Arbitration in Switzerland

The Practitioner's Guide

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Chapter 2
The Swiss Private International Law Statute (Chapter 12)

Section IX: Finality, Challenge
1. Principle

Article 190

(1) The award is final from its notification.

(2) The award may only be challenged:

(a) if the sole arbitrator was not properly appointed or if the arbitral tribunal was not properly constituted;

(b) if the arbitral tribunal wrongly accepted or declined jurisdiction;

(c) if the arbitral tribunal's decision went beyond the claims submitted to it, or it failed to decide on one of the prayers for relief;

(d) if the principle of equal treatment of the parties or the right of the parties to be heard was violated;

(e) if the award is incompatible with public policy.

(3) Interim awards may be challenged on the grounds of the above paras. 2(a) and 2(b) only; the time limit runs from the notification of the interim award.

I. Purpose of the Provision

A. Finality of Award; Start of Term for Challenge (paragraph 1)

1 Article 190(1) PILS provides that the award is final as from its notification. The provision, therefore, determines at which point in time the award becomes final. The award's finality in turn is of utmost importance because the *time-limit for challenging the award* before the Swiss Federal Supreme Court starts to run the day after the award was notified.[1] Under Art. 100(1) BGG, the setting aside motion must be filed within 30 days.[2] This statutory deadline cannot be extended[3] and applies to any kind of award open to challenge under Art. 190 PILS.[4]

2 Further, the finality of the award triggers *res judicata effects*.[5] Also, the finality of the award leads to the award becoming *enforceable* under the New York Convention, because the notion of *finality* under Art. 190(1) PILS is tantamount to that of *binding* within the meaning of Art. V(1)(e) NYC.[6]

B. Exhaustive List of Grounds for Challenge (paragraph 2)

3 Under Art. 190(2) PILS, motions to set aside the arbitral award may only be brought on the basis of one of the exhaustively listed grounds.[7] The only grounds which may be invoked are the following: (i) the

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1 For detail, cf. Arroyo, below commentary on Art. 191 PILS, paras. 32-43.

2 Amstutz/Arnold, para. 8 at Art. 44; Art. 190(3) PILS expressly mentions this start of the term regarding the challenge of interim awards. However, this principle applies by virtue of Art. 100(1) BGG to the challenge of any award (cf. Klett, para. 4 at Art. 77 BGG; cf. also BGer. 4A_582/2009 para. 2.1.2).

3 Art. 47(1) BGG. By contrast, the deadline set by the Supreme Court for filing an answer to the setting aside motion may be extended upon a reasoned request under Art. 47(2) BGG. The extension request must be filed within the deadline, i.e., at the latest on the day the deadline lapses (Amstutz/Arnold, para. 6 at Art. 47).

4 I.e., interim, partial and final awards (cf. Klett, para. 4 at Art. 77).

5 Bucher, para. 1 at Art. 190.

6 Cf. Berty/Schyder, para. 7 at Art. 190; concurring Bucher, para. 1 at Art. 190.

7 Cf. BGer. 4A_54/2012 para. 1.6; BGer. 4A_232/2012 para. 2.2; BGE 134 III 186 para. 5; BGE 128 III 50 para. 1a; BGE 127 III 279 para. 1a; BGE 119 II 380 para. 3c; see also Bucher, para. 40 at Art. 190; Berger/Kellerhals, para. 1542.

improper constitution of the tribunal, or the improper appointment of the sole arbitrator (para. 2(a)); (ii) wrong findings of the arbitral tribunal on jurisdiction (para. 2(b)); (iii) the award going *ultra petita* or being *infra petita* (para. 2(c)); the violation of either the principle of equality of the parties or their right to be heard (para. 2(d)); a violation of public policy (para. 2(e)).

4 Such a closed list, which can also be found in the English Arbitration Act[8] and the UNCITRAL Model Law,[9] reflects modern international standards to strictly limit and precisely define the grounds for challenge of an award.[10] As stated in the legislative materials, Chapter 12 of the PILS aims at limiting court intervention to the absolutely required minimum.[11]

5 It was thus the intended purpose of the Swiss legislature to limit court review of arbitral awards at the seat[12] as much as possible in order to foster Switzerland's reputation as a leading international arbitration venue.[13] The most significant advantage of this unique approach is that the court review procedure is both simple and rapid.[14] On average, Supreme Court setting aside proceedings, in fact, last four months only,[15] a feature which is unparalleled internationally.[16]

C. Restrictions with regard to Challenge of Interim Awards (paragraph 3)

6 Finally, under Art. 190(3) PILS interim (or preliminary) awards can only be challenged on the basis of a (purported) violation of Art. 190(2)(a) or 190(2)(b) PILS.[17] In other words, only the improper constitution of the arbitral tribunal or the incorrect finding of jurisdiction may be invoked against an interim award, while partial or final awards may be challenged on any of the grounds provided for in Art. 190(2) PILS, i.e., paras. (2)(a)-(e).[18]

7 The reason why interim awards are (only) open to challenge based on the grounds of Art. 190(2)(a)-(b) is that procedural efficiency demands that the important issues of proper constitution (including independence and impartiality)[19] and jurisdiction of the arbitral tribunal be subject to judicial review at the earliest possible stage of the arbitration.[20] As a result, the aim is to avoid the continuation of proceedings that are flawed from the outset. For this reason, interim awards on jurisdiction or the tribunal's constitution must be challenged immediately, failing which this right will be forfeited.[21]

II. Article 190(1) PILS

8 Pursuant to Art. 190(1) PILS, the award is final as from its notification. The award is notified in the way agreed by the parties or, failing such agreement, as determined by the arbitral tribunal.[22] Parties rarely

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8 Cf. Sections 67 to 69 of the 1996 English Arbitration Act.

9 Cf. Art. 34 UNCITRAL Model Law on International Commercial Arbitration.

10 Vischer, paras. 9-10 at Art. 190; cf. also Born, p. 2553; Hunter/Landau, *The English Arbitration Act 1996: Text and Notes*, The Hague, London, Boston 1998 p. 56.

11 Cf. legislative report on the PILS of 10 November 1982 ("*Botschaft zum Bundesgesetz über das internationale Privatrecht (IPR-Gesetz)*"), BBl 1983, vol. 1, p. 458.

12 Berger/Kellerhals, para. 1543.

13 Bucher, para. 2 at Art. 191; BGE 115 II 288 para. 2a; BGE 130 III 76 para. 4.2, with numerous references to the legislative materials.

14 Kaufmann-Kohler/Rigozzi, para. 706; Poudret/Besson, para. 772; BGE 119 II 380 para. 3c: "*Le législateur a intentionnellement limité, à l'art. 190 al. 2 LDIP, les griefs qui peuvent être invoqués [...] afin de réduire les possibilités de ralentir la procédure et afin d'augmenter l'efficacité de la juridiction arbitrale [...].*"; see also BGE 115 II 288 para. 2b.

15 Dasser, *ASA Bull. 2010*, pp. 90, 99.

16 By contrast, in most arbitration venues, setting aside proceedings generally last several years (see Dasser, *ASA Bull. 2010*, p. 92).

17 BGE 130 III 66 para. 4.3; BGE 130 III 755 para. 1.2.2 at the end; BGer. 4P.140/2004 para. 1.3.

18 Berger/Kellerhals, paras. 1526, 1530.

19 Under Supreme Court case law, an arbitral tribunal lacking independence or impartiality is irregularly constituted in terms of Art. 190(2)(a) PILS (BGE 129 III 445 para. 3.1).

20 Berger/Kellerhals, para. 1535, footnote 20.

21 BGE 130 III 76 para. 3.2.1; BGE 130 III 66 para. 4.3; BGE 116 II 80 para. 3a; BGer. 4P.40/2002 para. 1a.

22 Berti/Schnyder, para. 6 at Art. 190; Bucher, para. 3 at Art. 190.

address this issue in the arbitration agreement. However, by agreeing on a given set of arbitration rules containing a notification provision, they will (indirectly) have agreed on how notification of the award is to be made. In fact, most sets of arbitration rules contain provisions to that effect and contain a rule of service.[23]

9 Notification of the award is of paramount importance given that it triggers *res judicata effects*[24] and the *enforceability* of the award under the New York Convention.[25] Notwithstanding a challenge of the award before the Supreme Court, the award is final as from its notification under Art. 190(1) PILS and thus enforceable at law.[26] This is so because the filing of a setting aside motion does not *per se* have any suspensive effect[27] so that the award will continue to be enforceable despite such filing.[28] An exception to this rule only applies if the Supreme Court, upon express application of the party challenging the award,[29] grants such suspensive effect.[30]

10 Importantly, the *term for challenging the award* before the Swiss Federal Supreme Court also depends on the notification. Under Art. 100(1) BGG, the setting aside motion must be filed within 30 days after the award is notified to the parties.[31] This statutory deadline cannot be extended[32] and applies to any kind of award open to challenge under Art. 190 PILS, i.e., interim, partial and final awards.[33]

11 The day on which the award is notified must not be considered when it comes to computing the 30-day term.[34] Put differently, the term starts to run the day after the award was notified. As to the date of notification, this is the day on which the award is served on the parties or their legal representatives. In international arbitrations, parties normally are legally represented. The date of service of the award on the legal representatives, therefore, will be the relevant date, while a later – separate and additional – service on the parties is irrelevant.[35]

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23 See, e.g., Art. 34(1) ICC Rules: "Once an award has been made, the Secretariat shall notify to the parties the text signed by the arbitral tribunal [...]"; see also Art. 32(6) Swiss Rules: "Originals of the award signed by the arbitrators shall be communicated by the arbitral tribunal to the parties [...]."; Art. 26.5 LCIA Rules: "The sole arbitrator or chairman shall be responsible for delivering the award to the LCIA Court, which shall transmit certified copies to the parties [...]."; and Art. R59 CAS Rules: "The Panel may decide to communicate the operative part of the award to the parties, prior to the reasons. [...]. The award, notified by the CAS Court Office, shall be final and binding upon the parties."; Art. 34(6) UNCITRAL Rules: "Copies of the award signed by the arbitrators shall be communicated to the parties by the arbitral tribunal."

