this judgment was subject to a public deliberation, demonstrating the importance of this decision and its reasons.

II. Decision of the Swiss Federal Supreme Court 4A_65/2018 of 11 December 2018

[6] **Areas covered: jurisdiction of the arbitral tribunal (Article 190 (2) (b) PILA); right to be heard; scope of a bilateral investment protection treaty; concepts of *direct and indirect investor, pre-investment and essential security interests*.**

[7] **Facts**: In 1995, Germany and the Republic of India (hereinafter: «**India**») signed a convention on the encouragement and protection of investments, which contains an arbitration clause. In the early 2000s, India adopted a policy to encourage private sector investment in its space industry and to attract foreign investors. In 2007, the Indian company A. Limited (hereinafter: «**A**») contacted a subsidiary of the German company Deutsche Telekom AG (hereinafter: «Deutsche Telekom») to discuss a possible partnership. Deutsche Telekom approved an initial investment of USD 75 million made via its subsidiary Asia Pte Ltd (hereinafter: «**X**»), which is based in Singapore by means of a share subscription agreement in A. X's shareholding in A was almost 20%. However, the project never materialised. In 2013, Deutsche Telekom initiated arbitration proceedings against India seeking damages for breach of the applicable BIT. In accordance with the UNCITRAL rules, a three-member tribunal with its seat in Geneva was constituted. India raised three preliminary objections. First, it argued that Deutsche Telekom, which operated through X, would be an indirect investor not protected by the BIT, as it only protects investors who have made direct investments in India. Secondly, India argued that Deutsche Telekom's activities through X were not genuine investments, but pre-investments not protected by the BIT. Third, India contended that Deutsche Telekom could not rely on the substantive rules of the BIT because the measures complained of by Deutsche Telekom were necessary for the protection of its «essential security interests», which were subject to a reservation in the BIT. In 2017, the arbitral tribunal issued a decision confirming its jurisdiction and that India had violated the BIT. In January 2018, India appealed to the Swiss Federal Supreme Court on the grounds of a violation of Article 190(2)(b) PILA (lack of jurisdiction of the arbitral tribunal) and requested the annulment of the arbitral award and a finding that the arbitral tribunal lacked jurisdiction.

[8] **Law:** The Swiss Federal Supreme Court first recalled that it freely examines questions of law, including preliminary questions that determine the jurisdiction of the arbitral tribunal, which was the case here. Regarding the first claim, the Swiss Federal Supreme Court held that Deutsche Telekom, as a legal person under German law, qualified as an investor within the meaning of the applicable BIT, provided that it made an investment in India. The Swiss Federal Supreme Court pointed out that the concept of investment is not clearly and unanimously defined in international treaties, arbitration tribunals and legal literature. It therefore interpreted this concept in accordance with the principles of good faith, according to the method of legal pragmatism, and concluded that the acquisition by a German investor of shares in an Indian company is an investment within the meaning of the applicable BIT. The Swiss Federal Supreme Court then examined

whether indirect investments («*investissement médiat*») made by a German investor are protected by the BIT. Such a mechanism is not extraordinary in practice and the BIT does not contain any formal provision on this. The Swiss Federal Supreme Court found that the vast majority of arbitral tribunals have held that indirect investments are protected even if not expressly mentioned in the BIT concerned. Thus, in the view of the Swiss Federal Supreme Court, it is not necessary for the investor to be the direct owner of the assets constituting the investments. The Swiss Federal Supreme Court further examined the distinction between pre-investments and investments, as proposed by India. India distinguished between two categories of investment treaties: «right of establishment» type treaties and «admission clause» type treaties. The distinction is that the second type of treaty would grant protection only once the investor's establishment has become effective, i.e. it would allow the host state to subject the investor to its own conditions. This second type of treaty would therefore not include pre-investments in its scope. India contended that such distinction was widely recognised and that the arbitral tribunal wrongly denied such a qualification to the BIT. The Swiss Federal Supreme Court held that this distinction was unclear. Based on an interpretation of the text of the BIT, the Swiss Federal Supreme Court found that the BIT did not contain such admission clause, but only a compliance clause referring to the legality of the investment. The Swiss Federal Supreme Court further held that this issue was, in any event, irrelevant. Finally, the Swiss Federal Supreme Court held that the provision in the BIT on essential security interest related to the merits – and not the arbitral tribunal's jurisdiction. In any event, the respondent never raised this argument before the arbitral tribunal. In accordance with the general principle of good faith in proceedings, India was therefore precluded from raising such defence before the Swiss Federal Supreme Court. The setting aside application was therefore dismissed.

[9] **Commentary:** While each BIT should be interpreted separately, this decision is interesting as it defines (again) the key concept of «investment» in investment arbitration. In particular, the Swiss Federal Supreme Court held that so-called indirect investments, i.e. where the investor is not the direct owner of the protected assets, may be protected, even if the protection of such investments is not expressly guaranteed in the BIT concerned.

III. Decision of the Swiss Federal Supreme Court ATF 147 III 49 (4A_248/2019, 4A_398/2019 of 25 August 2020; Caster Semenya Case)

[10] **Areas covered: discrimination; proportionality; public policy.**

[11] **Facts**: This decision pertains to the seminal *Caster Semenya*'s case. The International Association of Athletics Federations (hereinafter: «**IAAF**»; currently: World Athletics) issued a new version of the testosterone eligibility rules, which applied to so-called «Athletes with Differences of Sex Development» (hereinafter: «**DSD Regulations**»). Said regulations hold that women with a level of naturally produced testosterone above 5 nmol/L, who are sensitive to testosterone and who have XY chromosomes, cannot compete in certain women's international athletic events unless they lower their testosterone level artificially. The athletic competitions in question are track events in which Ms Semenya competes.

[12] Ms Semenya and Athletics South Africa («ASA») challenged the legality of the DSD Regulations in ordinary proceedings at the CAS in 2018 on the ground that they are discriminatory against women athletes in general and in particular against women athletes with «certain phys-

iological traits», i.e. DSD. Ms Semenya and ASA also invoked that the DSD Regulations lack a sound scientific basis, are unnecessary to establish fair competitions and cause irreparable harm to said athletes, such as violations of their bodily integrity. The majority of the CAS arbitrators dismissed the claims (i.e. the decision was not unanimous within said Panel). While acknowledging that the DSD Regulations might be discriminatory, the Panel found that the discrimination «*is necessary, reasonable and proportionate*» to ensure fairness in women's competitions. However, the Panel reserved the possibility (for CAS) to reassess the proportionality of the DSD Regulations when applied in a specific case.

[13] Ms Semenya and ASA filed a setting aside application against the CAS award before the Swiss Federal Supreme Court. Ms Semenya invoked a breach of public policy (Article 190(2)(e) PILA), i.e. a violation of the principle of non-discrimination, a breach of her personality rights and of human dignity. The Swiss Federal Supreme Court first granted the stay on a «superprovisional» (*ex parte*) basis, but then revoked said stay on the ground that the requirement of the *prima facie* chances of success were not fulfilled.[1] The Swiss Federal Supreme Court then dismissed the setting aside applications on the merits.

[14] **Law**: The alleged unlawful eligibility rules were based on a regulation issued by a private law association. The Swiss Federal Supreme Court emphasised that the prohibition of discrimination, according to Article 8(2) of the Swiss Constitution, is part of public policy, with a view of protecting individuals *vis-à-vis* the State and thus does not have direct effect on relations between private persons. Although the Swiss Federal Supreme Court noted that competitive sport is characterised by its hierarchical structure, it found that it was unlikely that this was sufficient to allow an athlete to invoke the prohibition of discrimination in a civil action against an arbitration award on the grounds of violation of public policy. The Swiss Federal Supreme Court did not examine this question any further as it held that the contested award did not entail a discrimination that would be contrary to public policy.

[15] According to Article 8(2) Swiss Constitution, discrimination occurs when a person is treated differently because she or he belongs to a particular group which, historically or in the present social reality, suffers from exclusion or depreciation. The principle of non-discrimination does not, however, prohibit any distinction based on one of the criteria listed in Article 8(2) Swiss Constitution, but is rather based on a *prima facie* inadmissible differentiation. The inequalities that result from such a distinction must, however, be the subject of a specific justification. In matters of gender equality, separate treatment is possible if it is based on biological differences that categorically exclude identical treatment. The CAS Panel considered that the eligibility requirements established by the DSD Regulations were *prima facie* discriminatory but that they constituted a necessary, reasonable and proportionate measure to ensure the fairness and defense of the «protected class» and to guarantee fair competition. Based on the Panel's comprehensive analysis and weighing of interests involved, the Federal Supreme Court did not find the challenged award to be untenable or even unreasonable.

[16] Fair sport is a legitimate interest and competitive sport should be considered when assessing the balance of interests, as recognised by ECtHR.[2] The Federal Supreme Court concluded that fairness and equity of the competitions do not only concern problems linked to external manipu-

1 Swiss Federal Supreme Court decision 4A_248/2019 of 29 July 2019, paras. 3–4.

2 European Court of Human Rights decision *Fédération nationale des associations et syndicats de sportifs* [FNASS] *et al. v. France*, nos 48151/11 and 77769/13, para. 166.

lations, such as doping and corruption, but also inherent characteristics of athletes in a particular group. Sports federations aim to ensure fair and equitable competition by setting separate categories to reduce the difference between athletes. However, any binary division between men and women raises classification difficulties. The Swiss Federal Supreme Court clarified that it is up to the sports federation to determine if an advantage distorts competition and introduce legally permissible eligibility rules.

[17] Fairness of competition was not the only interest at play. The purpose of the «protected class» is to allow athletes to benefit from the same opportunities as male athletes, encouraging them to make the necessary sacrifices to reach the highest level of athletics and become models for young athletes. The desire to excel at an elite level of sport is not solely driven by financial interests. The IAAF issued the DSD Regulations to balance the interests of XY DSD athletes with those of other female athletes. The Panel considered the important circumstances such as the health effects of oral contraceptives on athletes, the harm associated with intrusive physical examinations and confidentiality issues. Based on this analysis, it found that the DSD Regulations contained a proportionate measure. The applicant failed to demonstrate that all side effects experienced when trying to reduce her testosterone levels were due to hormonal treatment, that all other XY DSD athletes would suffer the same side effects and that side effects would increase if the maximum allowable testosterone level were reduced from 10 to 5 nmol/L. The applicant's remaining arguments were either inadmissible due to its purely appellate nature or not subject to review by the Swiss Federal Supreme Court.

[18] The Panel expressed concern about the practicality of allowing XY DSD athletes to maintain testosterone levels below 5 nmol/L and noted that the DSD Regulation may be disproportionate in case of an impossibility or difficulty to implement such measures. The CAS reserved the possibility of further examination of proportionality in the application of the DSD Regulations. The IAAF considered the concerns expressed by the Panel by revising the DSD Regulations in order to allow, under certain conditions, the waiver of the disqualification of an athlete whose testosterone level involuntarily exceeds the authorised limit.

[19] Considering the various interests involved and the fact that athletes with XY DSD are not required to reduce their testosterone levels through hormonal treatment unless they wish to compete in a «Target Event» in the female category at an international competition, the Swiss Federal Supreme Court considered the Panel's finding neither untenable nor contrary to public policy.

[20] **Commentary**: Although the decision by the Swiss Federal Supreme Court in this case was not entirely unexpected given its narrow jurisdiction, this decision was criticised by several scholars. First, the Swiss Federal Supreme Court did not address the gender biases which had influenced the CAS' decision. By holding that the testosterone regulations are necessary for ensuring fairness and preserving the «protected class of women» in sports, the Court did not consider whether such regulations were discriminatory since there is no such distinction being made for men. In that regard, the Federal Supreme Court failed to debate whether it is discriminatory against women that there are no upper testosterone limits for men, as the DSD Regulations' rationale that high testosterone harms the «level playing field» by conferring a competitive advantage should logically also apply to men's competitions. Moreover, (the CAS's and) the Swiss Federal Supreme Court's analysis on the (egregious) violation of the athlete's personality rights is highly controversial. It downplays the possible side effects caused by the hormone treatments to lower the athletes' testosterone levels. Requiring women athletes with intersex variations to undertake unnecessary medically hormone treatment is basically an unprecedented (and, possibly, unlawful)

interference in their personality rights and, more generally, their physical integrity (see Article 8 of the Swiss Constitution; Article 8 of the European Convention on Human Rights (hereinafter: «ECHR»)). The Swiss Federal Supreme Court failed to discuss whether *forcing* women athletes to medically undertake hormone treatment would constitute an unjustified restriction in these fundamental guarantees. As to the breach of personality rights, the Swiss Federal Supreme Court reiterated its limited scope within the public policy grievance, which requires a clear and severe violation of a fundamental right. However, one may argue that such high threshold was met in the case at hand. Furthermore, the Swiss Federal Supreme Court did not fully embrace the protection against horizontal discrimination as part of an issue of «public order». Indeed, the decision noted that as the case involved an agreement between two private bodies, World Athletics and an athlete, it was doubtful whether the prohibition of this specific type of discrimination «is included in the scope of the restrictive notion of public order». However, this reasoning may also be in contradiction with former rulings, such as the *Cañas* case, in which the Swiss Federal Supreme Court recognised that sports governing bodies have a position of monopoly and that athletes will not have any choice but to submit to the rules imposed by the sports federation concerned (in that case, the former waiver of appeal against the CAS's award before the Swiss Federal Supreme Court), on pain of remaining grassroots athletes.[3] Similarly, one may argue that Ms Semenya does not have any choice but to take the hormone treatments if she wants to continue competing as a woman. Where is the limit? In essence, in any kind of competition, any athlete is unequal regarding her/his physical strengths. Some of these criticisms were indeed confirmed in a recent decision of the ECtHR on the case. In July 2023, the ECtHR held that there had been a violation of the prohibition of discrimination taken together with the right to respect for private life and the right to an effective remedy. In its decision, the most essential question was to determine whether the discrimination and the resulting violations of the right to respect for private life were based on an objective and reasonable justification. In this regard, the ECtHR considered that the CAS' and the Swiss Federal Supreme Court's analysis was not sufficient and should have been more thorough, especially regarding the necessity and the proportionality of the discrimination instituted under the DSD Regulations. In a nutshell, contrary to the assumption of the Swiss Federal Supreme Court, the ECtHR found that the DSD Regulations did not offer intersex athletes a genuine «choice», as they either had to give up their profession, or to undergo, without any therapeutic purpose, medical treatment likely to damage their physical and psychological integrity. The ECtHR stated that this would indeed violate Article 8 of the ECHR. Moreover, the Swiss Federal Supreme Court failed to sufficiently examine the side effects of such treatment. Consequently, the ECtHR held that the appeal before the Swiss Federal Supreme Court did not allow Ms Semenya an effective remedy guaranteed under Article 13 of the ECHR. Based on this decision of the ECtHR, Ms Semenya is henceforth entitled to request revision of the decision of the Swiss Federal Supreme Court.

3 ATF 133 III 235, 243 para. 4.3.2.2.

IV. Decision of the Swiss Federal Supreme Court ATF 144 III 120 (4A_260/2017 of 20 February 2018)

[21] **Areas covered: international arbitration; independence of the CAS from FIFA; substantive public policy.**

[22] **Facts**: A Belgian football club (hereinafter: the «**Club**») was sanctioned by the FIFA Disciplinary Committee for concluding third-party ownership (hereinafter: «**TPO**») contracts in breach of Articles 18bis and 18ter of the FIFA Regulations on the Status and Transfer of Players. The FIFA Appeal Committee rejected the Club's appeal.

[23] The Club appealed to CAS, which partially reduced the sanction while upholding the Committee's decision on other aspects.

[24] Subsequently, the Club filed a set aside application before the Swiss Federal Supreme Court, specifically arguing that the CAS could not be regarded as a bona fide court of arbitration for sport. The Swiss Federal Supreme Court had to decide on the requisite independence for the CAS to be acknowledged as an arbitral tribunal.

[25] **Law:** Article 75 of the Swiss Civil Code (hereinafter: «SCC») provides that any member who has not consented to a resolution that violates the law or the articles of association has the right to challenge such resolution in court within one month of becoming aware of it. This provision is mandatory, «requiring associations» decisions to be subject to review by an independent court. However, in certain cases, such disputes may be submitted to an arbitral tribunal, provided that it constitutes a genuine judicial authority. In such cases, appealing to the CAS against the FIFA Disciplinary Committee's decision amounts to seeking the annulment of a decision made by a Swiss association. Thus, the Swiss Federal Supreme Court must assess the independence of the CAS.

[26] The Club argued that the relationship between the FIFA and the CAS had never been examined by the Swiss Federal Supreme Court. The Club claimed that the FIFA, as a «major client» of the CAS, could potentially influence CAS awards in favour of the FIFA. Additionally, the Club relied on an article written by a FIFA representative to highlight the substantial influence of sports organisations in the appointment of members to the International Council of Arbitration for Sport (hereinafter: «**ICAS**»). In response, the FIFA pointed out that the CAS's independence had already been scrutinised in the landmark *Lazutina* judgment (ATF 129 III 445), and this jurisprudence had recently been affirmed by the German Federal Court of Justice in the *Pechstein* judgment of 7 June 2016.

[27] In its decision, the Swiss Federal Supreme Court began by reaffirming that the CAS's dependence on Olympic International Federations («**IFs**») has been less problematic than its dependence on the International Olympic Committee («**IOC**»). However, in the *Lazutina* judgment, the Swiss Federal Supreme Court concluded that the CAS is sufficiently independent from the IOC. Since then, the CAS's independence from various IFs has been repeatedly confirmed. In the present case, the FIFA can be equated with other IFs. As there is no need to revisit the well-established case law, the CAS's independence from the FIFA must also be recognised. The Swiss Federal Supreme Court also emphasised that it does not have authority to reform the CAS but is responsible for ensuring that the CAS meets the necessary level of independence to be considered equivalent to a state court. Moreover, the Club fails to demonstrate any structural or financial dependence of the CAS on the FIFA. Finally, the Club's other complaints, including the violation of its right to be heard and the violation of substantive public policy, were also dismissed.

[28] **Commentary**: This decision confirms an important aspect of the CAS's independence, not only from the IOC as established in the *Lazutina* judgment, but also from the FIFA, taking into account its governance and financial structure. The Swiss Federal Supreme Court also recognised that CAS awards hold the same status as state court decisions. However, it is important to note that the Brussels Court of Appeal in Belgium deemed the arbitration clause in the FIFA Statutes too broad and unenforceable. Consequently, the Court assumed jurisdiction despite FIFA's *exceptio arbitri* defense.[4] In the *Mutu Adrian, Pechstein Claudia v. Switzerland* case, the ECtHR further confirmed the independence of the CAS.

V. European Court of Human Rights, Mutu Adrian, Pechstein Claudia v. Switzerland, Decision no. 40575/10, 2 October 2018

[29] **Areas covered: independence and impartiality of CAS; notion of forced arbitration; absence of a public hearing.**

[30] **Facts**: Two cases were consolidated in this decision. The first concerns a professional football player (hereinafter: the «**First Applicant**»; the «**Player**») who signed a contract with Chelsea in 2003. In 2004, Chelsea terminated the contract with immediate effect because of a positive drug test for cocaine. In 2006, Chelsea applied to the FIFA Dispute Resolution Chamber for damages, which were awarded. The Player then appealed to the CAS. He also requested the challenge of the arbitrator chosen by Chelsea. The CAS rejected both the appeal and the challenge. In 2009, the player appealed to the Swiss Federal Supreme Court, arguing that the CAS had not provided the necessary guarantees of independence and impartiality. He argued that the arbitrator should have stepped down. The Swiss Federal Supreme Court dismissed his claim in decision 4A_458/2009 of 10 June 2010. The Player then filed an application before the ECtHR against Switzerland, alleging a violation of Article 6(1) ECHR due to a lack of independence and impartiality of the CAS.

[31] The second case concerns a professional speed skater (hereinafter: the «**Second Applicant**»; the «**Skater**») suspended for two years for an irregular blood profile detected during a doping control in 2009. She applied to the CAS and requested a public hearing. The CAS rejected the request and confirmed the suspension. The skater appealed to the Swiss Federal Supreme Court, complaining that the CAS was not independent and impartial because of the way the arbitrators were appointed and that her request for a public hearing had been wrongly refused. The Swiss Federal Supreme Court rejected the appeal in decision 4A_612/2009 of 10 February 2010. The skater then lodged an application with the ECtHR alleging a violation of Article 6(1) ECHR due to a lack of independence and impartiality as well as due to the unjustified refusal of a public hearing.

[32] **Law**: In the first case, the ECtHR examined whether (forced) arbitration was valid in the case at hand. The ECtHR considered that, if a commercial or sports arbitration is agreed upon in a «free, legal and unequivocal» manner, the guarantees of independence and impartiality that the tribunal should offer can be analysed in a more flexible manner. On the other hand, when arbitration is imposed by law, the guarantees of Article 6(1) ECHR must be respected. In the present case, the Player was subject to the FIFA regulations of 2001, which can be equated to

4 *See* Brussels Court of Appeal interlocutory decision 2018/6347 of 26 August 2018, paras. 14–16.

law. These regulations provide for the possibility (Article 42) for any football player to have recourse to arbitration but do not impose it. The Player was therefore not «forced» to choose the arbitration route, even though Chelsea potentially had greater bargaining power. However, his choice must also be «unequivocal». It is not the case in this instance, as Chelsea's choice to accept the arbitration clause in its contract cannot be understood as an «unequivocal» waiver of its right to have its dispute decided by an independent and impartial tribunal. Therefore, the arbitration procedure had to offer the guarantees provided for in Article 6(1) ECHR. The ECtHR found, however, that there was no lack of independence or impartiality on the part of the arbitrators.

[33] In the second case, the Skater raised two grievances. Firstly, she considered that her arbitration was «forced» insofar as the International Skating Union's (hereinafter: «**ISU**») regulations provide for mandatory recourse to CAS arbitration for disciplinary proceedings. The ECtHR agreed with the Second Applicant and held that, in view of the restriction on the Skater's professional life and despite the fact that arbitration is imposed by the ISU regulations and not by law, the acceptance of the CAS arbitration jurisdiction should be characterised as a «forced» arbitration within the meaning of the ECtHR's case law. It is then necessary that the tribunal offers the guarantees of independence and impartiality of Article 6(1) ECHR. In the present case, the Second Applicant claimed that the CAS does not offer the necessary guarantees insofar as the method of appointing the arbitrators is structurally problematic. However, the ECtHR did not see sufficient grounds for departing from the Swiss Federal Supreme Court's case law, according to which the CAS offers guarantees of independence and impartiality when it functions as an appeal body for the various sports federations. Thus, the first claim was dismissed. The Skater also complained about the absence of a public hearing before the CAS. In this respect, the ECtHR recalled that this fundamental requirement protects individuals against administration of justice in secret with no public scrutiny. However, the right to a public hearing in all proceedings cannot be deduced from Article 6(1) ECHR. Indeed, the circumstances of the case may require a public or in camera hearing, as applicable. Moreover, a party may expressly or tacitly waive its right to a public hearing. This is not the case here. The ECtHR therefore examined whether the circumstances permitted an in video hearing or whether a public debate was necessary. It concluded that the nature of the case required a public hearing: both the nature of the case (suspension for doping) and its resolution (expert hearings) had a high potential for controversy. Therefore, there was a violation of Article 6(1) ECHR by not recognising the right to public hearings before the CAS.

[34] **Commentary**: In this case, the ECtHR took a stance to protect the «weaker party» in sports arbitration and to hold States accountable for violations of human rights in arbitration proceedings seated in their territory and classified as «compulsory» arbitrations. In particular, while confirming the consistent jurisprudence of the Swiss Federal Supreme Court that recognises the independence of the CAS as an appellate body external to international federations and acknowledging that the CAS system of a mandatory list of arbitrators is in compliance with the requirements of independence and impartiality, the ECtHR held that the fundamental principle of the public nature of judicial procedures under Article 6(1) ECHR also applies to non-State tribunals ruling on disciplinary and/or ethics matters. This decision had a direct impact on the functioning of CAS proceedings as the CAS promptly committed to ensure the compliance with the decision by implementing public hearings upon request from a party. However, it is worth noting that the closed list of arbitrators in the CAS has been criticised for limiting the «parties'» freedom to appoint their own arbitrator. In this regard, some authors suggest opening the list and establish-

ing a list of presidents who are independent from the sports establishment.[5] It is worth noting that the dissenting opinion of the Swiss judge sitting in the ECtHR on the reasoning of the independence of CAS was not represented in this case. On 5 February 2019, the ECtHR rejected Ms Claudia Pechstein's request to refer her case to the Grand Chamber.

VI. Decision of the Swiss Federal Supreme Court ATF 145 III 199 (4A_646/2018 of 17 April 2019)

[35] **Areas covered: New York Convention (hereinafter: «NYC»); arbitration agreement; extension to non-signatories; interference of third party.**

[36] **Facts**: In 2009, the Slovenian company «C» and the Swiss company «B» signed a distribution Agreement, according to which the former delivered all kind of goods to the latter, which distributed them in Switzerland. The Agreement was concluded for a fixed period, until the end of 2014. However, the relationship was thereafter *de facto* continued until spring 2016. B forms part of a group of companies which includes B's affiliate «BX AG». The Agreement contained an arbitration agreement which referred to any claims arising out of or in relation to the Agreement to arbitration of the Slovenian Chamber of Commerce in Ljubljana, Slovenia. It remained disputed between the parties who was the contractual partner. Indeed, on one hand the Agreement was signed by the Slovenian company. On the other hand, the Agreement was not signed by the Swiss company itself, but rather «for and on behalf of the Distributor BX AG».

[37] In May 2016, the Slovenian company filed several claims under the Agreement against B before the state courts in Aargau. The Aargau Commercial Court rejected the «Slovenian companies» claims for lack of jurisdiction. The Court found in particular that by performing under the Agreement for many years, B expressed in an implied manner that it wanted to be a party to the Agreement. Therefore, B joined the Agreement and thus also the arbitration agreement contained therein. This decision was challenged by the Slovenian company before the Swiss Federal Supreme Court who had to determine whether the arbitration clause is binding on B even though it did not sign the distribution Agreement.

[38] **Law**: As a preliminary point, the Swiss Federal Supreme Court recalled that a distinction must be made between the formal validity of the arbitration clause and its scope *ratione personae*. The formal validity of the arbitration clause is determined in the present case according to the NYC on the Recognition and Enforcement of Foreign Arbitral Awards, since both Switzerland and Slovenia are parties to it. The NYC provides for the recognition of the written arbitration agreement by the States parties (Article II(1)). For the purposes of this provision, «written agreement» means an arbitration clause contained in a contract or an arbitration agreement signed by the parties or contained in an exchange of letters or telegrams (Article II(2)). As a result, the Slovenian company submitted that B was not a signatory of the Agreement (and neither of the arbitration agreement contained therein) and arbitral jurisdiction would thus not apply between them.

[39] Nevertheless, the Swiss Federal Supreme Court's case law under Article 178(1) PILA has long accepted that an arbitration agreement may be binding even on persons who have not signed it,

5 Antonio Rigozzi/Erika Hasler/Michel Noth, Introduction to the CAS Code in: Manuel Arroyo (ed.), Arbitration in Switzerland – The Practitioner's Guide, Wolters Kluwer, 2018, at p. 1423, para. 7.

for example in the event of a transfer of a contractual relationship. According to the case law, the formal requirements of Article II(2) NYC and Article 178(1) PILA are equivalent. Therefore, to be a valid written arbitration agreement under the NYC, it is sufficient that the original parties have signed the contract containing the arbitration clause. In case of substitution of parties or assignment of claims, it is not necessary that these formal requirements are also met by the new parties. Similarly, the extension of the validity of the arbitration clause is not subject to the formal requirements of Article II(2) NYC. In the present case, the implied extension of the contract therefore did not preclude the exception drawn from the arbitration clause.

[40] As mentioned previously, a distinction must be made between the formal validity of the arbitration clause and its scope *ratione personae*. The subjective scope of the arbitration clause is a matter of the applicable substantive law, not of the NYC. It is in principle for the arbitral tribunal to decide whether it has jurisdiction *ratione personae*. In any event, the Slovenian company did not argue that, under the applicable substantive law, the distributor would not have validly substituted itself for the original co-contractor as a party to the arbitration clause.

[41] In conclusion, the Swiss Federal Supreme Court found that an arbitral tribunal in Ljubljana had jurisdiction over the Slovenian company's claim and upheld the judgment of the Aargau Commercial. Therefore, the challenge of the Slovenian company was dismissed.

[42] **Commentary**: The Swiss Federal Supreme Court has now clarified that it considers – as a rule – formal aspects under Article II(2) NYC and Article 178(1) PILA to be congruent. Whether this congruence also extends to issues where the language of the two provisions expressly differs (such as the requirement of the «exchange» of communications which is merely provided in the NYC) is not specifically addressed in the present case. A difficulty of this clarified position of the Swiss Federal Supreme Court may lie in the methodological approach chosen: Swiss national principles are applied for the interpretation of the NYC to the extent that they do not conflict with a potential treaty-autonomous interpretation. As the NYC is an international treaty, one would rather have expected, as a first step, the Swiss Federal Supreme Court to conduct an autonomous interpretation of the NYC which would then influence the interpretation based on Swiss national law – and not the other way around (i.e. application of the Swiss national law to the extent that it does not conflict with the NYC). This former approach was even previously accepted in principle by the Swiss Federal Supreme Court. The said analysis of the Swiss Federal Supreme Court does – at least *prima facie* – not necessarily lead to the conclusion of full congruence between the Swiss *lex arbitri* and the NYC on all formal aspects of arbitration agreements.

[43] Moreover, in the present case, the arbitration agreement was extended based on the (willful) interference with the performance of a contract by the interfering party. The extension for reasons of intentional interference has typically been applied *against* the interfering party based on a «*venire contra factum proprium*» argument. Indeed, the interfering party should not be in a position to object to an arbitration agreement in a contract under which it had (knowingly) performed. In the present case, the Swiss company B successfully relied on its own interference with a contractual performance, in order to force the Slovenian company into arbitration. The Swiss Federal Supreme Court did, however, not analyse in detail to what extent the Slovenian company had given its consent to arbitrate with the non-signatory.

VII. Decision of the Swiss Federal Supreme Court ATF 147 III 65 (4A_318/2020 of 22 December 2020; Sun Yang case)

[44] **Areas covered: international arbitration; impartiality of the arbitrator; duty of care of the parties; revision.**

[45] **Facts**: On 4 September 2018, the Chinese swimmer Mr Sun Yang, a multiple Olympic medallist, was scheduled to undergo an out-of-competition doping test. However, he refused to allow the test to be completed, stating that the testers did not have the proper documentation to conduct the test.

[46] After allegations of anti-doping rules violation, the Anti-Doping Commission of the International Swimming Federation (the then «**FINA**»; currently: «**World Aquatics**») cleared Mr Sun Yang of any wrongdoings on 3 January 2019. On 14 February 2019, the World Anti-Doping Agency («**WADA**») filed an appeal before the CAS, in which it requested the athlete's suspension for eight years.

[47] On 1 May 2019, the CAS informed the parties involved that the arbitral tribunal that would oversee the appeal would be chaired by Mr Franco Frattini. In an award of 28 February 2020, the Panel found Mr Sun Yang guilty of violating the FINA Anti-Doping Rules. On 28 April 2020, the athlete challenged the award before the Swiss Federal Supreme Court.[6]

[48] On 15 June 2020, Mr Sun Yang filed a request for revision of the arbitral award before the Swiss Federal Supreme Court. Mr Sun Yang challenged the award based on the fact that the president of the Panel had posted comments on his Twitter account two years earlier that could have called his impartiality into question. The comments were related to certain Chinese practices regarding the slaughter of dogs: «*those bastard sadic chinese who brutally killed dogs and cats in Yulin [...] This yellow face chinese monster smiling while torturing a small dog, deserves the worst of the hell [...] those horrible sadics are CHINESE! [...] Old yellow-face sadic trying to kill and torture a small dog [...] Torturing innocent animal is a flag of chinese! Sadics, inhumans*».

[49] **Law**: The Swiss Federal Supreme Court first examined whether the discovery of the circumstances justifying the removal of an arbitrator could be accepted if filed after the expiry of the 30-day deadline for challenging an award. The Court found that the application could be admitted if the applicant exercised the required diligence (i.e., attention required by the circumstances) but was unable to make the discovery during the arbitral proceedings.

[50] The Swiss Federal Supreme Court went on to examine whether the swimmer had shown the attention required by the circumstances during the arbitral proceedings and ruled that in the absence of any other circumstances indicating a risk of impartiality, the swimmer had not breached a «duty of curiosity» by failing to detect the presence of tweets published nearly ten months before the arbitrator's appointment. The decision also states that a party cannot be required to continue its internet searches or scrutinise the messages of arbitrators on social networks during arbitration proceedings.

[51] Finally, the Swiss Federal Supreme Court examined whether the tweets in question were likely to give rise to doubts about the arbitrator's impartiality. While noting that the chairman denounced the slaughter of dogs and the consumption of this meat at a local festival in China,

6 After the present decision was issued, the challenge of 28 April 2020 was deemed purposeless by the Swiss Federal Supreme Court and thus as dismissed in the decision of the Swiss Federal Supreme Court 4A_192/2020 of 22 February 2021.

the Swiss Federal Supreme Court observed that the arbitrator did not hesitate to repeatedly use extremely violent terms and that several messages were published during the CAS proceedings.

[52] Furthermore, the Swiss Federal Supreme Court noted that the terms used by the chairman clearly referred to the skin colour of certain Chinese individuals, which clearly had nothing to do with the denounced acts of cruelty. Whatever the context, these terms were inadmissible. Under these circumstances, the Swiss Federal Supreme Court concluded that doubts on the impartiality of the arbitrator were objectively justified and ruled to annul the CAS award and remove the arbitrator.

[53] **Commentary**: As one of the authors was involved as counsel in this case, we will refrain from making any comment on this case.

VIII. Decision of the Swiss Federal Supreme Court ATF 146 III 142 (4A_306/2019 of 25 March 2020; Clorox v. Venezuela)

[54] **Areas covered: investment arbitration, ICSID award, jurisdiction of the arbitral tribunal, scope of application of a bilateral investment protection treaty.**

[55] **Facts**: A US company was the sole shareholder of a Venezuelan company. The US company established a Spanish company. Upon the incorporation of the Spanish company, the US company transferred all its shares in the Venezuelan company as a contribution in kind. The Spanish company thus owned all the shares of the Venezuelan company.

[56] After one year, the Spanish company initiated arbitration proceedings against Venezuela, based on the Convention on the Reciprocal Encouragement and Protection of Investments concluded between Spain and Venezuela on 2 November 1995. Pursuant to the UNCITRAL, a three-member arbitral tribunal was constituted with its seat in Geneva.

[57] The arbitral tribunal stated its lack of jurisdiction over the claim. According to the arbitral tribunal, an investment, as defined by the BIT, exists only when an investor actively engages in an investment activity within the contracting state. In this case, the Spanish company did not make an investment in Venezuela since it received the shares of the Venezuelan company from the American company without making any payment itself.

[58] **Law**: According to the English translation of Article I(2) of the BIT, written in Spanish, «*[t]he term investments means any kind of assets invested by investors of one Contracting Party in the territory of the other Contracting Party and in particular, although not exclusively, the following assets: a) Shares, securities, bonds and any other form of participation in companies [...]*».

[59] The Swiss Federal Supreme Court identifies a more complex reasoning behind the literal interpretation made by the arbitral tribunal. The Swiss Federal Supreme Court considered that the arbitral tribunal analysed the material origin of the investments made in Venezuela, which originated from the American companies. However, it appeared that the Spanish company was specifically established to obtain the protection of the BIT, which American companies could not benefit from. After underlining the broad definition of investment under Article I(2) of the BIT, the Swiss Federal Supreme Court examined the «denial of benefits clauses». These clauses, which are sometimes incorporated in investment treaties, allow for the restriction of their scope of protection in order to avoid treaty shopping. Thus, a company from a state not protected by a treaty could not establish a company in the territory of a contracting state to avail itself of the

treaty's protection. These clauses are widely recognised and commonly employed by numerous states.

[60] In the present case, the BIT contained no such clause. Considering that Spain has signed other treaties that include the denial of benefits clauses, the Swiss Federal Supreme Court considered that the contracting states that were party to the BIT at stake deliberately chose not to include such a clause. Due to the broad definition of investment, the Swiss Federal Supreme Court considered that the arbitral award erroneously maintained the existence of an active investment as a requirement of the application of the BIT. Therefore, the arbitration tribunal could not reject its jurisdiction.

[61] In a final aspect, the Swiss Federal Supreme Court discussed the application of the prohibition of abuse of rights when an investor undertakes an action with the specific intent of benefiting from the protection of an investment treaty in a particular dispute. This occurs when the transaction to acquire nationality is conducted at a time when the dispute giving rise to the proceedings was foreseeable, and this action must be deemed, in accordance with the principle of good faith, as having been carried out in anticipation of this dispute. If there is an abuse of rights, the company cannot invoke the protection of the investment treaty and this matter must be determined by the arbitral tribunal. The Swiss Federal Supreme Court thus upheld the challenge and referred the case back to the arbitral tribunal for a new decision. The arbitral tribunal was invited to examine its jurisdiction in light of any possible abuse of right by the Spanish company.

[62] **Commentary**: This decision demonstrates that the Swiss Federal Supreme Court considers the overall context of the investment at hand when interpreting the concept of investment. Additionally, when determining the application of a BIT, the Swiss Federal Supreme Court examines the presence of denial of benefits clauses and the potential abuse of rights by the party invoking the treaty's protection. It is important to note that the absence of limitation clauses in the BIT does not automatically grant protection to investments made in an abusive manner. In the decision 4A_398/2021 dated 20 May 2022 (discussed below under Section C, para. 33), the Swiss Federal Supreme Court conducted a thorough analysis of the distinction between legitimate nationality planning and treaty abuse in investment disputes, emphasising the importance of the temporal factor and the foreseeability of the dispute. The Swiss Federal Supreme Court also emphasised that the criterion of dispute foreseeability must be assessed restrictively.

IX. Decision of the Swiss Federal Supreme Court ATF 147 III 107 (4A_124/2020 of 13 November 2020; STX v. Singaporean Companies and Bangladeshi Companies)

[63] **Areas covered: subjective extension of an arbitration agreement to a third party, adherence by conclusive acts, interference theory.**

[64] **Facts**: A principal contractor commissioned a Korean company to build a power plant. The main contract between the parties contains an ICC arbitration clause with seat in Geneva. The Korean company ordered the diesel engines required for the operation of the power plant from a subcontractor. The subcontract did not contain any arbitration clause.

[65] After receiving the work, the principal contractor found that the diesel engines were defective, and therefore refused to pay the agreed price. The Korean company as a consequence

initiated arbitration proceedings in Geneva. The client requested that the subcontractor participate in the arbitration alongside the Korean company.

[66] In its «Partial Final Award on Jurisdiction», the arbitral tribunal granted the principal contractor's request and recognised the enforceability of the arbitration clause agreed between the principal contractor and the Korean company with respect to the subcontractor. The subcontractor challenged this decision before the Swiss Federal Supreme Court.