24 Bucher, para. 1 at Art. 190.

25 Cf. Art. V(1)(e) NYC; see also Berty/Schyder, para. 7 at Art. 190, stressing that the notion of *finality* under Art. 190(1) PILS is tantamount to that of *binding* within the meaning of Art. V(1)(e) NYC; concurring Bucher, para. 1 at Art. 190.

26 Girsberger/Voser, para. 1062; Jermini/Bernardoni, pp. 79-80.

27 By virtue of Art. 77(2) BGG, Art. 103(2) BGG is not applicable to challenges of arbitral awards.

28 Cf. Berger/Kellerhals, paras. 1495-1496.

29 As to the prerequisites for meeting the (high) threshold established by the Court's case law, cf. Arroyo, below commentary on Art. 191 PILS, para. 59.

30 Art. 103(3) BGG is not excluded by Art. 77(2) BGG so that the Supreme Court may, but need not, order the suspensive effect; see also Jermini/Bernardoni, pp. 81-82; Berger/Kellerhals, para. 1495; Kaufmann-Kohler/Rigozzi, para. 780; Girsberger/Voser, para. 1062.

31 Amstutz/Arnold, para. 8 at Art. 44; Art. 190(3) PILS expressly mentions this start of the term regarding the challenge of interim awards. However, this principle applies by virtue of Art. 100(1) BGG to the challenge of any award (cf. Klett, para. 4 at Art. 77 BGG; cf. also BGer. 4A_582/2009 para. 2.1.2).

32 Art. 47(1) BGG. By contrast, the deadline set by the Supreme Court for filing an answer to the setting aside motion may be extended upon a reasoned request under Art. 47(2) BGG. The extension request must be filed within the deadline, i.e., at the latest on the day the deadline lapses (Amstutz/Arnold, para. 6 at Art. 47).

33 Cf. Klett, para. 4 at Art. 77.

34 Art. 44(1) in conj. with Art. 77(1) BGG.

35 Amstutz/Arnold, para. 12 at Art. 44; for detail, cf. Arroyo, below commentary on Art. 191 PILS, paras. 32-43.

III. Article 190(2) PILS

A. Preliminary Remarks

As mentioned, Art. 190(2) PILS sets forth the only grounds on which an arbitral award rendered in an international arbitration having its seat in Switzerland can be challenged. The aim of the subsequent overview of Supreme Court case law is to provide practitioners with useful guidance as to which irregularities should be avoided in arbitration proceedings in order to avoid rendering an award open to challenge. Arbitrators sitting in Switzerland may thus find it useful to consult this chapter. As to the parties to the arbitration and their counsel, they may find valuable guidance in the study with respect to the advisability and the likeliness of a successful challenge of an award. Being aware of a well-known general principle applied by the Supreme Court, they may also submit a formal objection to the arbitral tribunal in the course of the proceedings so as not to be deemed to have waived their right to challenge the award. **12**

In short, an overview of case law should be valuable for arbitrators as well as parties and their counsel involved in arbitrations. After all, avoiding a serious (procedural) irregularity and a subsequent challenge of the award is in the interests of any arbitration, the aim of which is to resolve a dispute in a final and binding manner. **13**

B. Grounds that May Not Be Invoked

The grounds mentioned in Art. 190(2) PILS are the only grounds that may be invoked. The list is, as stated previously, exhaustive.[36] Even though several grounds may be invoked, it must be made sure that at least one of them falls under Art. 190(2) PILS, failing which the Supreme Court will not even deal with the setting aside motion.[37] **14**

For instance, a party may not argue that the arbitral proceedings were excessively long in duration, since this ground is not set forth under Art. 190(2) PILS.[38] Likewise, the tribunal's interpretation of the contract (or a given contractual provision) in dispute cannot be challenged as to its correctness, even if the interpretation was wrong.[39] Nor can a party invoke that the tribunal applied the wrong contractual provision, which (alleged) flaw is not even open to challenge under Art. 190(2)(e) PILS (i.e., as a violation of public policy).[40] **15**

Importantly, a party may not invoke that the award is arbitrary given that this ground is not provided for in Art. 190(2) PILS.[41] Nor may a party invoke that the arbitral tribunal's assessment of evidence,[42] the interpretation of a contractual clause,[43] or the factual findings[44] were arbitrary. Further, a party may not directly invoke the violation of a right under the Swiss Federal Constitution (FC) or the European **16**

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[36] BGer. 4A_232/2012 para. 2.2; BGer. 4A_54/2012 para. 1.6; BGE 134 III 186 para. 5; BGE 128 III 50 para. 1a; BGE 127 III 279 para. 1a; BGE 119 II 380 para. 3c; cf. also Bucher, para. 40 at Art. 190; Berger/Kellerhals, para. 1542.

[37] Cf. Bucher, para. 40 at Art. 190.

[38] Cf. BGer. 4A_160/2007 para. 6, *ASA Bull. 2008*, p. 133.

[39] BGer. 4A_256/2009 para. 4.2.2; BGer. 4A_258/2009 para. 4.2.2; BGer. 4P.134/2006 para. 5.2; BGer. 4P.104/2004 para. 6.3; BGer. 4P.93/2004 para. 2.2; BGer. 4P.242/2004 para. 7.1; BGer. 4P.250/2002 para. 2.1; BGE 117 II 604 para. 3; BGE 116 II 634 para. 4b.

[40] Cf. BGer. 4P.134/2006 para. 5.2 (with further references). Equally, an (allegedly) erroneous interpretation of a contractual provision cannot be challenged based on Art. 190(2)(e) PILS (cf. BGer. 4A_150/2012 paras. 5.1, 5.2.1; BGer. 4P.154/2006 para. 3). Nor can a party under Art. 190(2)(d) PILS complain about the interpretation of a contractual clause which (allegedly) was clearly to its disadvantage (cf. BGer. 4P.93/2004 para. 2.2 as to the finding of the arbitral tribunal that the clause in question constituted an exception and was thus to be construed narrowly).

[41] BGE 127 III 576 para. 2.b; BGE 121 III 331 para. 3a; BGE 116 II 634 para. 4; see also Berger/Kellerhals, paras. 1544-1545.

[42] BGer. 4A_360/2011 para. 4.1; BGer. 4P.140/2004 paras. 2.1, 2.2.3; BGer. 4P.200/2001 para. 2b.

[43] BGer. 4P.93/2004 para. 2.2 (finding of the arbitral tribunal that the clause in question constituted an exception and was thus to be construed narrowly).

[44] BGE 127 III 576 para. 2b; BGE 116 II 634 para. 4b.

Convention on Human Rights (ECHR) or another international convention.[45] According to the Supreme Court, the principles deriving from the FC or the ECHR may, at the most, serve as a reference for determining the guarantees provided for in Art. 190(2) PILS[46] (e.g., the right to be heard,[47] an expert's impartiality and independence,[48] the prerequisites for a waiver to challenge the award,[49] or public policy[50]).[51]

C. *Article 190(2)(a) PILS*

1. *Introduction*

17 Pursuant to Art. 190(2)(a)PILS, an award may be challenged if the sole arbitrator was not properly appointed or if the arbitral tribunal was not properly constituted. The provision aims at ensuring the parties' fundamental right to a fair decision of their dispute by an independent and impartial tribunal which has been constituted correctly. The provision reflects the prerequisites established in Art. 30(1) Swiss Federal Constitution and Art. 6(1) European Convention on Human Rights. [52]

18 Also, the corresponding duty imposed on arbitrators to act fairly and impartially as between the parties[53] reflects the *rules of natural justice*,[54] which have always been applied to arbitrations by the common law.[55] In conjunction with the parties' right to be heard and to be treated equally throughout the proceedings,[56] this is part of the idea that legal proceedings must be fair.[57] Indeed, *due process*, the generic term for this concept, encompasses all aspects of the parties' fundamental procedural rights.[58]

19 The setting aside motion based on Art. 190(2)(a) PILS is directed against the regular constitution of the arbitral tribunal. It will thus relate to (i) the way how the arbitrators were appointed or replaced (Art. 179 PILS), or (ii) their impartiality or independence (Art. 180 PILS).[59] In other words, under Art. 190(2)(a) PILS, the challenging party will argue that the tribunal's constitution was irregular.[60]

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[45] BGer. 4A_238/2011 para. 3.1.2; BGer. 4A_404/2010 para. 3.5.3; BGer. 4A_43/2010 para. 3.6.1; BGer. 4A_320/2009 paras. 1.5.3, 2; BGer. 4A_612/2009 paras. 2.4.1, 4.1; BGer. 4A_370/2007 para. 5.3.2.

[46] Cf. BGer. 4A_238/2011 para. 3.1.2; BGer. 4A_404/2010 para. 3.5.3; BGer. 4A_43/2010 para. 3.6.1; BGer. 4A_320/2009 para. 1.5.3; BGer. 4A_612/2009 para. 2.4.1; BGer. 4A_370/2007 para. 5.3.2; see also BGer. 4P.64/2001 para. 2d/aa; for a criticism of this approach, cf. Bucher, paras. 42-44 at Art. 190.

[47] The Supreme Court has always held that the right to be heard under Art. 182(3) PILS corresponds to the right to be heard under Art. 29(2) FC, except for the duty to give reasons in the award which requirement does not apply in arbitration (cf. BGE 130 III 35 para. 5; BGer. 4A_2/2007 para. 3.1; BGE 127 III 576 para. 2c; BGer. 4P.14/2004 para. 2.1).

[48] BGE 126 III 249 para. 3c; BGE 125 II 541 para. 4a (both decisions expressly referring to Art. 6(1) ECHR).

[49] BGE 133 III 235 para. 4.3.2.2.

[50] BGer. 4A_458/2009 paras. 4.1, 4.4.3.3, where the Supreme Court stated that public policy under Art. 190(2)(e) PILS encompassed the respect for and protection of human dignity in terms of Art. 7 FC. Similarly, the Court held that forced labor in terms of Art. 4(2) ECHR would be contrary to public policy under Art. 190(2)(e) PILS (BGer. 4A_370/2007 para. 5.3.2).

[51] Cf. Bucher, para. 41 at Art. 190.

[52] Cf. Berger/Kellerhals, para. 1546; see also Kaufmann-Kohler/Rigozzi, para. 797; Poudret/Besson, para. 790.

[53] See Art. 33(1)(a) English Arbitration Act.

[54] Cf. Mustill/Boyd, p. 299.

[55] Cf. Merkin, *Arbitration Act 1996*, London 2000, p. 81 (the first rule being that the arbitrator is unbiased and disinterested, and the second being that each party must be given a fair opportunity to present its case and to hear the case against it).

[56] Art. 182(3) and Art. 190(2)(d) PILS.

[57] Cf. Arroyo, *Jura Novit Arbiter*, p. 28.

[58] Cf. Blessing, *J.Int.Arb. 1988*, p. 48; see in this context also Bernstein/Tackaberry/Marriott, *Handbook of Arbitration Practice*, 3rd ed., London 1998, pp. 81-82, where instead of *due process* the traditional term under English law, i.e., the *principles of natural justice*, is used to describe the minimum procedural standards to be observed; cf. also Arroyo, *Jura Novit Arbiter*, pp. 28-29.

[59] BGer. 4A_538/2012 para. 4.3.2; Bucher, para. 45 at Art. 190; for a detailed commentary on Arts. 179-180 PILS, cf. Orelli above.

[60] Bucher, paras. 45, 48 at Art. 190.

20 To avoid repetition, reference is made to the above commentary on Arts. 179-180 PILS. In particular, the constitution of the arbitral tribunal,[61] the exact procedure for challenging an arbitrator[62] as well as the grounds which according to case law may give rise to serious doubts as to an arbitrator's independence (or impartiality)[63] have already been addressed in detail. For this reason, the present commentary on Art. 190(2)(a) PILS is to be read in conjunction with the one on Arts. 179-180 PILS. Suffice to reiterate here that arbitrators – just like state court judges – must be both independent and impartial under Supreme Court case law, failing which the tribunal will have been constituted incorrectly in terms of Art. 190(2)(a) PILS.[64]

2. *Case Law*

21 Any type of award is open to challenge under Art. 190(2)(a) PILS (i.e., partial and final as well as preliminary or interim awards). This follows from Art. 190(3) PILS.[65] Importantly, this also applies to decisions concerning the constitution of the tribunal – which includes both the nomination and replacement of arbitrators under Art. 179(1) PILS and their independence according to Art. 180(1)(c) PILS –,[66] even if the decision does not comply with the form (or other) requirements of an arbitral award, or even if the decision on the constitution is only an implicit one.[67]

22 The challenge before the Supreme Court normally has a purely "cassatory" (abolishing) effect in that the challenged award will be annulled in case the Supreme Court finds that the award is flawed in terms of Art. 190(2) PILS.[68] The setting aside of the award, and the remand to the arbitral tribunal for a new decision, is the usual consequence in case of a successful challenge.[69] An exception to this rule, however, applies if an irregular constitution of the arbitral tribunal under Art. 190(2)(a) PILS is (rightly) invoked, in which case the Supreme Court may directly order the removal of the challenged arbitrator.[70] Therefore, the prayer for relief submitted to the Supreme Court may – and should – expressly request the removal of an arbitrator pursuant to Art. 190(2)(a) PILS.[71]

23 Given that only awards are open to challenge under Art. 190(2) PILS, decisions of a private arbitral institution (such as the ICC Court of Arbitration) concerning the tribunal's constitution cannot be directly challenged under Art. 190(2)(a) PILS.[72] Such (institutional) decisions, which are not "awards", may only be challenged indirectly before the Supreme Court, i.e., together with the challenge against the (first) subsequent award of the arbitral tribunal[73] – be that an interim, partial or final award.[74]

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61 Cf. Orelli, paras. 4-45 at Art. 179 above.

62 Cf. Orelli, paras. 27-37 at Art. 180 above.

63 Cf. Orelli, paras. 7-18 at Art. 180 above.

64 BGE 136 III 605 para. 3.2.1; BGE 119 II 271 para. 3b; BGer. 4A_110/2012 para. 2.1.1; BGer. 4A_233/2010 para. 3.2.2.

65 See Kaufmann-Kohler/Rigozzi, para. 797.

66 Cf. Bucher, para. 45 at Art. 190; for a commentary on Art. 180 PILS, cf. Orelli above.

67 BGE 130 III 76 para. 3.2.1; BGer. 4A_210/2008 para. 2.1; BGer. 4A_370/2007 para. 2.3.1.

68 BGE 136 III 605 para. 3.3.4; BGE 128 III 50 para. 1b; BGE 127 III 279 para. 1b; BGE 117 II 94 para. 4; BGer. 4A_627/2011 para. 2.3; BGer. 4A_640/2010 para. 2.2; BGer. 4A_456/2009 para.2.4; BGer. 4A_320/2009 para. 1.2; BGer. 4A_428/2008 para. 2.4; BGer. 4A_224/2008 para. 2.4.

69 Cf. Art. 77(2) BGG which excludes Art. 107(2) BGG (see also Klett, para. 7 at Art. 77).

70 See BGE 136 III 605 para. 3.3.4, stressing that this exception is justified for the sake of legal certainty and procedural efficiency, and with reference to previous decisions where this question had been left open (BGer. 4A_539/2008 para. 2.2; BGer. 4A_210/2008 para. 2.2 ; BGer. 4P.196/2003 para. 2.2), while the Court had affirmed this possibility in an earlier 2003 *obiter dictum* (BGer. 4P.263/2002 para. 3.2); BGE 136 III 605 has been confirmed in BGer. 4A_54/2012 para. 1.4; BGer. 4A_110/2012 para. 1.

71 BGE 136 III 605 para. 3.3.4; BGer. 4A_54/2012 para. 1.4; BGer. 4A_110/2012 para. 1.

72 BGE 138 III 270 para. 2.2.1; BGer. 4A_256/2009 para. 3.1.2; BGer. 4A_644/2009 para. 1; BGer. 4P.208/2004 para. 3.2; BGer. 4P.226/2004 para. 3.1; BGE 118 II 359 para. 3b.

73 BGE 138 III 270 para. 2.2.1; BGer. 4A_256/2009 para. 3.1.2; BGer. 4P.208/2004 para. 3.2.

74 Cf. Bucher, para. 46 at Art. 190; Berger/Kellerhals, para. 836.

24 However, if the decision on a challenge of an arbitrator is rendered by the state court judge at the seat of arbitration pursuant to Art. 180(3) PILS[75] (i.e., by the so-called "*juge d'appui*"), that decision will be final and not open to challenge under Art. 190(2)(a) PILS – i.e., neither directly nor indirectly.[76] As a consequence, if an award is set aside because the right to be heard was violated,[77] and the award loser – upon remand to the same arbitral tribunal – subsequently challenges that arbitral tribunal's impartiality and independence (with regard to the new award to be issued) before the state court judge, that decision will not be open to challenge before the Supreme Court.[78] In a recent decision, the Court confirmed this case law, which aims at ensuring that there be only one judicial authority, and not two, deciding on this type of challenge.[79]

25 Since the challenged award must have been rendered by "the arbitral tribunal" pursuant to Art. 190(2)(a) PILS,[80] a motion for setting aside in case an originally appointed arbitrator was replaced during the arbitration may not be directed against the original constitution of the arbitral tribunal. A challenge of the award on this ground will be inadmissible under Supreme Court case law.[81]

26 If a claimant initiates an arbitration against a respondent and requests the sole arbitrator to declare the joint and several liability of several other parties, it will be insufficient to only allow the respondent to participate in the constitution of the tribunal (e.g., the appointment of the sole arbitrator). For this reason, the Supreme Court (partially) set aside an award in 2002 insofar as three parties, who had been excluded from the process of constitution at the outset of the arbitration, were declared to be jointly liable.[82]

27 In that instance, claimant initiated an *ad hoc* arbitration by proposing a sole arbitrator to respondent, who in turn did not object and thus accepted that sole arbitrator. However, the three other parties were notified by the sole arbitrator only two months after he had accepted his nomination. In that notification, the sole arbitrator informed them that he was supposed to decide the dispute between claimant and respondent. Given that all three were also concerned, they had the right to be heard, the sole arbitrator further noted. None of them participated in the proceedings. In the final award, the sole arbitrator ordered respondent to pay a given sum to claimant and additionally declared each of the three aforementioned parties to be jointly and severally liable (paras. 3, 4 and 5 of the award's operative part).[83] The Supreme Court, upon challenge of the respondent and the three parties, set aside these three paragraphs of the award's operative part.[84] In essence, the Court held that claimant – in order to comply with the process

75 For a commentary on this provision, cf. Orelli above, paras. 27-37 at Art. 180 PILS.

76 BGE 138 III 270 para. 2.2.1; BGE 128 III para. 2.2; BGE 122 I 370 para. 2d.

77 Cf. BGer. 4A_46/2011 para. 4, where the award was set aside because the arbitral tribunal had failed to address a statute of limitations objection raised by the supplier, who challenged the award with success. In BGE 138 III 270, however, that very supplier invoked a lack of independence and impartiality (i.e., an irregular constitution) of the same tribunal in vain. In fact, the arbitrators – in the first setting aside proceedings – had submitted that they had implicitly rejected the supplier's statute of limitations objection, which the Supreme Court rejected (cf. BGer. 4A_46/2011 para. 4.3.2: "*Or, on cherche en vain, dans le texte de la sentence, une réfutation, même implicite, des arguments développés par la recourante en ce qui concerne le délai de prescription absolu.*"). Therefore, the supplier – in the second setting aside proceedings – argued that the same arbitrators who, as they admitted, had already (impliedly) ruled on this question could not be considered impartial and independent (BGE 138 III 270 para. 2.1). The Supreme Court, however, dismissed the setting aside application based on Art. 180(3) PILS since the Geneva state court had already ruled on this question. It should be noted that the second award was virtually identical to the first one, with the arbitrators, this time, expressly rejecting the statute of limitations objection (cf. BGer. 4A_14/2012 para. B, not published in BGE 138 III 270); cf. also Magliana, p. 121.