[67] **Law**: The Swiss Federal Supreme Court first noted that the arbitral tribunal declared itself competent based on a normative interpretation of the behaviour of the subcontractor. Therefore, it can freely review this interpretation based on the principle of trust.

[68] The Swiss Federal Supreme Court then recalled its case law according to which an arbitration clause can be extended to a third party who, through its behaviour, interfered in the execution of the contract containing such a clause (*see* in particular ATF 129 III 727). On this basis, the Swiss Federal Supreme Court examined whether, as the arbitral tribunal considered, the subcontractor did indeed interfere in the main contract concluded between the principal and the Korean company and whether it was therefore justified to oppose the arbitration clause contained in this main contract to the subcontractor.

[69] The Federal Supreme Court considered that by delivering the diesel engines mentioned in the main contract – and thus by participating in its execution – the subcontractor did not interfere in the main contract within the meaning of the aforementioned case law. Therefore, the arbitration clause in the main contract could not be invoked against the subcontractor. The fact that representatives of the subcontractor were already present in the pre-contractual phase of the main contract did not change this conclusion. Similarly, it was not surprising that the contractual guarantees and payment terms agreed in the subcontract were aligned with the conditions of the main contract; one cannot deduce from such contractual similarities that the subcontractor would have had implicitly accepted the arbitration clause of the main contract. The appeal was therefore upheld.

[70] **Commentary**: In its decision, the Swiss Federal Supreme Court clarified that the present case fundamentally differed from that of ATF 129 III 727. In the latter decision, the third party to whom the arbitration agreement had been extended was not a subcontractor. Therefore, they were not contractually involved in the execution of the disputed business contract. Although totally unrelated to this contractual relationship, the third party voluntarily interfered, not only in the direction of the companies involved in the contract, but also in its execution. The Swiss Federal Supreme Court concluded that by behaving in this way, this third party could not ignore the terms of the business contract in question, in particular the arbitration clause that was included, and therefore had accepted it and that it could be invoked against them.

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

I. International Arbitration

A. Admissibility of Appeals in Civil Matters

1. Decision of the Swiss Federal Supreme Court 4F_8/2018 of 14 March 2018

[71] **Language of proceedings before the Swiss Federal Supreme Court.** Under Article 42(1) Federal Supreme Court Act (hereinafter: «**FSCA**»), submissions must be written in an official language. This means German, French, Italian and Romansh in cases of relations between the Confederation and Romansh-speaking persons (Article 70(1) Swiss Constitution). If the submission is not written in an official language, the Swiss Federal Supreme Court may return it to its author; in this case, it sets an appropriate deadline for the author to remedy the irregularity and warns the appellant that the pleading will otherwise not be taken into consideration (Article 42(6) FSCA).

[72] Despite the discretionary power («may») set forth in the first part of the sentence of Article 42(6) FSCA, the Swiss Federal Supreme Court is not, in principle, free to declare a submission filed in a language other than an official language inadmissible from the outset. It must rather set an appropriate time limit for the translation of the submission, in order to avoid any excessive formalism. However, this rule, far from being absolute, is subject to exceptions, in particular in case of abuse of rights.[7]

[73] In this case, the Swiss Federal Supreme Court considered abusive the filing by the applicant of its application for revision in English accompanied by a request for a six-week deadline to translate it. The applicant had previously filed a set aside application in French, was represented by a Lausanne lawyer, and therefore previously complied with the legal requirements of language. Under these circumstances, the applicant could no longer invoke, at the stage of the application for revision, that it was not aware of the requirements of Article 42(1) FSCA.

2. Decision of the Swiss Federal Supreme Court 4A_198/2020 of 1 December 2020

[74] **Language of proceedings before the Swiss Federal Supreme Court.** According to Article 54(1) FSCA, the Swiss Federal Supreme Court drafts its decision in an official language, as a rule in the language of the contested decision. If the decision was handed down in another language, the Swiss Federal Supreme Court uses the official language chosen by the parties.[8] In this case, the parties used either French (the appellant) or German (the respondent). In accordance with usage, the decision shall be delivered in the language of the set aside application (i.e. French in the case at hand).[9]

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7 *See also* Swiss Federal Supreme Court decision 4A_114/2020 of 20 May 2020, para. 3.

8 *See also* Swiss Federal Supreme Court decisions 4A_462/2021 of 7 February 2022, para. 1; 4A_618/2020 of 2 June 2021, para. 1; 4A_156/2020 of 1 October 2020, para. 1; 4A_342/2019 of 6 January 2020, para. 1; 4A_56/2018 of 30 January 2019, para. 2; 4A_300/2018 of 22 August 2018, para. 1; 4A_478/2017 of 2 May 2018, para. 1; 4A_491/2017 of 24 May 2018, para. 1; 4A_247/2017 of 18 April 2018, para. 1.

9 *See also* Swiss Federal Supreme Court decision 4A_20/2022 of 9 May 2022, para. 1; 4A_564/2021 of 2 May 2022, para. 1; 4A_616/2021 of 1 April 2022, para. 1; 4A_194/2022 of 30 August 2022, para. 1; 4A_574/2021 of 8 March 2022, para. 1; 4A_484/2021 of 31 January 2022, para. 1; 4A_344/2021 of 13 January 2022, para. 2; 4A_240/2021 of 2 November 2021, para. 1; 4A_27/2021 of 7 May 2021, para. 1; 4A_438/2020 of 15 March 2021, para. 1;

3. Decision of the Swiss Federal Supreme Court 4A_460/2021 of 3 January 2022

[75] **Language of the proceedings; submissions in English.** If the set aside application was drafted in English pursuant to Article 77(2bis) FSCA (in force since 1 January 2021), the Swiss Federal Supreme Court determines the language of the proceedings at its own discretion. In doing so, it may consider, inter alia, the balance of the workload of the linguistic sections of the Swiss Federal Supreme Court division dealing with the matter, in the interest of the constitutional requirement of expedited proceedings (Article 29(1) of the Swiss Constitution). In the present case, the contested decision and the set aside application were written in English. Since this is not an official language and the instruction proceedings before the Swiss Federal Supreme Court were conducted in German, the decision of the Swiss Federal Supreme Court was issued in German.[10]

[76] [*It should be noted that following the revision of the FSCA on 1 January 2021, it is now possible in arbitration matters to file submissions in English before the Swiss Federal Supreme Court (Article 77(2bis) FSCA). Regrettably, the legislator did not give the possibility for the Swiss Federal Supreme Court to run the proceedings and issue its judgment in English. Thus, if submissions are filed in English, the Swiss Federal Supreme Court will choose an official language to render its decision. De lege ferenda, it would be useful to provide that the proceedings may be conducted in English before the Swiss Federal Supreme Court, to strengthen Switzerland as leading place of international arbitration. Such legal framework already exists in specific fields, such as proceedings before the Federal Patent Court, before which the proceedings may be conducted in English with the Court and the «Parties» consent (being noted that the judgment shall be rendered, in any event, in an official language).*][11]

4. Decision of the Swiss Federal Supreme Court 4A_564/2021 of 2 May 2022

[77] **Request for a public hearing.** The President of the Division of the Swiss Federal Supreme Court may order an oral hearing in accordance with Article 57 FSCA. In the present case, the appellants invoked Article 30(3) Swiss Constitution, Article 6(1) ECHR and Article 14 of UN Covenant II. The application for a hearing before the Swiss Federal Supreme Court was dismissed because the appellants did not establish sufficient reasons for which, exceptionally, a mandatory public hearing should be held in accordance with overriding law. Indeed, the application to set aside an arbitration award was limited to highly technical legal issues that did not involve an examination of the facts and could be assessed without any public hearing even in cases were the ECHR is applicable. The requirements for an oral deliberation of the judgment pursuant to Article 58(1) FSCA are also not met, which is why a decision could be taken by way of circulation (Article 58(2) FSCA).

4A_346/2020 of 6 January 2021, para. 24; 4A_476/2020 of 5 January 2021, para. 1; 4A_124/2020 of 13 November 2020, para. 1; 4A_93/2020 of 18 June 2020, para. 1; 4A_418/2019 of 18 May 2020, para. 1; 4A_65/2018 of 11 December 2018, para. 1; 4A_491/2017 of 24 May 2018, para. 1.

10 *See also* Swiss Federal Supreme Court decision 4A_300/2021 of 11 November 2021, para. 1.

11 *See* Article 36(3) of the Federal Act on the Federal Patent Court («**Patent Court Act**», «**PatCA**»); RS 173.41.

5. Decision of the Swiss Federal Supreme Court ATF 147 III 500 (4A_612/2020 of 18 June 2021)

[78] **Requirement to exhaust prior remedies.** The requirement of exhausting prior remedies is based on the principle, which has been repeatedly reminded, to ensure that the Swiss Federal Supreme Court is presented with a given case only once, with exceptions made in the case law. This approach has also been embraced by the CAS, as evident in Article R47(1) CAS Code, which requires the appellant to exhaust all available legal remedies before initiating an appeal before the CAS. Although the explicit mention of the requirement to exhaust arbitral remedies is absent in Article 77 FSCA or Article 190 PILA, this omission does not serve as a sufficient ground to exclude the application of said requirement in the context of an appeal against an international arbitral award. Nothing prevents the application of Article 75(1) FSCA by analogy, a provision that is not among those excluded by Article 77(2) FSCA, serving as the legal basis for the requirement of exhausting the arbitral proceedings before the Swiss Federal Supreme Court.

6. Decision of the Swiss Federal Supreme Court 4A_114/2018 of 14 August 2018

[79] **Admissible claims; requirement to state reasons**. Only the claims listed exhaustively in Article 190(2) PILA are admissible. Furthermore, the Swiss Federal Supreme Court only examines claims that are substantiated (Article 77(3) FSCA),[12] and the requirements in this respect correspond to those set out for claims concerning the violation of fundamental rights (cf. Article 106(2) FSCA). Grievances of a purely appellate nature are inadmissible.[13]

7. Decision of the Swiss Federal Supreme Court 4A_453/2021 of 2 December 2021

[80] **Duty to substantiate**. A set aside application against an arbitral award must comply with the requirement to state reasons as set out in Article 77(3) FSCA, in conjunction with Article 42(2) FSCA and the case law. This presupposes that the appellant discusses the reasons of the award and indicates precisely in what way it considers that the author of the award has infringed the law. This can only be done within the limits of the grievances listed in Article 190(2) PILA when the arbitration is international in nature. Furthermore, the grounds must be set forth in the set aside application, so that the appellant cannot request the Swiss Federal Supreme Court to refer to the allegations, evidence and offers of proof contained in the pleadings of the arbitration case file.[14] Similarly, the appellant cannot use the rejoinder to put forward arguments of fact or law

12 *See also* Swiss Federal Supreme Court decision 4A_290/2020 of 26 August 2020.

13 *See also* Swiss Federal Supreme Court decisions 4A_316/2022 of 29 August 2022, para. 3.1; 4A_20/2022 of 9 May 2022, para. 2.3; 4A_564/2021 of 2 May 2022, para. 3.2; 4A_616/2021 of 1 April 2022, para. 3; 4A_194/2022 of 30 August 2022, para. 3.3; 4A_460/2021 of 3 January 2022, para. 2.3; 4A_618/2020 of 2 June 2021, para. 3.1; 4A_27/2021 of 7 May 2021, para. 2.3; 4A_563/2020 of 25 November 2020, para. 2.3; 4A_93/2020 of 18 June 2020, para. 2.4; 4A_160/2020 of 30 April 2020, para. 3; 4A_80/2018 of 7 February 2020, para. 2.2; 4A_98/2018 of 17 January 2019, para. 3; 4A_438/2017 of 11 October 2018, para. 1.2.; 4A_583/2017 of 1 May 2018, para. 1.3; 4A_136/2018 of 30 April 2018; 4A_580/2017 of 4 April 2018, para. 1.2.

14 *See also* Swiss Federal Supreme Court decisions 4A_242/2022 of 8 September 2022, para. 3; 4A_54/2022 of 7 July 2022, para. 3.1; 4A_520/2021 of 4 March 2022, para. 4; 4A_542/2021 of 28 February 2022, para. 4.1; 4A_618/2020 of 2 June 2021, para. 3.1; 4A_187/2020 of 23 February 2021, para. 3.1; 4A_342/2019 of 6 January 2020, para. 2.3; 4A_234/2019 of 9 July 2019. In domestic arbitration *see* Swiss Federal Supreme Court decisions 4A_348/2020 of 4 January 2021, para. 2.2; 5A_163/2018 of 3 September 2018, para. 2; 4A_450/2017 of 12 March 2018, para. 2.2.

that were not presented in time, i.e. before the expiry of the non-extendable time limit to appeal (Article 100(1) FSCA, in conjunction with Article 47(1) FSCA), or to supplement an insufficient substantiation of the grievances beyond the time limit to appeal.[15]

8. Decision of the Swiss Federal Supreme Court 4A_80/2018 of 7 February 2020

[81] **Duty to substantiate; reference to a legal opinion.** The grounds must be set forth in the set aside application alone, so that the appellant cannot request the Swiss Federal Supreme Court to refer to the allegations, evidence and offers of proof contained in the submissions of the arbitration file. While a bulk reference to an entire legal opinion extending over 40 pages is not admissible, it could be different if, while explaining its grounds, reference is made to specific paragraphs of such an opinion, drafted in support of the set aside application and positioning itself in relation to the contested decision.

9. Decision of the Swiss Federal Supreme Court 4A_564/2021 of 2 May 2022

[82] **Duty to substantiate; grounds based on the ECHR.** According to the settled case law of the Swiss Federal Supreme Court, it cannot be directly asserted in an appeal against an arbitral award that the arbitral tribunal violated the ECHR. However, the principles flowing from Article 6 ECHR can, if necessary, be used to specify the guarantees that can be invoked under Article 190(2) PILA. In view of the strict requirements regarding the duty to substantiate (Article 77(3) FSCA), the application must specifically show in what way the alleged violation of the Convention would constitute a disregard of the procedural guarantees of Article 190(2) PILA.

10. Decision of the Swiss Federal Supreme Court 4A_542/2021 of 28 February 2022

[83] **Principle of good faith, new argument raised before the Swiss Federal Supreme Court.** The duty to act in good faith applies to all participants in the proceedings. This general principle, which has been codified for ordinary civil proceedings (*see* Article 52 CPC), also governs arbitration proceedings, both in domestic and international arbitration. In the present case, the Court held that by complaining afterwards before the Swiss Federal Supreme Court about the excessive severity of the disciplinary sanction and by arguing that the Panel did not give sufficient reasons on this issue, the appellant was adopting a contradictory behaviour, incompatible with the rules of good faith (*venire contra factum proprium*), which does not deserve any protection. Indeed, the appellant did not formulate the slightest criticism in this respect before the CAS and even expressly acknowledged that the sanction was not disproportionate.

15 *See also* Swiss Federal Supreme Court decisions 4A_542/2021 of 28 February 2022, para. 4.1; 4A_618/2020 of 2 June 2021, para. 3.1; 4A_27/2021 of 7 May 2021, para. 2.4; 4A_35/2020 of 15 May 2020, para. 1.2; 4A_342/2019 of 6 January 2020, para. 2.3; 4A_628/2018 of 19 June 2019, para. 2.4; 4A_491/2017 of 24 May 2018, para. 3.1; 4A_170/2017 and 4A_194/2017 of 22 May 2018, para. 3.2; 4A_478/2017 of 2 May 2018, para. 2.2; 4A_247/2017 of 18 April 2018, para. 2.2; 4A_426/2017 of 17 April 2018, para. 3.2.3; 4A_580/2017 of 4 April 2018, para. 1.4; 4A_450/2017 of 12 March 2018, para. 2.2.

11. Decision of the Swiss Federal Supreme Court 4A_580/2017 of 4 April 2018

[84] **Cassatory nature of the appeal in civil matters.** 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, 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.[16]

12. Decision of the Swiss Federal Supreme Court 4A_560/2018 of 16 November 2018

[85] **Notion of interest worthy of protection, personal interest.** Under Article 76(1)(b) FSCA, the appellant must have a personal interest in bringing an action. According to the adage «*nul ne plaide par procureur*», it is not in principle permissible to bring an action in court by not asserting one's own interest, but the interest of another person.[17] In the present matter, the Swiss Federal Supreme Court found that FIFA did not have an interest worthy of protection in appealing against a CAS award on the grounds that the player concerned would have been punished more than it considered justified.

[86] [*This decision was issued in the Paolo Guerrero case. If one follows the reasoning of the Swiss Federal Supreme Court, the consequence would be that the WADA is also not entitled to appeal to the Swiss Federal Supreme Court against CAS awards in doping cases under the World Anti-Doping Code. It should be noted, however, that the Swiss Federal Supreme Court, in its decision 4A_692/2016 of 20 April 2017, considered that the WADA had an interest worthy of protection to appeal against a CAS Termination Order. Since it had taken part in the CAS proceedings, the Swiss Federal Supreme Court found that the WADA was particularly affected by the contested decision, as it resulted in the CAS Panel's refusal to act on its appeal. In case 4A_560/2018, FIFA also complained of a violation of its right to be heard. It is therefore questionable whether, in this respect, it did not also have an interest worthy of protection in challenging the contested award, as the reasoning in case 4A_692/2016 applies* mutatis mutandis *in this respect*.]

16 *See also* Swiss Federal Supreme Court decisions 4A_194/2022 of 30 August 2022, para. 3.2; 4A_564/2021 of 2 May 2022, para. 3.2; 4A_462/2021 of 7 February 2022, para. 2.3; ATF 147 III 586 (4A_166/2021 of 22 September 2021), para 2.2; 4A_27/2021 of 7 May 2021, para. 2.1; 4A_438/2020 of 15 March 2021, para. 2; 4A_476/2020 of 5 January 2021, para. 2.2; 4A_528/2019 of 7 December 2020, para. 1.1; 4A_563/2020 of 25 November 2020, para. 2.1; 4A_124/2020 of 13 November 2020, para. 2.1; 4A_461/2019 of 2 November 2020, para. 2.2; 4A_80/2018 of 7 February 2020, para. 2.1; 4A_342/2019 of 6 January 2020, para. 2.1; 4A_54/2019 of 11 April 2019, para. 2.2; 4A_583/2017 of 1 May 2018, para. 1.4; 4A_398/2017 of 16 October 2018, para. 3.3 [intended for publication]; 4A_398/2017 of 16 October 2018, para. 3; 4A_65/2018 of 11 December 2018, para. 2.1. *See also* in domestic arbitration: Swiss Federal Supreme Court decision 5A_163/2018 of 3 September 2018, para. 1.2: this decision states that a conclusion aimed at annulling a decision of the association concerned to exclude the appellant (member) concerned is inadmissible; it would have been necessary to conclude to the annulment of the contested award (confirming the associative decision to exclude).

17 *See also* Swiss Federal Supreme Court decisions 4A_248/2019 and 4A_398/2019 of 25 August 2020, para. 4.1.1 (not reported in ATF 147 III 49), in which the Swiss Federal Supreme Court held that the situation differed from the decision 4A_560/2018 of 16 November 2018 above.

13. Decision of the Swiss Federal Supreme Court 4A_284/2021 of 4 August 2021

[87] **Notion of interest worthy of protection, actual and practical interest.** A set aside application may only be heard if the appellant is particularly affected by the contested decision and has an interest worthy of protection in its annulment or amendment (Article 76(1)(b) FSCA). This must be a current and practical interest in legal protection.[18] This interest must be current and practical not only at the time the appeal is filed, but also at the time the judgment is rendered.[19] If it is already lacking when the appeal is filed, the Swiss Federal Supreme Court will not hear the appeal. If, however, the interest worthy of protection ceases to exist in the course of the proceedings, the appeal becomes moot pursuant to Article 71 FSCA in conjunction with Article 72 FSCA. The requirement of a current interest is waived exceptionally when the dispute on which the contested decision is based is likely to recur at any time in the same or similar circumstances, when its nature does not allow it to be decided before it loses its topicality, and when, because of its scope in principle, there is a sufficiently important public interest in the resolution of the disputed question.[20]

14. Decision of the Swiss Federal Supreme Court 4A_478/2020 of 29 December 2020

[88] **Interest worthy of protection regarding ongoing sports competition**. The reinstatement of the claimant in an ongoing sports competition (*in casu* the Champions League) that began several months ago seems rather theoretical, if not impossible. It seems very doubtful that the CAS, if the appeal was upheld, would be able to rule before the end of said competition. It should also be noted that the appellant, who received the contested decision on 31 July 2020 at the earliest, did not consider it useful to request the stay of the CAS award or any provisional measures aimed at enabling the Club to take part in the second qualifying round of the Champions League, which took place on 25 and 26 August 2020, thus accepting the fact that the CAS could not rule before the date on which the appellant should, in principle, have participated in the competition. Furthermore, the appellant's intention to bring an action for damages against the respondent at a later stage, should its exclusion prove to be unjustified and should it not be able to re-enter the current competition, does not in itself constitute an interest worthy of protection. In these circumstances, the admissibility of the set aside application appears questionable. In any case, the Swiss Federal Supreme Court left this question open as it dismissed the application on the merits.

15. Decision of the Swiss Federal Supreme Court 4A_548/2019 of 29 April 2020

[89] **Interest worthy of protection, financial and disciplinary sanctions.** It is true that, according to the case law of the Swiss Federal Supreme Court, there is in principle no interest worthy of protection in the review of an arbitral award in which a decision has been taken on the non-admission of an athlete or a sports team to a competition that has already been played in the

18 *See also* Swiss Federal Supreme Court decisions 4A_248/2019 and 4A_398/2019 of 25 August 2020, para. 4.1.1; 4A_560/2018 of 16 November 2018, para. 2.1 (not reported in ATF 147 III 49).

19 *See also* Swiss Federal Supreme Court decision 4A_312/2022 of 13 September 2022, para. 3.2.

20 *See also* Swiss Federal Supreme Court decisions 4A_478/2020 of 29 December 2020, para. 3.1; 4A_56/2018 of 30 January 2019, para. 4; 4A_426/2017 of 17 April 2018, para. 3.1.

meantime. The situation is different if and insofar as the arbitral awards at issue confirm financial and (other) disciplinary sanctions, the effects of which are still ongoing.

16. Decision of the Swiss Federal Supreme Court 4A_618/2020 of 2 June 2021

[90] **Power of review in respect of a CAS award**. It must be emphasised that the Swiss Federal Supreme Court cannot be equated with a court of appeal which would oversee the CAS and would freely verify the validity of international arbitration awards made by that judicial body. In this regard, one should remember that the appellant was able to submit this dispute in advance to the CAS, which is not only an independent and impartial court with full power of review of the facts and the law, but also a specialised court.[21]

17. Decision of the Swiss Federal Supreme Court 4A_580/2017 of 4 April 2018

[91] **Power of review; facts.** The Swiss Federal Supreme Court rules based on the facts found in the award (*see* Article 105(1) FSCA). The arbitral tribunal's findings on the procedural history of the proceedings are binding on the Swiss Federal Supreme Court, subject to the same reservations, whether they relate to the «parties'» submissions, the facts alleged or the legal grounds given by the parties, the oral statements made during the proceedings, the requests for evidence, and even the content of a witness statement or expert opinion, or information gathered during an ocular inspection.[22]

[92] The Swiss Federal Supreme Court 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 have been established by the evidence in the arbitration file.[23] However, the Swiss Federal Supreme Court retains the right to review the facts underlying the challenged award if one of the objections mentioned in Article 190(2) PILA is raised against said facts or if new facts or evidence are exceptionally taken into consideration in the course of the appeal proceedings in civil matters.[24]

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21 *See also* Swiss Federal Supreme Court decision ATF 147 III 49, para. 5.2 not published.

22 *See also* Swiss Federal Supreme Court decisions 4A_462/2021 of 7 February 2022, para. 2.4; ATF 147 III 586 (4A_166/2021 of 22 September 2021), para. 2.4; 4A_187/2020 of 23 February 2021, para. 3.2; 4A_461/2019 of 2 November 2020, para. 2.4; 4A_156/2020 of 1 October 2020, para. 4; 4A_418/2019 of 18 May 2020, para. 2.5; 4A_74/2019 of 31 July 2019, para. 2.4; 4A_556/2018 of 5 March 2019, para. 3; 4A_578/2017 of 20 July 2018, para. 3.3.1.1; 4A_170/2017 and 4A_194/2017 of 22 May 2018, para. 3.3.

23 *See also* Swiss Federal Supreme Court decisions 4A_242/2022 of 8 September 2022, para. 3; 4A_462/2021 of 7 February 2022, para. 2.4; 4A_618/2020 of 2 June 2021, para. 3.1; 4A_418/2019 of 18 May 2020, para. 2.5; 4A_342/2019 of 6 January 2020, para. 2.4; 4A_301/2018 of 19 November 2018, para. 3.2.

24 *See also* Swiss Federal Supreme Court decisions 4A_242/2022 of 8 September 2022, para. 3; 4A_462/2021 of 7 February 2022, para. 2.4; 4A_460/2021 of 3 January 2022, para. 2.5; ATF 147 III 586 (4A_166/2021 of 22 September 2021), para. 2.4; 4A_246/2019 of 12 December 2019, para. 3.4; 4A_244/2019 of 12 December 2019, para. 3.4; 4A_556/2018 of 5 March 2019, para. 3; 4A_247/2017 of 18 April 2018, para. 2.2; 4A_583/2017 of 1 May 2018, para. 1.5; 4A_478/2017 of 2 May 2018, para. 2.2; 4A_170/2017 and 4A_194/2017 of 22 May 2018, para. 3.3; 4A_438/2017 of 11 October 2018, para. 1.2; 4A_398/2017 of 16 October 2018, paras. 3.3 and 4.1; 4A_398/2017 of 16 October, paras. 3.3 and 4.1. *See also* in domestic arbitration decisions of the Swiss Federal Supreme Court 4A_217/2022 of 6 July 2022, para. 2.2; 4A_600/2021 of 28 February 2022, para. 4.2; 4A_544/2021 of 6 January 2022, para 2.2; 4A_461/2021 of 27 October 2021, para. 1.4; 4A_95/2021 of 17 June 2021, para. 3.1; 4A_348/2020 of 4 January 2021, para. 2.3; 4A_35/2020 of 15 May 2020, para. 1.4; 4A_224/2019 of 11 November 2019, para. 1.3; 4A_338/2018 of 28 November 2018, para 1.3.

[93] A person who invokes an exception to the principle that the Swiss Federal Supreme Court is bound by the findings of fact of the arbitral tribunal and in so doing, requests a correction or completion of the state of facts must demonstrate, with reference to the documents in the case file, that he or she has alleged the relevant facts in the arbitral proceedings in accordance with the applicable procedural rules.[25]

18. Decision of the Swiss Federal Supreme Court 4A_478/2017 of 2 May 2018

[94] **Power of review; facts and new evidence.** It should be recalled that the Swiss Federal Supreme Court rules based on the facts established in the challenged 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). Therefore, its task, when dealing with a set aside application in civil matters against an international arbitration award, is not to rule with full cognition, as would an appeal court, but only to examine whether the admissible claims against the award are well-founded or not. Allowing the parties to allege facts other than those found by the arbitral tribunal, except in exceptional cases, would no longer be compatible with such a mission, even if these facts were established by evidence in the case file.[26] However, as was already the case under the previous Federal Judiciary Act, the Swiss Federal Supreme Court retains the power to review the facts underlying the challenged award if one of the claims mentioned in Article 190(2) of the PILA is raised against said facts or if new facts or means of proof are exceptionally taken into consideration.[27]

[95] Moreover, Article 77(2) FSCA does not preclude the application by analogy of Article 99(1) FSCA in set aside application against an arbitration award, i.e. new facts and new evidence are inadmissible.[28]

19. Decision of the Swiss Federal Supreme Court 4A_80/2018 of 7 February 2020

[96] **Admissibility of nova; legal opinion on foreign law.** Article 99(1) FSCA, which also applies to international arbitration (*see* Article 77(2) FSCA *a contrario*), prohibits in principle the submis-

25 *See also* Swiss Federal Supreme Court decisions 4A_462/2021 of 7 February 2022, para. 2.4; 4A_342/2019 of 6 January 2020, para. 2.4; 4A_583/2017 of 1 May 2018, para. 1.5; 4A_398/2017 of 16 October 2018, para. 3.3; 4A_398/2017 of 16 October 2018, para. 3.3.

26 *See also* Swiss Federal Supreme Court decisions 4A_106/2022 of 5 May 2022, para. 4.2; 4A_520/2021 of 4 March 2022, para. 4; 4A_453/2021 of 2 December 2021, para. 4; 4A_618/2020 of 2 June 2021, para. 3.3; 4A_27/2021 of 7 May 2021, para. 2.5; 4A_187/2020 of 23 February 2021, para. 3.2; 4A_464/2021 of 31 January 2022, para. 4.2; 4A_156/2020 of 1 October 2020, para. 4; 4A_494/2018 of 25 June 2019, para. 3.2; 4A_578/2017 of 20 July 2018, para. 3.3.1.1.

27 *See also* Swiss Federal Supreme Court decisions 4A_106/2022 of 5 May 2022, para. 4.2; 4A_520/2021 of 4 March 2022, para. 4; 4A_453/2021 of 2 December 2021, para. 4; 4A_618/2020 of 2 June 2021, para. 3.3; 4A_464/2021 of 31 January 2022, para. 4.2; 4A_494/2018 of 25 June 2019, para. 3.2; 4A_424/2018 of 29 January 2019, para. 4; 4A_65/2018 of 11 December 2018, para. 2.3; 4A_578/2017 of 20 July 2018, para. 3.3.1.1: when the Swiss Federal Supreme Court is seized with an appeal in civil matters concerning an award made in the context of an international arbitration, it rules on the basis of the facts found in the challenged award even when it is examining a grievance within the meaning of Article 190(2) PILA, in respect of which it has full power of review.

28 *See also* Swiss Federal Supreme Court decisions 4A_247/2017 of 18 April 2018, para. 2.2; 4A_491/2017 of 24 May 2018, para. 3.1.

sion of new facts and new evidence before the Swiss Federal Supreme Court. This prohibition of so-called *nova* refers to the facts of the case.[29]

[97] Accordingly, this provision does not prohibit new legal arguments. Thus, the production of a legal opinion, doctrinal excerpts or case law is in principle exempt from the prohibition of *nova*, insofar as these elements are intended to consolidate the appellant's legal arguments. However, they must be produced in due time, i.e. within the time limit to file the appeal.

[98] Various gradations and nuances are to be made. For example, expert opinions on foreign law, excerpts from doctrinal opinion or decisions of foreign judicial authorities may be, at least partially, qualified as evidence, insofar as the parties must contribute to the determination of the foreign law. Moreover, the production of decisions rendered after the challenged decision is issued is per se contrary to the premise underlying Article 99 FSCA, namely that the Court reviews the application of the law based on the situation prevailing at the time the contested decision was issued; the expression «precedents» characterising the weight that can be conferred by the case law, speaks for itself in this regard.

[99] In the field of international arbitration, for example, the Swiss Federal Supreme Court declared inadmissible a French court decision, an opinion of the Court of Justice of the European Union as well as a foreign act, noting that these elements subsequent to the date the contested award was issued were to be considered as inadmissible new documents, as were the allegations thereto. The same applies to the submission of an arbitral award issued after the contested award.

20. Decision of the Swiss Federal Supreme Court 4A_491/2017 of 24 May 2018

[100] **Challengeable act.** The set aside application referred to in Article 77(1)(a) FSCA in conjunction with Articles 190–192 PILA is only admissible against an arbitration award. The challengeable act may be a final award – which terminates the arbitration proceedings on substantive or procedural grounds –, a partial award – which deals with a quantitatively limited part of a disputed claim or with one of the various claims at issue, or which terminates the proceedings with regard to one part of the parties –, or even a preliminary or interlocutory award – which settles one or more preliminary substantive or procedural questions.[30] On the other hand, a simple procedural order that can be amended or revoked in the course of proceedings is not subject to a set aside application. What is decisive for the admissibility of the application is not the name of the decision issued, but its content.[31]

29 *See also* Swiss Federal Supreme Court decision ATF 147 III 586 (4A_166/2021 of 22 September 2021), para. 2.5.

30 *See also* Swiss Federal Supreme Court decisions 4A_198/2020 of 1 December 2020, para. 3.1; 4A_287/2019 of 6 January 2020, para. 3.1; 4A_583/2017 of 1 May 2018, para. 1.2.

31 *See also* Swiss Federal Supreme Court decisions 4A_198/2020 of 1 December 2020, para. 3.1; 4A_287/2019 of 6 January 2020, para. 3.1; 4A_413/2019 of 28 October 2019, para. 2.3; 4A_238/2018 of 12 September 2018, para. 2.2: in this case, the Swiss Federal Supreme Court held that the refusal of the arbitral body (in casu, the CAS) to deal with the case before it, due to the expiry of the time limit for bringing the case before it, constituted a final award that could be appealed, in the same way as the decision of a CAS Panel declaring an appeal inadmissible («*inadmissible*») on the same ground. It does not matter that the award is in the form of a letter from the CAS Deputy Secretary.

21. Decision of the Swiss Federal Supreme Court 4A_300/2020 of 24 July 2020

[101] **Challengeable act; partial award**. According to the case law, a decision is said to be partial when the judge makes a final decision on a part of what is claimed, which could have been judged independently of the other claims made. This independence thus implies that the settled claim could have been the subject of separate proceedings, and that the award under appeal definitively settles part of the dispute. The Swiss Federal Supreme Court provided certain clarifications concerning the notion of partial awards and the requirement of independence of claims. It emphasised that a partial award implies not only that it is possible to reach a decision on claims already settled independently of those not yet settled, but also that the outcome of the case still in dispute can be settled independently of the claims already settled.

22. Decision of the Swiss Federal Supreme Court 4A_146/2019 of 6 June 2019

[102] **Challengeable act; decision on the number of arbitrators.** According to the settled case law, a decision taken by a private body, such as the ICC or the ICAS, on a request to challenge an arbitrator, cannot be directly challenged before the Swiss Federal Supreme Court. It may nevertheless be reviewed in the context of a set aside application against the first challengeable award, on the grounds of the irregular composition of the arbitral tribunal.

[103] Similarly, the decision to appoint an arbitrator taken by a private body – based on the rules of an arbitration institution – does not constitute an award and is therefore not subject to direct challenge before the Swiss Federal Supreme Court.

[104] For example, in the decision 4A_282/2013 of 13 November 2013 [*para. 5.3.2 not published in ATF 139 III 511*], the Swiss Federal Supreme Court noted that the decision on the number of arbitrators issued by the President of the CAS Ordinary Arbitration Division is not akin to a mere procedural order that can be modied or revoked in the course of the proceedings. Indeed, this decision denitively settles a dispute about the composition of the Panel called upon to hear the case between the parties. Therefore, the decision could and even should have been immediately challenged before the Swiss Federal Supreme Court. Nevertheless, the Swiss Federal Supreme Court noted that decisions taken by the ICAS on recusal requests cannot be directly challenged before the Swiss Federal Supreme Court by way of a set aside application based on Article 190(2)(a) of the PILA. It noted that there might be some inconsistency in giving the possibility to challenge a decision to appoint an arbitrator taken during the proceedings by another organ of the arbitration institution.

[105] As another example, the Swiss Federal Supreme Court refers to another decision issued in domestic arbitration [*decision 4A_546/2016 of 27 January 2017, para. 1.3*]. In this decision, the Court held inadmissible the challenge filed against two letters from the Swiss Chamber's Arbitration Institution notifying the parties of the appointment of a sole arbitrator. In substance, it found that the appointment of an arbitrator by an administrative body, responsible for managing the arbitration proceedings, did not constitute a challengeable arbitral award, since it did not emanate from an arbitral tribunal within the meaning of Chapter 3 CPC, respectively Chapter 12 of the PILA. The Swiss Federal Supreme Court further recalled that it had in no way modied its case law according to which the appointment of an arbitrator by an arbitration institution is not subject to appeal.

[106] Accordingly, in the present case, the Court concluded that these principles apply *mutatis mutandis* in international arbitration and that the appointment of a sole arbitrator by the CAS

cannot be challenged directly before the Swiss Federal Supreme Court as it does not constitute an arbitral award. Therefore, the appointment of a sole arbitrator can only be reviewed in the context of an appeal against the first challengeable award issued by said arbitrator.

23. Decision of the Swiss Federal Supreme Court 4A_416/2020 of 4 November 2020

[107] **Challengeable act; termination order.** A «Termination Order» is not a mere procedural order that can be modified or revoked during the proceedings. In the present case, the CAS did not merely fix the course of the ongoing proceedings but, having determined that the appellant had not appointed an arbitrator within the applicable time limit, ordered the termination of the proceedings. This order is thus akin to a decision of inadmissibility which closes the case for a reason based on a rule of procedure. The fact that it was issued by the Deputy President and not by the Panel that moreover had not yet been constituted, did not prevent to characterise said decision as challengeable before the Swiss Federal Supreme Court in set aside proceedings.[32]

24. Decision of the Swiss Federal Supreme Court 4A_300/2018 of 22 August 2018

[108] **Challengeable act; waiver of notification of the reasons for the arbitral award.** The waiver of the notification of reasons for an arbitral award does not constitute a legal obstacle to the filing of a set aside application against that award; however, such a waiver does in fact significantly reduce the chances of success of the party intending to challenge the unmotivated award.[33]

25. Decision of the Swiss Federal Supreme Court 4A_300/2021 of 11 November 2021

[109] ***Dies a quo* deadline to file the set aside application; notification of the award by email; interpretation of R59(4) CAS Code.** Pursuant to Article 100(1) FSCA, a set aside application against an award must be filed before the Swiss Federal Supreme Court within 30 days of the notification of the complete copy of the decision. According to the Swiss Federal Supreme Court's settled case law, the notification of a «CAS» arbitral award by fax or email does not trigger the time limit pursuant to Article 100(1) FSCA.[34]

[110] Article R59(4) of the CAS Code has been amended in the 2019 version, which is the applicable version in the present case since it is in force as of 1 January 2019 [*see now also the 2021 version which is identical*]. The English version now reads: «*The award, notified by the CAS Court Office, shall be final and binding upon the parties subject to recourse available in certain circumstances pursuant to Swiss law within 30 days from the notification of the award by mail or courier.*» In the 2017 version, it was still stated: «[...] *within 30 days from the notification of the original award.*» Nevertheless, the wording «*mail*» does not mean «*e-mail*». This is already shown by the fact that in the CAS Code, when e-mail is mentioned, the term «*electronic mail*» (in the French version «*courrier électronique*») is used (see amongst others, R31 of the CAS Code). In the French version

32 *See also* Swiss Federal Supreme Court decision 4A_556/2018 of 5 March 2019, para. 2.2.

33 *See also* Swiss Federal Supreme Court decision 4A_298/2018 of 22 August 2018, para. 3.

34 *See also* Swiss Federal Supreme Court decisions 4A_98/2018 of 17 January 2019, para. 2.2; 4A_40/2018 of 26 September 2018, para. 2.2; 4A_238/2018 of 12 September 2018, para. 3.1.

of R59(4) of the CAS Code, the term «*notification de la sentence par courrier*» is used. The phrase «*mail or courier*» in the English version is probably also intended to cover private courier services. The amendment was not intended as a change from the practice described above. Even though the deletion of the word «*original*» («*original award*»; «*sentence originale*») may *prima facie* speak in favour of this, it must nevertheless be assumed that, quite on the contrary, the constant practice described above was to be specified in the CAS Code and that its purpose is to clarify that the time limit only begins to run upon delivery of the arbitral award by mail or private courier service («*mail or courier*» [English version] or «*courrier*» [French version]).