78 BGE 138 III 270 para 2.

79 BGE 138 III 270 paras. 2.2.1-2.2.3; for a critical analysis of this decision, cf. Magliana, pp. 122-123; see also Beffa, ASA Bull. 2011, p. 602.

80 BGE 118 II 359 para. 3a; cf. also Bucher, para. 46 at Art. 190.

81 BGE 118 II 359 para. 3a.

82 BGer. 4P.129/2002 para. 3.4.

83 BGer. 4P.129/2002 para. B.

84 BGer. 4P.129/2002 para. 3.4 (in conj. with para. 1 of the decision's operative part).

provided for in the arbitration agreement regarding the appointment of a sole arbitrator[85] – should have directed its initial proposal to the three parties too, and not only to respondent. Their silence with regard to that appointment could not be considered as an acceptance of the already appointed sole arbitrator. As a result, the sole arbitrator was not properly appointed so that the award had to be set aside as far as it referred to these three parties, the Court concluded.[86] On the other hand, the Supreme Court dismissed respondent's motion to set aside.[87] Respondent submitted that the arbitral tribunal was not constituted properly since the sole arbitrator had been appointed by claimant only, which constituted an unequal treatment of the parties. The Court flatly rejected this argument on the ground that respondent, based on the arbitration agreement,[88] had the right to refuse the sole arbitrator by making an own proposal. Thus, both parties had the same right of proposal, which was in line with the equal treatment principle. Yet respondent had not exercised that right, even though it had been invited to do so. Consequently, respondent could not argue that it was precluded from (equally) participating in the appointment of the sole arbitrator, the Court held.[89]

28 Lastly, if an *arbitrator refuses to participate in the deliberations* of a three-member tribunal, this will not lead to the deliberations, including the voting process, being flawed. Above all, the award issued based on such deliberations will not be considered as rendered by an improperly composed tribunal under Art. 190(2)(a) PILS. This is so because under Supreme Court case law it is sufficient, but also indispensable, that any arbitrator be given the opportunity to participate in the deliberations, which not only includes the possibility to express his opinion but also to comment and refute the other arbitrators' views.[90] If an arbitrator then (i.e., upon such invitation) refuses to take part in the tribunal's deliberations, this will not affect the correctness of the deliberations and the ensuing award. This holds true even if the abstaining arbitrator did not formally waive his right to perform that task.[91]

3. *Timely Objection to Avoid Forfeiture*

29 Under Supreme Court case law, a purported procedural flaw must be invoked immediately, failing which that objection will be forfeited.[92] This also applies to the ground of the tribunal's incorrect constitution, which objection must, as a rule, be raised immediately during the arbitral proceedings (Art. 190(2)(a) PILS).[93]

30 Therefore, even though any type of award is open to challenge under Art. 190(2)(b) PILS – be it a partial, final or interim award –,[94] it is always the very first award which must be challenged, regardless of whether it is an interim, partial or final award.[95] If a party fails to challenge that "first" award, it will forfeit

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85 The relevant arbitration agreement provided (BGer. 4P.129/2002 para. A): "*Sollten […] Streitigkeiten entstehen, wird vereinbart, dass das Schiedsgerichtsverfahren mit 1-er Besetzung […] mit Gerichtsstand Schweiz zur Anwendung kommt. Wenn eine Partei keine Schiedsrichter zur Wahl vorschlägt, gelten die vorgeschlagenen der anderen Partei als gewählt.*" In free translation (last sentence): "If a party proposes no arbitrator, the arbitrator proposed by the opposing party will be considered as appointed."

86 BGer. 4P.129/2002 para. 3.4.

87 BGer. 4P.129/2002 para. 4.

88 As mentioned, the parties had agreed that, "[i]f a party proposes no arbitrator, the arbitrator proposed by the opposing party will be considered as appointed."

89 BGer. 4P.129/2002 para. 4.

90 BGE 128 III 234 para. 3b/aa; BGer. 4P.115/2003 paras. 3.2-3.3; cf. also Poudret/Besson, para. 737.

91 BGE 128 III 234 para. 3b/aa; BGer. 4P.115/2003 paras. 3.2-3.3; on this case law, cf. also Arroyo, *ZPO*, para. 6 at Art. 382.

92 Cf. BGE 130 III 66 para. 4.3; BGE 120 II 155 para. 3a.

93 BGE 136 III 605 para. 3.2.2; BGE 130 III 76 para. 3.2.1; BGE 129 III 445 para. 3.1; BGE 126 III 249 para. 3c; BGer. 4A_256/2009 para. 3.1.2; BGer. 4P.105/2006 para. 4; cf. also BGer. 4P.129/2002 para. 5.2.

94 Art. 190(3) PILS.

95 BGE 130 III 76 para. 3.2.1; BGE 130 III 66 para. 4.3; BGE 116 II 80 para. 3a.

its right to raise that objection at a later stage – at least with regard to facts (concerning the purportedly incorrect constitution) that it knew or ought to have known at the time.[96]

31 In a much-debated and criticized[97] decision, the Supreme Court recently confirmed the aforementioned duty to immediately raise any objection in terms of Art. 190(2)(a) PILS.[98] The Court reiterated that this duty not only concerns facts that a party knew, but also encompasses facts that a party should have known had it paid due attention.[99] All this was in line with the Court's restrictive case law. However, the Court's application of the so-called "*duty of curiosity*",[100] which a party's counsel must carry out in case of doubts as to an arbitrator's impartiality or independence, has rightly been criticized as overly restrictive since it is the arbitrator's duty to disclose such facts, and not counsel's (or a party's) duty to conduct an inquiry on the issue,[101] especially if – as in the case in question – that arbitrator is expressly confronted with this issue at the outset of the arbitration by opposing counsel, and the arbitrator had previously acted on multiple occasions as party-appointed arbitrator for one and the same party in arbitrations touching on the application of the same legal provision but refuses to disclose the exact number of times.[102] In any event, this case reaffirms the Court's extremely restrictive approach when dealing with an alleged lack of impartiality or independence of an arbitrator.[103]

D. Article 190(2)(b) PILS

1. Introduction

32 Under Art. 190(2)(b) PILS, an arbitral award is open to challenge if the tribunal wrongly found jurisdiction. The same applies if it wrongly declined jurisdiction. In either case, a party to the arbitration may file a setting aside motion before the Supreme Court.[104] The arbitral tribunal, in other words, has the so-called competence-competence to first decide on its jurisdiction pursuant to Art. 186(1) PILS, which decision however is subject to subsequent court review.[105]

33 Any type of award is open to challenge under Art. 190(2)(b) PILS (i.e., partial and final as well as preliminary or interim awards). This results from Art. 190(3) PILS.[106] However, it is always the very first award on jurisdiction which must be challenged, regardless of whether it is an interim, preliminary, partial or final award. Otherwise, the party will forfeit that right.[107]

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96 BGE 136 III 605 para. 3.2.2; BGE 130 III 76 para. 3.2.1; BGE 116 II 80 para. 3a; BGer. 4P.129/2002 para. 5.3; cf. also Art. 180(2) PILS.

97 Cf., in particular, Marguerat, *Jusletter of 15 April 2013*, paras. 21-39; Stutzer/Bösch, *Arbitration Newsletter Switzerland of 14 November 2012*, pp. 3-5.

98 BGer. 4A_110/2012 para. 2.1.2.

99 BGer. 4A_110/2012 para. 2.1.2: "*[…] aussi bien les motifs de récusation que la partie intéressée connaissait effectivement que ceux qu'elle aurait pu connaître en faisant preuve de l'attention voulue […]*"; cf. also BGE 129 III 445 para. 4.2.2.1.

100 On this "*devoir de curiosité*", cf. BGE 136 III 605 para. 3.4.2; BGer. 4A_506/2007 para. 3.2; BGer. 4A_110/2012 para. 2.2.2.

101 Cf. Stutzer/Bösch, p. 3: "It is not the counsel who has to ask, it is the arbitrator who has to disclose."; in virtually identical terms Marguerat, *Jusletter of 15 April 2013*, para. 28 (cf. also para. 27); similar also Stacher, *AJP 2013*, p. 105.

102 The Supreme Court concluded that the right to challenge the arbitrator under Art. 190(2)(a) PILS had been forfeited and thus did not even hear the challenge (BGer. 4A_110/2012 para. 2.2.2), which given the numerous appointments of the same arbitrator (O. Carrard) by the same party (International Cycling Union) touching on the same question (Art. 326 World Anti-Doping Code) probably would have been doomed to success.