26. Decision of the Swiss Federal Supreme Court 4A_40/2018 of 26 September 2018

[111] ***Dies a quo* of the deadline to file the application; ICC award.** According to Article 100(1) FSCA, an appeal against a decision must be filed before the Swiss Federal Supreme Court within 30 days of the notification of the complete dispatch. The notification by e-mail of a copy of the original of the award does not trigger the time limit. This is only the case where the applicable procedural rules do not require the dispatch of the original of the award to the parties. Applying these principles in the present case, the Swiss Federal Supreme Court held as regards Article 34(1) ICC Rules of Arbitration (2012 version) that it is the date of notification of the original award by post or by a courier service (and not the prior sending of the award by e-mail as a courtesy) that triggers the time limit under Article 100(1) FSCA.[35]

27. Decision of the Swiss Federal Supreme Court 4A_277/2021 of 21 December 2021

[112] ***Dies a quo* of the deadline to file the application; Swiss Rules award.** The appellant states that the award was notified by e-mail on 1 April 2021 and that it had therefore complied with the time-limit to file its application before the Swiss Federal Supreme Court (Article 100(1) FSCA in conjunction with Article 46(1)(a) FSCA). The latter statement applies insofar as the time limit has begun to run. Indeed, according to Article 32(2), (4) and (6) of the Swiss Rules of International Arbitration applicable here, the notification of the original award, bearing the prescribed signatures, should be authentic, notwithstanding the general rule (Article 2(1) Swiss Rules) authorising notifications to the addressee's e-mail address. In the present case, it is not known whether an original copy of the award was served on the parties. If so, it would have to be assumed that such notification would at best be concomitant with the e-mail dated 1 April 2021. Therefore, the appellant would in any event have satisfied the time-limit to file the application.

28. Decision of the Swiss Federal Supreme Court 4A_194/2022 of 30 August 2022

[113] **Fiction of notification in case of unsuccessful attempt.** Since the appellant had to expect to be served with correspondence after filing the set aside application, the letter of 12 July 2022 (deadline for a possible reply by 27 July 2022) is deemed to have been notified on the seventh day after the first unsuccessful notification attempt (Article 44(2) FSCA; so-called fiction of service).

35 *See also* Swiss Federal Supreme Court decision 4A_264/2019 of 16 October 2019, para. 1.1.

Since the appellant did not file any reply within the set time limit (and thereafter), it must be assumed that it has waived its right to do so.[36]

29. Decision of the Swiss Federal Supreme Court 4A_106/2022 of 5 May 2022

[114] **Proof of filing**. A set aside application is presumed to have been filed on the date shown on the postmark. In case of doubt, proof of compliance with the time limit must be provided by the person claiming to have acted in time to the degree of certainty and not merely to the degree of preponderance of probability. This proof usually results from contemporaneous evidence (postmark, receipt for registered mail or acknowledgement of receipt in the case of filing during office hours); the date of the postage stamp or the bar code for letters with delivery justication printed by a private machine does not constitute proof that the item was delivered to the post office. However, other forms of proof are possible, in particular the certification of the date of posting by one or more witnesses mentioned on the envelope; the presence of signatures on the envelope is not, in itself, a means of proof of timely posting since the proof lies in the testimony of the signatory or signatories; it is therefore incumbent on the party concerned to offer this proof within a reasonable time limit indicating the identity and address of the witness or witnesses.

30. Decision of the Swiss Federal Supreme Court 4A_22/2021 of 24 March 2021

[115] **Electronic submission; electronic signature**. Submission before the Swiss Federal Supreme Court may only be filed in the form prescribed by law. A set aside application submitted electronically must be accompanied by the qualified electronic signature of the party or his representative in accordance with the Swiss Electronic Signature Act of 18 March 2016.[37] Other electronic submissions are not valid, as they do not contain an original signature. Therefore, a set aside application filed by a simple e-mail is not valid.[38]

31. Decision of the Swiss Federal Supreme Court 4A_444/2020 of 1 December 2020

[116] **Domicile; notice**. Parties in proceedings before the Swiss Federal Supreme Court who reside abroad must designate a domicile for service in Switzerland. Notices to parties who do not comply with this requirement may be omitted or made through an official gazette. It is clear from the wording of the provision of Article 39(3) FSCA in the German and Italian versions («*Auflage*»; «*incombenza*») that this is a legal obligation. In case of non-compliance with said obligation, notices to the party concerned may be omitted or published in an official gazette.

36 *See also* Swiss Federal Supreme Court decision 5A_771/2020 of 23 September 2020, para. 2.

37 RS 943.03.

38 *See also* Swiss Federal Supreme Court decision 4A_444/2020 of 1 December 2020.

32. Decision of the Swiss Federal Supreme Court 4A_200/2021 of 21 July 2021

[117] **Minimum amount in dispute**. Since the new Article 77(1) FSCA took effect on 1 January 2021, the requirement for a minimum amount in dispute no longer applies to awards that were rendered and communicated after that date.[39]

33. Decisions of the Swiss Federal Supreme Court 4A_248/2019, 4A_398/2019 of 25 August 2020 (not reported in ATF 147 III 49)

[118] **Opting out.** Confirmation of the requirements for the opting out as per Article 192(1) PILA, in the context of waiver clauses contained in sports regulations (*see* ATF 133 II 235, the so-called *Cañas* case).

34. Decision of the Swiss Federal Supreme Court 4A_7/2019 of 21 March 2019

[119] **Opting out; application of PILA**. According to Article 176(2) PILA, as it stood at the time the arbitration clause was concluded, Chapter 12 on international arbitration does not apply «*if the parties have excluded its application in writing and have agreed to apply exclusively the rules of cantonal arbitration procedure*». According to the established case law of the Swiss Federal Supreme Court, the validity of an exclusion agreement, under Article 176(2) PILA, presupposes the existence of a written agreement by which the parties agree not only to apply exclusively the rules of cantonal arbitration procedure, but also to exclude the application of Chapter 12 PILA. In particular, the case law requires a clear written statement excluding the provisions of federal law on international arbitration. This condition is not fulfilled when the parties have only declared that they agreed to apply cantonal law, even though it could be proven that they intended to apply cantonal law instead of federal law, since such proof would be incompatible with the desirable rigour of the rules on setting aside applications in arbitration. It is probably not possible to impose upon the parties the use of a standard form for this exclusion. The common intention to exclude the federal law, which can certainly be ascertained by interpretation, must nevertheless be clear from the terms used by the parties, so that legal certainty is ensured.

35. Decision of the Swiss Federal Supreme Court 4A_382/2021 of 24 September 2021

[120] **Valid waiver of the right to challenge award**. If none of the parties is domiciled, habitually resident or has its seat in Switzerland, they may, pursuant to Article 192(1) PILA, by a declaration in the arbitration agreement or in a subsequent agreement, exclude appeals against arbitral awards in whole or in part. According to the Swiss Federal Supreme Court's case law under the previous Article 192 PILA, the declaration must unequivocally show the «parties'» common intent to make use of the possibility of this provision to waive the right to challenge the international arbitral award. Whether this is the case must be determined by interpreting the specific arbitration agreement.

[121] In a previous decision, the Swiss Federal Supreme Court considered that the sentence «*neither party shall seek recourse to a law court nor other authorities to appeal for revision of this decision*»

39 *See also* in domestic arbitration Swiss Federal Supreme Court decision 4A_139/2021 of 2 December 2021, para. 1.1.

can only be understood in good faith as meaning that the parties intended to exclude any recourse to a state authority to review the issued arbitral award. This expression expresses a clear intent of the parties to exclude any appeal or legal remedy against the arbitral award («of this decision») to state authorities – and thus also the challenge pursuant to Article 190 PILA to the Swiss Federal Supreme Court. Despite the disparate use of different terms of appeal («recourse», «appeal», «revision»), this intent is not misleading but unambiguous. An explicit reference to Article 192(1) PILA is not a necessary condition for a valid waiver.

[122] In the present case, the appellant is unable to show any real intent deviating from the clear and unambiguous wording of the arbitration agreement. The fact that the arbitration clause did not give rise to any discussions during the contract negotiations does not suggest a different real intent. On the contrary, this suggests that the parties agreed on this point. This decision confirms that a waiver is valid if the parties unambiguously express their intent to exclude any legal recourse against the award, even when the language used does not correspond to the proper legal terms.

36. Decision of the Swiss Federal Supreme Court 4A_322/2020 of 8 December 2020

[123] **Failure to pay the advance on costs**. It is in the nature of a grace period that it cannot, in principle, be extended; or that a second grace period for the payment of the advance on costs is inadmissible and that such a grace period may only be considered if there are very special, unforeseeable reasons why the advance on costs could not be paid within the time limit, which must be set out in the application.

37. Decision of the Swiss Federal Supreme Court 4A_462/2018 of 4 July 2019

[124] **Case referred back to the arbitral tribunal**. Where the Swiss Federal Supreme Court remands a matter to a lower court, the point in dispute covered by the remand cannot be expanded or placed on a new legal footing. Rather, the court dealing with the re-adjudication must instead base its decision on the legal assessment on which the remand of the case was based. That assessment is likewise binding on the Swiss Federal Supreme Court. Because of this binding effect on the courts, they and the parties (apart from any permissible new matter) are barred from considering circumstances other than the previous ones in assessing the legal dispute or from examining the matter from a legal point of view that had been expressly rejected in the decision to remand the case or that had not even been considered at all. The fact that the courts are bound by the considerations contained in the decision to remand the case is a procedural principle applying to all decisions of the Swiss Federal Supreme Court to remand a case and applies likewise in the realm of arbitration.

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_520/2021 of 4 March 2022

[125] **Notion of independence and impartiality**; **IBA Guidelines; duty of curiosity**. An arbitrator must, like a state judge, offer sufficient guarantees of independence and impartiality. Failure to comply with this rule leads to an irregular appointment under Article 190(2)(a) PILA. To de-

termine whether an arbitrator presents such guarantees, reference must be made to the constitutional principles developed for state courts, considering, however, the specicities of arbitration – especially in the field of international arbitration – when examining the circumstances of the concrete case.[40]

[126] The guarantee of an independent and impartial court derived from Article 30(1) of the Swiss Constitution makes it possible to demand the recusal of a judge if her or his situation or conduct raises doubts about her or his impartiality. It is intended to prevent circumstances outside the case from inuencing the decision in favour of or to the detriment of a party. It does not only require the removal if actual bias on the part of the judge is established, since an internal bias can hardly be proven; it is sufficient that the circumstances give the appearance of bias and give rise to fears of biased activity on the part of the judge. However, only objectively established circumstances may be considered; purely individual impressions of one of the parties to the proceedings are not decisive.[41]

[127] To verify the independence of the sole arbitrator or of the members of an arbitral tribunal, reference may be made to the Guidelines on Conicts of Interest in International Arbitration issued by the International Bar Association (hereinafter: «**IBA Guidelines**»). These guidelines, which could be compared to the rules of conduct used to interpret and clarify the professional rules, do not of course have the force of law and the circumstances of the concrete case are always decisive; they are nevertheless a useful working instrument that can contribute to the harmonisation and unication of the standards applied in the field of international arbitration for the settlement of conflicts of interest, which instrument should inevitably have an impact on the practice of arbitral institutions and courts. The IBA Guidelines set out general principles. They also contain an enumeration, in the form of non-exhaustive lists, of specific circumstances: a red list, divided into two parts (situations in which there are reasonable doubts as to independence and impartiality, the most serious of which cannot be waived by the parties); an orange list (intermediate situations that must be disclosed but do not necessarily justify a challenge); a green list (specic situations which objectively do not give rise to a conict of interest and do not have to be disclosed by arbitrators). It goes without saying that, notwithstanding the existence of such lists, the circumstances of the concrete case will always remain decisive in deciding the question of conflict of interests.

[128] The party wishing to challenge an arbitrator must raise the ground for challenge as soon as it becomes aware of it. This rule concerns both the grounds for challenge that were known by the concerned party and those that party could have known had it paid due attention; being specified that choosing to remain in ignorance may be regarded, depending on the case, as abusive conduct comparable to the postponement of the announcement of a challenge application. The rule in question constitutes an application of the principle of good faith in the field of arbitration proceedings. According to this principle, the right to raise the objection of improper composition of the arbitral tribunal is forfeited if the party does not raise it promptly since the party may not withhold it in order to raise it only in the event of an unfavourable outcome of the arbitral

40 *See also* Swiss Federal Supreme Court decisions 4A_462/2021 of 7 February 2022, para. 3.1.1; 4A_404/2021 of 24 January 2022, para. 5.2; ATF 147 III 586 (4A_166/2021 of 22 September 2021), para. 3.1; ATF 147 III 379 (4A_332/2020 of 1 April 2021), para. 2.3.1; 4A_292/2019 of 16 October 2019, para. 3.1; 4A_284/2018 of 17 October 2018, para. 6.1.2.

41 *See also* Swiss Federal Supreme Court decision 4A_404/2021 of 24 January 2022, para. 5.2; ATF 147 III 379 (4A_332/2020 of 1 April 2021), para. 2.3.1; 4A_292/2019 of 16 October 2019, para. 3.1.

proceedings.[42] A request for revision based on the alleged bias of an arbitrator can thus only be considered in respect of a ground for challenge which the appellant could not have discovered during the arbitration by exercising the care required by the circumstances. Article R34(1) of the CAS Code gives concrete expression to this case law by stipulating that the challenge must be requested within seven days from the knowledge of the ground for challenge.

[129] Since the decision on the challenge of the arbitrator was made by the ICAS, which is a private body, this decision cannot be appealed directly before the Swiss Federal Supreme Court and it is not binding on the latter. The Swiss Federal Supreme Court is therefore free to review whether the underlying circumstances of the decision issued by the ICAS are suitable to substantiate the allegation of improper appointment of the CAS Panel.[43] This being the case, the Swiss Federal Supreme Court can decide to examine the claim of irregular composition of the CAS Panel solely based on the facts established in the decision issued by the ICAS.

[130] Case law imposes a duty of curiosity on the parties as to whether there are possible grounds for challenge that could influence the composition of the arbitral tribunal. A party cannot therefore be satisfied with the general declaration of independence made by each arbitrator but must rather make certain investigations to ensure that the arbitrator offers sufficient guarantees of independence and impartiality.

[131] With regard to the issue of the repeated appointments of the arbitrator, the Swiss Federal Supreme Court clarified the cases that may play a role in determining the independence of the arbitrator. Only cases in which the arbitrator was directly appointed by FIFA can be considered as multiple appointments that could raise doubts on the arbitrator's impartiality (in the case at hand the arbitrator, acting as President of the Panel was appointed by the CAS). It also implicitly accepted that consolidated proceedings count as a single appointment and acknowledged that the three times the arbitrator had been directly appointed by FIFA in the previous three years might at first sign appear problematic under Article 3.1.3 of the IBA Guidelines. However, the Swiss Supreme Court noted the specificities of CAS proceedings and the CAS closed list of arbitrators to justify that this number of appointments did not raise sufficient doubts in respect of the impartiality of the arbitrator noting on a side note that the arbitrator appointed by the appellant himself had already been appointed by the appellant in six cases in the previous three years.

2. Decision of the Swiss Federal Supreme Court 4A_462/2021 of 7 February 2022

[132] **«Arbitrators» independence; alleged bias; procedural errors and incorrect decision on the merits; president's change of law firm.** Pursuant to Article 30(1) Swiss Constitution and Article 6(1) ECHR, every person whose case must be judged in court proceedings is entitled to have her or his case judged by an independent and unbiased judge. The purpose is to guarantee that no extraneous circumstances beside the proceedings have an improper influence on the court's judgment in favour of or to the detriment of a party. Article 30(1) Swiss Constitution is intended to contribute to the transparency of the proceedings in the individual case, which is necessary for a correct and fair trial, and thus to enable a fair judgment.

42 *See also* Swiss Federal Supreme Court decisions ATF 147 III 586 (4A_166/2021 of 22 September 2021), para. 3.1; 4A_54/2019 of 11 April 2019, para. 3.1.

43 *See also* Swiss Federal Supreme Court decision 4A_287/2019 of 6 January 2020, para. 5.2.

[133] The guarantee of the constitutional judge is violated if, when viewed objectively, circumstances exist that can give rise to the appearance of bias or the risk of bias. Bias and partiality in this sense are assumed according to the case law if, in the individual case, based on all factual and procedural factors, circumstances appear which are capable of creating mistrust in the impartiality of the judge. In this context, the subjective perception of a party is not to be considered. Rather, the distrust in the impartiality must appear to be justified in an objective manner. It is sufficient if circumstances exist which, when viewed objectively, give rise to the appearance of bias and partiality. For a challenge, it is not required that the judge is biased.

[134] The Swiss Federal Supreme Court applies a strict standard when assessing an arbitrator's alleged bias. Procedural errors or an incorrect decision on the merits are not sufficient to establish the appearance of bias. The situation is different only if there are particularly blatant or repeated errors that constitute a serious breach of the judge's duties and indicate an intent to disadvantage a party to the proceedings. This last exception should not be generalised, otherwise the system of grounds of appeal against decisions in international arbitration would be completely overturned. It cannot be used to criticise factual findings or legal assessments in the challenged decision or to enable a party who cannot successfully invoke the grounds under Article 190(2)(b) to (e) PILA to obtain the annulment of a decision based on Article 190(2)(a) PILA.

[135] The Swiss Federal Supreme Court repeatedly dealt with cases in which a part-time judge (or arbitrator) was particularly connected to a litigant because of his full-time activity in a law firm. According to settled case law, a lawyer acting as a judge appears to be biased if there is an outstanding mandate with a party or if she or he has acted as a lawyer for a party on several occasions in the sense that there is some kind of permanent relationship between them. This applies irrespective of whether the mandate has a factual connection with the subject matter of the dispute to be adjudicated or not. According to case law, an appearance of bias also arises from the fact that not the part-time judge (or arbitrator) herself or himself, but another lawyer of his or her firm maintains a mandate with a litigant or has maintained it several times shortly before or in the sense of a permanent relationship. The client expects solidarity not only from her or his contact person within the law firm, but from the firm itself. This uniform approach is also in line with the law governing the legal profession, which treats all lawyers in a law firm community as one lawyer in the event of a conflict of interest. Bias or appearance of bias can also exist if, due to the circumstances, the impression arises that an arbitrator, regarding her or his future work, could favour a party that is an important (long-term) client («key client») of the new law firm or is closely connected to such a client and from which she or he can profit in the future.[44]

[136] The Swiss Federal Supreme Court confirmed that the duty of independence applies until the conclusion of the proceedings («*le moment où la sentence finale est rendue*»; «*Abschluss des Verfahrens*»). In the present case, the Court denied bias and held that with their first (invalid) signature, the arbitrators had confirmed that they considered the deliberations to be over. The subsequent disputes only concerned a procedural problem which had had no influence on the decision. The appellant could not derive anything from this award. On the contrary, the award clearly showed that even if there was a temporal gap between the drafting of the award and the notification thereof, the only decisive factor was whether an influence on the award was still possible.

44 *See also* Swiss Federal Supreme Court decision 4A_404/2021 of 24 January 2022, para. 5.2.2.2.

[137] In the present case, the appellant argued that bias arose from the fact that the president failed to disclose that she had joined another law firm and that the group to which the other party was an affiliate was a key client of the new law firm. The Swiss Federal Supreme Court pointed out that in the present case, the president was entitled to assume that she did not have to disclose the agreed change of law firm only after the conclusion of the proceedings.

3. Decision of the Swiss Federal Supreme Court 4A_248/2019, 4A_398/2019 of 25 August 2020 (not reported in ATF 147 III 49)

[138] **Independence and impartiality of CAS; notion of forced arbitration**. While the applicant did not formally challenge the independence and impartiality of the Panel, the Swiss Federal Supreme Court confirmed in an *obiter dictum* the *Lazutina* ruling of 27 May 2003 (ATF 129 III 445), according to which the CAS is sufficiently independent so that the decisions issued by said arbitral institution must be characterised as genuine arbitral awards, which can be assimilated to state courts judgments. In this decision, the Swiss Federal Supreme Court further referred to the ECtHR's decisions in the *Mutu & Pechstein* case of 2 October 2018 (discussed above) and in the *Platini* case of 11 February 2020, according to which the CAS fulfils the legal requirements of Article 6(1) ECHR.

4. Decision of the Swiss Federal Supreme Court 4A_404/2021 of 24 January 2022

[139] **Rectification of a wrong designation of claimant (mere typo); unsuccessful challenge of arbitrator whose partner was honorary counsel of a State interested in the outcome of the arbitration**. As a matter of principle, inaccurate designation of a party should not be confused with lack of standing to sue or defend. The designation of a party that is vitiated by a purely formal inaccuracy may be rectified when there is no reasonable doubt in the minds of the judge and the parties as to its identity. However, if the defect in the designation of the parties is so serious that the identity of the parties remains entirely undetermined, or if the action is brought by a non-existent party, the claim must be declared inadmissible.

[140] In the present case, the ICC received a request for arbitration from «X._____ Inc/ C._____». In the contested decision, the arbitral tribunal explained that the slash separating «Inc.» and «C._____» had been used instead of the coordinator «and». The Swiss Federal Supreme Court held that the replacement of the disputed slash with the coordinator «and» is merely a permissible rectification of the designation of the parties, since, even in the eyes of the claimant, it was obvious that said slash was meaningless, since there was no known entity under that designation. In these circumstances, it cannot be considered that the claimant did not exist *prima facie* and that, therefore, no arbitral tribunal could be constituted *ab initio*.

[141] In respect of the recurring/lasting relationship between the arbitrator and a party, the Swiss Federal Supreme Court also held that neither the arbitrator nor his partner had carried out typical lawyer activities as defined by case law. The appellant did not provide any further information about the tasks or (financial) benefits received by said partner as an honorary consul. In general, it appears that the latter worked voluntarily, meaning without receiving a salary, but was entitled to reimbursement for expenses related to the conduct of this mission. The activity carried out and the interests involved were not thus comparable to those that come into play in the case of a true lawyer's mandate. Moreover, it was not the arbitrator who exercised this mission, but his partner,

who had already ceased his activities as an honorary consul at the time the arbitration proceedings were initiated. The Swiss Federal Supreme Court further noted that the State concerned was not a party to these proceedings. The appellant did refer to financial interests of said State, but without providing further details in this regard. Finally, the Swiss Federal Supreme Court stated that it was also important to note that the honorary consul mission is a private activity. Therefore, it held that, in the absence of other evidence to the contrary, it could be considered that the arbitrator was aware of it, which is why the fact that he did not mention this circumstance when accepting his mandate as an arbitrator could not be appreciated to his detriment and create an appearance of bias.

5. Decision of the Swiss Federal Supreme Court ATF 147 III 379 (4A_332/2020 of 1 April 2021)

[142] **Grounds under Article 190(2)(a) PILA; request for repetition of procedural acts following the resignation of an arbitrator and his/her replacement**. According to the case law of the Swiss Federal Supreme Court, the arbitral tribunal within the meaning of Article 190(2)(a) PILA can only be the one that rendered the challenged award. If an arbitrator is replaced during the proceedings, only the new arbitrator who issued an arbitral decision can be challenged through an appeal.

[143] In the present case, the appellants disregarded the scope of the remedy provided for under Article 190(2)(a) PILA as they argued that the resigned arbitrator was biased. They did not allege bias on the part of the newly appointed arbitrators; nor did they accuse the two arbitrators or the president of being partial. They also did not request recusal, but rather referral to the same arbitral tribunal. Furthermore, the mere fact that the new arbitral tribunal declined to repeat, in whole or in part, the procedure does not create an appearance of bias on the part of the arbitrators who rendered the challenged arbitral award.

[144] Contrary to what the appellants seem to believe, a claim that the new arbitral tribunal should have repeated certain procedural acts due to the alleged partiality of the resigning arbitrator is not covered by Article 190(2)(a) PILA. The PILA does not provide any rules or principles regarding the determination of a possible repetition of procedural acts in the event of an arbitrator's departure.

6. Decision of the Swiss Federal Supreme Court 4A_292/2019 of 16 October 2019

[145] **Unilateral contacts between an arbitrator and a party or party's counsel; IBA Guidelines.** Unilateral contacts between a party or party's counsel and an arbitrator are not prohibited in all cases. Thus, for example, it is customary and does not raise any objections in principle for a party or counsel to contact a potential arbitrator to ascertain her or his suitability and availability or to discuss appointment of a chairman of an arbitral tribunal.

[146] As to these issues, the following is listed in the so-called «Green List» – raising no concerns – of the IBA Guidelines on Conflicts of Interest: «*4.4 Contacts between the arbitrator and one of the parties. 4.4.1 The arbitrator has had an initial contact with a party, or an affiliate of a party (or their counsel) prior to appointment, if this contact is limited to the arbitrator's availability and qualifications to serve, or to the names of possible candidates for a chairperson, and did not address the merits or*

procedural aspects of the dispute, other than to provide the arbitrator with a basic understanding of the case».

[147] No. 8 of the IBA Guidelines on Party Representation in International Arbitration provides as follows: «*It is not improper for a Party Representative to have Ex-Parte Communications in the following circumstances: (a) A Party Representative may communicate with a prospective Party-Nominated Arbitrator to determine his or her expertise, experience, ability, availability, willingness and the existence of potential conflicts of interest. (b) A Party Representative may communicate with a prospective or appointed Party-Nominated Arbitrator for the purpose of the selection of the Presiding Arbitrator*.»

[148] The Swiss Federal Supreme Court pointed out that it is broadly accepted that – subject to agreements to the contrary – the two co-arbitrators may be in contact with the nominating parties with a view to selecting a chairman; however, unilateral contacts are generally not permitted after the appointment of the chairman. The fact that the time of appointment of the co-arbitrator is not decisive as to permissibility of communications with regard to selecting a chair, is also pointed out in No. 8 of the IBA Guidelines on Party Representation, which clearly distinguishes permissible unilateral contacts with a (future or previously appointed) arbitrator (b) with regard to selection of a chairperson from other permissible communications with a (future) co-arbitrator with regard to his own appointment (a). This view is also confirmed by Canon III/B.2 of the Code of Ethics for Arbitrators in Commercial Disputes of the American Arbitration Association dated 1 March 2004.

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

1. Decision of the Swiss Federal Supreme Court 4A_426/2017 of 17 April 2018

[149] **Final award**. If the arbitral tribunal, in considering the question of jurisdiction as a preliminary matter, declares that it lacks jurisdiction and consequently terminates the proceedings, it issues a final award (and not a preliminary or interlocutory award). Therefore, all the claims specified in Article 190(2) PILA are deemed admissible. However, it should be noted that the claim of arbitrariness is not pertinent to appeals in international arbitration.

2. Decision of the Swiss Federal Supreme Court 4A_300/2018 of 22 August 2018

[150] **Objection to jurisdiction; foreclosure; decision on jurisdiction.** The arbitral award may be challenged if the court has wrongly declared itself competent or incompetent (Article 190(2)(b) PILA). A plea of lack of jurisdiction must be raised prior to any defence on the merits (Article 186(2) PILA), otherwise the case will be time-barred. In general, the arbitral tribunal decides on its jurisdiction in a preliminary or interlocutory decision (Article 186(3) PILA). This last rule is not mandatory and absolute, and its violation is not subject to any sanction. The arbitral tribunal may depart from this rule if it considers that the plea of lack of jurisdiction is too closely related to the facts of the case to be decided separately from the merits.[45]

45 *See also* Swiss Federal Supreme Court decision 4A_298/2018 of 22 August 2018, para. 4.2.

3. Decision of the Swiss Federal Supreme Court 4A_198/2020 of 1 December 2020

[151] **Jurisdiction; preliminary or interlocutory decision.** According to Article 190(2) and (3) PILA, a final or partial award may be challenged based on all the grounds listed in Article 190(2) PILA. According to Article 190(3) PILA, however, a preliminary or interlocutory award may only be challenged before the Swiss Federal Supreme Court on the grounds of irregular composition (Article 190(2)(a) PILA) or lack of jurisdiction (Article 190(2)(b) PILA) of the arbitral tribunal.

4. Decision of the Swiss Federal Supreme Court 4A_136/2018 of 30 April 2018

[152] **Preliminary award; risk of foreclosure**. A preliminary award, by which the arbitral tribunal decides on its composition or jurisdiction, can – and must – be challenged directly before the Swiss Federal Supreme Court (Article 190(3) PILA), under risk of foreclosure; the claims relating to it cannot be raised in an appeal against the final award.[46]

5. Decision of the Swiss Federal Supreme Court 4A_187/2020 of 23 February 2021

[153] **Classification of a preliminary or interlocutory award; grounds.** When it rejects an objection of lack of jurisdiction in a separate award, the arbitral tribunal renders a preliminary or interlocutory award (Article 186(3) PILA), whatever name it may give to it. Under Article 190(3) PILA, this decision, which the parties must contest immediately, can only be challenged before the Swiss Federal Supreme Court 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 grounds mentioned under Article 190(2)(c) to (e) PILA may also be raised against preliminary or interlocutory decisions in accordance with Article 190(3) PILA, but only insofar as they are strictly limited to points directly concerning the composition or jurisdiction of the arbitral tribunal. In order to qualify the award, the name of the decision is irrelevant.

[154] In the present case, the Swiss Federal Supreme Court noted that while the applicant could perhaps have argued that the procedural order wrongly failed to address the matter of its new objection to jurisdiction in breach of 190(2)(b) PILA, as it was clearly a decision on jurisdiction, it should have been challenged within 30 days. The applicant was thus precluded from raising grievances related to the procedural order in these proceedings.

6. Decision of the Swiss Federal Supreme Court 4A_287/2019 of 6 January 2020

[155] **Objection to jurisdiction; preliminary or final award.** According to Article 186(2) PILA, the claim of lack of jurisdiction must be raised prior to any defence on the merits. This is an application of the principle of good faith, enshrined in Article 2(1) SCC, which applies to all fields of law, including civil procedure. In other words, the rule established in Article 186(2) PILA, as well as the more general rule set out in Article 6 PILA, means that the arbitral tribunal before which the respondent proceeds on the merits without reservation had jurisdiction for this reason alone. Accordingly, a person who enters into an adversarial arbitration proceeding on the merits without reservation («*vorbehaltlose Einlassung*»; «*sans réserve sur le fond*») recognises, by

46 *See also* Swiss Federal Supreme Court decision 4A_583/2017 of 1 May 2018, paras. 1.2 and 1.3.

this conclusive act, the jurisdiction of the arbitral tribunal and loses the right to challenge the jurisdiction of that tribunal.[47] However, the respondent may present alternatively its arguments on the merits in the event that the claim of lack of jurisdiction is not admitted without such conduct amounting to a tacit acceptance of the jurisdiction of the arbitral tribunal.

[156] Article 186(3) PILA provides that, as a rule, the arbitral tribunal shall decide on its jurisdiction by a preliminary or interlocutory decision. Although this provision expresses a rule, it is not mandatory and absolute, and its violation is not subject to any sanction. The arbitral tribunal will depart from this if it considers that the objection to jurisdiction is too closely connected to the facts of the case to be judged separately from the merits.

[157] If the arbitral tribunal, in considering the question of jurisdiction as a preliminary issue, declares that it does not have jurisdiction, thereby terminating the proceedings, it shall render a nal award. When it rejects a claim of lack of jurisdiction, by a separate award, it renders a preliminary or interlocutory decision (Article 186(3) PILA), irrespective of the name given to it. A preliminary or interlocutory award in which the arbitral tribunal does not directly decide on its jurisdiction but nevertheless implicitly and recognisably accepts it by the very fact of settling one or more preliminary procedural or substantive issues is to be equated with this. Under Article 190(3) PILA, this award, which the respondent must challenge immediately, can only be challenged before the Swiss Federal Supreme Court for improper composition (Article 190(2)(a) PILA) or lack of jurisdiction (Article 190(2)(b) PILA) of the arbitral tribunal. The claims referred to in Article 190(2)(c) to (e) PILA can also be raised against preliminary or interlocutory decisions in accordance with Article 190(3) PILA, but only insofar as they are strictly limited to points directly concerning the composition or jurisdiction of the arbitral tribunal. As for the mere procedural order that may be modied or revoked during the proceedings, it is not subject to appeal, unless there are exceptional circumstances.

[158] The common denominator of all these decisions, apart from the procedural order, 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 nal award or a preliminary or interlocutory award, the arbitral tribunal decides this question denitively, admitting or excluding its jurisdiction by an explicit decision or procedural conduct whose denitive character will be binding upon it as well as upon the parties. Such a character thus appears to be the common element of all such decisions, whatever their purpose and form. Consequently, as the Swiss Federal Supreme Court has already emphasised in relation to Article 92 FSCA, in the context of criminal proceedings, by requiring that a separate decision on international jurisdiction should decide the question denitively in order to be the subject of the appeal provided for by that provision, it is also not possible to appeal against a decision that only provisionally settles the issue of the jurisdiction of an international arbitral tribunal.

7. Decision of the Swiss Federal Supreme Court 4A_247/2017 of 18 April 2018

[159] **Suspension of proceedings in the event of *lis pendens*; Article 186(1bis) PILA.** The stay of proceedings in case of *lis pendens* is a jurisdictional rule, the violation of which falls under Article 190(2)(b) PILA. Consequently, the arbitral tribunal's procedural order, by which it (implicitly)

47 *See also* Swiss Federal Supreme Court decision 4A_618/2019 of 17 September 2020, para. 4.4.1.

refused to suspend the arbitration proceedings, had to be appealed immediately, under risk of foreclosure (cf. Article 190(3) PILA).

8. Decision of the Swiss Federal Supreme Court 4A_140/2022 of 22 August 2022

[160] **Preliminary or interlocutory award on jurisdiction; *lis pendens*.** In accordance with Article 186(3) PILA, the arbitral tribunal generally rules on its jurisdiction by means of a preliminary or interlocutory award. Although this provision expresses a rule, it is not mandatory and absolute, and failure to comply with it is not subject to any sanction. The arbitral tribunal will depart from this if it considers that the objection to jurisdiction is too closely related to the facts of the case to be judged separately from the merits. When it rejects a plea of lack of jurisdiction in a separate award, it renders a preliminary or interlocutory decision, whatever name it gives to it.

[161] According to Article 186(1bis) PILA, the arbitral tribunal shall decide on its jurisdiction without regard to an action on the same subject-matter already pending between the same parties before another state or arbitral tribunal, unless there are serious reasons to suspend the proceedings. According to Article 64(1)(a) CPC, *lis pendens* excludes that the same cause of action, opposing the same parties, can be brought before another authority. Violation of the rules on *lis pendens* can be invoked under Article 190(2)(b) PILA.

9. Decision of the Swiss Federal Supreme Court 4A_461/2019 of 2 November 2020

[162] **Jurisdiction, *lis pendens*, principle of res judicata.** Where an international arbitral tribunal with its seat in Switzerland constitutes the adjudicatory body of first instance, in other words, where the case was made *lis pendens* through the filing of an arbitration, then the arbitral tribunal is not required to take account of the existence of parallel litigation before the state courts or another arbitral tribunal (whether in Switzerland or abroad) from the standpoint of the *lis pendens* rules. As the adjudicatory body of first instance, the arbitral tribunal has priority. Because of the priority in time of the arbitration, the arbitral tribunal was not even required to have recourse to Article 186(1bis) PILA to establish its *Kompetenz-Kompetenz*.

[163] Under Article 27(2)(c) PILA a decision issued abroad will not be recognised in Switzerland if one party establishes that litigation between the same parties on the same subject matter was first initiated in Switzerland, even if the Swiss proceedings take longer than the foreign proceedings initiated subsequently.

10. Decision of the Swiss Federal Supreme Court 4A_272/2019 of 4 September 2019

[164] **Jurisdiction v. *res iudicata issue*.** The communication of the reasons for the decision to the parties, which took place more than eleven months after the decision was rendered, could not restart the time limit for appeal to the CAS. As the claimant had failed to obtain a reasoned decision, the parties were deemed to have excluded their right to appeal against the decision to the CAS. The CAS therefore rightly declared the appeal inadmissible. The case at issue has therefore nothing to do with the question of the CAS jurisdiction. In refusing to hear the appeal, the Panel did not declare itself incompetent *rationae materiae* or *personae*: it merely applied a procedural rule concerning the time limit for appeal. In fact, the present case raises the problem of *res iudicata*, which the claimant himself acknowledges since he points out that *res iudicata* is the cardinal

and decisive principle invoked by the Panel in the inadmissibility decision. According to the established case law, the issue of *res iudicata* is a matter of procedural public policy under Article 190(2)(e) PILA. Thus, the present application does not comply with the strict requirements of the statement of reasons since the claimant wrongly alleges a violation of Article 190(2)(b) PILA. It is not for the Court itself to look for legal arguments in the challenged award that could justify the admission of the application and which the appellant has not raised (Article 77(3) FSCA).

11. Decision of the Swiss Federal Supreme Court 4A_583/2017 of 1 May 2018

[165] **Jurisdiction; review power of the Swiss Federal Supreme Court.** The Swiss Federal Supreme Court is free to examine the legal issues, including preliminary issues, which determine the jurisdiction or lack of jurisdiction of the arbitral tribunal.[48] However, it will review the facts on which the contested award was based – even if it concerns the question of jurisdiction – only when one of the objections mentioned in Article 190(2) PILA is raised against the facts or when new facts or evidence are exceptionally taken into consideration.[49] The other claims mentioned in Article 190(2) PILA may also be raised in an appeal in civil matters against a preliminary or interlocutory award on jurisdiction, provided that they are directly related to the question of the arbitral tribunal's jurisdiction.[50]

12. Decision of the Swiss Federal Supreme Court 4A_314/2017 of 28 May 2018

[166] **Jurisdiction; review power of the Swiss Federal Supreme Court.** The Swiss Federal Supreme Court is free to examine questions of law, including preliminary issues, which determine the jurisdiction or lack of jurisdiction of the arbitral tribunal. This does not make it a court of appeal. It is therefore not for the arbitral tribunal itself to look for legal arguments in the award that might justify the admission of the claim under Article 190(2)(b) PILA. Rather, it is up to the appellant to draw attention to them, in order to comply with the requirements of Article 77(3) FSCA.[51] Subject to this reservation, the Swiss Federal Supreme Court, in the context of its

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48 *See also* Swiss Federal Supreme Court decisions 4A_194/2022 of 30 August 2022, para. 4.1; 4A_64/2022 of 18 July 2022, para. 6.1; 4A_398/2021 of 20 May 2022, para. 5.1; 4A_355/2021 of 18 January 2022, para. 5.1; 4A_174/2021 of 19 July 2021, para. 5.1; 4A_27/2021 of 7 May 2021, para. 4.1; 4A_618/2019 of 17 September 2020, para. 4.1; 4A_268/2019 of 17 October 2019, para. 3.2; 4A_386/2018 of 27 September 2019, para. 4.1, 4A_394/2017 of 19 December 2018, para. 4.1; 4A_314/2017 of 28 May 2018, para. 2.1; 4A_398/2017 of 16 October 2018, para. 3.3; 4A_398/2017 of 16 October, para. 3.3: in these decisions, the Swiss Federal Supreme Court clarified that these principles also apply to international investment arbitrations, e.g. for the interpretation of the concepts of contract claims, treaty claims and umbrella clause under the Energy Charter Treaty of 17 December 1994, as well as the requirement of investment in bilateral investment treaties. *See also* Swiss Federal Supreme Court decision 4A_65/2018 of 11 December 2018, para. 2.4.1, which confirms this point and also mentions by way of illustration the concepts of direct or indirect investments/investors, pre-investments and essential security interests. The three rulings mentioned above (4A_398/2017; 4A_398/2017; 4A_65/2018) contain lengthy developments on these concepts.

49 *See also* Swiss Federal Supreme Court decisions 4A_194/2022 of 30 August 2022, para. 4.1; 4A_64/2022 of 18 July 2022, para. 6.1; 4A_20/2022 of 9 May 2022, para. 3.1; 4A_355/2021 of 18 January 2022, para. 5.1; 4A_174/2021 of 19 July 2021, para. 5.1; 4A_27/2021 of 7 May 2021, para. 4.1; 4A_618/2019 of 17 September 2020, para. 4.1; 4A_386/2018 of 27 September 2019, para. 4.1; 4A_170/2017 and 4A_194/2017 of 22 May 2018, paras. 3.3, 5.1; 4A_314/2017 of 28 May 2018, para. 2.1.

50 *See also* Swiss Federal Supreme Court decisions 4A_398/2017 of 16 October 2018, para. 3.3; 4A_398/2017 of 16 October 2018, para. 3.3; 4A_65/2018 of 11 December 2018, para. 2.1.

51 *See also* Swiss Federal Supreme Court decisions ATF 147 III 586 (4A_166/2021 of 22 September 2021), para. 4.1; 4A_174/2021 of 19 July 2021, para. 5.1.

free examination of all the legal aspects involved (*iura novit curia*), will be led, if necessary, to reject the claim 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 proviso, the arbitral tribunal may accept the 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 award under appeal.

13. Decision of the Swiss Federal Supreme Court 4A_80/2018 of 7 February 2020

[167] **Scope of review on grounds of lack of jurisdiction based on foreign law; investment arbitration.** When dealing with a claim of lack of jurisdiction under Article190(2)(b) PILA, the Swiss Federal Supreme Court freely examines the questions relating to the application of the law, including preliminary questions, which determine the arbitral tribunal's jurisdiction or lack thereof. Where appropriate, it also reviews the application of the relevant foreign law, also with full power of review. However, the Swiss Federal Supreme Court will follow the clear majority opinion expressed on the point (of foreign law) in question and, in the event of controversy between doctrine and case law, the Swiss Federal Supreme Court will follow the opinion issued by the supreme court of the country that enacted the applicable statutory rule.[52]

14. Decision of the Swiss Federal Supreme Court 4A_618/2019 of 17 September 2020

[168] **Jurisdiction; scope of review in case of default procedure; CAS**. Article 186(2) PILA is discretional as to the manner in which the plea of lack of jurisdiction may be exercised. The arbitration rules therefore provide for specific forms and time limits. Article R55(1) of the CAS Code requires that this exception be raised in the respondent's reply, which must be submitted to the CAS within twenty days of the notification of the grounds for the appeal.

[169] The legal situation is different when the respondent is in default. In this case, the arbitral tribunal must review its jurisdiction *proprio motu*, based on the information available to it, but without going beyond such information or conducting its own investigations. However, nothing prevents the arbitral tribunal from gathering certain additional information and conducting its own investigations with a view to clarifying the issue of jurisdiction.

15. Decision of the Swiss Federal Supreme Court ATF 147 III 586 (4A_166/2021 of 22 September 2021)

[170] **Jurisdiction; rescission of an arbitration agreement; legal aid.** It should be noted that free legal aid in domestic arbitration is explicitly excluded by virtue of Article 380 CPC. Considering this clear legislative provision, it is difficult to justify why the same principle should not apply in international arbitration. This rule is mandatory, meaning that the parties and the arbitral tribunal cannot arrange for free legal aid financed by the State to the detriment of the latter. The exclusion of state-provided free legal aid in arbitration proceedings does not prevent the parties or the relevant arbitral institution from finding alternative solutions to enable access to

52 *See also* Swiss Federal Supreme Court decisions 4A_64/2022 of 18 July 2022, para. 6.1; 4A_20/2022 of 9 May 2022, para. 3.3.4; 4A_636/2018 of 24 September 2019, para. 4.1.

arbitration for financially disadvantaged parties. These solutions may include financing of the arbitral proceedings by the arbitration institution, waiver of fees by the institution or the arbitral tribunal, or full or partial financing of costs by the opposing party in favour of the financially disadvantaged party. These measures ensure that parties lacking financial means can still access the agreed-upon arbitral tribunal. Therefore, the solution proposed in prevailing legal doctrine for the guarantee of legal recourse (Article 29a Swiss Constitution or Article 6(1) ECHR), which suggests terminating the arbitration agreement for just cause and filing the dispute before a state court while seeking free legal aid, is irrelevant. If an arbitral institution provides legal aid to indigent parties, it precludes dissolution of the arbitration agreement based on lack of financial means.

[171] For sports arbitration before the CAS, the ICAS has issued guidelines on legal aid based on the CAS Code. The Guidelines on Legal Aid before the CAS outline the requirements and scope of legal aid in Article 5 and subsequent provisions. Pursuant to Article 6 of these Guidelines, it is possible to waive the payment of an advance on costs and to conduct the arbitration proceedings free of charge in favour of an indigent applicant. Additionally, the indigent party has the right to select a *pro bono* legal representative, i.e. a voluntary and unpaid lawyer, from a list maintained by the CAS. The guidelines also provide for the provision of funds to cover travel and accommodation expenses for the applicant, witnesses, experts, interpreters, and the *pro bono* lawyer during oral proceedings before the CAS. With this regulation in place, even individuals without means are generally able to bring a case before the CAS. There was therefore no reason to allow the applicant to bring proceedings before a state court despite the conclusion of an arbitration agreement, in order to preserve the guarantee of legal remedies under Article 29a Swiss Constitution and Article 6(1) ECHR.

16. Decision of the Swiss Federal Supreme Court 4A_174/2021 of 19 July 2021

[172] **Jurisdiction; validity of an arbitration agreement; interpretation of an arbitration agreement**. The arbitrator has jurisdiction if the case is arbitrable under Article 177 PILA, the arbitration agreement is valid in form and substance under Article 178 PILA, and the case is covered by the agreement, all these conditions being indissociable. An arbitration agreement is an agreement by which two or more identified or identifiable parties agree to entrust an arbitral tribunal or a sole arbitrator, instead of the state court which would have jurisdiction, to render a binding award on an existing dispute(s) (arbitration agreement) or future dispute(s) (arbitration clause) arising out of a particular legal relationship. It is important that the will of the parties to exclude the ordinary competent state court jurisdiction in favour of the private jurisdiction of an arbitral tribunal is apparent. From a formal point of view, an arbitration agreement is valid if it is made in writing, telegram, telex, fax or any other means of communication which allows proof by text. In the draft bill submitted to the legislature, the Federal Council decided not to include the rule proposed in the draft bill according to which it would be sufficient when one of the parties complies with the formal requirement of Article 178(1) PILA.

[173] The case law under Article 178(1) former PILA thus remains valid.

[174] The special form prescribed by Article 178(1) PILA is intended to avoid any uncertainty as to the choice of the parties to opt for this type of private justice and any light-hearted renunciation of the natural judge and the means of appeal that exist in a state court procedure.

[175] According to the case law, a given behaviour can, depending on the circumstances, replace, under the rules of good faith, the observance of a formal requirement. Thus, the problem will very often shift from the issue of form to that of consent, which is a question on the merits within the meaning of Article 178(2) PILA.

[176] As to the substance, the arbitration agreement is valid, according to Article 178(2) PILA, if it meets the conditions of either the law chosen by the parties, or the law governing the subject matter of the dispute and in particular the law applicable to the main contract, or Swiss law. The above provision 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.

[177] Under Swiss law, the interpretation of an arbitration agreement is governed by the general rules of contract interpretation. Like a judge, the arbitrator or arbitral tribunal must first ascertain the real and common intention of the parties (cf. Article 18(1) CO), if necessary empirically, on the basis of indications, and not limited to any inaccurate expressions or designations they may have used. The content of the declarations of intent and the general context, i.e. all the circumstances that allow the «parties'» intentions to be ascertained, such as statements made prior to the conclusion of the contract, drafts of the contract, correspondence and even the «parties'» behaviour after the conclusion of the contract, constitute indications. This subjective interpretation is based on an assessment of the evidence. If it proves conclusive, the result, i.e. the finding of a common and real intention of the parties, is a matter of fact and is therefore binding on the Swiss Federal Supreme Court. If not, one must determine, in accordance with the principle of trust (*principe de la confiance*), the meaning that the parties could and should have given, in accordance with the rules of good faith, to their mutual expressions of intent in the light of all the circumstances.[53]

17. Decision of the Swiss Federal Supreme Court 4A_583/2017 of 1 May 2018

[178] **Jurisdiction; principles of interpretation of an arbitration agreement.** Under Swiss law, the interpretation of an arbitration agreement is governed by the general rules of contract interpretation. Like a judge, the arbitrator or arbitral tribunal will first seek to ascertain the real and common intention of the parties. If this cannot be established, it will then be necessary to seek, by 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 intent in the light of all the circumstances. In doing so, the court must consider what is appropriate, as it cannot be assumed that the parties intended an inappropriate solution. The meaning of an apparently clear text is not necessarily decisive, so that a purely literal interpretation is prohibited. Even if the content of a contractual clause appears clear at first sight, it may be the result of other conditions of the contract, the purpose of the parties or other circumstances so that the text of the clause does not exactly reflect the meaning of the agreement reached. In the case of a validly concluded arbitration agreement, there is no reason for a restrictive interpretation; on the contrary, it must be assumed that the parties intended to confer a broad jurisdiction on the arbitral tribunal. Arbitra-

53 *See also* Swiss Federal Supreme Court decision 4A_124/2020 of 13 November 2020, para. 3.1.

tion agreements relating to disputes arising out of a contract also cover disputes relating to the formation and termination of the contract.

18. Decision of the Swiss Federal Supreme Court 4A_418/2019 of 18 May 2020

[179] **Interpretation of an arbitration clause; subjective interpretation.** The interpretation of an arbitration agreement follows the generally applicable principles of interpretation governing private declarations of intent. What is thus decisive is, first of all, identifying the common and actual intent of the parties. This subjective interpretation is based on the assessment of the evidence which, as a general principle, is excluded from the scope of the Swiss Federal Supreme Court's review. Where no actual intent of the parties can be ascertained in respect of the arbitration agreement, the arbitration clause should be interpreted based on the principle of trust, i.e. the presumed intent of the parties should be determined as what could and should have been understood by the respective recipient of the declaration in good faith. If the result of judicial interpretation is that a valid arbitration agreement is present, then there will be no cause to interpret it restrictively; rather, the presumption will be that the parties desire to vest comprehensive jurisdiction in the arbitral tribunal.

[180] One cannot infer from the wording in Article 190(2)(b) PILA («the decision may only be challenged [...] if the Arbitral Tribunal has wrongly found that it has jurisdiction or that it lacks jurisdiction») that an arbitral award on jurisdiction could be freely reviewed in factual respect. The binding nature of the facts established by the contested decision on the Swiss Federal Supreme Court also arises in the context of an arbitration appeal under Article 105(1) FSCA, whereas the correction or supplementation of facts established in the arbitral proceedings, as provided in Article 105(2) FSCA, is excluded under Article 77(2) FSCA.

19. Decision of the Swiss Federal Supreme Court 4A_314/2017 of 28 May 2018

[181] **Jurisdiction; principles of interpretation of statutes (of a sports association and containing an arbitration clause).** When it comes to the interpretation of articles of association, the methods of interpretation may vary depending on the type of company under consideration. For the interpretation of the articles of association of large companies, the methods of interpretation of laws are preferred. For the interpretation of the articles of association of small companies, preference is given to methods of interpretation of contracts, such as objective interpretation according to the principle of trust. Applying this criterion of distinction, the Swiss Federal Supreme Court interpreted the statutes of major sports associations, such as UEFA, FIFA or IAAF, in the same way as statutory law, in particular their clauses relating to questions of jurisdiction. It did the same to establish the meaning of subordinated rules subject to the overriding statutes enacted by a major sports association.[54]

[54] *See also* Swiss Federal Supreme Court decision 4A_564/2020 of 7 June 2021, para. 6.4. In this case, the Swiss Federal Supreme Court did not decide which interpretation method should apply for the interpretation of the rules of the national federation concerned. Indeed, on the merits, the Panel argued in its award that it had decided to delve into the numerous internal provisions of the national federation at hand, its various bodies and procedures, in order to determine whether there was a right of appeal to the CAS, taking the risk of getting lost in an «enchanted forest». This formulation did not fail to provoke a reaction from the Swiss Federal Supreme Court, which held that the reasoning of the Panel was particularly puzzling and that the Panel should have stuck to its initial conclusion and refrained from going into this enchanted forest, but preferred to venture into it at the risk

20. Decision of the Swiss Federal Supreme Court 4A_564/2020 of 7 June 2021

[182] **Interpretation of articles of association; *in dubio contra proferentem; pro arbitrato*.** If a party challenges the jurisdiction of the CAS, it is not obliged to determine which authority would have jurisdiction over the CAS.

[183] The objection to the CAS's jurisdiction must be raised at the latest in the respondent's statement of defence, pursuant to Article R55 of the CAS Code. It is not possible to infer from a party's silence on a jurisdictional issue at the stage of provisional measures a possible tacit acceptance of the CAS jurisdiction. The mere fact of responding to a request for provisional measures cannot be equated with an unconditional acceptance to argue the merits of the case or a tacit acceptance of the CAS's jurisdiction. It is not even necessary to assert it in the context of a response to a request for provisional measures.

[184] When seized with the claim of lack of jurisdiction of the arbitral tribunal, the Swiss Federal Supreme Court freely reviews the legal issues without being bound by the legal considerations issued by the Panel regarding its jurisdiction.

[185] According to the principle *pro arbitrato*, if the interpretation of an arbitration agreement leads to the conclusion that the parties wanted to exclude the dispute from state jurisdiction and have it decided by an arbitral tribunal, but there are disagreements about the conduct of the arbitral proceedings, the principle of utility (*Utilitätsgedanke; principe de l'utilité*) must be applied, i.e. the pathological clause must be given a meaning that allows the arbitration agreement to be maintained. However, this principle was not applicable in the present case as there was no doubt that the applicable rules excluded any possibility of appeal to the CAS.

21. Decision of the Swiss Federal Supreme Court 4A_314/2017 of 28 May 2018

[186] **Validity of the arbitration clause (CAS) in sports matters (contained in the statutes of a sports association); arbitration clause by reference.** The arbitration agreement must be in the form prescribed by Article 178(1) PILA. Although it cannot completely disregard this requirement, the Swiss Federal Supreme Court nevertheless examines the consensual nature of recourse to arbitration in sports matters with «benevolence», with the aim of encouraging the swift settlement of disputes by specialised tribunals offering sufficient guarantees of independence and impartiality, such as the CAS. The liberalism that characterises its case law in this field is manifested in particular in the flexibility with which this case law deals with the problem of the arbitration clause by reference; it is also apparent in the jurisprudential principle according to which, depending on the circumstances, a given conduct may replace, by virtue of the rules of good faith, the observance of a formal requirement. In sum, it is generally considered that CAS arbitration clauses are inherent («*branchentypisch*») to sports matters. This means that there is practically no elite sport without consent to sports arbitration.

of getting lost. The Swiss Federal Supreme Court also took the opportunity to clarify that the principle of *in dubio contra proferentem* does not apply when it is invoked, not against the originator of the rule, in this case the national federation, but against the appealing club. In other words, according to the Swiss Federal Supreme Court, the Panel wrongly applied this principle to the appellant to impose an interpretation of the national federation rules and thus recognising the jurisdiction of the CAS.

22. Decision of the Swiss Federal Supreme Court 4A_27/2022 of 10 May 2022

[187] **Jurisdiction; cantonal court decision rejecting jurisdiction annulled; arbitration defence based on superseded arbitration agreement.** An arbitration agreement is an agreement by which two or more specific or identifiable parties agree to submit one or more existing or future disputes to binding arbitration in accordance with a directly or indirectly determined legal order, to the exclusion of the original state jurisdiction. The decisive factor is that the intent of the parties is expressed to have certain disputes bindingly decided by a private arbitral tribunal to the exclusion of state courts. Accordingly, the concurring actual intent of the parties is primarily decisive. This subjective interpretation is based on assessment of evidence, which is in principle not subject to review by the Swiss Federal Supreme Court. If the «parties'» intents regarding the arbitration agreement do not match, they must be interpreted in accordance with the principle of trust, i.e. the presumed intention must be determined as it could and should have been understood in good faith by the respective recipient of the declaration. When interpreting an arbitration agreement, its legal nature must be considered; in particular, it must be noted that the waiver of a state court severely restricts the legal remedies. According to case law, such a waiver cannot be assumed lightly, which is why a restrictive interpretation is required in case of doubt.[55]

[188] In the case at hand, the parties dispute whether there is a valid arbitration agreement that precludes the jurisdiction of state courts. The lower court did not find a concordant intention of the parties regarding the settlement of the dispute. Based on the findings of the lower court, the Swiss Federal Supreme Court found that the various agreements in force between the parties were not independent contractual instruments. Accordingly, the lower court could not disregard the jurisdiction clause in favour of the ordinary courts contained in the transfer agreement of 12 January 2017 by pointing out that the transfer agreement «does not contain any provisions that contradict the partner agreement – apart from the jurisdiction agreement». There was no indication whatsoever that the parties intended to divide the legal proceedings within the same contractual relationship depending on the contractual basis of the claim sued for, as the lower court assumed. In view of the chronological sequence, it seemed rather obvious in good faith that the presumed intention of the parties was to replace the arbitration clause contained in the partner contract with the jurisdiction clause agreed on later. Contrary to the contested decision, the Swiss Federal Supreme Court therefore found that there was no valid arbitration agreement. The appeal was upheld.

23. Decision of the Swiss Federal Supreme Court 4A_12/2019 of 17 April 2020

[189] **Jurisdiction; objective and subjective scope of the arbitration clause; determination of the parties to the arbitration agreement; standing to sue/standing to be sued; case of an assignment of a claim; third-party beneficiary**. In considering whether it has jurisdiction to decide the dispute submitted before it, the arbitral tribunal must examine, *inter alia*, the objective (*ratione materiae*) and subjective (*ratione personae*) scope of the arbitration agreement, i.e. it must determine which disputes are covered and which parties are bound by the arbitration clause.[56] A set aside application under Article 190(2)(b) PILA is possible when the arbitral tribunal ruled on

55 *See also* Swiss Federal Supreme Court decision 4A_460/2021 of 3 January 2022, para. 3.1.4.

56 *See also* Swiss Federal Supreme Court decision 4A_314/2017 of 28 May 2018, para. 2.2.2.

claims upon which it did not have jurisdiction, i.e. either because there was no arbitration agreement or because the agreement was limited to certain matters that did not involve the claims at issue («*extra potestatem*»).[57] Whether the claimant or respondent is a party to the arbitration agreement is a question of admissibility which determines the jurisdiction of the arbitral tribunal. It should be distinguished from the standing to sue or standing to be sued that belongs to the active or passive holder of the right invoked in court and which relates to the merits («substance») of the cause of action. In arbitration however, these two aspects may overlap. Since arbitrators, unlike judges, derive their jurisdiction solely from the agreement of the parties, to the extent that this procedural agreement is incorporated in a contract, they may have to share its fate. Thus, a valid assignment of a claim (or of a contractual relationship) with an arbitration clause has two effects: it entails not only the material transfer of the assigned right, but also that of the arbitration agreement. Such an act determines both the active or passive entitlement of the assignee and its capacity to participate in arbitration proceedings carried out by virtue of the arbitration clause; it has a double relevance.

[190] Determining whether a contract contains an obligation in favour of a third party and whether it is possible to make prayers for relief in favour of a third party based on a third-party beneficiary agreement or other grounds is a substantive question (pertaining to the merits). Arbitrators have jurisdiction to deal with this matter, provided that the parties to the arbitration are precisely the signatories of the contract in question and that the contract includes a clause stating that any dispute relating to the contract, respectively any claim relating to the contract or its breach, shall be submitted to arbitration. Similarly, where an arbitration clause covers disputes relating to the damages resulting from a breach of contract, it is irrelevant whether the creditor claims her/his own damages or those of a third party. In either case, her/his claims fall within the scope of the arbitration clause.

24. Decision of the Swiss Federal Supreme Court 4A_272/2019 of 4 September 2019

[191] **Notion of competence; *res iudicata*.** In refusing to hear the appeal, the Panel did not declare itself incompetent *rationae materiae* or *personae*: it merely applied a procedural rule concerning the time limit to file an appeal. In fact, the present case raises the issue of *res iudicata*. According to the Swiss Federal Supreme Court's settled case law, said issue falls under procedural public policy in accordance with Article 190(2)(e) PILA. Thus, in wrongly claiming a violation of Article 190(2)(b) PILA, the present appeal does not comply with the strict requirements of substantiation of the appeal. It is not up to the Swiss Federal Supreme Court to search in the challenged award itself for the legal arguments that could justify the granting of the set aside application which has not been raised by the applicant contrary to the requirements of Article 77(3) FSCA.

57 *See also* Swiss Federal Supreme Court decision, 4A_355/2021 of 18 January 2022, para. 5.2; 4A_413/2019 of 28 October 2019, para. 3.2, in this decision, the Swiss Federal Supreme Court specified that the question of whether a party is entitled to challenge the decision taken by the body of a sports federation on the basis of the applicable statutory rules and legal provisions does not concern the jurisdiction of the arbitral tribunal hearing the case, but the question of standing, i.e. a procedural issue to be resolved in accordance with the relevant rules, the application of which the Federal Supreme Court does not review when hearing an application to set aside an international arbitral award; 4A_394/2017 of 19 December 2018, para. 4.1.

25. Decision of the Swiss Federal Supreme Court 4A_355/2021 of 18 January 2022

[192] **Scope of jurisdiction of an arbitral tribunal; arbitral agreement; preliminary or interlocutory award and public policy.** An arbitral tribunal has jurisdiction, among other conditions, only if the dispute falls within the scope of the arbitration agreement and if it does not exceed the limits set by the request for arbitration and, where applicable, the terms of reference.[58] According to the case law, it is accepted that the scope of an arbitration agreement, inserted in a contract, covering any dispute relating to the contract, may extend to ancillary or subsidiary agreements, unless the latter contain a specific dispute resolution clause of different content.

[193] The admissibility of the claim of lack of jurisdiction insofar as it relates to the binding effect of the preliminary or interlocutory award on the arbitrators appears doubtful from the outset, since the disregard by an arbitral tribunal of the binding effect of a preliminary or interlocutory award on jurisdiction does not fall within the scope of the plea referred to in Article 190(2)(b) PILA, but within the scope of the violation of procedural public policy sanctioned by Article 190(2)(e) PILA.

26. Decision of the Swiss Federal Supreme Court 4A_268/2019 of 17 October 2019

[194] ***Ratione personae* jurisdiction of sports associations; challenge against a CAS award**. There is no reason to infer the standing of party of the sports association itself as a party to the appeal proceedings subsequent to the decision of the body in question from the fact that the judicial bodies of sports associations are not real courts and that their decisions are mere expressions of the will of the associations concerned. In the present case, the Swiss Federal Supreme Court held that the standing to be sued of the Algerian Football Federation could not be inferred from the simple fact that the (Algerian) National Dispute Resolution Chamber was called upon to rule on the dispute and in this context, pronounced the termination of the contractual relationship between the parties. The fact that the arbitration agreement is inserted in the Algerian Football Federation's articles of association does not mean that the Federation has the standing of a party in the proceedings between a player and his (former) club.

27. Decision of the Swiss Federal Supreme Court 4A_27/2021 of 7 May 2021

[195] **Jurisdiction of an arbitral tribunal *ratione temporis***. The procedural requirements, including the lawful composition and the jurisdiction of an arbitral tribunal, must (at the latest) be met when the arbitral award is issued. It is irrelevant whether an arbitral tribunal lacks jurisdiction over the original legal claims if they are subsequently adjusted by means of an amendment thereto.

28. Decision of the Swiss Federal Supreme Court 4A_406/2021 of 14 February 2022

[196] **Jurisdiction; late filing of the appeal to the CAS.** Compliance with the time-limit to file an appeal before the CAS is a condition of admissibility of the appellant's setting aside application, which does not relate to the jurisdiction of the arbitral tribunal. Consequently, the ground that

58 *See also* Swiss Federal Supreme Court decision 4A_394/2017 of 19 December 2018, para. 4.1.

the time limit for appealing to the CAS was not complied with does not fall within the scope of Article 190(2)(b) PILA. The appellant could therefore not immediately challenge the decision in question before the Swiss Federal Supreme Court before the issuance of the final award since he did not challenge either the composition of the arbitral tribunal nor its jurisdiction (Article 190(3) PILA).[59]

29. Decision of the Swiss Federal Supreme Court 4A_344/2021 and 4A_346/2021 of 13 January 2022

[197] **Association bodies are not arbitral tribunal; FIFA Committee**. According to the consistent case law of the Swiss Federal Supreme Court, decision-making bodies within associations are not arbitral tribunals. Their decisions are simple expressions of the will of the associations involved – and not acts of jurisdiction. This also applies to the FIFA Committee at issue here.

[198] Such decisions of organs of an association under Swiss law can be challenged – provided that the internal instances of the association have been exhausted – on the basis of Article 75 SCC, either before the competent state court or – if a corresponding arbitration agreement or arbitration clause exists – before an independent arbitral tribunal, such as the CAS. In this context, it can be argued before the Swiss Federal Supreme Court, based on Article 190(2)(b) PILA, that the arbitral tribunal (such as the CAS) has wrongly declared itself competent or lacking jurisdiction to hear such an action for annulment.

[199] In the case at hand, the appellant argued that the internal FIFA Committee was not competent to assess the dispute based on the FIFA Statutes. The Swiss Federal Supreme Court noted that the only complaint that could have been raised before it was that the arbitral tribunal (i.e. the CAS) had wrongly declared itself competent to assess the challenge based on Article 75 CC (Article 190(2)(b) PILA) and not the FIFA Committee. The Court can only review the content of the challenged decision under public policy aspects (Article 190(2)(e) PILA). However, the claimant does not assert a violation of fundamental legal principles. The set aside application was therefore dismissed.

30. Decision of the Swiss Federal Supreme Court 4A_64/2022 of 18 July 2022

[200] **Extension of an arbitral agreement to third parties**. According to the principle of relativity of contractual obligations, the arbitration agreement included in a contract is in principle only binding on the contracting parties. The formal requirement of Article 178(1) PILA applies only to the arbitration agreement itself, i.e. to the agreement by which the original parties have expressed their mutual and concordant will to compromise. However, it is a different question whether third parties fall within the scope of a formally valid agreement, even though they have not signed it and are not mentioned therein. In a number of cases, such as the assignment of a claim, the (simple or cumulative) assumption of debt or the transfer of a contractual relationship, the Swiss Federal Supreme Court has long accepted that an arbitration agreement can bind persons who have not signed it and who are not mentioned therein.

59 *See also* Swiss Federal Supreme Court decisions 4A_626/2020 of 15 March 2021, para. 3.2; 4A_198/2020 of 1 December 2020, para. 3.2.

[201] In addition, the third party who interferes in the performance of the contract containing the arbitration agreement is deemed to have acceded, by implied consent, to the arbitral agreement if her/his will to be a party thereto can be inferred from this interference.[60] This case law is based on the rules of good faith; it allows to infer from the conduct of a party the will to adhere to a contract which it has not signed and to submit to the arbitration clause contained therein; to this extent, circumstances after the conclusion of the arbitration agreement may be taken into account. However, such an intention cannot be accepted lightly. The case law notes that the particular nature of the arbitration agreement must be taken into account. The waiver of state justice implies in particular a significant restriction of remedies, which should not be easily accepted. In other words, the willingness to submit to arbitration must be clear and unequivocal.[61]

31. Decision of the Swiss Federal Supreme Court 4A_65/2018 of 11 December 2018

[202] **Jurisdiction; investment arbitration.** The Swiss Federal Supreme Court examined whether the compliance of a particular investment with the law of the host State related to the jurisdiction of the arbitral tribunal or to the merits of the claim. In the absence of evidence to the contrary, the compliance of the investment with the law of the host State to which the relevant BIT refers relates to the jurisdiction of the arbitral tribunal. Indeed, each of the contracting parties consented in advance to waive their right to proceed before the natural (state) courts and to be sued before a private tribunal only insofar as the forthcoming proceedings concerned an investment that was not unlawful.

32. Decision of the Swiss Federal Supreme Court 4A_398/2021 of 20 May 2022

[203] **Jurisdiction; investment arbitration**; **treaty shopping**. The Swiss Federal Supreme Court is free to examine questions of law, including preliminary issues, which determine the jurisdiction or lack of jurisdiction of the arbitral tribunal.

[204] The same applies when it is called upon to interpret the meaning of certain terms used in a BIT, it being specified that such an interpretation will be made, in such a case, in accordance with the rules of the Vienna Convention of 23 May 1969 on the Law of Treaties (RS 0.111).

[205] States have different ways of influencing the practice of treaty shopping. In particular, they can influence the definition of investor and investment and the criterion determining the nationality of the legal person; they can require a certain effective link with the national State, allow denial of the benefit of the protective treaty (denial of benefits clause) to an entity controlled by a national of a third State – or even of the host State – or impose requirements as to the origin of the funds invested.

[206] The absence of limitation clauses in an investment treaty does not mean, however, that practices aimed at abusing the protection of such a treaty should be tolerated by contracting states. Doctrine and arbitral tribunals thus see the abuse of rights (and its procedural component, the abuse of process) as a possible remedy against treaty shopping.

60 *See also* Swiss Federal Supreme Court 4A_124/2020 of 13 November 2020, para. 3.1.1.

61 *See also* Swiss Federal Supreme Court decision 4A_636/2018 of 24 September 2019, para. 4.5.3.

[207] The Swiss Federal Supreme Court has also emphasised that an investor may, depending on the circumstances, commit an abuse of rights, which constitutes a general principle recognised internationally and forming part of Swiss substantive public policy, by claiming the protection offered by an investment treaty.

[208] Investment arbitral tribunals regularly face the difficult exercise of drawing a line between legitimate nationality planning and treaty abuse in investment disputes.

[209] The borderline between the two processes is tenuous and there is necessarily a certain grey area. Several arbitral tribunals and many authors rightly recognise that it is not in itself abusive for an investor to (re)structure its investment in order to fulfil the conditions of an investment treaty and thereby obtain the benefit of the treaty, including to protect itself from possible future disputes with the host State. A restructuring carried out with the intention of benefiting from the protection of a treaty may, however, depending on the circumstances, constitute an abuse of the treaty when it is carried out at a time when the dispute with the State is foreseeable. In distinguishing between legitimate strategy and abusive practice on the part of an investor, arbitral case law attaches particular importance to the time factor. Thus, when the restructuring of an investment is carried out after the dispute between the parties has already arisen, the arbitral tribunal should in principle decline jurisdiction for lack of jurisdiction *ratione temporis*. If the restructuring is carried out with a view to a specific future dispute at a time when the dispute is foreseeable, the objection based on abuse of treaty may apply. However, several authors point to the relatively vague nature of the foreseeability test, which raises various legal questions, and deplore the fluctuating application of this test by the various arbitral tribunals that have had to rule on this issue. Arbitral tribunals vary in their assessment of the foreseeability of the dispute, sometimes requiring that the dispute be «foreseeable with a very high degree of probability and not merely a possible dispute», sometimes that it be «highly probable», and sometimes that it be «reasonably foreseeable» or that there be «a reasonable prospect that a Treaty Claim will materialise». Notwithstanding these disparities, several arbitral tribunals recognise, as do many authors, that the threshold for finding an abuse of a treaty is high, which is why it should not be accepted too easily.

[210] Even if it is aware of the important place that arbitral awards rendered in the field of international investment protection occupy in the specialised literature, the Swiss Supreme Federal Court will itself determine whether the restructuring of an investment must be qualified as abusive, taking into account, if necessary, the doctrine and drawing inspiration from the solutions reached by arbitral tribunals in this field, noting that the solutions given in certain arbitration cases are not binding on other arbitral tribunals or on the Swiss Supreme Federal Court, so that the arbitral case law cannot be considered as a source of arbitration law.

[211] The Swiss Supreme Federal Court has made it clear that the temporal factor is in principle decisive in drawing the line between legitimate planning to acquire nationality and treaty abuse. The protection of an investment treaty must thus in principle be denied to an investor when he carries out a nationality acquisition transaction at a time when «the dispute giving rise to the arbitration proceedings was foreseeable and this transaction must be regarded, according to the rules of good faith, as having been carried out with a view to that dispute». It follows that a restructuring must have been carried out with a view to a specific dispute at a time when its occurrence was foreseeable.

[212] In assessing the foreseeability of the dispute in the restructuring of the investment, it is not appropriate to focus on the perspective of the investor concerned. Since the abuse of rights is

intended to limit manoeuvres that objectively do not deserve protection, it is more appropriate to ask whether a specific dispute would have been foreseeable for a reasonable investor in the same situation as the investor concerned at the time of the restructuring of the investment.

[213] Since abuse of rights is an exceptional remedy, the criterion of the foreseeability of the dispute must be assessed restrictively. It is up to the party claiming the existence of an abuse of rights to allege and prove the facts to establish the foreseeability of the dispute when restructuring the investment.

[214] If this is proven, the reorganisation of the investment structure will be presumed to have been carried out with a view to the said dispute and will therefore be considered abusive. The investor concerned may, however, rebut this presumption by showing that the restructuring, which took place at a time when the dispute was foreseeable, was in fact undertaken primarily for reasons other than to benefit from the protection offered by an investment treaty.

[215] In the case at hand, there was no need to examine further whether the objection (*from the respondent*) based on the abuse of the treaty affected the jurisdiction of the arbitral tribunal or constituted a condition for the admissibility of the action which was not within the jurisdiction of the Swiss Federal Supreme Court.

[216] The issue of the foreseeability of the dispute at the time of the restructuring of the investment is not a question of fact but of law. However, this legal consideration is necessarily based on facts that must be apparent from the arbitral award.

D. Ultra and Infra Petita Award (Article 190 (2)(c) PILA)

1. Decision of the Swiss Federal Supreme Court 4A_314/2017 of 28 May 2018

[217] «***Ultra/extra petita»; «ne eat iudex ultra petita partium»***. Article 190(2)(c) PILA allows an award to be challenged, inter alia, where the arbitral tribunal has ruled beyond the claims before it. This provision applies to awards which award more or something other than what was requested (*ultra* or *extra petita*).[62] However, according to the case law, the arbitral tribunal does not go beyond the claims if it does not ultimately award more than the total amount claimed by the claimant, but assesses some of the elements of the claim differently than the claimant did, or if, having been seized of a legal claim that it considers unfounded, it notes the existence of the disputed legal relationship in the operative part of its award rather than dismissing that claim. Nor does the arbitral tribunal violate the principle *ne eat iudex ultra petita partium* if it gives a claim a different legal characterisation than that presented by the claimant. The principle *iura novit curia*, which is applicable to arbitral proceedings, requires arbitrators to apply the law *ex officio*, without limiting themselves to the reasons given by the parties. It is therefore open to the arbitral tribunal to accept pleas that have not been raised, since this is not a new or different claim, but only a new characterisation of the facts of the case. The arbitral tribunal is, however,

62 *See also* Swiss Federal Supreme Court decisions 4A_430/2020 of 10 February 2021 para. 6.1; 4A_341/2018 of 15 April 2019, para. 4.2.1; 4A_151/2018 of 1 February 2019, para. 3.3; 4A_98/2018 of 17 January 2019, para. 4.2: in this decision, the Court held that there is no *ultra petita* challenge possible if the award dismisses all claims; 4A_284/2018 of 17 October 2018, para. 3.1: this decision states that the award is *infra petita* when the arbitral tribunal has failed to rule on one of the heads of claim.

bound by the subject matter and the amount of the submissions made to it, in particular if the party concerned qualifies or limits its claims in the submissions themselves.[63]

2. Decision of the Swiss Federal Supreme Court 4A_294/2019 of 13 November 2019

[218] «***Ne eat iudex ultra petita partium*».** Pursuant to the jurisprudence of the Swiss Federal Supreme Court, there will be no violation of the principle of *ne eat iudex ultra petita partium* if the disputed claim is, in legal terms, merely analysed differently – wholly or in part – from the «parties'» arguments, provided that it is covered by the relief requested. However, the principle of *ne eat iudex ultra petita partium* will be found to have been violated where the arbitral tribunal has not only dismissed an action for a negative declaratory judgment but has also awarded the defendant party the disputed claim.[64] However, in another case, the Swiss Federal Supreme Court found that the grounds for appeal under Article 190(2)(c) PILA were lacking in a case in which the arbitral tribunal had not limited itself to merely rejecting the negative declaratory relief but had found that the disputed legal relationship existed.[65]

[219] In the present case, the claimant requested a declaratory decision with the following relief*: «The Tribunal shall declare Respondents, severally and jointly, liable to compensate Claimant for any and all damages incurred as a result of Respondents» contractual breaches resulting in Claimant's partial avoidance of the 4x4 Armored Tactical Vehicle Contract dated 25 January 2015, as «amended»*. Instead of ruling on this request for a declaratory judgment, the arbitral tribunal found the respondent – with joint and several liability – liable to pay damages totalling USD 1,605,521.37. The Swiss Federal Supreme Court found that the claimant rightly raised the grievance that instead of ruling on the declaratory judgment request, the arbitral tribunal had ruled on a request for payment that the claimant had never asserted in the arbitration. Hence, the grievance based on Article 190(2)(c) PILA was upheld.

3. Decision of the Swiss Federal Supreme Court 4A_284/2018 of 17 October 2018

[220] «***Ultra/extra petita*».** The mere fact that in the award under appeal the arbitral tribunal deviated from the wording of the pleadings or interpreted the pleadings on the basis of the relevant pleadings does not suffice to meet the requirements of Article 190(2)(c) PILA.

4. Decision of the Swiss Federal Supreme Court 4A_198/2020 of 1 December 2020

[221] «***Ne infra petita*».** According to Article 190(2)(c), second hypothesis of the PILA, the award may be challenged if the arbitral tribunal has failed to decide on one of the claims. The failure to decide is a formal denial of justice. The term «claim» («*chef de la demande*», «*Rechtsbegehren*», «*determinate conclusion*») refers to the claims or submissions of the parties. What is meant here is an incomplete award, i.e. one in which the arbitral tribunal has not ruled on one of the submis-

63 *See also* Swiss Federal Supreme Court decisions 4A_244/2020 of 16 December 2020, para. 5.1; 4A_294/2019 of 13 November 2019, para. 4.1; 4A_341/2018 of 15 April 2019, para. 3.2; 4A_284/2018 of 17 October 2018, para. 3.1; 4A_580/2017 of 4 April 2018, para. 2.1.1.