103 Marguerat, *Jusletter of 15 April 2013*, para. 21; Stutzer/Bösch, *Arbitration Newsletter Switzerland of 14 November 2012*, p. 3; cf. also Beffa, *ASA Bull. 2011*, pp. 598-606; cf. also Stacher, *AJP 2013*, p. 106.

104 BGE 133 III 139 para. 5; BGE 117 II 94 para. 5a; BGer. 4P.129/2002 para. 6.1; BGer. 1P.113/2000 para. 4b; cf. also BGE 138 III 29 para. 2.2.1; BGE 134 III 565 para. 3; BGE 129 III 727 para. 5.2.1; BGer. 4A_640/2010 para. 3; BGer. 4A_460/2008 para. 5.

105 For a commentary on Art. 186 PILS, cf. Berger above.

106 Cf. Berger/Kellerhals, para. 1558.

107 Art. 186(2) PILS; see also the above commentary of Berger on this provision (paras. 43-60 at Art. 186).

34 Nonetheless, raising the objection in time will prove futile if the party previously fully waived its right to challenge the award under Art. 192(1) PILS[108] because such waiver precludes a challenge of the award on the basis that the arbitrators wrongly extended the scope of the arbitration clause – and thus their jurisdiction – to other contracts not containing such clause (or to a non-signatory).[109] Parties are therefore ill-advised to enter into waiver agreements in terms of Art. 192(1) PILS.[110]

35 As mentioned, challenges under Art. 190(2) PILS normally have a purely "cassatory" (i.e., abolishing) effect in that the challenged award will be annulled in case the Supreme Court finds that the award is flawed in terms of Art. 190(2) PILS.[111] The Court may, in other words, generally not decide on the merits of the case afresh but can only set aside the award in question.[112] An exception to this rule concerns challenges under Art. 190(2)(b) PILS where the Supreme Court may find that the arbitral tribunal has[113] (or lacks) jurisdiction.[114] Thus – even though the challenging party may generally only request the setting aside of the award and the remand to the arbitral tribunal for a new decision – where a jurisdictional flaw is invoked, a prayer for relief demanding the Court's (affirmative or negative) determination on the arbitral tribunal's jurisdiction may (additionally) be submitted.[115]

2. *Case Law*

36 Article 190(2)(b) PILS may be invoked to raise the following objections to the decision of the arbitral tribunal through which it found (or declined) jurisdiction: (i) the lacking (or existing) *arbitrability* of the dispute;[116] (ii) the lacking (or existing) defense on the merits within the meaning of Art. 186(2) PILS;[117] (iii) the non-existence (or existence) of an arbitration agreement;[118] (iv) the *formal invalidity* (or validity) of the arbitration agreement;[119] (v) the *substantive invalidity* (or validity) of the arbitration agreement;[120] (vi) the narrower (or more comprehensive) *objective scope* of the arbitration agreement;[121] (vii) the narrower (or more comprehensive) *subjective scope* of the arbitration agreement;[122] (viii) the shorter (or longer) *temporal scope* of the arbitration agreement.[123]

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108 A waiver under Art. 192 PILS is only open to the parties if none of them had its domicile or residence in Switzerland at the time the arbitration agreement was concluded (see Klett, para. 4 at Art. 77; cf. also BGE 134 III 260 para. 3.2.1); for a comprehesive commentary on this provision, see below Baizeau at Art. 192 PILS.

109 Cf. BGE 134 III 260 para. 3.2.4; BGE 131 III 173 para. 4.2.3.1.

110 Cf. Jermini/Arroyo, *ASA Bull. 2009*, pp. 112-113.

111 BGE 136 III 605 para. 3.3.4; BGE 128 III 50 para. 1b; BGE 127 III 279 para. 1b; BGE 117 II 94 para. 4; BGer. 4A_627/2011 para. 2.3; BGer. 4A_640/2010 para. 2.2; BGer. 4A_456/2009 para. 2.4; BGer. 4A_320/2009 para. 1.2; BGer. 4A_428/2008 para. 2.4; BGer. 4A_224/2008 para. 2.4.

112 Cf. Bucher, para. 52 at Art. 191; Kaufmann-Kohler/Rigozzi, para. 778; Berger/Kellerhals, para. 1652; Girsberger/Voser, *2012*, para. 1066.

113 This power of the Supreme Court includes the right to determine that a party (or several parties) that was (were) not allowed to take part in the arbitral proceedings based on a (wrong) decision of the arbitral tribunal be admitted as parties to the arbitration (cf. BGer. 4A_376/2008 para. 9).

114 BGE 136 III 605 para. 3.3.4; BGE 128 III 50 para. 1b; BGE 127 III 279 para. 1b; BGE 117 II 94 para. 4; BGer. 4A_627/2011 para. 2.3; BGer. 4A_640/2010 para. 2.2; BGer. 4A_456/2009 para.2.4; BGer. 4A_320/2009 para. 1.2; BGer. 4A_428/2008 para. 2.4; BGer. 4A_224/2008 para. 2.4; BGer. 4A_376/2008 paras. 3.1 and 9.

115 Berger/Kellerhals, para. 1653. The same holds true with regard to a prayer for relief requesting the removal of an arbitrator pursuant to Art. 190(2)(a) PILS (cf. BGE 136 III 605 para. 3.3.4; BGer. 4A_54/2012 para. 1.4; BGer. 4A_110/2012 para. 1).

116 BGE 133 III 139 para. 5; BGer. 4A_654/2011 para. 3.2; BGer. 4A_370/2007 para. 5.2.2.

117 For a commentary on this provision, cf. Berger, paras. 43-60 at Art. 186 PILS above.

118 BGE 120 II 155 para. 3b/bb; BGE 116 II 639 para. 3; cf. also Kaufmann-Kohler/Rigozzi, para. 813.

119 BGE 133 III 139 para. 5; BGE 120 II 155 para. 3b/bb; BGE 138 III 29 para. 2.2.2.

120 BGE 138 III 29 para. 2.2.2; BGE 133 III 139 para. 5; BGE 120 II 155 para. 3b/bb; BGE 119 II 380 para. 4a.

121 BGE 133 III 139 para. 5; BGE 120 II 155 para. 3b/bb; BGE 116 II 639 para. 3; BGer. 4A_428/2010 para. 2.

122 BGE 134 III 565 para. 3.2; BGE 129 III 727 para. 5.3.1; BGE 120 II 155 para. 3b/bb; cf. also Kaufmann-Kohler/Rigozzi, para. 811 b.

123 BGE 120 II 155 para. 3b/bb; BGer. 4A_46/2011 para. 3.3.2; BGer. 4A_488/2011 para. 4.3.1; BGer. 4A_18/2007 para. 4.2; cf. also Berger/Kellerhals, para. 1551.

37 In a most recent 2013 decision, the Supreme Court, for instance, set aside an award issued by a CAS tribunal, in which the tribunal had affirmed the validity of an arbitration agreement and thus its jurisdiction.[124] The Supreme Court, in essence, set aside the award on the basis that *the forum selection clause in a (subsequent) settlement agreement had replaced the (original) arbitration clause* in the initially concluded employment agreement (i.e., the main contract). The Court stressed that its case law on this very question should have been taken into consideration by the CAS tribunal.[125] Given that the tribunal had failed to do so, and in particular had failed to adopt a restrictive approach when determining whether an arbitration agreement had been concluded among the parties, the award was set aside.[126]

38 On the other hand, in 2012, the Supreme Court refused to set aside an interim award, in which the sole arbitrator had found jurisdiction based on an *arbitration clause despite the main contract containing a* (separate and independent) *forum selection clause*.[127] In the Court's view, the crucial question was not one of interpretation of the arbitration clause. Rather, the question was which of the two contradicting and irreconcilable clauses was applicable. This determination, the Court held, had to be made according to general principles of contract interpretation, and where two contractual clauses were inconsistent with one another, the principle of *favor negotii* demanded to construe both clauses in a manner that would harmonize them.[128] In essence, the Court thus approved the sole arbitrator's reasoning pursuant to which the arbitration clause (Art. 14 of the agreement) was very detailed and over a page long, while the forum section clause (Art. 16) was both very short and rather hidden (i.e., inconspicuous) so that it would have been for the party challenging the jurisdiction to establish that the opposing party, who initiated the arbitration, had to assume from a good faith perspective that the forum selection clause prevailed over the arbitration clause. However, the party challenging the jurisdiction had failed to establish this. The opposing party could therefore in good faith assume that the arbitration clause reflected the other party's understanding (who itself had proposed to include that clause in the agreement). [129] Consequently, the sole arbitator had rightly found jurisdiction, the Court concluded.[130]

39 By contrast, in a 2010 decision, the Supreme Court had considered a clause providing for "*binding arbitration through The American Arbitration Association or to any other US court*" to not reflect the parties' clear and unequivocal understanding to exclude state court jurisdiction in favor of arbitration.[131] As a result, the lower court had rightly declined the validity of that clause as arbitration agreement, the Court found.[132] It should be noted that this case was quite different from the aforementioned 2012 case where the relationship between two (clear and unequivocal yet incompatible) clauses had to be determined, as the Court itself stressed.[133]

40 Under the long-standing Supreme Court case law, an arbitration agreement, as any other contractual agreement, is to be construed pursuant to the general rules of contract interpretation.[134] Two conditions

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[124] BGer. 4A_244/2012; for an analysis of this decision, cf. Voser/Truttmann, *PLC Arbitration Newsletter of 6 March 2013*.