64 Swiss Federal Supreme Court decision 4P.20/1991 of 28 April 1991 para. 2b, not reported in ATF 118 II 193.

65 Swiss Federal Supreme Court decision ATF 120 II 172 para. 3a.

sions made to it by the parties.[66] The claim in question does not allow for the argument that the arbitral tribunal failed to decide an issue that is important for the resolution of the dispute.

[222] It is sufficient for the challenged award to reject «all other or further claims» («*toutes autres ou plus amples conclusions*») for the set aside application based on the *ne infra petita* ground to be rejected.

5. Decision of the Swiss Federal Supreme Court 4A_516/2020 of 8 April 2021

[223] «***Ultra vel extra petita partium*», claim awarded in an «unstable currency despite claimants» request.** Article 190(2)(c) PILA allows an award to be challenged «*where the arbitral tribunal has ruled beyond the claims before it*». This refers to decisions that award more («*ultra petita*») or something else («*extra petita*») than was requested. The private autonomy inherent in contract law means that the parties can freely dispose of the subject matter of the dispute. Article 190(2)(c) PILA protects this principle in an area that is strongly influenced by private autonomy.

[224] As long as Article 182(1) and 187(1) PILA allow the parties to choose both procedural and substantive law, and as long as one or the other authorises the arbitrator to rule *ultra vel extra petita partium*, such an authorisation must logically have effect. Moreover, Article 190(2) PILA is influenced by Article V(1) of the NYC, a provision which guarantees in its letter c) the principle *ne eat judex ultra petita partium*. However, commentators on this Convention require that the *lex arbitri* and the substantive law be examined to see whether the arbitrators were entitled to go beyond the scope of the «parties'» submissions.

[225] In application of Article 190(2)(c) PILA, the contours of the precept *ne eat judex ultra vel extra petita partium* are frequently traced with the help of case law relating to Swiss law. According to the practice concerning Article 84(2) SCO, the debtor of a debt expressed in foreign currency and payable in Switzerland may discharge himself either in the agreed currency or in Swiss currency. The court must order the payment in its decision in the agreed currency. Whether the court can order payment in the foreign currency owed even though the claimant has formulated his claims in Swiss francs, is a procedural question whose answer was previously left to the cantonal legislator. Henceforth, the maxim of disposition is anchored in Article 58 CPC and precludes the court from issuing a monetary decision in a currency other than the one dened by the claimant in its submission. Such an approach would be tantamount to granting an *aliud*. If a claim is brought before the court in the wrong currency, it has no other option than to dismiss it. In principle, the claimant can file a new claim by submitting claims in the «correct» currency, but this may prove time-consuming and costly. The doctrine points out that in banking cases involving sophisticated nancial products, it can be difficult to determine the «currency actually owed» and advocates a relaxation of the disposition maxim.

[226] In the case at hand, the Swiss Federal Supreme Court upheld an ICC award in which the arbitral tribunal had awarded Turkish investors compensation in Syrian lira («SYP») although the investors had requested relief in USD. The Swiss Federal Supreme Court admitted that payment in SYP was technically something «*other than what had been claimed*». However, it found that the appellant (investors) lacked a legitimate interest in having the award set aside, because they had

66 *See also* Swiss Federal Supreme Court decision 4A_462/2021 of 7 February 2022, para. 5.

not sufficiently demonstrated that they would obtain a more favourable decision if the award were set aside in application of Article 190(2)(c) PILA and the case remanded to the tribunal.

E. Equality of the Parties and Right to Be Heard (Article 190(2)(d) PILA)

1. Decision of the Swiss Federal Supreme Court 4A_247/2017 of 18 April 2018

[227] **Right to be heard; requirement to state reasons for the appeal.** The burden of proof lies with the allegedly aggrieved party to show, in its appeal against the award, how an oversight by the arbitrators prevented it from being heard on an important point. It is up to the aggrieved party to establish, first, that the arbitral tribunal failed to consider certain matters of fact, evidence or law which it had properly put forward in support of its submissions and, second, that these matters were of such a nature as to affect the outcome of the dispute.[67]

2. Decision of the Swiss Federal Supreme Court 4A_580/2017 of 4 April 2018

[228] **Right to be heard; no requirement to state reasons; minimum duty to examine the relevant issues.** The ground for appeal provided for in Article 190(2)(d) PILA sanctions the violation of the only mandatory procedural principles reserved by Article 182(3) PILA. In accordance with the latter provision, the arbitral tribunal must respect the «parties'» right to be heard. This right corresponds – with the exception of the requirement to state reasons – to the right guaranteed by Article 29(2) of the Swiss Constitution. According to the case law, it gives each party the right to present all its arguments of fact and law relevant to the outcome of the dispute, to present the necessary evidence, to participate in the hearings and to consult the file.[68]

[229] The right to be heard, as guaranteed by Article 182(3) and Article 190(2)(d) PILA, does not require that an international arbitral award be reasoned. However, case law has deduced a minimum duty for the arbitral tribunal to examine and address the relevant issues.[69] This duty is breached when, through inadvertence or misunderstanding, the arbitral tribunal fails to take into account allegations, arguments, evidence and offers of proof presented by one of the parties

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67 *See also* Swiss Federal Supreme Court decisions 4A_242/2022 of 8 September 2022, para. 4.1; 4A_10/2022 of 17 May 2022, para. 4.1; 4A_520/2021 of 4 March 2022, para. 6.1; 4A_618/2020 of 2 June 2021, para. 4.2; 4A_494/2018 of 25 June 2019 para. 4.1.

68 *See also* Swiss Federal Supreme Court decisions 4A_564/2021 of 2 May 2022, para. 5.1; 4A_574/2021 of 8 March 2022, para. 3.1; ATF 147 III 586 (4A_166/2021 of 22 September 2021), para. 5.1; ATF 147 III 379 (4A_332/2020 of 1 April 2021), para. 3.1; 4A_27/2021 of 7 May 2021, para. 5.1; 4A_380/2021 of 22 March 2022, para. 4.1; 4A_548/2019 of 29 April 2020, para. 6.2.1; 4A_74/2019 of 31 July 2019, para. 3.1; 4A_54/2019 of 11 April 2019, para. 5.1; 4A_438/2018 of 17 January 2019, para. 4.1; 4A_247/2017 of 18 April 2018, para. 5.1.1; 4A_583/2017 of 1 May 2018, para. 2.2.1; 4A_284/2018 of 17 October 2018, para. 4.1; 4A_438/2018 of 17 January 2019, para. 4.1; *see also* in domestic arbitration (Article 393(d) CPC): Swiss Federal Supreme Court decision 4A_143/2018 of 4 April 2018, para. 6; 5A_163/2018 of 3 September 2018, para. 3.1.

69 *See also* Swiss Federal Supreme Court decisions 4A_242/2022 of 8 September 2022, para. 3; 4A_64/2022 of 18 July 2022, para. 6.2; 4A_10/2022 of 17 May 2022, para. 4.1; 4A_564/2021 of 2 May 2022, para. 5.1; 4A_574/2021 of 8 March 2022, para. 3.2; 4A_520/2021 of 4 March 2022, para. 6.1; 4A_542/2021 of 28 February 2022, para. 5.1; 4A_484/2021 of 31 January 2022, para. 4.1; 4A_504/2021 of 18 January 2022, para. 5.1; 4A_264/2021 of 11 November 2021, para. 5.1; 4A_530/2020 of 15 June 2021, para. 6.7.1; 4A_618/2020 of 2 June 2021, para. 4.2; 4A_27/2021 of 7 May 2021, para. 5.1; 4A_384/2020 of 10 December 2020, para. 6.1; 4A_486/2019 of 17 August 2020, para. 8.1; 4A_93/2020 of 18 June 2020, para. 3.2.1; 4A_548/2019 of 29 April 2020, para. 6.2.1; 4A_422/2019 of 21 April 2020, para. 3.1; 4A_12/2019 of 17 April 2020, para. 4.2; 4A_536/2018 of 16 March 2020, para. 4.1; 4A_318/2018 of 4 March 2019, para. 4.1.1; 4A_438/2018 of 17 January 2019, para. 4.1; 4A_98/2018 of 17 January 2019, para. 5.2; 4A_382/2018 of 15 January 2019, para. 3.1.1; in domestic arbitration: see also Swiss Federal Supreme Court decision 5A_163/2018 of 3 September 2018, para. 3.1.

and important for the award to be made.[70] However, the arbitral tribunal is not obliged to discuss all the arguments raised by the parties.[71]

3. Decision of the Swiss Federal Supreme Court 4A_491/2017 of 24 May 2018

[230] **Right to be heard; minimum duty to examine relevant issues; subsidiary reasoning.** As Bernard Corboz points out, the door opened by the case law regarding the arbitral tribunal's minimum duty to examine and deal with the relevant issues is narrow. Only if a point of fact or law raised by one of the parties appears to be essential for the decision to be rendered and is simply ignored in the reasons of the award, without it being possible to understand why, then the right to be heard has been emptied of its substance, in the sense that the arbitral tribunal simply did not rule on the dispute as it was brought before said tribunal.

[231] When the contested decision contains several independent, alternative or subsidiary reasons, all of which are sufficient to determine the outcome of the case, the appellant must, on pain of inadmissibility, show that each of them is contrary to law.[72]

4. Decision of the Swiss Federal Supreme Court 4A_478/2017 of 2 May 2018

[232] **Right to be heard; no requirement to state reasons; minimum duty to consider relevant issues.** It is for the allegedly aggrieved party to show, in its appeal against the award, how an oversight by the arbitrators prevented it from being heard on an important point.[73] It is up to the appellant to establish, on the one hand, that the arbitral tribunal did not examine some of the

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70 *See also* Swiss Federal Supreme Court decisions 4A_312/2022 of 13 September 2022, para. 3.1; 4A_64/2022 of 18 July 2022, para. 6.1; 4A_10/2022 of 17 May 2022, para. 4.1; 4A_564/2021 of 2 May 2022, para. 5.1; 4A_574/2021 of 8 March 2022, para. 3.2; 4A_520/2021 of 4 March 2022, para. 6.1; 4A_406/2021 of 14 February 2022, para. 6.1; 4A_484/2021 of 31 January 2022, para. 4.1; 4A_504/2021 of 18 January 2022, para. 5.1; 4A_264/2021 of 11 November 2021, para. 5.1; 4A_530/2020 of 15 June 2021, para. 6.7.1; 4A_618/2020 of 2 June 2021, para. 4.2; 4A_666/2020 of 17 May 2021, para. 5.1; 4A_27/2021 of 7 May 2021, para. 5.1; 4A_478/2020 of 29 December 2020, para. 4.1; 4A_384/2020 of 10 December 2020, para. 6.1; 4A_198/2020 of 1 December 2020, para. 4.2; 4A_62/2020 of 30 September 2020, para. 4.1; 4A_486/2019 of 17 August 2020, para. 8.1; 4A_93/2020 of 18 June 2020, para. 3.2.1; 4A_422/2019 of 21 April 2020, para. 3.1; 4A_12/2019 of 17 April 2020, para. 4.2; 4A_536/2018 of 16 March 2020, para. 4.1; 4A_66/2019 of 17 June 2019, para. 2.1; 4A_424/2018 of 29 January 2019, para. 5.2.1; 4A_98/2018 of 17 January 2019, para. 5.2; 4A_382/2018 of 15 January 2019, para. 3.1; 4A_450/2017 of 12 March 2018, para. 4.1; 4A_247/2017 of 18 April 2018, para. 4.2.1; 4A_170/2017 and 4A_194/2017 of 22 May 2018, para. 4.1; 4A_550/2017 of 1 October 2018, para. 3.1; 4A_438/2018 of 17 January 2019, para. 4.2.

71 *See also* Swiss Federal Supreme Court decisions 4A_312/2022 of 13 September 2022 para. 3.1, 4A_20/2022 of 9 May 2022, para. 5.1; 4A_406/2021 of 14 February 2022 para. 6.1: in these decisions, the Swiss Federal Supreme Court states in particular that in the context of a violation of the right to be heard in adversarial proceedings, the arbitrators cannot be blamed for not having refuted, even implicitly, a plea that is objectively irrelevant; 4A_484/2021 of 31 January 2022, para. 4.1; 4A_486/2019 of 17 August 2020, para. 8.1; 4A_583/2017 of 1 May 2018, para. 2.2.1; 4A_114/2018 of 14 August 2018, para. 3.2; 4A_284/2018 of 17 October 2018, para. 4.1; 4A_438/2018 of 17 January 2019, para. 4.2; 4A_550/2017 of 1 October 2018, para. 3.1: in the latter decision, the Swiss Federal Supreme Court states that the failure to rebut, even implicitly, a plea that is objectively irrelevant does not constitute a violation of the right to be heard in adversarial proceedings.

72 *See also* Swiss Federal Supreme Court decision 4A_66/2019 of 17 June 2019 para. 2.3.

73 *See also* Swiss Federal Supreme Court decision 4A_312/2022 of 13 September 2022, para. 3.1; 4A_64/2022 of 18 July 2022, para. 6.2; 4A_406/2021 of 14 February 2022 para. 6.1; 4A_504/2021 of 18 January 2022, para. 5.1; 4A_264/2021 of 11 November 2021, para. 5.1; 4A_530/2020 of 15 June 2021, para. 6.7.1; 4A_666/2020 of 17 May 2021, para. 5.1; 4A_384/2020 of 10 December 2020, para. 6.1; 4A_422/2019 of 21 April 2020, para. 3.1; 4A_422/2019 of 21 April 2020, para. 3.1; 4A_12/2019 of 17 April 2020, para. 4.2; 4A_540/2018 of 7 May 2019, para. 2.1; 4A_556/2018 of 5 March 2019, para. 4.1; 4A_382/2018 of 15 January 2019, para.3.1.1; 4A_578/2017 of 20 July 2018, para. 3.1.1.

factual, evidentiary or legal elements that it had regularly put forward in support of its prayers and, on the other hand, that these elements were of such a nature as to influence the outcome of the dispute.[74]

[233] If the award completely omits elements that are apparently important for the resolution of the dispute, it is up to the arbitrators or the respondent to justify this omission in their observations on the appeal. They may do so by demonstrating 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.[75] In this case, the CAS award was annulled for breach of the minimum duty to examine the relevant issues.

5. Decision of the Swiss Federal Supreme Court 4A_578/2017 of 20 July 2018

[234] **Right to be heard; minimum duty to consider relevant issues.** Not every obvious oversight constitutes a violation of the right to be heard. Indeed, a false or even arbitrary finding is not in itself sufficient to set aside an international arbitral award. Consequently, the Swiss Federal Supreme Court will only intervene in this area if the party claiming a violation of its right to be heard succeeds in establishing that the inadvertence of the arbitral tribunal prevented it from putting forward its arguments and providing the necessary evidence on a question relevant to the solution of the dispute.[76]

6. Decision of the Swiss Federal Supreme Court 4A_574/2021 of 8 March 2022

[235] **Right to be heard; review power of the Swiss Federal Supreme Court.** It does not follow from the minimal duty of the arbitral tribunal to deal with the issues relevant to the decision that the arbitral tribunal would have to expressly deal with each and every submission of the parties. In other words, a violation of the right to be heard in international arbitration proceedings cannot be justified solely by the fact that the arbitral tribunal did not expressly address all of the «parties'» arguments or did not rebut them in detail. Similarly, the Swiss Federal Supreme Court does

74 *See also* Swiss Federal Supreme Court decisions 4A_312/2022 of 13 September 2022, para. 3.1; 4A_64/2022 of 18 July 2022, para. 6.2; 4A_54/2022 of 7 July 2022, para. 4.1; 4A_406/2021 of 14 February 2022 para. 6.1; 4A_504/2021 of 18 January 2022, para. 5.1; 4A_264/2021 of 11 November 2021, para. 5.1; 4A_530/2020 of 15 June 2021, para 6.7.1; 4A_666/2020 of 17 May 2021, para. 5.1; 4A_384/2020 of 10 December 2020, para. 6.1; 4A_198/2020 of 1 December 2020, para. 4.2; 4A_12/2019 of 17 April 2020, para. 4.2; 4A_536/2018 of 16 March 2020, para. 4.1; 4A_540/2018 of 7 May 2019, para. 2.1; 4A_556/2018 of 5 March 2019, para. 4.1; 4A_382/2018 of 15 January 2019, para.3.1.1; 4A_170/2017 and 4A_194/2017 of 22 May 2018, para. 4.1; 4A_491/2017 of 24 May 2018, para. 4.1.1; 4A_550/2017 of 1 October 2018, para. 3.1. In the latter decision, the Swiss Federal Supreme Court states that such a demonstration will be made based on the grounds set out in the challenged award.

75 *See also* Swiss Federal Supreme Court decisions 4A_64/2022 of 18 July 2022, para. 6.2; 4A_10/2022 of 17 May 2022, para. 4.1; 4A_542/2021 of 28 February 2022, para. 5.1; 4A_406/2021 of 14 February 2022 para. 6.1; 4A_504/2021 of 18 January 2022, para. 5.1; 4A_264/2021 of 11 November 2021, para. 5.1; 4A_618/2020 of 2 June 2021, para. 4.2; 4A_666/2020 of 17 May 2021, para. 5.1; 4A_536/2018 of 16 March 2020, para. 4.1; 4A_384/2020 of 10 December 2020, para. 6.1; 4A_12/2019 of 17 April 2020, para. 4.2; 4A_628/2018 of 19 June 2019, para. 3.1.1; 4A_556/2018 of 5 March 2019, para. 4.1; 4A_491/2017 of 24 May 2018, para. 4.1.1; 4A_438/2018 of 17 January 2019, para. 4.2.

76 *See also* Swiss Federal Supreme Court decisions 4A_494/2018 of 25 June 2019 para. 4.1; 4A_318/2018 of 4 March 2019, para. 4.1.2; 4A_424/2018 of 29 January 2019, para. 5.2.1; 4A_578/2017 of 20 July 2018, para. 3.3.

not have to examine whether the arbitral tribunal took into account and correctly understood all passages of the file.[77]

[236] It is not the task of the Swiss Federal Supreme Court to review whether the arbitral tribunal examined the submitted allegations, evidence and results of the taking of evidence and correctly assessed them. In particular, there is no right to have the arbitral tribunal refer to each piece of evidence in detail in the reasons for its decision. What is decisive is whether it examined the issues relevant to the decision as such.[78]

7. Decision of the Swiss Federal Supreme Court 4A_247/2017 of 18 April 2018

[237] **Right to be heard; no right to a reasoned decision; surprise effect; right of reply; principle of good faith; formal nature of the right to be heard.** The equality of the parties, which is also guaranteed by the above-mentioned provisions [Article 182(3) and Article 190(2)(d) PILA], implies that the procedure should be regulated and conducted in such a way that each party has the same opportunity to put forward its case.[79] As for the principle of contradiction, guaranteed by the same provisions, it requires that each party be given the opportunity to determine the arguments of its opponent, to examine and discuss the evidence brought by it and to refute it with its own evidence.[80] In Switzerland, the right to be heard in adversarial proceedings, far from being unlimited, is, on the contrary, subject to important restrictions in the field of international arbitration. For example, it does not require that an international arbitration award be reasoned. Moreover, a party is not entitled 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 not raised during the proceedings and whose relevance to the case in dispute neither of the parties to the case has relied on nor could have assumed.[81] 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 claim that the right to be heard has been violated must not be used by the party claiming an irregularity in the award's reasoning to trigger a review of the application of the merits.[82]

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77 *See also* Swiss Federal Supreme Court decisions 4A_616/2021 of 1 April 2022, para. 4.1; 4A_114/2018 of 14 August 2018, para. 3.4.

78 *See also* Swiss Federal Supreme Court decision 4A_616/2021 of 1 April 2022, para. 4.2.

79 *See also* Swiss Federal Supreme Court decision 4A_438/2018 of 17 January 2019, para. 4.1.

80 *See also* Swiss Federal Supreme Court decision 4A_530/2020 of 15 June 2021, para. 5.2.

81 *See also* Swiss Federal Supreme Court decisions 4A_284/2018 of 17 October 2018, para. 5.1; 4A_301/2018 of 19 November 2018, para. 4.2: the Swiss Federal Supreme Court is rather restrictive in the field of international arbitration when it comes to examining the argument of unpredictability of the arbitral tribunal's reasoning. *See also* in domestic arbitration: Swiss Federal Supreme Court decision 4A_338/2018 of 28 November 2018, para. 5.2.

82 *See also* Swiss Federal Supreme Court decision 4A_312/2022 of 13 September 2022, para. 3.1; 4A_10/2022 of 17 May 2022, para. 4.1; 4A_484/2021 of 31 January 2022, para. 4.1; 4A_504/2021 of 18 January 2022, para. 5.1; 4A_264/2021 of 11 November 2021, para. 5.1; 4A_306/2021 of 6 September 2021, para. 4.1; 4A_430/2020 of 10 February 2021, para. 5.1; 4A_384/2020 of 10 December 2020, para. 6.1; 4A_486/2019 of 17 August 2020, para. 8.1; 4A_550/2017 of 1 October 2018, para. 3.1; 4A_238/2018 of 12 September 2018, para. 4.2: in this decision, the Swiss Federal Supreme Court further clarifies that the right to be heard relates essentially to the establishment of the facts. *See also* Swiss Federal Supreme Court decision 4A_438/2017 of 11 October 2018, para. 2.3: in this decision, the Swiss Federal Supreme Court states that, with regard to the effect of surprise, the litigants must consider all conceivable scenarios and develop their arguments accordingly, even if it means expressing opinions in the alternative, so as to cover all hypotheses that could come into play.

[238] With regard to the right of reply, the relatively strict requirements formulated by the Swiss Federal Supreme Court in the light of the case law of the ECtHR cannot be applied unchanged to domestic and international arbitration. It is also generally accepted in this area that the guarantee of the right to be heard does not imply an absolute right to a double exchange of pleadings (in the arbitration proceedings), provided that the claimant has the opportunity to comment, in one form or another, on the arguments put forward by the respondent in a second round, in particular on counterclaims (if any).[83]

[239] Anyone participating in the proceedings must comply with the rules of good faith. The principle of good faith, thus stated for ordinary civil proceedings, is of general application, so that it also governs arbitration proceedings, both in domestic and international arbitration. According to this principle, it is not permissible to hold in reserve claims about procedural irregularities that could have been rectified immediately and only raise them in the event of an unfavourable outcome of the arbitral proceedings.[84]

[240] The right to be heard is a constitutional guarantee of a formal nature, the violation of which in principle leads to the annulment of the contested decision, irrespective of the chances of success of the appeal on the merits. The right to be heard is not, however, an end in itself; it is a means of preventing a judicial procedure from leading to a vitiated decision due to the violation of the «parties'» right to participate in the procedure, particularly in the taking of evidence. If it is not clear what influence the violation of the right to be heard may have had on the proceedings, there is no reason to annul the contested decision.[85]

[241] This case law also applies, *mutatis mutandis*, to international arbitration. Thus, in addition to the alleged violation, the party allegedly harmed by an inadvertence of the arbitrators must show, on the basis of the grounds set out in the challenged award, that the factual, evidentiary or legal elements which it had regularly put forward, but which the arbitral tribunal failed to take into consideration, were of such a nature as to influence the outcome of the dispute.[86] Similarly, the appellant who claims to be the victim of unequal treatment in relation to its opposing party or who maintains that the arbitral tribunal disregarded the principle of contradiction must, at the very least, attempt to show how the outcome of the proceedings could have been different if the alleged violation of its right to be heard had not been committed.[87]

8. Decision of the Swiss Federal Supreme Court 4A_556/2018 of 5 March 2019

[242] **Surprise effect.** Pursuant to the Swiss Federal Supreme Court's case law, there is no constitutional right of the parties to be specifically heard as to the legal assessment of the facts they introduce in the case. Neither does the right to be heard entitle the parties to be advised in advance as to which facts the arbitral tribunal considers important to the decision. There is, notably,

83 *See also* Swiss Federal Supreme Court decision 4A_156/2020 of 1 October 2020, para. 5.4.

84 *See also* Swiss Federal Supreme Court decision 4A_530/2020 of 15 June 2021, para. 5.4: in this decision, the Swiss Federal Supreme Court states that sanction of such breach of obligation is presumed.

85 *See also* Swiss Federal Supreme Court decisions 4A_167/2021 of 19 July 2021, para. 4.1.2; 4A_198/2020 of 1 December 2020, para. 4.2; 4A_156/2020 of 1 October 2020, para. 5.1.

86 *See also* Swiss Federal Supreme Court decisions 4A_167/2021 of 19 July 2021, para. 4.1.2; 4A_424/2018 of 29 January 2019, para. 5.2.2; 4A_578/2017 of 20 July 2018, para. 3.1.2.

87 *See also* Swiss Federal Supreme Court decisions 4A_167/2021 of 19 July 2021, para. 4.1.2; 4A_156/2020 of 1 October 2020, para. 5.1; 4A_491/2017 of 24 May 2018, para. 4.1.2; 4A_478/2017 of 2 May 2018, para. 3.2.2.

an exception where a tribunal intends to base its decision on a legal ground which the parties did not invoke and the relevance of which they could not reasonably have anticipated. In international arbitration, the Swiss Federal Supreme Court examines with restraint whether the arbitral tribunal's application of the law constitutes a «surprise» to the parties.

9. Decision of the Swiss Federal Supreme Court 4A_438/2018 of 17 January 2019

[243] **Procedural irregularity; foreclosure.** The party that considers itself affected by a procedural irregularity relevant under Article 190(2) PILA forfeits its objections if it does not raise its objection in time in the arbitral proceedings and does not make all reasonable efforts to remedy the irregularity – as far as possible. It is contrary to good faith to complain about a procedural defect only at the stage of the appeal proceedings, although there would have been an opportunity in the arbitral proceedings to give the arbitral tribunal the opportunity to cure the alleged irregularity. In particular, a party acts in bad faith and commits an abuse of rights if it keeps grounds for objection in reserve and postpone them in the event of an unfavourable course of the proceedings and a foreseeable loss of the proceedings. This also applies to an alleged violation of the right to be heard.[88]

10. Decision of the Swiss Federal Supreme Court 4A_450/2017 of 12 March 2018

[244] **Equality of the parties; granting of different time limits; allocation of costs.** The equality of the parties, guaranteed by Article 182(3) and Article 190(2)(d) PILA, implies that the procedure is regulated and conducted in such a way that each party has the same opportunity to put forward its case.[89] Granting different time limits to the parties does not necessarily constitute unequal treatment. According to case law, the arbitral tribunal must treat the parties in a similar manner at all stages of the proceedings. The concept of procedure must be given a restrictive meaning, the *ratione temporis* scope of the guarantee in question being limited to the evidentiary phase, including the pleadings, if any, to the exclusion of the arbitral tribunal's deliberations. To assimilate to a violation of equality between the parties the fact that an arbitral tribunal inadvertently or for any other reason disregards a relevant rule of law invoked by a party or a decisive fact alleged by it, would be tantamount to introducing, in the case law and under cover of the plea of violation of Article 190(2)(d) PILA, the claim of arbitrariness, whereas the federal legislator did not intend that an award in international arbitration could be set aside on this ground.[90] The principle of equality is therefore not affected by the assessment of the evidence and the application of the law in such an award, even if they are untenable. The «appellants'» challenge,

88 *See also* Swiss Federal Supreme Court decisions 4A_332/2021 of 6 May 2022, para. 5.1; 4A_156/2020 of 1 October 2020, para. 5.1; 4A_486/2019 of 17 August 2020, para. 8.1; 4A_550/2017 of 1 October 2018, para. 5.3.1; 4A_40/2018 of 26 September 2018, para. 3.3.1; 4A_450/2017 of 12 March 2018, para. 4.2; 4A_438/2018 of 17 January 2019, para. 4.3.

89 *See also* Swiss Federal Supreme Court decisions 4A_20/2022 of 9 May 2022, para. 4.1; ATF 147 III 379 (4A_332/2020 of 1 April 2021), para. 3.1; 4A_156/2020 of 1 October 2020, para. 5.1; 4A_341/2018 of 15 April 2019, para. 3.2; 4A_284/2018 of 17 October 2018, para. 6.1.1: this decision states that under this principle, the arbitral tribunal cannot grant to one party what has been denied to the other.

90 *See also* Swiss Federal Supreme Court decisions 4A_341/2018 of 15 April 2019, para. 3.2; 4A_284/2018 of 17 October 2018, para. 6.2.

from the point of view of equal treatment, of the manner in which the arbitrator apportioned the costs in accordance with the applicable rules and principles, is therefore inadmissible.

11. Decision of the Swiss Federal Supreme Court ATF 147 III 586 (4A_166/2021 of 22 September 2021)

[245] **Equality of the parties; legal aid**. Respecting the procedural guarantees outlined in Article 190(2)(d) PILA does not presuppose that the parties involved in the proceedings have equal financial resources to conduct the proceedings. Rather, what is essential is the equal treatment of the parties in procedural matters, ensuring that each party has an equal opportunity to present its case in the arbitration proceedings.

12. Decision of the Swiss Federal Supreme Court 4A_40/2018 of 26 September 2018

[246] **Right to be heard; right to take position on the facts essential for the decision; principle of contradiction.** The right to be heard, as guaranteed by Article 182(3) and Article 190(2)(d) PILA, does not in principle have a different content from that enshrined in constitutional law.[91] Thus, in the field of arbitration, it has been accepted that each party has the right to express itself on the facts essential for the decision, to present its legal arguments, to propose its means of proof on the relevant facts and to take part in the hearings before the arbitral tribunal.[92]

[247] The equality of the parties, which is also guaranteed by the above-mentioned provisions, implies that the procedure should be regulated and conducted in such a way that each party has the same opportunity to put forward its case. As for the principle of contradiction, guaranteed by the same provisions, it requires that each party be given the opportunity to take position on the arguments of its opponent, to examine and discuss the evidence provided by it and to refute it with its own evidence.[93]

13. Decision of the Swiss Federal Supreme Court 4A_556/2018 of 5 March 2019

[248] **Right to be heard; procedural order.** The right to be heard, as guaranteed by Article 182(3) and Article 190(2)(d) PILA, does not require that reasons be given for an international arbitral award. This principle also applies, if not *a fortiori*, to a procedural order whose purpose is to simply declare that the pending case has been terminated *ipso jure* and that it must be struck out of the list of cases («*rayer du rôle*»). This procedural decision, like an arbitral award on the

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91 *See also* Swiss Federal Supreme Court decisions 4A_54/2022 of 7 July 2020, para. 4.1; 4A_666/2020 of 17 May 2021, para. 5.1: in this decision, the Court states that the right to be heard does not embrace the right to express orally; 4A_198/2020 of 1 December 2020, para. 4.2; 4A_486/2019 of 17 August 2020, para. 8.1.

92 *See also* Swiss Federal Supreme Court decisions 4A_54/2022 of 7 July 2020, para. 4.1; 4A_332/2021 of 6 May 2022, para. 5.1; 4A_198/2020 of 1 December 2020, para. 4.2; 4A_530/2020 of 15 June 2021, para. 5.2; 4A_156/2020 of 1 October 2020, para. 5.1; 4A_486/2019 of 17 August 2020, para. 8.1: in this decision, the Swiss Federal Supreme Court includes the right to have access to the documents of the case file; 4A_98/2018 of 17 January 2019, para. 5.2; 4A_301/2018 of 19 November 2018, para. 4.4: in this case, the Swiss Federal Supreme Court clarified that the arbitral tribunal does not violate the «parties'» right to be heard when it relies on known facts or retains factual elements that have been proven in the course of the investigation, even if the parties have not formally alleged such facts; 4A_550/2017 of 1 October 2018, para. 3.1. *See also* in domestic arbitration: Swiss Federal Supreme Court decision 4A_642/2017 of 12 November 2018, para. 4.2.2.1.

93 *See also* Swiss Federal Supreme Court decisions 4A_332/2021 of 6 May 2022, para. 5.1; 4A_530/2020 of 15 June 2021, para. 5.2.

merits, requires that the arbitral tribunal has addressed all relevant arguments raised by the parties. There is no need, however, to do so expressly or to devote lengthy explanations to it, at least when the sanction associated with non-compliance with a procedural rule leaves limited discretion to the arbitral tribunal.

14. Decision of the Swiss Federal Supreme Court 4A_247/2017 of 18 April 2018

[249] **Right to be heard; no right to a reasoned decision.** If the award is completely silent on matters that are apparently important for the resolution of the dispute, it is up to the arbitrators or the respondent to justify such omission in their observations on the appeal.[94] The burden of proof 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.

15. Decision of the Swiss Federal Supreme Court 4A_450/2017 of 12 March 2018

[250] **Right to be heard; right to have an expert opinion.** In international arbitration, in particular in arbitration under the ICC Rules, the Swiss Federal Supreme Court recognised the right to have an expert opinion given under certain conditions long before the entry into force of the PILA on 1 January 1989. It has confirmed on several occasions, under this law, 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 an expert opinion in international arbitration proceedings is subject to the following conditions. First, 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 made in the agreed form and timely, and the party must have agreed to advance the costs. Finally, the expert opinion must relate to relevant facts, i.e. facts that may influence the award, be capable of proving those 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, so that they cannot be proven in any other way, and if, on the other hand, the arbitrators themselves do not have such knowledge.

16. Decision of the Swiss Federal Supreme Court 4A_550/2017 of 1 October 2018

[251] **Right to be heard; right to have evidence administered; anticipatory assessment of evidence.** The arbitral tribunal may refuse to take evidence without violating the right to be heard if the evidence is not capable of forming a conviction, if the fact to be proven has already been established, if it is irrelevant or if the tribunal, in carrying out an anticipatory assessment of the evidence, comes to the conclusion that its conviction has already been formed and that the result of the requested evidentiary measure can no longer change it. The Swiss Federal Supreme Court cannot review an anticipatory assessment of evidence, except from the extremely narrow scope of public policy.[95]

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94 *See also* Swiss Federal Supreme Court decisions 4A_520/2021 of 4 March 2022, para. 6.1; 4A_618/2020 of 2 June 2021, para. 4.2; 4A_550/2017 of 1 October 2018, para. 3.1.

95 *See also* Swiss Federal Supreme Court decision 4A_65/2018 of 11 December 2018, para. 3.2.1.2.5.

17. Decision of the Swiss Federal Supreme Court 4A_430/2020 of 10 February 2021

[252] **Right to be heard; principle of *jura novit curia*.** In Switzerland, the right to be heard relates primarily to the establishment of facts. The right of the parties to be questioned on legal issues is only recognised to a limited extent. As a general rule, according to the adage *jura novit curia*, state courts or arbitral tribunals are free to assess the legal significance of the facts and may also decide on the basis of legal rules other than those invoked by the parties.[96] Consequently, provided that the arbitration agreement does not restrict the task of the arbitral tribunal to the legal arguments raised by the parties, the parties do not need to be heard specifically on the scope of the legal rules. Exceptionally, they should be called upon when the judge or arbitral tribunal intends to base its decision on a legal standard or consideration that was not raised during the proceedings and whose relevance could not be assumed by the parties.[97] What is unforeseeable is a matter of appreciation. The Swiss Federal Supreme Court is restrictive in its application of this rule for this reason and, in view of the particularities of this type of proceedings, to avoid that the argument of surprise is used to obtain a review of the merits of the award by the appellate court.[98]

18. Decision of the Swiss Federal Supreme Court 4A_536/2018 of 16 March 2020

[253] **Right to be heard; public order**. The right to be heard does not guarantee an accurate decision on the merits. A finding that is manifestly inaccurate or contrary to the case file is not sufficient to set aside an arbitral award, the substantive review of which by the Swiss Federal Supreme Court is limited to the question of its compliance with public policy. Even if the alleged manifest inadvertence would lead to an erroneous or even arbitrary assessment of the evidence, there would not necessarily be a violation of the right to be heard. Rather, the litigant must establish that the inadvertence or misunderstanding on the part of the arbitrators has prevented it from putting forward its position and its means of proof on an element relevant to the proceedings.

19. Decision of the Swiss Federal Supreme Court 4A_504/2021 of 18 January 2022

[254] **Right to be heard; principle of free assessment of evidence.** If each party could decide in advance, for each document produced, what evidentiary arbitral tribunal will be allowed to draw from it, the principle of free assessment of evidence, which is a pillar of international arbitration, would be emptied of its substance. The assessment of the evidence that led the arbitral tribunal

96 *See also* Swiss Federal Supreme Court decisions 4A_504/2021 of 18 January 2022, para. 5.1; 4A_253/2020 of 21 September 2021, para. 5.2; 4A_62/2020 of 30 September 2020, para. 4.1; 4A_151/2018 of 1 February 2019, para. 4.2.

97 *See also* Swiss Federal Supreme Court decisions 4A_253/2020 of 21 September 2021, para. 5.2; 4A_384/2020 of 10 December 2020, para. 6.1; 4A_318/2018 of 4 March 2019, para. 4.1.3; 4A_151/2018 of 1 February 2019, para. 4.2.

98 *See also* Swiss Federal Supreme Court decision 4A_504/2021 of 18 January 2022, para. 5.1; 4A_253/2020 of 21 September 2021, para. 5.2; 4A_384/2020 of 10 December 2020, para. 6.1; 4A_318/2018 of 4 March 2019, para. 4.1.3; 4A_151/2018 of 1 February 2019, para. 4.2; 4A_382/2018 of 15 January 2019, para. 3.1.1: in the latter decision, the Swiss Federal Supreme Court states that it has rarely accepted the argument of the surprise effect and that in the vast majority of cases, it has rejected such ground; in that regard *see also* 4A_424/2018 of 29 January 2019, para. 5.2.3.

to accept or reject certain facts is not within the ambit of the Swiss Federal Supreme Court when it rules on an appeal in international arbitration.

20. Decision of the Swiss Federal Supreme Court 4A_438/2021 of 15 March 2021

[255] **Broad request for evidence; reservation of the violation of the right to be heard.** Together with its appeal, the appellant filed extensive requests for document production, which were rejected by the CAS Panel that considered them a «*fishing expedition*». This was echoed in the challenged award. In view of the vague and overly broad wording («*any and all*») of the requests for document production, without any substantiation of the existence and relevance of the documents sought, no further explanation was required. After this explanation by the president of the Panel, the former counsel of the appellant no longer insisted on these requests at the hearing and did not raise any reservation regarding a violation of their right to be heard (and thus forfeited their right to raise this grievance).

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

1. Decision of the Swiss Federal Supreme Court 4A_170/2017, 4A_194/2017 of 22 May 2018

[256] **Notion of public policy.** An award is incompatible with public policy if it disregards the essential and widely recognised values which, according to the prevailing views in Switzerland, should form the basis of any legal order.[99] A distinction is made between procedural and substantive public policy.[100]

2. Decision of the Swiss Federal Supreme Court 4A_616/2021 of 1 April 2022

[257] **Notion of public policy; review of the award on the merits.** The review on the merits of an international arbitral award by the Swiss Federal Supreme Court is limited to the question of whether the award is compatible with public policy. The substantive assessment of a disputed claim is only contrary to public policy if it ignores fundamental principles of law and is therefore wholly incompatible with the essential, widely recognised set of values which, according to the prevailing view in Switzerland, should form the basis of any legal order. The arbitral award is only set aside if it is contrary to public policy not only in its reasoning but also in its outcome.

99 *See also* Swiss Federal Supreme Court decisions 4A_242/2022 of 8 September 2022, para. 5.1; 4A_54/2022 of 7 July 2022, para. 5.1; 4A_10/2022 of 17 May 2022, para. 5.2; 4A_406/2021 of 14 February 2022 para. 7.1; 4A_464/2021 of 31 January 2022, para. 5.1; 4A_418/2021 of 18 January 2022, para. 4.2; 4A_264/2021 of 11 November 2021, para. 6.1; 4A_167/2021 of 19 July 2021, para. 5.1; 4A_618/2020 of 2 June 2021, para. 5.1; 4A_156/2020 of 1 October 2020, para. 6.1; 4A_324/2020 of 18 September 2020, para 7.1; 4A_70/2020 of 18 June 2020, para. 7.1; 4A_486/2019 of 17 August 2020, para. 3.1.

100 *See also* Swiss Federal Supreme Court decision 4A_54/2022 of 7 July 2022, para. 5.1; 4A_10/2022 of 17 May 2022, para. 5.2; 4A_167/2021 of 19 July 2021, para. 5.1; 4A_430/2020 of 10 February 2021, para. 7.1; 4A_486/2019 of 17 August 2020, para. 3.1.

3. Decision of the Swiss Federal Supreme Court 4A_318/2018 of 4 March 2019

[258] **Notion of substantive public policy; Article 27 SCC.** An award is contrary to substantive public policy if it violates fundamental principles of substantive law to such an extent that it can no longer be reconciled with the relevant legal order and system of values.[101] These principles include, in particular, the «*pacta sunt servanda*» principle, observance of the rules of good faith, the prohibition of abuse of rights, the prohibition of discriminatory or spoliating measures, and the protection of persons lacking legal capacity.[102]

[259] As the adverb «in particular» makes clear, the list of examples drawn up by the Swiss Federal Supreme Court to describe the content of substantive public policy is not exhaustive, although it is constantly used in the case law regarding Article 190(2)(e) PILA.[103] Moreover, it would be delicate, even dangerous, to try to list all the fundamental principles that would certainly be covered, at the risk of forgetting one or another. It is therefore better to leave the list open.[104] The Swiss Federal Supreme Court has already included other fundamental principles that are not in the list, such as the prohibition of forced labour, and it would not hesitate to sanction an award that violates the cardinal principle of respect for human dignity as a violation of substantive public policy, even if this principle is not explicitly included in the list.

[260] While it is not easy to positively define the substantive public policy and precisely determine its contours, it is, on the other hand, easier to exclude certain elements from it. This exclusion concerns, in particular, the entire process of interpreting a contract and the legal consequences that are logically drawn from it,[105] as well as the interpretation made by an arbitration tribunal of the statutory provisions of a private law institution. Similarly, it is not sufficient for an incompatibility with public policy – a concept narrower than that of arbitrariness – that the evidence has been wrongly assessed, that a finding of fact is manifestly wrong or that a legal norm has been clearly violated.[106]

[261] According to the case law, a violation of Article 27 SCC does not automatically violate the substantive public order dened thereby; rather, there must be a serious and clear case of violation of fundamental rights. A contractual restriction of economic freedom is only considered excessive according to Article 27(2) SCC if it leaves the obligor to the arbitrariness of the other party, abolishes her/his economic freedom, or limits it to such an extent that the foundations of her/his economic existence are endangered; Article 27(2) SCC also covers commitments that are

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101 *See also* Swiss Federal Supreme Court decisions 4A_242/2022 of 8 September 2022, para. 5.1; 4A_54/2022 of 7 July 2022, para. 5.1.1; 4A_10/2022 of 17 May 2022, para. 5.2; 4A_564/2021 of 2 May 2022, para. 6.1.1; 4A_418/2021 of 18 January 2022, para. 4.1; 4A_253/2020 of 21 September 2021, para. 4.3.1; 4A_167/2021 of 19 July 2021, para. 5.1.1; 4A_406/2021 of 14 February 2022, para. 7.1; 4A_324/2020 of 18 September 2020, para 7.1; 4A_486/2019 of 17 August 2020, para. 3.2; 4A_70/2020 of 18 June 2020, para. 7.1; 4A_12/2019 of 17 April 2020, para. 5.2;
4A_294/2019 of 13 November 2019, para. 5.1.

102 *See also* Swiss Federal Supreme Court decisions 4A_564/2021 of 2 May 2022, para. 6.1.1; ATF 147 III 379 (4A_332/2020 of 1 April 2021), para. 3.1, para. 4.1; 4A_253/2020 of 21 September 2021, para. 4.3.1; 4A_167/2021 of 19 July 2021, para. 5.1.1; 4A_618/2020 of 2 June 2021, para. 5.1; 4A_666/2020 of 17 May 2021, para. 6.1; 4A_516/2020 of 8 April 2021, para. 4.2.1; 4A_156/2020 of 1 October 2020, para. 6.1; 4A_486/2019 of 17 August 2020, para. 3.2; 4A_12/2019 of 17 April 2020, para. 5.2; 4A_294/2019 of 13 November 2019, para. 5.1; 4A_450/2017 of 12 March 2018, para. 5.1.

103 *See also* Swiss Federal Supreme Court decisions 4A_564/2021 of 2 May 2022, para. 6.1.1; 4A_486/2019 of 17 August 2020, para. 3.2.

104 *See also* Swiss Federal Supreme Court decision 4A_486/2019 of 17 August 2020, para. 3.2.

105 *See also* Swiss Federal Supreme Court decision 4A_12/2019 of 17 April 2020, para. 5.2.

106 *See also* Swiss Federal Supreme Court decision 4A_486/2019 of 17 August 2020, para. 3.2.

excessive in terms of their subject matter, i.e. obligations that relate to certain personal rights whose importance is such that a person cannot bind himself or herself to them for the future.[107]

4. Decision of the Swiss Federal Supreme Court 4A_70/2020 of 18 June 2020

[262] **Substantive public policy; *pacta sunt servanda*.** The «*pacta sunt servanda*» principle, in the restrictive sense given to it by the case law on Article 190(2)(e) PILA, is violated only if the arbitral tribunal refuses to apply a contractual clause while admitting that it is binding on the parties or, conversely, if it imposes on them compliance with a clause that it considers not binding. 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 that are logically drawn from it are not matters of the «*pacta sunt servanda*» principle. Consequently, these issues cannot be the subject of a claim of violation of public policy. Thus, almost all litigation arising from breach of contract is excluded from the scope of protection of the principle of *pacta sunt servanda*.[108]

5. Decision of the Swiss Federal Supreme Court 4A_516/2020 of 8 April 2021

[263] **Public policy; compensation for an expropriation/nationalisation.** Conscations, expropriations or nationalisations carried out without compensation are considered to be spoliating measures contrary to public policy. There can be no question of expropriation contrary to public policy if an investor was awarded compensation of DM 2.3 million by an arbitral award (made in 1995) on the basis of a BIT. The principles of international law do not confer an absolute right to full compensation. The Swiss Federal Supreme Court is not required to sanction, on the basis of public policy, an erroneous or even arbitrary interpretation of a BIT clause; it cannot be led to examine whether or not the compensation provided for in the BIT includes loss of profit.

[264] The principles underlying the provisions of the ECHR may be taken into account in order to give concrete form to the concept of public policy. That said, the violation of the ECHR – or of one of its additional Protocols – does not as such constitute a ground for appeal, as it is not included in the exhaustive list of Article 190(2) PILA. It may happen that such a violation simultaneously constitutes a breach of public policy under Article 190(2) PILA (for instance in case of prohibition of forced labour), but this is not necessarily the case.

[265] According to case law, a spoliation measure without compensation is contrary to public policy. This expression should certainly not be taken literally. However, the restrictive nature of such a formulation and the notion of public policy under 190 PILA require that the compensation appears so disproportionate to the value of the lost property that it violates the most essential principles of the legal order. However, it should be noted that the circumstances of the case

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107 *See also* Swiss Federal Supreme Court decision 4A_542/2021 of 28 February 2022, para. 6.1.

108 *See also* Swiss Federal Supreme Court decisions 4A_242/2022 of 8 September 2022, para. 5.2.1; 4A_632/2021 of 28 April 2022, para. 5.1; 4A_380/2021 of 22 March 2022, para. 5.1; 4A_462/2021 of 7 February 2022, para. 7.1; 4A_484/2021 of 31 January 2022, para. 5.1; 4A_453/2021 of 2 December 2021, para. 5.4.1; 4A_253/2020 of 21 September 2021, para. 4.3.1; 4A_167/2021 of 19 July 2021, para. 5.2.1; 4A_618/2020 of 2 June 2021, para. 5.4.1; 4A_516/2020 of 8 April 2021, para. 4.2.1; 4A_660/2020 of 15 February 2021, para. 3.2.2; 4A_346/2020 of 6 January 2021, para. 6.1; 4A_494/2018 of 25 June 2019, para. 5.2.3; 4A_98/2018 of 17 January 2019, para. 7.3; 4A_491/2017 of 24 May 2018, para. 5.1. 1; 4A_450/2017 of 12 March 2018, para. 5.1.

must be taken into account. There is no absolute right to full compensation. Moreover, the fact that the investor is denitively deprived of her/his investment does not necessarily mean that the principles of expropriation should be applied.

[266] Public policy under Article 190 PILA should also not be confused with customary international law or general principles of international law.

[267] The purpose of the claim under Article 190(2)(e) PILA is not to ensure the correct – or even non-arbitrary – application of an investment treaty, customary international law, general principles of international law or the guarantees conferred by the ECHR (and its additional Protocols). The Swiss Federal Supreme Court's power of review must be limited to the review of the award in terms of substantive public policy. Accordingly, the public order is not necessarily breached because the investor does not obtain full compensation for its loss, because it is awarded compensation that does not fully cover the loss suffered – or that is not in reasonable proportion to the value of the lost investments. Taking into account all the specific circumstances, the compensation must appear disproportionate to the value of the lost investment, in a way that there is such an extreme disproportion between the two values to the extent that the most essential principles of the legal system are completely violated.

[268] In the case at hand, the investors commenced ICC arbitration against Syria to obtain compensation for the value of their investment in two cement plants in North-eastern Syria and requested payment of damages in USD. The investors were granted a compensation against Syria of approximately SYP 2 billion plus interest. The arbitral tribunal allowed the investors to request payment in USD at the official exchange rate of the Syrian Central Bank on the day of payment, which corresponded to approximately USD 42 million. However, due to the devaluation of the SYP, the amount awarded went down to approximately USD 9 million. The investors challenged the award *inter alia* based on a violation of public policy. The Swiss Supreme Court held that, from a public policy perspective, the amount awarded was not so out of proportion to the loss incurred that it «utterly contradicts» fundamental principles of the legal order. Because of the tribunal's refusal to convert the award into USD, the investors had to bear the consequences of the significant inflation of the SYP. As a result, the value of the investment in SYP was approximately 79% lower in comparison with an investment in USD. However, taking into account all circumstances, including the fact that the investors had chosen to invest in Syria and, therefore, accepted the risks inherent to the host state, the Swiss Federal Supreme Court dismissed the ground of public policy.

6. Decision of the Swiss Federal Supreme Court 4A_453/2021 of 2 December 2021

[269] **Public policy; interpretation of a contractual clause**. The Swiss Federal Supreme Court, when examining a violation of public policy in accordance with Article 190(2)(e) PILA, does not have to examine whether the arbitrator has correctly interpreted a contractual clause.

7. Decision of the Swiss Federal Supreme Court 4A_242/2022 of 8 September 2022

[270] **Public policy; scope of review; mandatory provisions.** In determining whether the award is compatible with public policy, the Swiss Federal Supreme Court does not review the legal assessment made by the arbitral tribunal on the basis of the facts found in its award. In fact, what matters for the decision to be rendered under Article 190(2)(e) PILA is whether the result of this

legal assessment made by the arbitral tribunal is compatible with the definition of substantive public policy as set forth in the case law.[109]

[271] The claim of incompatibility with substantive public policy, in accordance with Article 190(2)(e) PILA and the related case law, is not admissible insofar as it seeks only to establish the incompatibility of the challenged award with a rule of Swiss law, irrespective of the degree of such incompatibility, assuming it is established. Moreover, the fact that a rule belongs to mandatory Swiss law does not necessarily mean that its violation would contravene the public policy of Article 190(2)(e) PILA.

8. Decision of the Swiss Federal Supreme Court 4A_65/2018 of 11 December 2018

[272] **Public policy; corruption.** Claims relating to promises of bribes are only accepted by the Swiss Federal Supreme Court if bribery is established, but the arbitral tribunal refused to take it into account in its award.

9. Decision of the Swiss Federal Supreme Court 4A_247/2017 of 18 April 2018

[273] **Procedural public policy; *res judicata*.** Public policy within the meaning of Article 190(2)(e) PILA contains two elements: substantive public policy and procedural public policy. The latter guarantees the parties the right to an independent assessment of the claims and facts submitted to the arbitral tribunal in a manner consistent with the applicable procedural law. A violation of procedural public policy occurs when fundamental and generally recognised principles have been violated, leading to an unbearable contradiction to the sense of justice, so that the decision appears incompatible with the values recognised in a state governed by law.[110]

[274] An arbitral tribunal violates procedural public policy if it rules without taking into account the *res judicata* effect of an earlier decision or if it departs in its final award from the opinion it expressed in a preliminary ruling on a preliminary question of substance.[111]

[275] *Res judicata* also applies at the international level and governs, in particular, the relationship between a Swiss arbitral tribunal and a foreign court. If a party therefore brings a claim before an arbitral tribunal with its seat in Switzerland that is identical to the claim that was the subject of a final decision rendered between the same parties in a territory other than Switzerland, the arbitral tribunal must, under risk of violating procedural public policy, declare the claim inadmissible insofar as the foreign decision is capable of being recognised in Switzerland by virtue

109 *See also* Swiss Federal Supreme Court decisions 4A_167/2021 of 19 July 2021, para. 5.1.1; 4A_324/2020 of 18 September 2020, para 7.1.

110 *See also* Swiss Federal Supreme Court decisions 4A_54/2022 of 7 July 2022, para. 5.1.2; 4A_253/2020 of 21 September 2021, para. 4.3.1; 4A_167/2021 of 19 July 2021, para. 5.1.2; 4A_416/2020 of 4 November 2018, para. 3.1: in this decision, the Swiss Federal Supreme Court held that the interpretation of Article R36 of the CAS Code and its application to the circumstances of the case escape the scope of scrutiny of the Court. *See also* 4A_667/2020 and 4A_668/2020 of 17 May 2021, para. 4.1; 4A_187/2020 of 23 February 2021, para. 6.3.2; 4A_486/2019 of 17 August 2020, para. 3.3; 4A_548/2019 of 29 April 2020, para. 7.2; 4A_536/2018 of 16 March 2020, para. 3.1.3; 4A_430/2020 of 10 February 2021, para. 7.1; 4A_151/2018 of 1 February 2019, para. 5.2; 4A_98/2018 of 17 January 2019, para. 6.2; 4A_170/2017 and 4A_194/2017 of 22 May 2018, para. 6.1; 4A_550/2017 of 1 October 2018, para. 7.2.

111 *See also* Swiss Federal Supreme Court decisions 4A_355/2021 of 18 January 2022, para. 6.1; 4A_253/2020 of 21 September 2021, para. 4.3.1: in this decision, the Swiss Federal Supreme Court specifies that a foreign arbitral decision cannot have wider *res iudicata* effect than a decision rendered in Switzerland and therefore cannot extend to its reasoning; 4A_187/2020 of 23 February 2021, para. 6.3.2; 4A_530/2020 of 15 June 2021, para. 6.3.

of Article 25 PILA, the special provisions of the international treaties referred to in Article 1(2) PILA being reserved. A foreign decision is recognised in Switzerland, among other conditions, if the jurisdiction of the judicial or administrative authorities of the State in which it was rendered was given (Article 25(a) PILA). This condition will not be fulfilled with respect to a decision that a state court rendered without taking into account an arbitration objection validly raised by the party summoned before it. In a previous decision (ATF 124 III 83), the Swiss Federal Supreme Court held that the examination of the indirect jurisdiction of the foreign court under Article 25(a) PILA must be carried out by reference to Article II(3) NYC.[112] The question left open in this case is whether it would be more appropriate to deal with the problem in the light of Article 7 PILA and Chapter 12 of the same Act, on international arbitration. According to some scholars, the NYC is inapplicable in this matter, since it does not deal with the recognition of foreign state decisions. The decisive question was not whether the foreign court had jurisdiction according to its *lex fori*, which could encourage delaying tactics, but whether, from the point of view of Swiss law, there was a valid arbitration agreement (Article 178 PILA) concerning an arbitrable case (Article 177 PILA), which could be used as a basis for the jurisdiction of an arbitral tribunal with its seat in Switzerland. The Court left this question open on the grounds that, both under Article II(3) NYC and Article 7(b) PILA, the only decisive factor is whether the court in question, having been duly seized of an arbitration objection, did not take it into account, even though it had not found that the arbitration agreement was «*null and void, inoperative or incapable of being applied*».

10. Decision of the Swiss Federal Supreme Court 4A_564/2021 of 2 May 2022

[276] **Procedural public policy.** A violation of procedural public policy is a violation of fundamental and generally accepted procedural principles, the non-observance of which is in intolerable contradiction to the sense of justice, so that the decision appears to be utterly incompatible with the order of law and values applicable in a state governed by the rule of law. This procedural guarantee is subsidiary to the other grounds of appeal under Article 190(2) PILA. However, an incorrect or even arbitrary application of procedural rules is not in itself sufficient to constitute a breach of formal public policy. Rather, only a violation of a rule that is indispensable to ensure the fairness of the proceedings comes into consideration.[113]

11. Decision of the Swiss Federal Supreme Court 4A_238/2018 of 12 September 2018

[277] **Procedural public policy; excessive formalism.** It is an unsettled question whether a clear violation of the prohibition of excessive formalism can be equated with a violation of procedural public policy. In the case at hand, the Swiss Federal Supreme Court found that there was no

112 SR 0.277.12.

113 *See also* Swiss Federal Supreme Court decisions 4A_27/2021 of 7 May 2021, para. 6.1; 4A_54/2019 of 11 April 2019, para. 4.1; 4A_98/2018 of 17 January 2019, para. 6.2.

excessive formalism on the part of the CAS in this case, which had found the appeal inadmissible due to non-compliance with Article R31 of the CAS Code.[114,115]

12. Decision of the Swiss Federal Supreme Court 4A_416/2020 of 4 November 2018

[278] **Procedural public policy; excessive formalism.** According to case law on Article 29(1) of the Swiss Constitution, there is excessive formalism when procedural rules are conceived or applied with such rigour that is not justified by any interest worthy of protection, to the extent that the procedure becomes an end in itself and prevents or complicates the application of the law in an untenable manner. Procedural forms are necessary in order to take legal action, to ensure the course of the proceedings in accordance with the principle of equal treatment, and to ensure the application of substantive law. As an example, the sanction of inadmissibility of the appeal for failure to pay the advance on costs in time is not excessive formalism or a denial of justice, provided that the parties were given adequate notice of the amount to be paid, of the time limit for payment and of the consequences of failure to comply with this time limit. The Swiss Federal Supreme Court has already had the opportunity to clarify that the CAS did not display excessive formalism when it punished the formal error of sending a statement of appeal by fax with inadmissibility. It also confirmed that this applies *mutatis mutandis* to the transmission of the appeal brief by simple fax.[116]

13. Decision of the Swiss Federal Supreme Court 4A_550/2017 of 1 October 2018

[279] **Procedural public policy; subsidiary guarantee.** The guarantee of procedural public policy is subsidiary; it can only be invoked if none of the grounds provided for in Article 190(2)(a)-(d) of the PILA come into consideration.[117] It is a precautionary rule for procedural defects that the legislator would not have considered when adopting the other letters of Article 190(2) PILA. An unreasoned award does not violate public policy.[118]

14. Decision of the Swiss Federal Supreme Court 4A_430/2020 of 10 February 2021

[280] **Public policy; arbitrariness; assessment based on the outcome of an award.** It is not sufficient that a reason given by an arbitral tribunal violates public policy; it is the outcome of the

114 Pursuant to Article R31 of the CAS Code, the filing of the statement of appeal or any other written pleading is valid upon receipt of the fax or e-mail by the CAS Court Office, but provided that the pleading and its copies are also filed by mail on the first working day following the expiry of the applicable time limit.

115 *See also* Swiss Federal Supreme Court decision 4A_316/2021 of 3 August 2021, para. 5.2: procedural rules are necessary to ensure that the proceedings are conducted in accordance with the principle of equal treatment, it is therefore inconceivable to punish the failure to meet a deadline more or less severely depending on whether the failure to meet the deadline is minor or not. Accordingly, the refusal of the CAS to deal with the case does not appear to be contrary to public policy under Article 190(2)(e) PILA. *See also* Swiss Federal Supreme Court decisions 4A_318/2021 of 3 August 2021, para. 5.2, 4A_324/2021 of 3 August 2021, para. 5.2; 4A_556/2018 of 5 March 2019, para. 6.5.

116 *See also* Swiss Federal Supreme Court decisions 4A_666/2020 of 17 May 2021, para. 6.4.2; 4A_54/2019 of 11 April 2019, para. 4.2.

117 *See also* Swiss Federal Supreme Court decision 4A_332/2021 of 6 May 2022, para. 6.1.

118 *See also* Swiss Federal Supreme Court decision 4A_556/2018 of 5 March 2019, para. 6.1.

award that must be incompatible with public policy.[119] The incompatibility of the award with public policy, referred to in Article 190(2)(e) PILA, is a more restrictive concept than that of arbitrariness. It is not enough that another solution seems conceivable, or even preferable. For there to be incompatibility with public policy, it is not sufficient that the evidence has been wrongly assessed, that a factual finding is manifestly false or that a rule of law has been clearly violated.[120] The annulment of an international arbitration award on this ground is extremely rare.[121] In deciding whether the award is compatible with public policy, the Swiss Federal Supreme Court does not review the legal assessment made by the arbitral tribunal based on the facts set out in the award. The only relevant factor for the decision to be made under Article 190(2)(e) PILA is whether the outcome of this legal assessment made by the arbitrators is compatible with the case law definition of substantive public policy.[122]

15. Decision of the Swiss Federal Supreme Court 4A_453/2021 of 2 December 2021

[281] **Public policy; provisions of the ECHR or Swiss Constitution.** Violation of the provisions of the ECHR or the Swiss Constitution is not one of the complaints exhaustively listed in Article 190(2) of the PILA. It is therefore not possible to directly invoke such a violation. However, the principles underlying the provisions of the ECHR or the Swiss Constitution may be taken into account in the context of public policy in order to flesh out this concept.[123]

[282] The plea alleging a violation of public policy is therefore not admissible, as it merely seeks to establish that the award in question is contrary to the various guarantees derived from the ECHR and the Swiss Constitution invoked by the appellant, especially since Swiss law was not applicable to the arbitration proceedings conducted by the arbitrator.

16. Decision of the Swiss Federal Supreme Court 4A_156/2020 of 1 October 2020

[283] **Substantive public policy; amount of costs.** In theory, it is not inconceivable that the decision of an arbitral tribunal on the amount of costs could contravene substantive public policy. However, in an area (costs and expenses) where the Swiss Federal Supreme Court only intervenes with the utmost restraint when faced with a complaint of arbitrariness, it must be even more reserved when this question arises in international arbitration. It is not enough that the amount of costs fixed by the arbitral tribunal may be regarded as excessive for the state court to have to

119 *See also* Swiss Federal Supreme Court decisions 4A_10/2022 of 17 May 2022, para. 5.2; 4A_406/2021 of 14 February 2022 para. 7.1; 4A_264/2021 of 11 November 2021, para. 6.1; 4A_167/2021 of 19 July 2021, para. 5.1.1; 4A_618/2020 of 2 June 2021, para. 5.1; 4A_666/2020 of 17 May 2021, para. 6.6.1; 4A_156/2020 of 1 October 2020; para. 6.1; 4A_70/2020 of 18 June 2020, para. 7.1.

120 *See also* Swiss Federal Supreme Court decisions 4A_406/2021 of 14 February 2022 para. 7.1; 4A_418/2021 of 18 January 2022, para. 4.1; 4A_316/2021 of 3 August 2021, para. 5.2; 4A_318/2021 of 3 August 2021, para. 5.2; 4A_324/2021 of 3 August 2021, para. 5.2; 4A_167/2021 of 19 July 2021, para. 5.1.1; 4A_324/2020 of 18 September 2020, para 7.1; 4A_70/2020 of 18 June 2020, para. 7.1.

121 *See also* Swiss Federal Supreme Court decision 4A_418/2021 of 18 January 2022, para. 4.1.

122 *See also* Swiss Federal Supreme Court decisions 4A_406/2021 of 14 February 2022 para. 7.1; 4A_418/2021 of 18 January 2022, para. 4.1; 4A_453/2021 of 2 December 2021, para. 5.1; 4A_167/2021 of 19 July 2021, para. 5.1.1; 4A_618/2020 of 2 June 2021, para. 5.1; 4A_666/2020 of 17 May 2021, para. 6.1.1; 4A_12/2019 of 17 April 2020, para. 5.2.

123 *See also* Swiss Federal Supreme Court decisions 4A_10/2022 of 17 May 2022, para. 5.1; 4A_406/2021 of 14 February 2022, para. 7.2.

intervene on the ground of breach of substantive public policy. To justify such an intervention, it is at least necessary that the costs awarded by the arbitral tribunal to the party entitled to them are out of proportion to the necessary costs incurred by that party in defending its rights, having regard to all circumstances of the specific case, to the extent that they utterly infringe the most essential principles of the determining legal order.

17. Decision of the Swiss Federal Supreme Court 4A_618/2020 of 2 June 2021

[284] **Substantive public policy; prohibition of discriminatory committed by a private person.** The Swiss Federal Supreme Court expressed doubts as to whether the prohibition of discriminatory measures falls within the scope of the restrictive concept of public policy when the discrimination is committed by a private person and occurs in relations between private individuals. However, the Swiss Federal Supreme Court did not examine this question further since in the present case the challenged award did not establish discrimination that was contrary to substantive public policy.[124]

18. Decision of the Swiss Federal Supreme Court ATF 146 III 358 (4A_486/2019 of 17 August 2020)

[285] **Substantive public policy; principle of good faith (Article 2 SCC)**. The Swiss Federal Supreme Court held that it does not review whether the arbitral tribunal correctly applied the law on the basis of which standing was denied. Although the principle of good faith must be examined in the light of the case law regarding Article 2 SCC and that its violation may be irreconcilable with the concept of substantive public policy, a violation of Article 2 SCC does not – per se – render the award incompatible with public policy.

19. Decision of the Swiss Federal Supreme Court 4A_556/2018 of 5 March 2019

[286] **Nullity of the award**. Case law has not ruled out the possibility that, in exceptional cases, an arbitral award may be considered null and void, in particular if there is obviously no arbitration agreement and no arbitration proceedings have taken place. However, restraint is required in admitting absolute grounds for nullity, which must be examined at all times and *ex officio*, since the dispute denitively decided by arbitration proceedings should in principle not be questioned. It is up to the person who intends to challenge a defective award to articulate her/his complaints in the context of an action brought against the award, and not to wait until she/he is sued to claim, only then, the nullity of the award to be executed. An award will only be held to be null and void based on its content in exceptional cases. An award that violates public policy is, in principle, not absolutely null and void, but can only be challenged, unless it affects overriding public interests.

124 *See also* ATF 147 III 49, para. 9.4.

20. Decision of the Swiss Federal Supreme Court 4A_618/2019 of 17 September 2020

[287] **Public policy; award lacking reference to possible legal remedies.** There is no need to decide whether a contention that there is a violation of public policy on the ground that the award does not indicate legal remedies falls within the restrictive concept of public policy within the meaning of Article 190(2)(e) PILA – even if this seems *prima facie* highly doubtful – as the plea is in any case unfounded. When the indication of legal remedies is lacking, the appellant is expected to show diligence in seeking the necessary information itself. The addressee of a decision which is recognisable as such but does not contain a reference to the legal remedies must therefore take the necessary steps within a reasonable time limit to safeguard its rights, in particular by seeking information from a lawyer or from the authority which has decided on the means of challenging that decision and, after having obtained the necessary information, act in a timely manner. In the case at hand, the Swiss Federal Supreme Court ruled that such a plea is unfounded as the appellant was represented by counsel.

21. Decision of the Swiss Federal Supreme Court 4A_355/2021 of 18 January 2022

[288] **Public policy; res judicata; preliminary and interlocutory awards; Article 29a of the Swiss Constitution.** Preliminary or interlocutory awards, which settle preliminary matters of substance or procedure, do not have a *res judicata* effect; they are, however, binding on the arbitral tribunal from which they emanate, and disregard of their binding effect falls within the provisions of Article 190(2)(e) PILA as a violation of procedural public policy.

[289] The admissibility of the ground based on Article 29a of the Swiss Constitution appears questionable. It should be recalled that the violation of constitutional provisions is not one of the grounds listed exhaustively in Article 190(2) PILA. It is therefore not possible to invoke such a violation directly. The plea alleging a violation of public policy is therefore inadmissible insofar as it merely seeks to establish that the award in question is contrary to guarantees of a constitutional nature.

22. Decision of the Swiss Federal Supreme Court 4A_406/2021 of 14 February 2022

[290] **Public policy; late filing before the CAS; res judicata; the Swiss Federal Supreme Court's power to review an international award; violation of personality rights (Article 27 ss SCC); anti-doping.** It should be noted that it is doubtful, to say the least, that the appellant can invoke the argument of *res judicata* of the first instance decision to refuse to pursue a procedure of appeal allegedly lodged late by the adverse party. In fact, it follows from the jurisprudential definition of *res judicata* that it presupposes the existence in time of two distinct trials, with a second *lis pendens*, which would exclude its application in relations between two courts of different levels (first and second instance) dealing with the same case.

[291] Even when the Swiss Federal Supreme Court is called upon to rule on an appeal against an award rendered by an arbitral tribunal seated in Switzerland and authorised to apply Swiss law by default, it is obliged to apply the same restraint when examining the manner in which this law has been applied as it would for application of any other law, and it must not attempt to examine

with full cognition whether the topical rules of Swiss law have been correctly applied, as it would do if it were seized of an appeal in civil matters against a state court decision.[125]

[292] In the field of high-level sport, the Swiss Federal Supreme Court recognises that the personality rights (Article 27 ss SCC) embrace the right to health, physical integrity, honour, professional reputation, sporting activities and, as regards professional sport, the right to economic development and economic fulfilment. Depending on the circumstances, an infringement of an athlete's personality rights may be contrary to substantive public policy. According to the case law, a breach of Article 27(2) SCC is not, however, automatically contrary to substantive public policy; it still needs to be a serious and clear case of violation of a fundamental right.

[293] It must be emphasised that the plea of incompatibility with substantive public policy, within the meaning of Article 190(2)(e) PILA and the relevant case law, is not admissible insofar as it seeks only to establish the conflict between the challenged award and a treaty guarantee or a norm of Swiss law of constitutional rank. It is therefore impossible to agree with the appellant when he merely seeks to transpose the procedural guarantees applicable to searches and home visits – based on the requirements of the Swiss Code of Criminal Procedure – to anti-doping proceedings. The Swiss Federal Supreme Court has also made it clear that the automatic application of criminal law principles and the corresponding guarantees contained in the ECHR is not self-evident in disciplinary sanctions imposed by associations governed by private law such as sports federations.[126] It should be noted that private entities responsible for combating doping cannot, unlike the criminal authorities with extensive powers of investigation and coercion, rely on such a power relationship with athletes suspected of prohibited practices. Thus, the attempt to apply the rules on criminal searches *mutatis mutandis* to anti-doping proceedings could prevent the system set up to combat the scourge of doping in sport from functioning properly. It should also be noted that the ECtHR also attaches particular importance to sporting fairness and to the fight against doping. In a decision dated 18 January 2018, the ECtHR recognised that fair play and equal opportunities are one of the foundations of the fight against doping and saw in the quest for equal and genuine sport a legitimate purpose, namely the protection of the rights and freedoms of others. This decision thus confirms that the pursuit of fair sport is an important objective that can justify serious infringements of «athletes'» rights.

[294] The specific rules for appealing against an international arbitration award, i.e. the limitation of admissible grounds (as set forth in the exhaustive list of Article 190(2) PILA), the (restricted) substantive review of the award based on the restrictive concept of public policy (Article 190(2)(e) PILA), the strict requirements as to the allegation and reasoning of the grievances and, in general, the limited power of review of the Swiss Federal Supreme Court are in conformity with the ECHR. It must therefore be emphasised once again that the Swiss Federal Supreme Court cannot be equated with a court of appeal which would oversee the CAS and freely review the merits of international arbitration awards rendered by this jurisdictional body. It should be also noted that the appellant was able, beforehand, to put forward all his arguments before the CAS, which

125 *See also* Swiss Federal Supreme Court decisions 4A_632/2021 of 28 April 2022, para. 5.4; 4A_324/2020 of 18 September 2020, para. 7.1.

126 *See also* Swiss Federal Supreme Court decision 4A_462/2019 of 29 July 2020, para. 7.1.

is not only an independent and impartial tribunal with full power of examination in fact and in law, but also a specialised court.[127]

23. Decision of the Swiss Federal Supreme Court 4A_530/2020 of 15 June 2021

[295] **Procedural public order; *res judicata*; concept of *res judicata* in common law; issue estoppel/preclusion; controversy in international practice.** In an *obiter dictum*, the Swiss Federal Supreme Court clarified that a violation of procedural public policy may also occur when an arbitral tribunal incorrectly applies the principle of *res judicata* to a previous arbitral award and refrains from examining an issue when the disputed claim is not identical to the one already judged. This analysis is supported by Bernhard Berger, who highlights that in this constellation, there is no risk of two contradictory decisions being simultaneously enforceable. However, it is precisely this element that is deemed inconsistent with public policy. In such circumstances, a court that erroneously deems itself bound by a prior decision would be committing a denial of justice and violating the right to a fair trial, which also falls under procedural public policy.

[296] In the Swiss conception, only the operative part of the decision has *res judicata* effect, to the exclusion of the reasoning, even though the analysis of the reasoning is sometimes necessary for the understanding of the decision. Some countries (especially common law countries) have a broader definition of *res judicata* which includes the issue estoppel or preclusion: questions of fact and/or law constituting the necessary and essential basis of a final decision rendered by a competent authority cannot be relitigated again in subsequent proceedings between the same parties or their successors, even if the action is based on another cause of action.

[297] An arbitral tribunal seated in Switzerland must therefore determine the *res judicata* effect of a previous decision in accordance with the *lex fori*, i.e. the principles developed by the Swiss Federal Supreme Court in this regard, unless an international treaty provides otherwise.

[298] Some scholars, like the International Law Association (hereinafter: the «**ILA**»), would like to impose a broader concept of *res judicata* in international commercial arbitration cases, sometimes making a distinction between the concept that would be defined based on *(i)* the type of jurisdiction (i.e. state or arbitral) that issued the first decision and *(ii)* the nature of the issue previously decided (final or preliminary ruling). The Swiss Federal Supreme Court has disagreed with such an approach. Some scholars regret this, while conceding that the ILA's recommendations and the doctrine of issue preclusion have not really taken hold in international practice. Others consider this position to be consistent with the definition of public policy.

24. Decision of the Swiss Federal Supreme Court 4A_476/2020 of 5 January 2021

[299] **Public policy; limitation of the principle of *res judicata*; no direct application of 6 ECHR.** The arbitral tribunal violates the procedural public policy, *inter alia*, if it disregards the substantive legal authority of a previous decision in its own decision or if it deviates in its final decision from its opinion that was expressed in a preliminary decision regarding a substantive preliminary question. The effect of *res judicata* is limited to the operative part of the decision, and the rea-

127 *See also* Swiss Federal Supreme Court decision 4A_248/2019 of 29 July 2019, para. 5.1 and 5.2.4–5.2.6, not published in ATF 147 III 49.

soning behind the judgment is not covered by it. The reasoning of the judgment has no binding effect in another dispute, but it may be consulted to clarify the scope of the judgment.

[300] According to the established case law of the Swiss Federal Supreme Court, violation of the ECHR cannot be directly invoked in a set aside application against an arbitral award. However, the principles arising out of Article 6(1) ECHR can be used, if necessary, to define the guarantees that can be invoked under Article 190(2) PILA.

[301] Accordingly, a mere disregard of Article 6(1) ECHR does not necessarily constitute a violation of procedural public policy under Article 190(2)(e) PILA. Due to the stringent requirements for substantiation (Article 77(3) FSCA), the appellant must specifically demonstrate how the alleged violation of the Convention amounts to a disregard of procedural public policy. In the present case, the Swiss Federal Supreme Court concluded that the appellant disregarded these principles by assuming that he could directly invoke Article 6(1) ECHR as an additional *sui generis* ground of challenge and by taking the position that a violation of this provision constituted *eo ipso* a violation of procedural public policy under Article 190(2)(e) PILA.

[302] Apart from that, the Swiss Federal Supreme Court clarified that the appellant cannot be followed when he argues, relying on the *Mutu and Pechstein* decision, that the guarantees under Article 6(1) ECHR are directly applicable in the present case because it is a case of compulsory arbitration and not voluntary arbitration.

25. Decision of the Swiss Federal Supreme Court 4A_418/2021 of 18 January 2022

[303] **Public policy; power to rule based on equity.** According to the case law of the Swiss Federal Supreme Court, the usurpation of the power to decide in equity constitutes an irregularity covered by Article 190(2)(e) PILA, although this point is controversial.

26. Decision of the Swiss Federal Supreme Court 4A_536/2018 of 16 March 2020

[304] **Public policy; limited *res judicata* effect of award dismissing request for declaratory relief; partial actions; partial award.** The concept of *res judicata* forbids to question, in a new proceeding opposing the same parties, an identical claim that has been decided definitively. The judge hearing a new case is bound by everything that has been decided in the operative part of the previous decision; this is known as the prejudicial or binding effect. Identity is understood in the substantive sense; it is not necessary or even decisive that the prayers are formulated in the same way in the two proceedings. It is sufficient that the new claim is contained in the claim already litigated, or that the disputed issue decided as the main issue in the first case now has the characteristics of a preliminary issue in the new case.

[305] Only the operative part of the decision has *res judicata* effect. It is sometimes necessary to refer to the reasoning in order to determine the precise scope of the decision, in particular when the operative part merely states that the application is rejected;[128] however, insofar as they are not reflected in the operative part, the reasoning is not binding on the judge. Thus, factual findings and legal considerations do not have *res judicata* effect and do not bind the judge in a new proceeding.

[128] *See also* Swiss Federal Supreme Court decision 4A_355/2021 of 18 January 2022, para. 6.1.