[125] BGer. 4A_244/2012 para. 4.5; cf. also BGE 121 III 495 para. 5, where the Supreme Court also set aside an interim award in which the arbitrators had disregarded the forum selection clause in the (later) settlement agreement and had wrongly found jurisdiction based on the arbitration clause in the (original) sales agreement.

[126] BGer. 4A_244/2012 para. 4.6. Voser/Truttmann rightly welcome this decision and submit that, "the Supreme Court has confirmed that CAS tribunals must strictly adhere to the general principles developed in the Supreme Court's practice"; they view this decision "as an indication by the Swiss Supreme Court that it is not willing to accept that sports arbitration should detach itself further from the well-established principles of international arbitration in general" (cf. *PLC Arbitration Newsletter of 6 March 2013*).

[127] BGer. 4A_240/2012; for an analysis of this decision, cf. Berger, *Jusletter of 13 May 2013*, paras. 1-13.

[128] BGer. 4A_240/2012 para. 4.1.

[129] BGer. 4A_240/2012 para. 4.2.1.

[130] BGer. 4A_240/2012 para. 4.2.4.

[131] BGer. 4A_279/2010 paras. 3.2-3.4.

[132] BGer. 4A_279/2010 para. 3.5.

[133] BGer. 4A_240/2012 para. 4.2.5.

[134] BGE 138 III 29 para. 2.2.3; BGE 132 III 626 para. 3.2; BGE 130 III 66 para. 3.1; BGE 129 III 675 para. 2.3; BGer. 4A_244/2012 para. 4.2; BGer. 4A_452/2007 para. 2.3.

must be met as regards the validity of an arbitration agreement: (i) the arbitration agreement must manifest the intention of the parties to subject a dispute to arbitration, to the exclusion of the jurisdiction of the state courts; and (ii) the agreement must be sufficiently specific to determine which current or future disputes shall fall within the scope of the arbitration agreement.[135] These two prerequisites are deemed to be the only *essentialia negotii* of an arbitration agreement under Art. 178 PILS.[136]

41 When it comes to determining whether or not the parties had the intention to submit a given dispute to arbitration, to the exclusion of state court jurisdiction, the Supreme Court adopts a restrictive approach in consideration of the important limitations of appeal ensuing from an agreement to arbitrate.[137] However, once such an intention to arbitrate has been established, the interpretation is no longer restrictive and a broad approach as to contents and scope is adopted. In that case, it can be assumed that the parties wanted the arbitral tribunal to have extensive jurisdiction.[138] Thus, provided it is clear that the parties have submitted a dispute to arbitration, the case law commands that an arbitration clause be applied, even if it is subject to interpretation or even in case it is pathological (i.e., incomplete, unclear or inconsistent).[139]

42 Swiss law, in other words, favors the validity of arbitration agreements and the possibility to appoint an arbitral tribunal – especially in connection with unclear (pathological) arbitration agreements.[140] As a consequence, an arbitration agreement containing a partially impossible content does not trigger the entire invalidity (or inoperability) of the clause at issue. Rather, the impossible (i.e. inoperable) part is either to be substituted in a way to ensure the validity of the clause as a whole, or to be deleted without replacement, or to be replaced by a complementary provision.[141]

43 Frequently, the parties to an arbitration agreement provide that a conciliation (or mediation) phase aiming at an *amicable solution of the dispute should precede any initiation of an arbitration* (e.g., during a 90-day term). In other words, arbitration is contingent on such amicable solution having failed. Typically, the parties will not provide for any sanction in case of non-compliance with that attempt (or the 90-day term). No legal consequence is usually discussed or determined in the event a party would not respect that agreement (or the term at issue) and commence arbitration. Nor is the lapse of the stipulated term, if any, usually made a condition precedent to initiate arbitration. Rather, the wording of such multi-tiered arbitration agreements normally suggests that a simple *duty to use best efforts to resolve any dispute amicably first*, i.e., before resorting to arbitration, has been established between the parties.[142]

44 Therefore, in the author's view, the arbitral tribunal will normally have jurisdiction even if the agreed-upon conciliation duty was not respected. This approach is in line with Supreme Court case law[143] since even if a given conciliation mechanism (or term) had been made a mandatory requirement or condition precedent, the consequence would not be the inadmissibility of the claims ("*irrecevabilité*" in French) but the stay ("*suspension*") of the arbitral proceedings ordered by the arbitral tribunal and the setting

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[135] BGE 138 III 29 para. 2.2.3; BGE 130 III 66 para. 3.1; BGE 129 III 675 para. 2.3; BGer. 4A_388/2012 para. 3.4.2.

[136] Cf. Wenger, para. 28 at Art. 178; for a commentary on Art. 178 PILS, cf. Müller above.

[137] BGE 138 III 29 para. 2.3.1; BGE 129 III 675 para. 2.3; BGE 116 Ia 56 para. 3b; BGer. 4A_388/2012 para. 3.4.2.

[138] BGE 129 III 675 para. 2.3; BGE 116 Ia 56 para. 3b; BGer. 4A_246/2011 para. 2.2.3; BGer. 4C.40/2003 para. 5.3.

[139] BGE 130 III 66 paras. 3.1-3.2; BGE 110 Ia 59 para. 4; legal commentators approve this approach (see, e.g., Berger/Kellerhals, paras. 418-423; Wenger/Müller, para. 56 at Art. 178).

[140] BGE 138 III 29 para. 2.2.3; BGE 130 III 66 para. 3.2; BGer. 4A_244/2012 para. 4.2; BGer. 4A_388/2012 para. 3.4.2.

[141] Cf. Wenger/Müller, paras. 54-56 at Art. 178, which approach corresponds to the established Supreme Court case law (see BGE 130 III 66 paras. 3.1-3.3, especially para. 3.3.3, with reference to BGE 110 Ia 59 paras. 3-4); cf. also Berger/Kellerhals, paras. 552-553, who favor the *favor negotii* (i.e., *favor validitatis*) interpretation through an analogous application of Art. 20(2) Swiss Code of Obligations to arbitration agreements in case of partial invalidity, as applied by the Supreme Court since its 1984 decision BGE 110 Ia 59 para. 3a.

[142] E.g., in a dispute in which the author was recently involved, the arbitration agreement provided thus: "*Any dispute, controversy, or claims arising out of or relating to this Agreement which cannot be resolved by mutual agreement within ninety (90) business days [...]*".

[143] For a summary and analyis of this decision, cf. Berger, *ZBJV 2013*, pp. 275-277.

of a (further) deadline to the parties to allow them to remedy this flaw.[144] The Swiss commentators the Supreme Court referred to in the aforementioned decision[145] also advocate the stay of the arbitration in case the pre-arbitral settlement (or conciliation) was mandatory, and not the denial of jurisdiction.[146]

45 In a recent decision, the Supreme Court also held that a party from abroad – over which *insolvency proceedings* were opened in its country of incorporation – is capable of being (and continues to be) a party in a (pending) arbitration having its seat in Switzerland, always provided that the insolvent company under the relevant laws at the place of incorporation continues to have legal personality and legal capacity. If the latter is the case, even provisions of the laws at the place of incorporation according to which arbitration agreements become null and void once insolvency proceedings are initiated, will not have an impact on the involved company's capacity to be a party to (prospective or pending) arbitrations. This is so because the question of the validity of arbitration agreements (designating Switzerland[147] as seat of arbitration) is governed by the Swiss *lex arbitri* (i.e., Art. 178 PILS), and under Swiss law the arbitration agreement remains valid in case of insolvency (*favor validitatis*; Art. 178(2) PILS).[148] At any rate, the insolvency does not affect the validity of an arbitration agreement from a Swiss legal perspective (i.e., in an international arbitration governed by Chapter 12 PILS), the Court concluded.[149]

46 The Supreme Court emphasized that its earlier *Vivendi*[150] decision should not be taken as a precedent pursuant to which any provision of a foreign insolvency law providing for the nullity of an arbitration agreement in case of insolvency would, as a rule, trigger the incapacity of the affected company to be a party to arbitral proceedings.[151] *Vivendi*, the Court stressed, was a decision specifically dealing with and based on Polish law[152] (including the authorities referred to in the legal opinions issued by Polish law professors), and could neither be generalized nor applied to other jurisdictions, especially given that in the case at issue, the Portuguese authorities (i.e., case law and legal commentary)[153] were not in line with Polish law,[154] which law provided for the incapacity to (continue to) be a party to arbitral proceedings

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144 BGer. 4A_46/2011 para. 3.4: "*(…) il n'est guère possible d'affirmer, comme le fait la recourante, qu'il existerait une tendance marquée à sanctionner la violation d'un mécanisme obligatoire préalable à l'arbitrage par une décision d'irrecevabilité ratione temporis de la demande au fond. Il semblerait plutôt qu'un courant doctrinal majoritaire se dessine, du moins en Suisse, en faveur de la suspension de la procédure arbitrale et de la fixation d'un délai aux parties pour leur permettre de réparer cette omission" (cf., parmi d'autres: POUDRET/BESSON, Comparative law of international arbitration, 2e éd. 2007, n° 13 in fine; KAUFMANN-KOHLER/RIGOZZI, Arbitrage international, 2e éd. 2010, n° 32a; CHRISTOPHER BOOG, How to Deal with Multi-tiered Dispute Resolution Clauses, in Bulletin ASA 2008 p. 103 ss, spéc. p. 109)*; in free translation: "*(…) it is not possible to affirm, as the appellant does, that there is a tendency to sanction the violation of a mandatory mechanism prior to the arbitration by a decision to dismiss the claim on the merits ratione temporis. Rather, it appears that there is a tendency among legal scholars, at least in Switzerland, in favor of suspending the arbitral procedure and the setting of a deadline to let the parties cure this omission.*"

145 I.e., in BGer. 4A_46/2011 para. 3.4; on this decision, cf. Stacher, *AJP 2013*, pp. 115-116.

146 Cf. Kaufmann-Kohler/Rigozzi, para. 32a; Boog, *ASA Bull. 2008*, p. 109; Poudret/Besson (para. 13) who state: "*If* the interpretation of the conciliation agreement indicates that *conciliation* is *mandatory*, the arbitral tribunal should *stay* the proceedings rather than decline its jurisdiction pending the phase of conciliation" (emphasis added).