[306] It follows that in partial actions, the reasoning of the first decision have no binding effect in subsequent proceedings, even though the questions raised are typically the same. This apparent paradox can be explained by the fact that the concept of *res judicata* is a consequence of the judge's competence to decide a certain dispute, a competence which is delimited by the prayers brought before her/him. The concept of *res judicata* cannot have any effect beyond this framework.

[307] In principle, only a final decision on the merits has *res judicata* effect. When a lawsuit ends with a decision of inadmissibility of the claim, the status of this decision is limited to the requirement of admissibility that was discussed and found to be lacking.

[308] The arbitral tribunal which has made a preliminary ruling on the principle of the defendant's liability is bound by its decision when it decides, in its final award, on the claimant's pecuniary claims. It may happen that a court renders a decision that has simultaneously the features of a partial award and a preliminary decision on a preliminary question on the merits, which is binding on it for the rest of the arbitral proceedings.

27. Decision of the Swiss Federal Supreme Court 4A_167/2021 of 19 July 2021

[309] **Substantive public policy; spoliating effect of an award**. According to the case law of the Swiss Federal Supreme Court, the following are considered as spoliation measures: confiscation, expropriation or nationalisation without compensation. In the case at hand, the Swiss Federal Supreme Court ruled that the award did not have a spoliating effect as it did not fall under the definition of spoliation measures.

28. Decision of the Swiss Federal Supreme Court 4A_10/2022 of 17 May 2022

[310] **Public policy; presumption of innocence**. According to the case law of the Swiss Federal Supreme Court, the automatic application of concepts such as the presumption of innocence is not self-evident in the case of disciplinary sanctions imposed by associations governed by private law, such as sports federations. While the application of the principle of *in dubio pro reo* is not open to discussion in ordinary or criminal proceedings, because of the broad investigative and coercive powers belonging to the State, the strict application of the same principle in the case of disciplinary proceedings conducted by private entities that cannot rely on such a power relationship with athletes suspected of prohibited practices could in fact prevent the system put in place to fight the scourge of doping in sport from functioning.

29. Decision of the Swiss Federal Supreme Court 4A_542/2021 of 28 February 2022

[311] **Public policy; disciplinary sanctions; power of review.** As regards disciplinary sanctions imposed in the field of sport, it should be recalled that the Swiss Federal Supreme Court only intervenes in decisions handed down under a discretionary power if they lead to a manifestly unjust result or shocking inequity. In the *Platini* case, in which it had to examine the sanction imposed on the latter from the already limited angle of the complaint of arbitrariness under Article 393(e) CPC, the Court noted that only the identification of one or more gross violations of the «arbitrators'» discretionary powers, which, moreover, led to the imposition of an excessively severe sanction, could justify the intervention of the Court. The Court's power of review is even more limited *in casu*, since it is exercised in the context of the grounds of violation of substantive

public policy, a more restrictive concept than that of arbitrariness. It should be borne in mind when analysing the criticisms levelled against the contested sanction.

G. Revision

1. Decision of the Swiss Federal Supreme Court 4A_36/2020 of 27 August 2020

[312] **Request for revision; new facts.** Only facts that occurred up to the point where, in the previous proceedings, facts could still be alleged, but which were not known to the applicant despite its diligence, can justify a review; furthermore, these facts must be relevant, i.e. of such a nature as to alter the state of affairs on which the decision taken was based and to lead to a different outcome on the basis of a correct legal assessment. A lack of diligence is to be found where the discovery of new facts or evidence is the result of research that could and should have been carried out in the previous proceedings. It will only be accepted with restraint that it was impossible for a party to allege a certain fact in the previous proceedings, as this ground for review must not be used to remedy the applicant's omissions in the conduct of the proceedings.[129] [*This decision was issued before the new provision Article 190a PILA was adopted*.]

2. Decision of the Swiss Federal Supreme Court 4A_100/2022 of 24 August 2022

[313] **New provision on revision.** The new provisions on the revision of international arbitral awards apply to revision proceedings filed with the Swiss Federal Supreme Court after 1 January 2021, even if the challenged award was issued before that date (Article 132 FSCA).[130]

[314] The Swiss Federal Supreme Court is responsible for assessing applications for revision, whereby the procedure is governed by Article 119a FSCA (Article 191 PILA). If the Swiss Federal Supreme Court approves the application for revision, it shall set aside the arbitral decision and refer the matter back to the arbitral tribunal for reconsideration or make the necessary findings (Article 119a(3) FSCA). The application for revision must be filed within 90 days of the discovery of the grounds for revision (Article 190a(2) sentence 1 PILA).[131]

[315] Article 190a(1)(c) PILA – the now effective legal provision on the revision of arbitral awards in international arbitration – not only requires that a ground for challenge pursuant to Article 180(1)(c) PILA was only discovered after the conclusion of the arbitral proceedings; the requesting party must furthermore show that the ground for challenge could not have been discovered in time and already asserted in the arbitral proceedings despite due attention.

3. Decision of the Swiss Federal Supreme Court 4A_606/2021 of 28 April 2022

[316] **Full list of requirements for a revision; time limit.** According to Article 190a(1)(a) PILA, a party may apply for revision of an award if it discovers relevant facts or conclusive evidence after the award was rendered that it was unable to rely on in the previous proceedings despite having

129 *See also* Swiss Federal Supreme Court decisions 4A_597/2019 of 17 March 2020 and 4A_662/2018 of 14 May 2019 for decisions issued before the new provision Article 190a PILA was adopted. *See also* in domestic arbitration: Swiss Federal Supreme Court decision 4A_71/2021 of 13 July 2021.

130 *See also* Swiss Federal Supreme Court decision 4A_69/2022 of 23 September 2022 para. 3.1.

131 *See also* Swiss Federal Supreme Court decision 4A_69/2022 of 23 September 2022 para. 3.2.

exercised due care; facts or evidence subsequent to the rendering of the award are excluded. An application for review based on Article 190a(1)(a) PILA is subject to the same requirements as an application based under Article 123(2)(a) FSCA. The wording of Article 190a(1)(a) PILA corresponds in substance to that of Article 123(2)(a) FSCA. The case law on the above-mentioned provision of the FSCA can therefore be referred to.[132]

[317] Revision on the grounds of the discovery of new facts presupposes the fulfilment of five conditions: 1° the applicant invokes one or more facts; 2° these facts are «relevant», in the sense of important, i.e. they are of such a nature as to modify the state of facts on which the decision was based and to lead to a different solution according to a correct legal assessment; 3° these facts already existed when the decision was handed down: they are pseudo-nova, i.e. facts that predate the decision or, more precisely, facts that occurred up to the time when, in the main proceedings, factual allegations were still admissible; 4° these facts were discovered afterwards; 5° the applicant was unable, despite all its diligence, to invoke these facts in the previous proceedings. A lack of care must be found where the discovery of new elements results from research that could and should have been carried out in the previous proceedings. The existence of excusable grounds must be accepted with restraint, as the review must not serve to remedy the applicant's omissions in the conduct of the proceedings.

[318] As for the application for review based on the discovery of conclusive evidence, it also presupposes, in short, that five conditions have been met: 1° the evidence must relate to earlier facts (pseudo-nova); 2° it must be conclusive, i.e. capable of leading to a modification of the decision in favourable way to the applicant; 3° it must have already existed when the judgment was handed down (more precisely, up to the last moment when it could still be introduced in the main proceedings); 4° it must have been discovered only after the event; 5° the applicant could not have relied on it, through no fault of its own, in the previous proceedings. There are no grounds for review merely because the court appears to have misinterpreted facts already known in the main proceedings. Rather, the incorrect assessment must be the consequence of the ignorance or lack of proof of facts that are essential for the judgment.

[319] The application for review must be filed with the Swiss Federal Supreme Court within 90 days of the discovery of the ground for review, on pain of forfeiture (Article 190a(2) PILA). This is a matter of admissibility, not of substance. The discovery of the ground for review implies that the applicant has sufficiently reliable knowledge of the new fact to be able to invoke it, even if she/he is unable to provide definite proof of it; mere supposition is not enough. It is up to the applicant to establish the circumstances that are decisive for verifying compliance with the time-limit.[133]

4. Decision of the Swiss Federal Supreme Court 4A_69/2022 of 23 September 2022

[320] ***Dies a quo* of the time limit to submit a request for revision; broad waiver of appeal may exclude the possibility of revision under 190a(1)(a) PILA; revision due to the award being influenced by a criminal act.** Where several grounds for revision are invoked, the time limit begins to run separately for each of them.

132 *See also* Swiss Federal Supreme court decision 4A_422/2021 of 14 October 2021, para. 4.4.

133 *See also* Swiss Federal Supreme court decisions 4A_422/2021 of 14 October 2021, para. 4.4.2; 4A_69/2022 of 23 September 2022, para. 4.2.1.

[321] In the case of Article 190a(1)(a) PILA, the discovery of the ground for revision implies that the applicant has sufficiently reliable knowledge of the new fact to be able to invoke it, even if it is not able to prove it with certainty; mere supposition is not enough. As for the conclusive means of proof, the applicant must be able to have an exhibit establishing it or have sufficient knowledge of it to request its administration.

[322] In the case of Article 190a(1)(b) PILA, the time limit begins to run as soon as the requesting party learns of the final conviction or, if this is no longer possible, of the existence of the offence and the evidence of it.

[323] In its new wording, Article 192(1) PILA no longer requires that the waiver be the subject of an «express declaration». It also follows from the wording of this provision that the parties may exclude all legal remedies for challenging an international arbitral award before the Swiss Federal Supreme Court, including the right to revision, except Article 190a(1)(b) PILA. In its explanatory message of 24 October 2018, the Swiss Federal Council clarifies that the new provisions of the PILA will also apply to arbitration agreements concluded before their entry into force and stresses that the same will apply to the formal requirements for waiving legal remedies under Article 192(1) PILA. This step-by-step approach shows that a waiver of legal remedies in an arbitration agreement concluded before 1 January 2021 can also exclude the right to apply for revision of the award, subject to the limits of Article 192 PILA. According to the case law under the former Article 192 PILA, it is necessary, but sufficient, that the clause in question clearly shows the «parties'» common intention to waive remedies. On the other hand, when the parties wish to exclude recourse only on one or other of the grounds listed in Article 190(2) PILA, the Swiss Federal Supreme Court has specified that they must in principle expressly mention the excluded ground(s) in the arbitration clause, whether by indicating the corresponding letter(s) of Article 190(2) PILA, by repeating the legal text or by any other wording that makes it possible to identify the excluded ground with certainty. It is therefore legitimate to ask whether parties who wish to waive only the right to appeal in civil matters to the exclusion of the extraordinary revision procedure should not state this clearly in the waiver clause. In the absence of precision as to the exact scope of a very broadly worded waiver clause, it is indeed difficult to imagine that it does not entail exclusion of the application for revision, which is an extraordinary legal remedy subject to even stricter rules than the appeal. It also seems doubtful to limit the scope of such a clause on the ground that parties from a wide variety of backgrounds who have no territorial connection with Switzerland have not specifically mentioned the possibility to apply for the revision of the award in their waiver clause.

[324] Whether the waiver clause constitutes a waiver of the right to appeal in civil matters alone or whether it also covers the application for revision is a matter of interpretation. In that regard, the Swiss Federal Supreme Court has already made it clear that the word «appeal» – in its broad sense – is a generic term that encompasses the most diverse legal means. In the present case, the Swiss Federal Supreme Court considered that it was clear from the litigious clause that the parties intended to exclude any recourse against possible future decisions. It concluded that the clause in question constituted a valid waiver of recourse, since it unambiguously showed that the parties intended to waive any right to appeal against any decision of the arbitral tribunal before any state court whatsoever. In these circumstances, in view of the clear intention of the parties to withdraw from any dispute before the state authorities, the Swiss Federal Supreme Court held that the waiver clause also precluded revision insofar as it was based on the ground provided for in Article 190a(1)(a) PILA.

[325] In the case of Article 190a(1)(b) PILA, it is irrelevant whether the criminal investigation was conducted abroad, as long as it complied with the minimum procedural safeguards prescribed by Article 6(2) and (3) ECHR and 14(2) to (7) of the International Covenant on Civil and Political Rights. It is also irrelevant whether the criminal offence was committed by a party to the treaty or by a third party. The essential element is that there is a causal link between the offence committed and the terms of the award whose revision is sought. In other words, the offence, regardless of when it occurred, must have had an actual influence, direct or indirect, on the decision at issue to the detriment of the applicant, who thus suffered an unfavourable result. The influence of a crime or misdemeanour on the applicant must have been established by a decision terminating criminal proceedings separate from those that led to the decision whose revision is sought. The decision handed down by the criminal court must show that the objective conditions for a crime or misdemeanour have been met. However, it is not necessary for the criminal proceedings to have resulted in a conviction, as is explicitly stated in Article 190a(1)(b) PILA.

[326] However, an arbitral tribunal is not bound by a criminal judgment rendered in the same set of facts, which is why it may reach a different solution from that adopted by the criminal authority.

[327] In the present case, contrary to the opinion of the Croatian courts, the arbitral tribunal had denied all credibility of Croatia's key witness on the alleged corruption. This divergence in assessment was deemed insufficient by the Swiss Federal Supreme Court to establish that the award was influenced by a criminal act under Article 190a(1)(b) PILA.

5. Decision of the Swiss Federal Supreme Court 4A_210/2021 of 28 September 2021

[328] **Requirements of revision; award influenced by a felony or misdemeanour.** In accordance with Article 190a(1)(b) PILA, a party may apply for revision of an award if criminal proceedings have shown that the award was influenced to the detriment of the party concerned by a felony or misdemeanour; a conviction by a criminal court is not required; if criminal proceedings cannot be instituted, the evidence may be adduced in another way. This rule codifies for international arbitration jurisdiction the practice based on an application by analogy of Article 123 FSCA, developed by the Swiss Federal Supreme Court in order to fix the loophole in the former legislation. Article 123(1) FSCA has in turn taken over Article 137(a) of the repealed Federal Act on the Organisation of Justice (hereinafter: «**OJ**»), which is why the case law and doctrine referring thereto remain valid. With reference to Article 137(a) OJ, which has a similar wording to Article 190a(1)(b) PILA, the doctrine has specified that the criminal proceedings must pertain to the punishment of the felony or misdemeanour that has influenced the award.

H. Other Questions

1. Decision of the Swiss Federal Supreme Court 5A_910/2019 of 1 March 2021

[329] **Enforceability of an award; bankruptcy proceedings.** This decision concerns the recognition and enforcement of an arbitral award rendered under the auspices of the London Court of International Arbitration (hereinafter: «**LCIA**»). During the LCIA proceedings, the respondent went bankrupt, and, with the consent of the creditors, the bankruptcy administrator assigned the respondent's rights in the LCIA proceedings to one of its former directors and creditors. The claimant lost and was ordered to pay the costs of LCIA proceedings. In the subsequent enforce-

ment proceedings, the cantonal courts of Zurich recognised the costs award and declared it enforceable. The claimant appealed the decision to the Swiss Federal Supreme Court arguing that the recognition and enforcement of the award should be refused since the subject matter of the dispute was not arbitrable under Article V(2)(a) of the NYC.

[330] The Swiss Federal Supreme Court clarifies that claims remain generally arbitrable even if insolvency proceedings are initiated against a respondent in an ongoing arbitration. This is consistent with the principle that arbitral awards are afforded the same treatment as domestic and foreign court judgments.

[331] However, it is not entirely clear whether this applies if the arbitral tribunal failed to stay the proceedings to allow the creditors to decide on their continuation. The Swiss Federal Supreme Court's reference to domestic and foreign state court proceedings suggests that the suspension is a necessary precondition. To stay on the safe side, a claimant in arbitration against a Swiss debtor who falls into bankruptcy during the proceedings should motion the tribunal for a stay.

2. Decision of the Swiss Federal Supreme Court 5A_1019/2018 of 5 November 2019

[332] **Final lifting of the objection to the summons to pay; exequatur of an arbitral award; public policy.** According to Article 80(1) Swiss Federal Act on Debt Enforcement and Bankruptcy (hereinafter: «**DEBA**»), the creditor who has the benefit of an enforceable judgment may request the judge to definitively release the opposition. Awards issued by arbitral tribunals are treated in the same way as decisions made by state courts. Awards issued by arbitral tribunals not based in Switzerland are foreign arbitral awards, the recognition and enforcement of which is governed by the NYC, in accordance with Article 194 PILA. Article V NYC lists exhaustively the grounds for refusing to recognise and enforce the arbitral award; these grounds must be interpreted restrictively in order to favour the enforcement of the award. It is up to the opposing party to establish the grounds for refusal provided for in Article V(1) NYC, whereas the court considers *ex officio* those mentioned in Article V(2) NYC.[134]

[333] According to Article V(1)(a) NYC, recognition and enforcement of the arbitral award will be refused if, in particular, it is proven that the agreement referred to in Article II NYC is not valid under the law to which the parties have subjected it or, in the absence of any indication in this respect, under the law of the country where the award was made. In the present case, the arbitration proceedings were suspended until the competent state court had ruled on the respondent's (claimant in the arbitration) motion to compel the appellant (respondent 1 in the arbitration) personally to submit to arbitration, which the said court admitted by judgment of 17 November 2015; this decision was based, among other reasons, on the «case law of US federal courts» which had accepted that non-signatories of an arbitration agreement could be bound. Since the present case is a pecuniary one, the Swiss Federal Supreme Court could only review the application of foreign law from the limited angle of arbitrariness.[135]

[334] According to Article V(2)(b) NYC, the recognition and enforcement of an arbitral award may be refused if the competent authority of the country where recognition and enforcement are sought finds that the recognition or enforcement of the award would be contrary to the public

134 *See also* Swiss Federal Supreme Court decision 5A_1046/2019 of 27 May 2020, para. 4.2.

135 *See also* Swiss Federal Supreme Court decision 5A_1046/2019 of 27 May 2020, para. 4.2.

policy of that country. According to the case law, an arbitral award violates substantive public policy if it violates fundamental principles of substantive law to such an extent that it can no longer be reconciled with the relevant legal order and system of values. As an exception clause, the public policy reservation must be interpreted restrictively, especially in the area of recognition and enforcement of foreign judgments, where its scope is narrower than for the direct application of foreign law. It is not sufficient that a reason chosen by the arbitral tribunal is irreconcilable with public policy; only the result reached by the award is decisive.[136]

3. Decision of the Swiss Federal Supreme Court 4A_95/2021 of 17 June 2021

[335] **Exequatur of an arbitral award; public policy.** The public policy reservation is interpreted, as an exception clause, narrowly, especially in matters of recognition and enforcement of foreign judgments, where its scope is narrower than in the direct application of foreign law. There is a violation of public policy when the recognition and enforcement of a foreign judgment intolerably impacts the Swiss conception of justice. A foreign judgment may be incompatible with the Swiss legal order not only because of its material content, but also because of the procedure from which it arose. In the present case, the appellant's grievance, which is appellatory in nature, turns out to be inadmissible. Indeed, it is largely based on facts that were not established by the cantonal court and is basically limited to repeating the arguments refuted by the lower authority without seriously confronting the reasoning of the appealed judgment. Contrary to what the appellant seems to believe, the application of a bilateral convention does not exempt a party from complying with the procedural rules of substantiation set forth in the Swiss Code of civil procedure, nor does their application become a violation of the prohibition of excessive formalism. Even if one were to disregard what has just been observed, it is worth noting that not every violation of a mandatory rule of Swiss law constitutes a violation of public policy, and that even from the standpoint of the NYC (although this convention – unlike the Convention between Switzerland and Belgium on the Recognition and Enforcement of Judgments and Arbitral Awards – explicitly mentions the need for the arbitration clause to be signed by the parties), failure to comply with this requirement is not always a ground for refusing exequatur.

4. Decision of the Swiss Federal Supreme Court ATF 144 III 411 (5A_942/2017 of 7 September 2018)

[336] **Attachment of assets based on a foreign arbitral award; recognition and enforcement under NYC**. If, as in the present case, there is no sufficient connection between the claim and Switzerland to warrant an attachment order, the grounds for granting such relief under Article 272(1)(2) DEBA, as stipulated in Article 271(1)(6) DEBA, cannot succeed. The judge will not consider an application to lift the objection to the summons to pay or an action brought against a foreign State for the purpose of the proceedings (Article 279 DEBA) due to the lack of jurisdiction over a defendant foreign State. Consequently, the judge will not address the dispute relating to the procedural issue. However, if one focused solely on the fact that the requirement of sufficient connection with the Swiss jurisdiction is a procedural prerequisite unrelated to the merits, the

136 *See also* Swiss Federal Supreme Court decisions 5A_1046/2019 of 27 May 2020, para. 4.2 and 4A_663/2018 of 27 May 2019, para. 3.3.

theory of the primacy of treaty law conflicts with Article III NYC and the case law of the Swiss Federal Supreme Court. According to the prevailing theory, the procedure for recognition and enforcement is generally subject to national law, particularly under the NYC.

[337] As previously explained, the seat of the arbitral tribunal in Switzerland is not a sufficient ground to establish a connection with Switzerland. Therefore, the mere fact that the arbitral award was rendered against a foreign State in a jurisdiction unrelated to the legal relationship on which the attachment request is based does not prevent recognition and enforcement in Switzerland. The decisive factor is the attachment to the place of enforcement, not the place of arbitration. The requirement of a connection with Switzerland does not preclude relocating the dispute.

[338] The Swiss Federal Supreme Court is not obliged to address the respondent's hypothesis, suggesting that attachment under Swiss law (Article 271 et seq. DEBA) is purely a precautionary measure and thus falls outside the scope of the NYC. This question can also remain unanswered, as the cantonal authorities were able to reject, without arbitrariness, the plausibility of the grounds for attachment based on the reasoning that the foreign arbitral award cannot be enforced in Switzerland as the respondent is not subject to the Swiss jurisdiction due to the lack of necessary domestic connection. The challenged decision finds that the requirement of sufficient domestic connection also applies under the NYC. The appellant fails to demonstrate any arbitrariness in such reasoning from the cantonal court. The question of what conclusions the Swiss Federal Supreme Court would have reached if it were to adjudicate an appeal against a legally binding decision on the recognition and enforcement of a foreign arbitral award made against a foreign State, without limitation of its power of review, can remain open here.

5. Decision of the Swiss Federal Supreme Court 5A_1046/2019 of 27 May 2020

[339] **Exequatur of an arbitral award**; **Article V(1)(e) and VI NYC.** According to Article V(1)(e) NYC, in order to be recognised and declared enforceable, the award does not need to be enforceable in the country of origin. It is sufficient that it is binding on the parties. This is not the case if, in the country of origin, the award has been set aside or if, for the duration of pending set aside proceedings, its effects have been suspended by the competent authority. On the other hand, when annulment has been requested and suspensive effect has not been requested from the competent authority or has not been granted, the award is binding under this provision. However, according to Article VI NYC, if annulment or suspension of the award is requested from the competent authority of the country in which, or under whose law, the award was issued, the authority before which the award is invoked may, if it considers it appropriate, stay the enforcement of the award. It may also, at the request of the party seeking enforcement of the award, order the other party to provide adequate security.

[340] Article VI NYC gives the authority of the enforcing state a wide discretion. The circumstances of the specific case, in particular the chances of success of the legal argument, are decisive. It is not permissible to refuse enforcement of a binding award solely on the ground that there are pending appeal proceedings in the state in which it was made.

II. Domestic Arbitration

A. Admissibility of the Appeal in Civil Matters

1. Decision of the Swiss Federal Supreme Court 4A_338/2018 of 28 November 2018

[341] **Domestic arbitration; applicability of Part 3 CPC; requirement to state reasons.** The challenged award relates to a dispute between the parties, who were domiciled in Switzerland at the time the arbitration agreement was concluded. Neither the arbitration agreement nor any subsequent agreement provides that the provisions on international arbitration (cf. Article 176 et seq. PILA) shall apply (Article 353(2) CPC). Consequently, the provisions on domestic arbitration contained in Part 3 CPC (Article 353 ff CPC) shall apply.[137]

[342] Only the claims listed in Article 393 CPC are admissible. It is therefore not admissible to claim, in such proceedings, that the award violates Swiss federal law under Article 95(a) FSCA, including the Swiss Constitution and federal law.[138] Furthermore, the Swiss Federal Supreme Court only examines claims that are substantiated (Article 77(3) FSCA), and the requirements in this respect correspond to those set out for claims concerning the violation of fundamental rights (cf. Article 106(2) FSCA).[139] It only examines the admissible claims that have been raised and sufficiently substantiated in the setting aside application and it is not for it to investigate which of the hypotheses of Article 393 CPC have been fulfilled. Starting from the challenged award, the appellant must show in detail what, in her/his opinion, the violation of the claims raised consists of.[140]

2. Decision of the Swiss Federal Supreme Court 4A_600/2021 of 28 February 2022

[343] **Preliminary award; admissible grounds under the CPC.** A preliminary or interlocutory award is subject to appeal to the Swiss Federal Supreme Court (Article 389 et seq. CPC) on the grounds set out in Article 393(a) and (b) CPC (Article 77(1)(b) FSCA in conjunction with Article 392(b) CPC). In the context of such an appeal, the other grounds under Article 393(c) to (e) CPC may also be raised, provided they are related to the appointment or the jurisdiction of the arbitral tribunal. However, such grounds must be strictly limited to points that directly relate to the appointment or the jurisdiction of the arbitral tribunal; otherwise, they are inadmissible, and no action is to be taken on them.[141]

3. Decision of the Swiss Federal Supreme Court 4A_58/2020 of 3 June 2020

[344] **Appealable award under the CPC.** Arbitral awards that are subject to appeal in civil matters include final arbitral awards by which an arbitral tribunal approves, rejects or does not up-

137 *See also* Swiss Federal Supreme Court decisions 4A_240/2021 of 2 November 2021, para. 2.1; 4A_461/2021 of 27 October 2021, para. 1.1; 4A_58/2020 of 3 June 2020, para. 1.1; 4A_35/2020 of 15 May 2020, para. 1.1.

138 *See also* Swiss Federal Supreme Court decisions 4A_528/2019 of 7 December 2020, para. 1.1; 4A_395/2019 of 2 March 2020, para. 1; 4A_338/2018 of 28 November 2018, para. 1.2; 5A_163/2018 of 3 September 2018, para. 1.1.

139 *See also* Swiss Federal Supreme Court decisions 4A_583/2020 of 19 January 2021, para. 1.3; 4A_35/2020 of 15 May 2020, para. 1.3; 5A_163/2018 of 3 September 2018, para. 2.

140 *See also* Swiss Federal Supreme Court decisions 4A_583/2020 of 19 January 2021, para. 1.2; 4A_35/2020 of 15 May 2020, para. 1.3.

141 *See also* Swiss Federal Supreme Court decision 4A_112/2021 of 9 September 2021, para. 1.2–1.3.

hold the claim in whole or in part (Article 392(a) CPC). Partial arbitral awards by which the arbitral proceedings are concluded with respect to a quantitative part of the subject matter of the dispute, in that individual claims at issue are comprehensively assessed in advance and the proceedings with respect to the others are suspended for the time being (Article 392(a) CPC), may also be challenged. Finally, preliminary or interlocutory awards may also be challenged on the grounds set out in Article 393(a) and (b) CPC, by which the arbitral tribunal decides a procedural or substantive preliminary issue separately in advance (Article 392(b) CPC).[142]

[345] By contrast, arbitral awards that can be challenged within the meaning of Article 389 et seq. CPC do not include procedural orders that do not bind the arbitral tribunal and to which it can return in the course of the proceedings. These include, *inter alia*, the arbitral tribunal's decision on the payment of an advance on costs.[143]

4. Decision of the Swiss Federal Supreme Court 4A_139/2021 of 2 December 2021

[346] **Minimum amount in dispute in the CPC.** The requirement of a minimum amount in dispute no longer applies under the new Article 77 para. 1 FSCA on 1 January 2021, which entered into force before the challenged award was rendered and communicated (Article 407 para. 3 CPC).[144]

5. Decision of the Swiss Federal Supreme Court 5A_1007/2020 of 2 July 2021

[347] **Award based on several grounds; requirement to state reasons.** If the arbitral tribunal bases its award on two or more arguments that are independent of each other, each of the considerations supporting the decision is validly objectionable in terms of form and content. In other words, the appeal against the award is only to be granted if all grievances raised against the several parts of reasoning prove to be well-founded. Conversely, the appeal must be dismissed if the objections raised against one of the parts of reasoning cannot be upheld due to a lack of substantiation or if the objections raised against one of the parts of reasoning prove to be unfounded.

6. Decision of the Swiss Federal Supreme Court 4A_30/2022 of 3 May 2022

[348] **Nature of the application; exception of Article 395(4) CPC.** The set aside application pursuant to Article 389 et seq. CPC is in principle of a cassatory nature, which is why, if it is upheld, the only option is to set aside the contested decision and to refer the case back to the arbitral tribunal (Article 77(2) *cum* 107(2) FSCA). An exception is provided for in the law in the event that the arbitral award is challenged on the grounds of manifestly excessive compensation and expenses (Article 395(4) CPC). In this case, the appellant has to submit a substantive legal claim in compliance with the general rules for appeals to the Swiss Federal Supreme Court (Article

142 *See also also* Swiss Federal Supreme Court decision 5A_978/2021 of 31 August 2022, para. 2.1.1.

143 *See also* Swiss Federal Supreme Court decision 4A_270/2019 of 24 June 2019.

144 *See also* in international arbitration: Swiss Federal Supreme Court decision 4A_200/2021 of 21 July 2021, para. 2.

42(1) FSCA), i.e. the appellant has to quantify the compensation and expenses she/he considers reasonable.[145]

7. Decision of the Swiss Federal Supreme Court ATF 145 III 266 (4A_540/2018 of 7 May 2019)

[349] **Opting out of the CPC.** According to Article 353(2) CPC, the parties may, by an express declaration in the arbitration agreement or in a subsequent agreement, exclude the application of Part 3 of the CPC and agree that the provisions of Chapter 12 of the PILA shall apply (so-called «opting out»). Article 176(2) PILA gives the parties the opposite possibility, i.e. to opt for the arbitration provisions of the CPC to the exclusion of those of the PILA, if the arbitration is international in nature.

[350] According to the case law on Article 176(2) PILA, in order to be valid, a choice of law must meet the three conditions established by the law. There is no reason why the case law on Article 176(2) PILA should not be applied *mutatis mutandis* to the opting out under Article 353(2) CPC. According to the clear wording of this provision, an opting out is valid if (*i*) the application of Part III of the CPC is expressly excluded, (*ii*) the exclusive application of the provisions of Chapter 12 of the PILA is agreed, and (*iii*) the «parties'» express declaration is in writing. Thus, an agreement of the parties as to the exclusive application of the rules of international arbitration is not sufficient on its own. It is imperative that the parties expressly exclude the application of the CPC provisions on domestic arbitration.

[351] In a recent decision, the Swiss Federal Supreme Court stated in an *obiter dictum* that an opting out under Article 353(2) CPC cannot be validly agreed to circumvent the restriction on arbitrability of disputes involving claims arising out of a purely Swiss employment relationship which the employee cannot waive (*see* Art 354 CPC *cum* Article 341(1) SCO). Although this is not strictly speaking an additional condition to those of Article 353(2) CPC, it should be noted that, even in the case of an opting out, the arbitrability of a domestic dispute within the meaning of the above-mentioned provisions is determined according to Article 354 CPC and not Article 177 PILA.

[352] In the case at hand, the parties did not agree to an opting out of Chapter III CPC before the arbitration proceedings. However, the parties signed without any reservation the following procedural order: «*In accordance with the terms of the present Order of Procedure, the parties agree to refer the present dispute to the CAS Code. Furthermore, the provisions of Chapter 12 of PILA shall apply to the exclusion of any other procedural law*». The appellant claimed that the parties did not validly agree to an opting out because it lacked intent on his part to submit the dispute to the rules on international arbitration. The Swiss Federal Supreme Court held that a party, especially if assisted by an attorney, cannot sign a procedural order containing a choice of law clause and subsequently claim not to be bound by it. Admitting the contrary would violate the «*pacta sunt servanda*» principle.

[353] Moreover, the CAS is not responsible for clearly highlighting an opting out clause, the so-called «*règle de l'insolite*» or «*Ungewöhnlichkeitsregel*» does not apply to a procedural order signed by two experienced parties and assisted by an attorney in the context of arbitration proceedings.

145 *See also* Swiss Federal Supreme Court decisions 4A_461/2021 of 27 October 2021, para. 1.2; 5A_213/2020 of 31 August 2020, para. 1.3.

The use by the court of a model or standard document does not change this. The CAS did not impose an international arbitration on the parties but has merely proposed a procedural order containing an opting out clause which the parties accepted without reservation.

[354] To examine more concretely the requirements for a valid opting out, it is useful to draw on the case law on the waiver of the right to appeal against the arbitral awards under Article 192 PILA, which also requires an «express declaration» by the parties. According to case law, a direct waiver does not necessarily have to include a reference to Article 190 PILA and/or Article 192 PILA. It is sufficient if the «parties'» express declaration clearly shows their common intent to waive the right to appeal against the award. The Swiss Federal Supreme Court considered that making a valid waiver conditional on the express mention of these provisions of the PILA in the arbitration clause would amount to inappropriate formalism. Indeed, it would imply disregarding, for a purely formal reason, the «parties'» intent to waive any appeal against an arbitral award. Such an exclusion would, moreover, be tantamount to excluding any waiver made before the entry into force of the PILA. Thus, for example, the Court held that the following clause constituted a valid exclusion under Article 192 PILA: «*All and any awards or other decisions of the Arbitral Tribunal [...] shall be nal and binding on the parties who exclude all and any rights of appeal from all and any awards insofar as such exclusion can validly be made*».

[355] The consequences of the waiver of the right to appeal under Article 192 PILA are more important than those of an opting out under Article 353(2) CPC with regard to the «parties'» possibilities to challenge the arbitral award. While the choice of law in favour of Chapter 12 of the PILA leads to the replacement of the grounds of appeal of Article 393 CPC by the narrower ones of Article 190 PILA, the waiver under Article 192 PILA deprives the appellant of any means of appeal. This waiver in fact relates to all the grounds listed in Article 190(2) PILA, unless the parties have excluded the appeal only on one or other of these grounds. It is therefore not justified to impose stricter requirements on an opting-out agreement than on a waiver of the right to appeal.

[356] Although the Swiss Federal Supreme Court did not rule on the degree of precision with which the exclusion of the third part of the CPC (or, in the case of an opting out under Article 176(2) PILA, of Chapter 12) must be formulated, it nevertheless specified that the use of a standard formula could not be imposed on the parties and that the common intent to exclude the provisions in question could be ascertained by interpretation. According to the case law, however, legal certainty requires that this intention be clearly apparent from the terms used by the parties. It is not essential, in order to establish such an intent, that the parties have cited the provisions whose application is excluded. If the wording used by the parties clearly shows their common intent to submit the dispute to the provisions of Chapter 12 PILA instead of Part III of the CPC, it would mean disregarding this intent for formal reasons if an explicit reference to these provisions were made a *sine qua non* condition for opting out. As with the waiver of the right to appeal against an international arbitral award, such formalism is not justied. While the law requires an opting-out agreement to meet the three requirements of Article 353(2) CPC, it does not require the parties to cite specific provisions or use specific expressions. However, for obvious reasons of clarity, parties – and institutions drafting opting-out clauses for them – can only be advised to refer explicitly to the above-mentioned provisions. Accordingly, a valid opting out under Article 353(2) CPC and Article 176(2) PILA does not require an express reference to Part III of the CPC or, respectively, to Chapter 12 of the PILA in the arbitration agreement or in a subsequent agreement. While such a reference is advisable in order to cut short any discussion,

the validity of a choice of law does not depend on it. As the Swiss Federal Supreme Court clearly stated in its case law on Article 176(2) PILA, it is sufficient that the «parties'» common intent to exclude the application of these provisions is clear from the terms used.

[357] Regarding the time of conclusion of the opting out agreement, Article 353(2) CPC provides that an opting out may be agreed «in the arbitration agreement or in an agreement concluded subsequently». Almost identically, Article 176(2) PILA provides that the parties may agree on an opting out in favour of the third part of the CPC «*in the arbitration agreement or in a subsequent agreement*». In a ruling made before the revision of Article 176(2) PILA, the Swiss Federal Supreme Court left open the question of whether such an agreement can be made at any time. The majority of legal scholars consider that an opting out agreement can be concluded at any time, even during the course of an arbitration, some commentators specifying that such a change of regime can occur until the final award is issued.

[358] All scholars commenting on the timing requirement of the waiver make no distinction between Article 353(2) CPC and Article 176(2) PILA. Only Felix Dasser justifies the possibility of opting out under Article 353(2) CPC at any stage of the proceedings *inter alia* by stating that such a choice of law would correspond to a transition to a more liberal regime, without however stating when the reverse transition is possible.[146]

[359] It must be noted that the practical importance of the question is limited. In view of the slight differences between Part III of the CPC and Chapter 12 of the PILA, a change of regime – even in the course of an arbitration – should not generally have any consequences for the procedure before the arbitral tribunal. The present case provides a telling example, as the CAS noted that the question of the validity of the choice of law clause was of no importance for the proceedings before it and would only become relevant at the time of a possible appeal before the Swiss Federal Supreme Court.

[360] It should also be recalled that opting out is by nature consensual. Any inconveniences that a change of regime during the arbitration might cause the parties, such as a delay of the proceedings, are therefore only the consequences of their own choice. Thus, even if such inconveniences could justify advising the parties against agreeing to a change of regime during the course of the arbitration, they do not require prohibition. As pointed out by some scholars, the real problem with the temporal limit of an opting out lies in the relationship of the parties to the arbitrators. To admit the possibility of a change of regime at all stages of the arbitration without the agreement of the arbitrators would be tantamount to forcing them to arbitrate a dispute according to the rules of a *lex arbitri* other than the one that governed the proceedings at the time of the constitution of the tribunal.

[361] The Swiss Federal Supreme Court left open the question of the last moment at which the parties can agree to an opting out without the agreement of the arbitrators. Indeed, the appellant acknowledged that the disputed clause had been proposed by the CAS to the parties. Thus, there was no question of a choice of law being agreed upon without the agreement of the arbitral tribunal. In such a constellation, there was nothing to prevent an opting out being concluded until the issuance of the arbitral award.

146 Felix Dasser, in Schweizerische Zivilprozessordnung [ZPO], Kurzkommentar, 2nd ed. 2014, n° 13 ad art. 353 CPC.

B. Improper Appointment of the Sole Arbitrator and Improper Composition of the Arbitral Tribunal (Article 393(a) CPC)

[362] The Swiss Federal Supreme Court did not issue any decision on this ground during the reporting period.

C. Jurisdiction (Article 393(b) CPC)

1. Decision of the Swiss Federal Supreme Court 4A_600/2021 of 28 February 2022

[363] **Autonomy of the arbitration agreement.** Pursuant to Article 357(2) CPC, the arbitration agreement cannot be challenged on the grounds that the main contract is invalid. This provision codifies the principle of the autonomy of the arbitration agreement. Accordingly, the main contract does not necessarily have the same fate as the arbitration agreement regarding its formation, validity and termination. In this respect, the main contract and the arbitration clause are to be assessed independently of each other. It is not excluded that the same grounds for invalidity can affect both the main contract and the arbitration clause, but the mere assertion that the main contract does not exist or is invalid does not invalidate the arbitration clause.

2. Decision of the Swiss Federal Supreme Court 5A_907/2017 of 4 April 2018

[364] **Arbitration agreement (Article 61 CPC); theory of double relevance.** According to Article 61(b) CPC, where the parties have entered into an arbitration agreement relating to an arbitrable dispute, the court seized shall decline jurisdiction, unless [the court] finds that the arbitration agreement is manifestly invalid or unenforceable.

[365] The elements set forth in Article 61 *ab initio* CPC, i.e. an arbitration agreement relating to an arbitrable dispute, must be examined, in a first step, with full cognition. Only in a second step should it be examined, according to Article 61(b) CPC, whether the agreement is manifestly invalid or cannot be enforced.[147] The term «manifestly» implies that the court, in contrast to the arbitration agreement and the arbitrable dispute, only carries out a summary examination. This applies not only where the existence or validity of the arbitration agreement is in dispute but also, as in this case, where the issue is whether or not the claim in dispute is covered by the agreement, i.e. the material scope of the agreement.

[366] An arbitration agreement is an agreement by which two or more specific or determinable parties agree to submit one or more existing or future disputes to an arbitral tribunal, to the exclusion of the original competent state court, according to a directly or indirectly defined procedure. What is decisive is that it expresses the will of the parties to have certain specific disputes decided by a private arbitral tribunal, to the exclusion of the state courts. The will of the parties to exclude state courts must be clearly and unequivocally expressed in the «parties'» agreement. In the first place, the real and common will of the parties is decisive. If this cannot be established, the declarations of the parties must be interpreted according to the principle of trust. In this respect the court must adhere to the expressions used by the parties in order to comply with the formal requirements of the text (Article 358 CPC). If the application of the principle of trust does not lead to a conclusive result, subsidiary means of interpretation may be applied, such as

147 *See also* Swiss Federal Supreme Court decision ATF 144 III 235 (4A_7/2018 of 18 April 2018), para. 2.1.

the rule on ambiguous clauses, according to which the contract is interpreted, in case of doubt, against the drafter.

[367] Where an arbitration agreement is formulated in such a way that it also covers disputes arising «in connection with» the contract, it must be concluded from the presumed intention of the parties that they intended to submit to the exclusive jurisdiction of the arbitral tribunal all claims arising out of or directly affecting the state of facts governed by the contract.

[368] The exclusion of the theory of dual relevance applies only to the arbitral tribunal itself when its jurisdiction is challenged before it, and not to the state court when it considers whether it should accept its jurisdiction despite the existence of an arbitration agreement within the meaning of Article 61 CPC.

3. Decision of the Swiss Federal Supreme Court 4A_528/2019 of 7 December 2020

[369] **Extension of an arbitration agreement to third parties; stipulation for third parties (Article 112 SCO).** In case of a challenge of the tribunal's jurisdiction, pursuant to Article 393(b) CPC, the Swiss Federal Supreme Court examines the questions of law, including the preliminary questions of substantive law that determine the jurisdiction or lack of jurisdiction of the arbitral tribunal, at its own discretion. The question of the subjective scope of the arbitration agreement to non-signatory third parties, also called subjective extension (jurisdiction *ratione personae*), is included in the question of jurisdiction and lack thereof in accordance with this provision.[148]

[370] An arbitration agreement under Article 357 CPC is an agreement by which two or more specific or determinable parties agree to entrust an arbitral tribunal or a sole arbitrator, instead of the state court that would have jurisdiction, with the task of making a binding award on one or more existing (arbitration agreement) or future (arbitration clause) disputes arising from a specific legal relationship.

[371] According to Article 359(1) CPC, in the event of a challenge to its jurisdiction, the arbitral tribunal must examine the validity of the arbitration agreement, its content, its scope and the regularity of its composition. The term «scope» refers to the objective scope (*Objektive Tragweite; sachlicher Geltungsbereich*) and the subjective scope (*subjektiver Tragweite; subjektiver Geltungsbereich*) of the arbitration agreement.

[372] According to the case law, when examining the subjective scope of the arbitration agreement, the arbitral tribunal must determine which parties are bound by the agreement and, if necessary, investigate whether one or more third parties not named in the agreement nevertheless fall within its scope. According to the principle of privity of contractual obligations, the arbitration agreement included in a contract is in principle only binding on the contracting parties. However, case law identifies various hypotheses that may lead to an arbitration agreement binding persons who have not signed it or are not mentioned in it. This is the case in particular:

- in the case of assignment of a claim, assumption of a debt (simple or cumulative) or transfer of a contractual relationship;
- where a third party interferes in the performance of the contract containing the arbitration agreement, if it can be inferred from this interference that he or she wishes to be a party to

148 *See also* Swiss Federal Supreme Court 5A_1027/2018 of 22 July 2019, para. 2.1.

the arbitration agreement. This case law, based on the rules of good faith, makes it possible to deduce from the conduct of a party its will to be part of a contract it has not signed and to submit to the arbitration clause contained therein;

- if the conditions of the principle of transparency (Durchgriff) are fulfilled, the arbitration clause being not binding on the person who formally concluded the contract, but on the third party who forms an economic unit with it;
- in the case of a genuine stipulation in favour of a third party in accordance with Article 112(2) CO (*Vertrag zugunsten eines Dritten*): unless otherwise agreed, the beneficiary of such a stipulation may file a request for arbitration since she/he acquires, against the debtor (or promisor), a claim with all the preferential rights and other ancillary rights attached to it, including therefore the arbitration clause, and it is not within the power of the stipulator or the promisor to prevent her/him from doing so; the question of whether she/he can be summoned against her/his will in arbitration proceedings relating to the obligation stipulated in her/his favour, which is controversial in the doctrine, was left open.

[373] On the other hand, in the case of securities such as a guarantee, a surety bond or a bank guarantee, the arbitral tribunal cannot accept its jurisdiction to rule on the creditor's rights vis-à-vis the guarantor merely because the contract binding the creditor and the debtor contains an arbitration agreement.

[374] The Swiss Federal Supreme Court freely examines the question of whether non-signatory third parties are bound, including the preliminary questions of substantive law. Indeed, only a complete claricationof these issues will help to avoid, on the one hand, a party being deprived of the possibility of submitting its claim to a court because neither the arbitral tribunal nor the ordinary court would accept jurisdiction and, on the other hand, even in the absence of a negative conflict (where the ordinary court would accept jurisdiction while the arbitral tribunal has declared itself incompetent), the chosen regulation of jurisdiction not being respected.

[375] The issue of whether a genuine stipulation in favour of a third party is revocable or irrevocable also falls within the subjective scope of the arbitration clause. This is a question of law that the Swiss Federal Supreme Court must examine freely, since it is a question of determining whether the arbitral tribunal or the state court should decide the matter and, if revocability is accepted, whether it has actually been revoked, expressly or tacitly.

4. Decision of the Swiss Federal Supreme Court 4A_90/2021 of 9 September 2021

[376] **Mandatory dispute resolution mechanism as a precondition for arbitration.** The Swiss Federal Supreme Court examines the complaint of a breach of a mandatory contractual dispute resolution mechanism as a precondition for (internal) arbitration proceedings (such as conciliation proceedings) from the perspective of jurisdiction under Article 393(b) CPC.[149] In the case at hand, the arbitration clause contained in a consortium agreement mandatorily provided that «in any event» an attempt at conciliation was to be made between the parties prior to the commencement of arbitration proceedings.

149 *See also* Swiss Federal Supreme Court 4A_112/2021 of 9 September 2021, which concerns the same matter and whose findings are identical.

[377] However, an interpretation according to the principle of trust would show that low requirements had to be applied; any attempt to find a mutually agreeable solution by means of an arbitrator appointed by the parties was sufficient. Accordingly, a meeting and the subsequent written settlement negotiations, led by the liquidator of the consortium who had been impliedly appointed as conciliator, constituted an attempt at conciliation.

[378] Even if this were not the case, the complaint of the bypassed conciliation procedure had to be qualified as a manifest abuse of rights. Indeed, according to the Swiss Federal Supreme Court's case law, anyone who invokes the lack of an attempt at conciliation without proposing conciliation prior to the arbitration proceedings is acting in abuse of rights.

[379] In the present case, the initiation of the arbitration proceedings was marked by the efforts of at least the respondents to reach an agreement. It was decisive that it would have been up to the appellant to propose a conciliation procedure that corresponded to his ideas if he had been of the opinion that the conciliation efforts did not meet the requirements of the consortium agreement, especially since the respondents had expressly announced that legal steps would be undertaken. It did not seem compatible with good faith to wait for the «respondents'» settlement efforts to then complain, after the initiation of the arbitration proceedings, that the attempt at conciliation had not met the requirements for conciliation proceedings. In the arbitral proceedings, the appellant had also rejected the «respondents'» proposal to conduct an attempt at conciliation (without the participation of the arbitral tribunal) instead of the oral hearing. Under these circumstances, Article 2 SCC precluded the subsequent invocation of the non-exhaustion of the mandatory conciliation requirement.

5. Decision of the Swiss Federal Supreme Court 4A_461/2021 of 27 October 2021

[380] **Interpretation of an arbitration agreement.** To determine the scope of the arbitration agreement, it must be interpreted. In doing so, the principles generally applicable to the interpretation of private declarations of intent are to be followed. Accordingly, the common and real intent of the parties is decisive in the first place. If such an intention cannot be ascertained, the arbitration agreement must be interpreted in accordance with the principle of trust, i.e. the presumed intention of the parties must be determined in such a way as it could and should have been understood in good faith by the respective recipient of the declaration according to all the circumstances.

[381] If, for objective reasons, there was already a lack of jurisdiction to adjudicate the claims asserted, the arbitral tribunal did not have to further address the question of whether the respondents were bound by the arbitration clause, let alone whether they had passive standing.

6. Decision of the Swiss Federal Supreme Court ATF 144 III 235 (4A_7/2018 of 18 April 2018)

[382] **Employment contract; arbitrability of claims based on wrongful dismissal.** Considering that the provisions governing the arbitrability of labour law claims in domestic arbitration remain unchanged with the entry into force of the CPC, the established case law derived from the Swiss Federal Supreme Court decision ATF 136 III 467 should generally continue to be upheld. As per this ruling, claims under Article 341(1) SCO can only be referred to an arbitral tribunal through mutual agreement, after a one-month period has elapsed since the termination of the employment

relationship. Consequently, the respondent's claims pertaining to the alleged wrongful dismissal, based on Article 337c(1) and (3) SCO, are deemed non-arbitrable. Furthermore, once one month has passed following the termination of the employment relationship, labour law claims are no longer considered as non-waivable (Article 341(1) SCO). Thus, they can be freely arbitrated without any limitations, in accordance with Article 354 CPC. At this stage, an arbitration agreement encompassing all claims arising from the employment contract can be concluded.

7. Decision of the Swiss Federal Supreme Court 4A_209/2020 of 19 August 2020

[383] **Rental agreement; post-termination dispute; lifting of the opposition to summons to pay is not arbitrable**. Pursuant to Article 354 CPC, the subject matter of arbitration proceedings may be any claim which the parties are free to dispose of. Article 361(4) CPC stipulates in a restrictive manner that the parties may only appoint the conciliation authority as arbitral tribunal in matters arising from the rent and lease of residential premises. The proceedings before the conciliation authority as arbitral tribunal are governed by the general rules on arbitration under Article 372 et seq. CPC.

[384] According to the case law, arbitration agreements for disputes arising from a specific contract also generally refer to disputes regarding claims that may result from the termination of the contract.

[385] According to the case law, which in turn is based on the doctrine, the lifting of the opposition to debt collection proceedings is not arbitrable. It is also prohibited for the enforcement judge, in application of Article 386(3) CPC, to declare binding an arbitral order «lifting» the opposition (respectively to certify the binding nature of the lifting of the opposition). Against this background, the «lifting» of the opposition by the arbitral tribunal cannot have any effect from the outset. It is to be held as if no such order had been made in the arbitral decision at all.

[386] There is no interest worthy of protection under Article 76(1)(b) FSCA in the setting aside of an arbitral award solely on the basis of such an order – which is ineffective because it is not enforceable – as the Swiss Federal Supreme Court has ruled in a similarly situation in an officially published decision *(see* ATF 143 III 578 para. 3.2.2.2).

D. Ultra and Infra Petita Award (Article 393(c) CPC)

1. Decision of the Swiss Federal Supreme Court 4A_642/2017 of 12 November 2018

[387] ***Ne ultra petita partium;* compensation.** According to the published case law, the principle of disposition is a procedural principle and the set-off between different items does not violate the *ne ultra petita partium* principle. The question is left open as to whether the principle of disposition is derived from substantive private law, as claimed by certain scholars.

E. Equality of the Parties and the Right to Be Heard (Article 393(d) CPC)

1. Decision of the Swiss Federal Supreme Court 4A_655/2020 of 27 June 2022

[388] **Transposition of the PILA case law.** In the field of domestic arbitration, Article 374(4) and Article 393(d) CPC correspond, respectively, to Article 182(3) and Article 190(2)(d) PILA. It follows that the case law relating to these provisions can be transposed to those.[150]

2. Decision of the Swiss Federal Supreme Court 4A_395/2019 of 2 Mach 2020

[389] **Equality of the parties; right to be heard.** Article 393(d) CPC states that the award of 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 on Article 190(2)(d) PILA is, in principle, also applicable in the field of domestic arbitration. Given the formal nature of the right to be heard, the violation of this guarantee leads, in principle, to the annulment of the challenged award.[151]

3. Decision of the Swiss Federal Supreme Court 4A_461/2021 of 27 October 2021

[390] **Notion of the right to be heard.** The right of the parties to be heard in arbitration proceedings essentially corresponds to the constitutional right guaranteed in Article 29(2) Swiss Constitution.[152] The case law derives from this in particular the right of the parties to express themselves on all facts that are essential for the judgment, to present their legal position, to prove their factual submissions that are essential for the decision with suitable means offered in due time and form, to participate in the negotiations and to inspect the files. This corresponds to a duty of the arbitral tribunal to actually hear and examine the legally relevant submissions of the parties. This does not mean, however, that it must expressly deal with every argument of the parties.[153]

[391] The right to equal treatment requires that the arbitral tribunal treat the parties equally at all stages of the proceedings and not grant to one party what is denied to the other. Both parties must be given the same opportunity to present their point of view in the proceedings.

[392] In the present case, the Swiss Federal Supreme Court specified that the fact that a party may incur expenses for translations in arbitral proceedings due to the admissible use of a language by the opposing party does not constitute unequal treatment proscribed by Article 393(d) CPC (German was the language of the proceedings, with the parties being given the option of submitting legal documents in Italian).

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150 *See also* Swiss Federal Supreme Court decision 4A_402/2018 of 11 March 2019, para. 3.2.

151 *See also* Swiss Federal Supreme Court decisions 4A_35/2020 of 15 May 2020, para. 2.1; 4A_642/2017 of 12 November 2018, para. 4.2.2.1: in that decision, the claim of a violation of the right to be heard was accepted on certain points of the contested award, so that the appeal was partially admitted (*see* para. 6.3); 5A_163/2018 of 3 September 2018, para. 3.1. *See also* Swiss Federal Supreme Court decision 4A_461/2021 of 27 October 2021, para. 2.2.

152 *See also* Swiss Federal Supreme Court decisions 4A_655/2020 of 27 June 2022, para. 4.2; 4A_35/2020 of 15 May 2020, para. 2.1; 4A_402/2018 of 11 March 2019, para. 3.2.

153 *See also* Swiss Federal Supreme Court decisions 4A_348/2020 of 4 January 2021, para. 5; 4A_35/2020 of 15 May 2020, para. 2.1.

4. Decision of the Swiss Federal Supreme Court 4A_655/2020 of 27 June 2022

[393] **Minimum duty to examine and review relevant issues**. The right to be heard imposes on arbitrators a minimum duty to examine and deal with the relevant issues. This duty is breached if due to inadvertence or misunderstanding the arbitral tribunal fails to consider allegations, arguments, evidence or offers of evidence submitted by the parties and relevant to the decision.[154]

5. Decision of the Swiss Federal Supreme Court 4A_277/2021 of 21 December 2021

[394] **Adversarial proceedings; no unconditional right to reply to written submissions in arbitration.** Even if, in the field of arbitration, the Swiss Federal Supreme Court is accustomed to saying that the right to be heard guaranteed by Article 190(2)(d) PILA – respectively by Article 393(d) CPC – essentially corresponds to that enshrined in Article 29(2) of the Swiss Constitution, the relatively strict requirements formulated with regard to the unconditional right of reply cannot be reproduced as they stand in the field of domestic and international arbitration. In this area, the guarantee of the right to be heard in the broad sense does not confer an absolute right to a double exchange of written submissions; at most, the claimant must be able to take position, in one way or another, on the arguments put forward by the respondent in the second place, in particular on possible counterclaims. The Swiss Federal Supreme Court recalls that in a 2004 decision [*see* decision 4P.104/2004 of 18 October 2004, para. 5.3.1] concerning an international arbitration, it held that the requirement for both sides to file post-hearing briefs simultaneously, without the possibility of reply, did not violate the right to be heard in adversarial proceedings; the adversarial principle does not give the right to respond indefinitely to the opposing party's arguments.

F. Arbitrariness (Article 393(e) CPC)

1. Decision of the Swiss Federal Supreme Court 4A_152/2019 of 5 June 2019

[395] **Concept of arbitrariness; review power; facts and documents.** A finding of fact is arbitrary within the meaning of Article 393(e) CPC only if the arbitral tribunal inadvertently contradicted the evidence in the case file, either by overlooking certain passages in a particular document or by attributing to them a content other than that which they actually have, or by mistakenly assuming that a fact is established by a document when the document in question does not in fact give any indication in this regard. The scope of the claim of arbitrariness in matters of fact is limited: it does not concern the assessment of evidence and the conclusions drawn from it, but only findings of fact that are clearly refuted by the 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 case file.[155]

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154 *See also* Swiss Federal Supreme Court decision 4A_539/2018 of 27 March 2019, para. 6.

155 *See also* Swiss Federal Supreme Court decisions 4A_217/2022 of 6 July 2022, para. 3.1; 4A_633/2021 of 21 January 2022, para. 5.1; 4A_544/2021 of 6 January 2022, para. 3.1.1; 4A_277/2021 of 21 December 2021, para. 3.1; 5A_1007/2020 of 2 July 2021, para. 1.2.1.1; 4A_117/2020 of 27 January 2021, para. 2.1.2; 4A_583/2020 of 19 January 2021, para. 2.1; 4A_215/2020 of 5 August 2020, para. 4; 4A_56/2020 of 8 July 2020, para. 6; 4A_586/2019 of 21 April 2020, para. 2; 4A_563/2018 of 16 October 2019, para. 2; 4A_81/2019 of 13 October 2019, para. 2; 4A_338/2018 of 28 November 2018, para 2; 4A_572/2017 of 2 November 2018, para. 4.

[396] Arbitrariness also exists under Article 393(e) CPC if the award is tainted with a manifest violation of law. Only the law applicable to the merits of the case is concerned, to the exclusion of procedural law. However, by analogy with the case law on Article 190(2)(e) PILA, procedural errors affecting the procedural public policy are reserved.[156] A possible manifest violation of equity, also censured by Article 393(e) CPC, presupposes that the arbitral tribunal is entitled to decide in equity or that it has applied a rule referring to equity.[157]

[397] According to Article 77(3) FSCA, the Swiss Federal Supreme Court can only deal with claims raised and substantiated by the appellant. Therefore, if the appellant invokes Article 393(e) CPC, it must precisely identify the documents that are considered to have been incorrectly read and indicate the precise nature of the error. Criticism of the assessment of evidence is inadmissible if it goes beyond the specific scope of the limited protection afforded by this provision.[158]

2. Decision of the Swiss Federal Supreme Court 4A_143/2018 of 4 April 2018

[398] **Notion of arbitrariness; assessment of documents submitted to the arbitral tribunal.** The protection against arbitrariness conferred by Article 393(e) CPC in the field of domestic arbitration does not allow the appellant to challenge the assessment of the documents submitted to the arbitral tribunal; it only allows him to argue, if necessary, that the tribunal ignored certain passages of a given document or attributed to it a content diverging from its real content, in particular by erroneously holding that a fact is established by a document, whereas this document does not provide any indication of this fact.

3. Decision of the Swiss Federal Supreme Court 5A_163/2018 of 3 September 2018

[399] **Notion of arbitrariness; facts; assessment of evidence; clear violation of law under Article 393(e) CPC.** A set aside application may be lodged against a domestic arbitration award if, among other things, the outcome is arbitrary because it is based on findings that are clearly contrary to the facts of the case or because it constitutes a manifest violation of law or equity (Article 393(e) CPC). This ground for appeal was taken from Article 36(f) of the Swiss Intercantonal Arbitration Convention of 27 March 1969 (hereinafter: «**CA**»).

[400] According to the case law on Article 36(f) CA, which is still valid under the CPC, a finding of fact is only arbitrary if the arbitral tribunal inadvertently contradicts the documents in the case file, either by overlooking certain passages in a particular document or by attributing to them a content other than that which they actually have, or by mistakenly assuming that a fact is established by a document when the document in question does not in fact give any indication of this. The scope of the claim of arbitrariness in matters of fact provided for in Article 36(f) CA is therefore limited: it does not concern the assessment of evidence and the conclusions drawn from it, but only findings of fact that are clearly refuted by the documents in the file.[159] The manner in

156 *See also* Swiss Federal Supreme Court decision 4A_117/2020 of 27 January 2021, para.2.2.2.

157 *See also* Swiss Federal Supreme Court decisions 4A_544/2021 of 6 January 2022, para. 3.1.1; 4A_56/2020 of 8 July 2020, para. 6; 4A_58/2020 of 3 June 2020, para. 4.1; 4A_586/2019 of 21 April 2020, para. 2.

158 *See also* Swiss Federal Supreme Court decision 4A_56/2020 of 8 July 2020, para. 6.

159 *See also* Swiss Federal Supreme Court decisions 4A_139/2021 of 2 December 2021, para. 3.1; 4A_395/2019 of 2 March 2020; para. 6.1; 4A_338/2018 of 28 November 2018, para. 2.

which the arbitral tribunal exercises its discretion cannot be appealed; 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 documents in the file.[160] In other words, the error sanctioned in the past by Article 36(f) CA and today by Article 393(e) CPC is more akin to the concept of manifest inadvertence used in Article 63(2) OJ than to the concept of manifestly inaccurate establishment of the facts contained in Article 105(2) FSCA, which corresponds to arbitrariness.[161]

[401] The arbitrariness prohibited by Article 393(e) of the CPC also arises from the fact that the arbitral award constitutes a clear violation of the law. Only substantive law is concerned, to the exclusion of procedural law.[162] By analogy with the case law on Article 190(2)(e) PILA, procedural errors that infringe procedural public policy are reserved.[163]

[402] In accordance with the general definition of arbitrariness, a decision can be labelled as such, in terms of the application of the law, only if it seriously disregards a clear and undisputed legal norm or principle. It is therefore not enough that an alternative solution seems conceivable or even preferable.[164]

[403] As for the manifest violation of equity, sanctioned by the same provision, it presupposes that the arbitral tribunal was authorised to rule in equity or that it applied a norm referring to equity.

[404] In the cases mentioned above, it is also necessary for the violation to have rendered the award arbitrary in its result, as the above-mentioned provision expressly states.

4. Decision of the Swiss Federal Supreme Court 4A_240/2021 of 2 November 2021

[405] **Notion of arbitrariness; manifest violation of the law**. The definition of arbitrariness in Article 393(e) CPC is consistent with the concept of arbitrariness developed by the Swiss Federal Supreme Court in relation to Article 9 Swiss Constitution. The «manifest violation of the law» only refers to a violation of substantive law and not to a violation of procedural law. Arbitrariness in the application of the law exists if the challenged decision is obviously untenable, clearly contradicts the factual situation, blatantly violates a norm or an undisputed legal principle or is utterly contrary to the idea of justice; in this context, it is necessary that the decision is arbitrary

160 *See also* Swiss Federal Supreme Court decisions 4A_395/2019 of 2 March 2020, para. 6.1; 4A_642/2017 of 12 November 2018, para. 4.1.1; 4A_547/2018 of 12 February 2019, para. 4; 5A_890/2018 of 25 February 2019, para. 2.2.

161 *See also* Swiss Federal Supreme Court decision 4A_395/2019 of 2 March 2020, para. 6.1.

162 *See also* Swiss Federal Supreme Court decision 4A_547/2018 of 12 February 2019, para. 4. *See also* Swiss Federal Supreme Court decision 4A_642/2017 of 12 November 2018, paras. 5.1 and 5.4: in this decision, the Swiss Federal Supreme Court clarified that the fact that the appellant complains of an arbitrary application of a standard of SIA Regulation 102 does not strictly speaking constitute a clear breach of law, as required by Article 393(e) CPC. It left open the question whether it is sufficient to admit the plea of an untenable interpretation of the relevant clause of SIA Regulation 102, i.e. a criticism of the law if it is accepted that the arbitral tribunal sought the meaning of this clause according to the principle of trust.

163 *See also* Swiss Federal Supreme Court decisions 4A_572/2017 of 2 November 2018, para. 5.1; 4A_338/2018 of 28 November 2018, para. 2, which mentions by way of illustration the right to an independent expert or the principle of *res iudicata*.

164 *See also* Swiss Federal Supreme Court decision 4A_642/2017 of 12 November 2018, para. 5.1: in this decision, the Swiss Federal Supreme Court clarifies that the choice of a solution cannot be qualified as arbitrary when the question is controversial in doctrine.

not only in its reasoning but also in its outcome. The appellant must demonstrate in detail that there is obvious untenability in this sense based on the criteria developed by case law.[165]

5. Decision of the Swiss Federal Supreme Court 4A_58/2020 of 3 June 2020

[406] **Violation of procedural law; allocation of costs and compensation**. According to the Swiss Federal Supreme Court case law on Article 393(e) CPC, the «allocation of the attorneys» fees and of the arbitration costs is also a question of procedural law – and not of substantive law – which can only be reviewed from the perspective of (procedural) public order. Whether an arbitral tribunal decides in advance in a separate partial award on the reimbursement of the advance of the arbitration costs or whether it decides in the final award on the apportionment of costs cannot make any difference regarding the Swiss Federal Supreme Court's power of review. In both cases, it is a question of the application of procedural rules and in this context, it cannot play a role whether an arbitral party fulfils its obligation under the arbitration agreement to pay the advance on costs ordered by the arbitral tribunal directly to the arbitral tribunal or indirectly via reimbursement to the other party who has fulfilled the obligation to advance costs to the arbitral tribunal. However, since the appellant does not complain of a violation of public policy on this point either, its grievance cannot be accepted.

6. Decision of the Swiss Federal Supreme Court 4A_277/2021 of 21 December 2021

[407] **Allocation of costs «manifestly excessive».** The approach set forth in the decision of the Swiss Federal Supreme Court 4A_424/2011 of 2 November 2011, which also corresponds to a widespread scholarly opinion, must be adhered to. The provisions on costs differ from other procedural rules in that they confer direct claims; this particularity justifies admitting the possibility of raising the grievance of arbitrariness under Article 393(e) CPC. However, the reader should not be misled: there can be no question of opening a Pandora's box. The reservations already expressed in the case law remain valid (*see* for example decision of the Swiss Federal Supreme Court 4A_156/2020 of 1 October 2020, para. 6.1), and the constraints on the review of substantive law cannot be lessened when the review concerns an award of costs. On the contrary, the broad discretion available to the arbitrator in this matter will only allow arbitrariness to be found on very rare occasions. On the other hand, the appellant cannot in future run the risk of being dismissed on the pretext that he failed to complain of a contradiction with public policy.

7. Decision of the Swiss Federal Supreme Court 4A_67/2020 of 12 June 2020

[408] **Notion of arbitrariness; equity; equality; right to be heard**. According to Article 393(e) CPC, the appellant is entitled to argue that the challenged award is arbitrary in its outcome because it contains a clear violation of law or equity. A possible manifest violation of equity presupposes that the arbitral tribunal is empowered to decide in equity or that it has to decide in equity or that it applied a rule referring to equity. The appellant is also entitled to argue, if necessary, that the arbitral tribunal ruled beyond the claims before it or that the equality of the

165 *See also* Swiss Federal Supreme Court decisions 4A/655/2020 of 27 July 2022, para. 5.3; 4A_224/2019 of 11 November 2019, para. 2.1.

parties or their right to be heard in adversarial proceedings has not been respected (Article 393(d) CPC).

8. Decision of the Swiss Federal Supreme Court 4A_348/2020 of 4 January 2021

[409] **Notion of arbitrariness, factual findings.** The concept of arbitrariness in Article 393(e) CPC is consistent with that of Article 9 Swiss Constitution. According to case law, arbitrariness does not already exist if another solution would also have to be considered or would even be preferable, but only if the contested decision is obviously untenable, clearly contradicts the factual situation, blatantly violates a norm or an undisputed principle of law or is utterly contrary to the idea of justice. The facts with regard to which arbitrariness in the aforementioned sense can be asserted under Article 393(e) CPC are limited: with regard to the findings of fact, only obvious inconsistencies in the case file may be alleged. This is the case if the arbitral tribunal, due to an oversight, has contradicted the records; be it that it has overlooked parts of the records or has attributed to them a different content than the true one, be it that it has erroneously assumed that a fact is documented in the records, whereas in reality the records do not provide any information about it. Inconsistency with the file only exists if the arbitral tribunal, in its assessment of the evidence, proceeds from incorrect factual premises; the result and the manner of the assessment of the evidence as well as the evaluations therein are not the subject of arbitrariness, but only findings of fact that are not subject to any further appraisal because they are inconsistent with the files.[166] If the arbitral award is set aside, the arbitral tribunal shall – as expressly provided in Article 395(2) CPC – «*decide anew in accordance with the considerations in the rejection decision*». According to case law, the violation of this provision constitutes a ground of appeal under Article 393(e) CPC.

9. Decision of the Swiss Federal Supreme Court 4A_139/2021 of 2 December 2021

[410] **Notion of arbitrariness; distinction with assessment of evidence.** A finding is contrary to the file when a relevant element of the file is not integrated at all in the assessment of the evidence, or at least not in its true content; for example, the arbitrator disregards the text of a title or the precise wording of a testimony. On the other hand, there is no finding contrary to the file, but rather an assessment of the evidence when the arbitrator weighs up several contradictory means of proof and gives precedence to some to the detriment of others. In short, the complaint of arbitrariness as circumscribed by Article 393 CPC only relates to findings that are irreconcilable with the documents of the record, to the exclusion of those that depend on an assessment or a value judgment.[167] It makes sense to avoid this pitfall in arbitration proceedings and to use this remedy only in clear-cut cases; because anyone who submits his dispute to an arbitral tribunal must accept its assessment of the evidence, but not the findings that are manifestly contrary to the record. An award constitutes a manifest violation of law, according to Article 393(e) CPC, when it seriously disregards a clear and undisputed legal norm or principle. It is therefore not

166 *See also* Swiss Federal Supreme Court decisions 4A_240/2021 of 2 November 2021, para. 4.1.1; 4A_461/2021 of 27 October 2021, para. 2.1; 4A_35/2020 of 15 May 2020, para. 3.1.

167 *See also* Swiss Federal Supreme Court decision 4A_642/2017 of 12 November 2018, para. 4.1.1.

sufficient that another solution appears conceivable or even preferable. The choice of a solution cannot be qualified as arbitrary when the question is controversial in scholarly writings.[168]

G. Excessive Expenses and «Arbitrators» Fees (Article 393(f) CPC)

1. Decision of the Swiss Federal Supreme Court 4A_544/2021 of 6 January 2022

[411] **Challenge of the allocation of costs.** Under Article 393(f) CPC, the appellant is entitled to argue that the «arbitrators'» costs and fees xed by the arbitral tribunal are manifestly excessive. This claim, however, only allows for a challenge to the amount of the arbitral tribunal's costs and fees, to the exclusion of the apportionment of these costs and fees between the parties.

[412] According to case law, the manner in which an arbitral tribunal allocates costs between the parties and decides whether or not to award costs to them is largely beyond the scope of the Swiss Federal Supreme Court's review. Indeed, the allocation of costs is not a ground for appeal included in the exhaustive list of Article 393 CPC and Article 393(e) only refers to the violation of substantive law. The application of the rules on the allocation of costs and expenses is a matter of procedural law, so that the appellant cannot complain about it by invoking Article 393(e) CPC. Only an allocation of costs that is incompatible with procedural public policy may be sanctioned by the Swiss Federal Supreme Court.

2. Decision of the Swiss Federal Supreme Court 4A_67/2020 of 12 June 2020

[413] **Excessive expenses and «arbitrators'» fees; quantification of claims.** Pursuant to Article 393(f) CPC, the appellant is entitled to argue that the «arbitrators'» costs and fees fixed by the arbitral tribunal are manifestly excessive. According to Article 395(4) CPC, the Swiss Federal Supreme Court is then entitled to substitute a reduced amount for that fixed by the arbitral tribunal. It is up to the appellant to provide quantified figures.[169]

3. Decision of the Swiss Federal Supreme Court 4A_49/2019 of 15 July 2019

[414] **«Arbitrators'» and secretary's fees**. The hourly rate of 500 Swiss francs applied in the case at hand is not unusual for arbitrators who are lawyers. In this respect, it is irrelevant that some law firms advertise an hourly rate of between 300 and 400 francs on their websites, and also that the authority of Vaud for the moderation of «lawyers'» fees has approved a rate of this magnitude in some of its published decisions.

[415] The secretary of an arbitral tribunal, appointed as such, a lawyer, takes part in the proceedings. In the system adopted by the arbitral tribunal, where each arbitrator is remunerated according to her/his usual fee and the time actually invested in the arbitration, it is logical that the secretary should be remunerated in the same way and at the «parties'» cost.

168 *See also* Swiss Federal Supreme Court decisions 4A_277/2021 of 21 December 2021, para. 3.1; 4A_395/2019 of 2 March 2020, para. 4.1.

169 *See also* Swiss Federal Supreme Court decision 4A_49/2019 of 15 July 2019, para. 5.

4. Decision of the Swiss Federal Supreme Court 5A_213/2020 of 31 August 2020

[416] The parties have not concluded a separate fee agreement with the arbitral tribunal. The rate in accordance with the arbitration rules to which the parties have submitted themselves thus applies to the compensation and expenses of the arbitral tribunal. The appellate authority must therefore limit itself to examining whether this rate was obviously exceeded. The ground of appeal pursuant to Article 393(f) CPC thus does not make the Swiss Federal Supreme Court the taxation authority. It is only entitled to reduce the compensation and expenses of the arbitral tribunal if they prove to be «obviously too high» when considered as a whole. The rate has to be determined on a case-by-case basis according to the criteria laid down by the arbitration rules.

H. Revision (Article 396 ss CPC)

1. Decision of the Swiss Federal Supreme Court 4A_62/2019, 4A_354/2019 of 6 August 2019

[417] Articles 34 to 38 FSCA regulate the cases in which judges and clerks of the Swiss Federal Supreme Court may be challenged, as well as the challenge procedure. Article 38(4) FSCA provides that if a ground for challenge is only discovered after the proceedings have been completed, the provisions on revision apply. Of the various cases in which a Swiss Federal Supreme Court's decision may be revised, Article 121(a) FSCA provides for the case in which the provisions on the composition of the court or the challenge have not been observed.

[418] Articles 367 to 369 CPC regulate the challenge of arbitrators and the challenge procedure in domestic arbitration. There is no provision dealing with the possibility that a ground for challenge is discovered only after the arbitral proceedings have been concluded, and non-compliance with provisions concerning the challenge of arbitrators is not one of the grounds for revision of an arbitral award listed in Article 396 CPC. At first sight, a revision of an arbitral award cannot therefore be claimed on the ground that the sole arbitrator or a member of the arbitral tribunal should have disqualified herself/himself.

[419] In a 2016 decision [*142 III 521*, *para. 2*], the Swiss Federal Supreme Court considered that the rules applicable for its own judges and clerks (i.e. Article 38(4) and 121(a) FSCA) should be applicable *mutatis mutandis* to the members of an arbitral tribunal, notwithstanding the absence of corresponding provisions in the CPC. After a detailed and methodical discussion, the Swiss Federal Supreme Court decided to leave this question open because a legislative revision procedure was about to start and that the relevant legislation would eventually be supplemented in a clear and coherent manner, and that in the present case, in any event, there was no reason to revise the challenged award.

[420] In domestic arbitration, according to Article 367(1)(c) CPC, an arbitrator may be challenged «in case of legitimate doubts as to his independence or impartiality». In international arbitration, according to Article 180(1)(c) PILA, an arbitrator may be challenged «where circumstances give rise to justifiable doubts as to his independence». Although these provisions differ in their wording, they all aim to implement at the level of the law the constitutional guarantee of an independent and impartial tribunal which is conferred on every litigant by Article 30(1) of the Swiss Constitution. Like a state judge, and subject to the specifics of arbitration which may have to be taken into account when examining the concrete circumstances of the case, an arbitrator must comply with this guarantee.

[421] This guarantee allows the appellant to challenge a judge or arbitrator whose situation or behaviour is such as to raise doubts about her/his impartiality. In particular, it aims to prevent circumstances outside the case from inuencing the judgment in favour of or to the detriment of a party. It does not require disqualification only when an actual bias on the part of the judge is established, since an internal disposition on her/his part can hardly be proved; it is sufficient that the circumstances give the appearance of bias and give rise to a fear of biased activity. Only objectively ascertained circumstances must be taken into account; the purely individual impressions of one of the parties to the proceedings are not decisive.

[422] [*The question left undecided in this case has since been clarified directly in the CPC. Indeed Article 396(1) CPC has been modified and a new ground for revision added. As of 1 January 2021, Article 396(1)(d) provides for the following: «A party may request the ordinary court that has jurisdiction under Article 356(1) CPC to review an arbitral award if a ground for challenge under Article 367(1)(c) only came to light after conclusion of the arbitration proceedings despite exercising due diligence and no other legal remedy is available.»]*

I. Other Questions

1. Decision of the Swiss Federal Supreme Court 4A_151/2020 of 2 November 2020

[423] **Scope of arbitration agreement; interpretation of a hybrid dispute resolution clause.** Under Swiss law, interpretation of contractual clauses – including arbitration clauses – rests upon an examination of the real and common intention of the parties, which prevails over the objective method of contract interpretation based on a plain meaning of the text (*see* Article 18 SCO).

[424] In the present case, the loan agreement at issue contained conflicting dispute resolution clauses: first, a general choice-of-forum clause under which all disputes under the contract should be brought before the state courts of Lugano (Switzerland), and second, an arbitration clause stating that specific disputes on the interpretation and application of the contract should be brought before a sole arbitrator. The Swiss Federal Supreme Court found that the arbitration clause was meant by the parties to only cover disputes centred on the interpretation and application of the loan agreement. The lender's claim in repayment of the loan, which sought performance of the borrower's repayment obligation under the contract, was not such a dispute and therefore fell outside of the scope of the arbitration clause. Based on this reasoning, the Court rejected the borrower's challenge to the jurisdiction of the Swiss courts and affirmed their jurisdiction over the matter.

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