147 Normally, a Swiss city will be mentioned in the arbitration agreement, though one sometimes also comes across general references to Switzerland as seat (or place) of arbitration.

148 BGE 138 III 714 para. 3.6; on this decision, cf. Stacher, *AJP 2013*, pp. 102-104.

149 BGE 138 III 714 para. 3.6, with reference to BGE 136 III 107 para. 2.5; cf. also BGE 138 III 714 para. 3.4.2, where the Court emphasized that a lack of capacity to be a party in a Portuguese (i.e., domestic) arbitration could have no relevance in an international arbitration under Chapter 12 PILS.

150 That decision met with stark criticism (for an overview, cf. BGE 138 III 714 para. 3.5.2); on *Vivendi*, cf. also Naegeli, pp. 57-61.

151 BGE 138 III 714 para. 3.5.3.

152 The germane provision of Polish insolvency law (Art. 142) reads as follows: "Any arbitration clause concluded by the bankrupt shall lose its legal effect as of the date bankruptcy is declared and any pending arbitration proceedings shall be discontinued."

153 The relevant provision of Portuguese insolvency law (Art. 87) provides: "Without prejudice to provisions contained in applicable international treaties, the efficacy of arbitral agreements relating to disputes that may potentially affect the value of the insolvency estate and to which the insolvent is a party shall be suspended."

154 BGE 138 III 714 para. 3.5.3.

once insolvency proceedings were opened.[155] Lastly, if an arbitral tribunal has to determine the validity of a contract that affects the European Common Market, the tribunal will have to examine this question pursuant to Art. 81[156] of the Treaty establishing the European Community, even if the parties agreed on Swiss law as the law governing their contract. If the tribunal refuses to apply this standard (i.e., that of Art. 81 of the Treaty) because it considers itself not competent to so proceed, this non-application will lead to the setting aside of the award (declining jurisdiction) under Art. 190(2)(b) PILS if one of the parties invoked the nullity of the contract. As mentioned, this applies even if the contract in dispute was governed by Swiss law.[157]

3. *Timely Objection to Avoid Forfeiture*

47 As mentioned, a (purported) jurisdictional flaw must, just like any other procedural flaw, be invoked immediately, failing which that jurisdictional objection will be forfeited.[158] Thus, although any type of award is open to challenge under Art. 190(2)(b) PILS (be it a partial, final, preliminary or interim award),[159] it is always the very first award on jurisdiction which must be challenged (regardless of whether it is an interim, preliminary, partial or final award), failing which the party will forfeit its right.[160] This drastic consequence even applies in default proceedings, always provided the award was duly notified to the defaulting party.[161]

48 In 1984, the Supreme Court held that an exception to the aforementioned rule applied if an arbitral tribunal first confirms jurisdiction in an interim award but then decides on the merits of the case based on equity (i.e., *ex aequo et bono*) instead of the law (or vice versa). In such an instance, the final award on the merits could be challenged even if the interim award on jurisdiction had remained unchallenged.[162] This case law met with criticism,[163] and the Supreme Court in 2012 expressly reversed it.[164] Consequently, an award in which the arbitrators wrongly decided the case based on equity principles in lieu of the law chosen by the parties – or vice versa – cannot be challenged on the jurisdictional ground of Art. 190(2)(b) PILS.[165]

49 In the aforementioned 2012 decision, the Supreme Court again left open the – controversial – question whether such *usurpation of power* on the part of the tribunal[166] is part of public policy within the meaning of Art. 190(2)(e) PILS.[167] In any event, the party challenging the award on this ground would have to

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[155] BGE 138 III 714 para. 3.5.1, with express reference to BGer. 4A_428/2008 para. 3.3 (*Vivendi*); for an analyis and comparision of both decisions, cf. Voser/George, *Kluwer Arbitration Blog of 5 December 2012*, who welcome "the result of this [2012] decision" as it "sends a valuable message that foreign insolvency laws cannot, as a rule, affect an entity's capacity to be a party in an arbitration seated in Switzerland."; Stacher, *AJP 2013*, pp. 103-104, also seems to approve the decision.

[156] Formerly Art. 85.

[157] Cf. BGE 132 III 389 para. 3.3; BGE 118 II 193 para. 5; BGer. 4P.119/1998 para. 1a.

[158] Cf. BGE 130 III 66 para. 4.3; BGE 120 II 155 para. 3; BGer. 4A_428/2010 para. 2.3; BGer. 4P.42/2000 para. 5.

[159] Art. 190(3) PILS.

[160] Art. 186(2) PILS; see also the above commentary of Berger on this provision (paras. 43-60 at Art. 186).

[161] BGE 120 II 155 para. 3b/bb; see also BGE 118 II 508 para. 2b/bb; Berger/Kellerhals, para. 1558.

[162] BGE 110 Ia 56 para. 1b; Bucher, para. 66 at Art. 190.

[163] See the authors mentioned at para. 3.2.2 of BGer. 4A_14/2012.

[164] Cf. BGer. 4A_14/2012 para. 3.2.2: "*L'usurpation du pouvoir de statuer en équité constitue une irrégularité qui n'affecte pas la compétence du tribunal arbitral, mais qui soulève la question des principes juridiques ou de la méthode suivant lesquels le différend opposant les parties doit être tranché […]. Autrement dit, savoir quelles sont les règles de procédure et de droit de fond que le tribunal arbitral doit appliquer n'est pas un problème de compétence […]. Le grief correspondant n'est donc pas celui visé par l'art. 190 al. 2 let. b LDIP.*"

[165] BGer. 4A_14/2012 para. 3.2.2.

[166] BGer. 4A_14/2012 para. 3.2.2 ("*l'usurpation du pouvoir de statuer en équité*"); in same terms BGer. 4A_370/2007 para. 5.6; Kaufmann-Kohler/Rigozzi, paras. 651, 847 m.

[167] Cf. BGer. 4A_14/2012 para. 3.2.2: "*Tout au plus relève-t-il de l'art. 190 al. 2 let. e LDIP, encore que ce dernier point soit controversé […]. Il n'est cependant pas nécessaire de pousser plus avant l'analyse à cet égard, puisque la recourante n'invoque pas cette dernière disposition à l'appui du grief considéré.*"; cf. also BGer. 4A_370/2007 para. 5.6; BGE 116 II 634 para. 4a; BGer. 4P.96/2002 para. 6.2.

additionally establish that the award's result is contrary to public policy,[168] which makes the setting aside of the award appear very unlikely.[169]

E. Article 190(2)(c) PILS

1. Introduction

50 Pursuant to Art. 190(2)(c) PILS, an arbitral award may be set aside if the arbitral tribunal went beyond the claims submitted to it, or if it failed to address a (or several) prayer(s) for relief. According to the Supreme Court, the principle *ne eat judex ultra petita partium* (i.e., the judge may not decide on more than he has been asked for in the prayers for relief), is a *particular aspect of the right to be heard* in that it precludes arbitrators from ruling on any claims in the award on which the parties were not able to present their (factual and legal) allegations.[170]

51 The wording of the German[171] and Italian[172] texts of Art. 190(2)(c) PILS differs from the French[173] one. Under Supreme Court case law, the French text is controlling.[174] This is so because the flaw mentioned in the German and Italian texts (i.e., the arbitrators ruling on claims not submitted to them) falls within the meaning of Art. 190(2)(b) PILS, for this is a particular case of want of jurisdiction. Put differently, if the arbitrators rule on claims not submitted to them, they lack jurisdiction in terms of Art. 190(2)(b) PILS, and the award will be open to challenge under this ground only (e.g., because the claims at issue are not covered by the arbitration agreement).[175]

52 The challenge under Art. 190(2)(c) PILS in turn applies to cases where the arbitrators in the award either (i) completely failed to rule on a (or several) claim(s) submitted (i.e., *infra petita*); or (ii) went beyond the claim(s), i.e., *ultra petita*; or (iii) awarded something different from what a party requested (i.e., *extra petita*).[176]

2. Case Law

a. Preliminary Remarks

53 Article 190(2)(c) PILS *only applies to prayers* for relief (or claims) *concerning the merits* of the case, to the exclusion of any procedural requests (or prayers touching on procedural matters).[177]

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[168] BGE 116 II 634 para. 4; confirmed in BGE 138 III 322 para. 4.1; BGE 128 III 191 para. 6b; BGE 120 II 155 para. 6a; BGer. 4A_16/2012 para. 4.1; BGer. 4A_558/2011 para. 4.1; BGer. 4A_654/2011 para. 4.1; BGer. 4A_320/2009 para. 4.1; BGer. 4A_284/2009 para. 3.1; BGer. 4A_17/2007 para. 4.1; BGer. 4P.134/2006 para. 5.1.

[169] Kaufmann-Kohler/Rigozzi, para. 847 m ("*ce qui rend une annulation de ce chef pour le moins peu probable*"), para. 651 ("*hautement improbable*"). By contrast, Berger/Kellerhals (para. 1603) are of the opinion that such usurpation of power on the part of arbitrators does not fall within the definition of public policy under Art. 190(2)(e) PILS in the first place.

[170] BGE 120 II 172 para. 3a; BGE 116 II 80 para. 3a.

[171] I.e., "*wenn das Schiedsgericht über Streitpunkte entschieden hat, die ihm nicht unterbreitet wurden […]*".

[172] I.e., "*il tribunale arbitrale ha deciso punti litigiosi che non gli erano stati sottoposti […]*".

[173] I.e., "*lorsque le tribunal arbitral a statué au-delà des demandes dont il était saisi […]*".

[174] BGE 120 II 172 para. 3a; BGE 116 II 639 para. 3a; concurring BGer. 4A_654/2011 para. 5.2 ("*entsprechend der französischen Fassung des Gesetzestextes*"); in identical terms: BGer. 4P.146/2004 para. 6.2; BGer. 4P.260/2000 para. 5a.

[175] Cf. BGE 116 II 639 para. 3a: "*[…] entsprechend dem französischen Gesetzestext […] gegen die Beurteilung von Ansprüchen, für die das Schiedsgericht wegen fehlender oder begrenzter Schiedsvereinbarung nicht zuständig ist (extra potestatem), ausschliesslich der Beschwerdegrund von Art. 190 Abs. 2 lit. b IPRG offensteht.*"

[176] Berger/Kellerhals, paras. 1569, 1571.

[177] Berger/Kellerhals, para. 1571; concurring: Bucher, para. 82 at Art. 190 (rightly stressing that the right to be heard under Art. 190(2)(d) PILS might be violated if a given procedural request is omitted, but not Art. 190(2)(c) PILS); and Kaufmann-Kohler/Rigozzi, para. 817 b; cf. also BGer. 4P.96/2002 para. 4.3.1, where the Supreme Court left open the question because the (*infra petita*) irregularity was unfounded in the first place since the arbitral tribunal had rejected the procedural request at issue.

As a consequence, Art. 190(2)(c) PILS can only be invoked against an award which in its operative part (i) grants a party *more than* what was claimed in its prayers for relief (*ultra petita*); or (ii) grants *something else* than the party requested in its prayers for relief (*extra petita*); or (iii) fails to rule on a (or several) prayer(s) for relief (*infra petita*). **54**

b. Award Ultra Petita or Extra Petita

An award is *ultra petita* if it goes beyond the claims (or prayers for relief) in that it grants more than what was requested. For instance, if the claimant demands USD 500'000 (only) and the arbitral tribunal awards USD 600'000, or USD 500'000 plus 5 % interest, that would be *ultra petita* within the meaning of Art. 190(2)(c) PILS.[178] **55**

Importantly, to determine whether the amount awarded goes beyond what was claimed, it is necessary to add all amounts claimed in the (several) prayers for relief.[179] If the amount awarded does not exceed the total sum of the monetary claims, the award will not be *ultra petita*.[180] In other words, the arbitrators may award more than what was claimed in a given prayer for relief (and less with regard to another prayer), always provided that the awarded aggregate amount does not exceed the sum of all claimed amounts.[181] **56**

Further, if the arbitral tribunal not merely dismisses the claimant's prayer for negative declaratory relief (as to the non-existence of a given debt), but additionally orders the claimant to pay the debt to the respondent despite the latter not having submitted a prayer for relief demanding such payment, this will also amount to an *ultra* (or *extra*)[182] *petita* irregularity.[183] **57**

Conversely, the award is neither *ultra petita* nor *extra petita* if the arbitrators, after concluding that a prayer for negative declaratory relief (regarding the non-existence of a debt) is unfounded, not merely dismiss that prayer but (in the award's operative part) positively hold that the legal relationship actually does exist, without ordering payment of that debt.[184] In the Supreme Court's view, rejecting a prayer demanding the (negative) confirmation that a given debt does not exist is tantamount to the (positive) finding that the debt does exist.[185] As a result, a party may not invoke Art. 190(2)(c) PILS in such a case – always provided that no additional payment of the debt is ordered.[186] **58**

Nor is an award *ultra petita* or *extra petita* if the arbitrators – based on their legal assessment of the case – award damages in the amount of USD 13 million, which in their view result from a contractual violation, and not USD 20 million on the basis of the (advanced) performance claim under the contract at issue. In that instance, [187] the award loser in vain challenged the award on the ground that the claimant in the arbitration had advanced a USD 20 million performance claim only ("*Erfüllungsanspruch*" in German), while the arbitrators had ultimately awarded a (non-advanced) damage claim of USD 13 million for a contractual violation ("*Schadenersatzanspruch*").[188] The Supreme Court emphasized that Art. 190(2)(c) PILS could not be invoked, for the arbitrators had neither awarded more nor something different from what was claimed. The principle *jura novit curia* entitles (and even compels) arbitrators, just like state **59**

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178 Cf. Berger/Kellerhals, para. 1571, footnote 68; BGer. 4A_440/2010 para. 3.1; BGer. 4A_464/2009 para. 4.1.

179 Cf. Kaufmann-Kohler/Rigozzi, para. 821.

180 BGer. 4A_440/2010 para. 3.1; BGer. 4A_464/2009 para. 4.1; BGer. 4A_220/2007 para. 7.2.

181 See BGer. 4P.54/2006 para. 2.1; cf. also BGE 119 II 396 para. 2.

182 According to Kaufmann-Kohler/Rigozzi (para. 820 b), this is a case of *extra petita*, while Berger/Kellerhals (para. 1571) leave this open, i.e., refer to both "ultra (or extra) petita".

183 BGer. 4P.20/1991 para. 2b (unpublished in BGE 118 II 193 of 28 April 1992).

184 BGE 120 II 172 para. 3a; BGer. 4A_464/2009 para. 4.1.

185 BGE 120 II 172 para. 3a: "*Peu importe […] que la juridiction saisie d'une action négatoire de droit qu'elle estime infondée, la rejette dans le dispositif de son jugement ou y constate l'existence du rapport de droit litigieux. Dans l'un et l'autre cas, l'objet de la constatation est le même […].*"; cf. also BGer. 4A_440/2010 para. 3.1.

186 Otherwise, the award would be set aside if no pertinent prayer demanding such payment was submitted (cf. BGer. 4P.20/1991 para. 2b, unpublished in BGE 118 II 193 of 28 April 1992).

187 Cf. BGer. 4P.260/2000.

188 BGer. 4P.260/2000 para. 5.

court judges, to undertake a comprehensive legal assessment, without being bound by the parties' legal arguments.[189] Therefore, arbitrators may grant a claimed amount on a distinct legal basis than a party invoked, the Court concluded.[190]

60 By contrast, it has been submitted that an award is *extra petita* if the arbitral tribunal dismisses the claim demanding compensation for damages and orders specific performance instead.[191]

61 Finally, if an arbitral tribunal awards the entire amount claimed but refuses to convert it into a given currency (e.g., from Euros to Serbian Dinars) because it concludes – on the basis of its legal assessment of the contract – that the amount is due in Euros, this will not constitute a violation of Art. 190(2)(c) PILS given that neither more nor something different was awarded.[192]

c. Award Infra Petita

62 As mentioned, an award is *infra petita* if the arbitrators failed to rule on a (or several) prayer(s) for relief or claim(s). Such omission constitutes a formal denial of justice (*"déni de justice formel"* in French),[193] and the reason why the error occurred is irrelevant.[194]

63 However, a party may not rely on this ground to complain about the arbitrators not addressing a given question, which (in the appellant's view) was important for the outcome of the dispute.[195] Nor may a party invoke this ground to query that the arbitrators failed to address all legal aspects of the case (e.g., the provisions of a given competition law).[196]

64 Also, Art. 190(2)(c) PILS may not be invoked to question a legal assessment as such, including the resulting legal consequence. For example, the determination that a given letter from FIFA only served informational purposes and was not a decision within the meaning of Art. R47 CAS Code (against which an appeal before the Court of Arbitration for Sport could be brought), is a legal qualification which cannot be challenged, and which inevitably triggers the non-admissibility of any claims or prayers for relief included in the (inadmissibly filed) appeal. Therefore, a party may not argue in such a case that the CAS failed to deal with its prayers for relief (or claims) and thus committed a violation under Art. 190(2)(c) PILS.[197]

65 Lastly, Art. 190(2)(c) PILS may not be invoked if the arbitrators in the award's operative part expressly dismissed all other or more comprehensive claims (or prayers for relief).[198] Cautious arbitrators apply

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[189] BGer. 4P.260/2000 para. 5b, with reference to BGE 120 II 172 para. 3a; cf. also BGer. 4A_440/2010 para. 3.1; BGer. 4A_220/2007 para. 7.2.

[190] BGer. 4P.260/2000 para. 5c; cf. also BGer. 4A_440/2010 para. 3.1; BGer. 4A_464/2009 para. 4.1.

[191] Cf. Berger/Kellerhals, para. 1571, footnote 69.

[192] BGer. 4A_654/2011 para. 5.2. In that case, the prayer for relief not only requested payment of a given sum but also demanded that the sum (which was awarded) be transferred in Dinars ("EUR 300'000 in Dinar counter value"); cf. also Magliana, pp. 156-157.

[193] BGE 128 III 234 para. 4a; BGE 115 II 288 para. 5; BGer. 4A_524/2009 para. 3.1; BGer. 4P.206/2006 para. 6; BGer. 4P.198/2002 para. 3.2; BGer. 4P.96/2002 para. 4.2.

[194] Kaufmann-Kohler/Rigozzi, para. 818.

[195] BGE 128 III 234 para. 4a (*"Il ne permet pas non plus de faire valoir que le tribunal arbitral a omis de trancher une question importante pour la solution du litige."*); in identical terms: BGer. 4A_524/2009 para. 3.1.

[196] BGE 128 III 234 para. 4a: *"[…] la recourante se plaint de ce que le Tribunal arbitral n'aurait pas examiné le litige sous tous ses aspects juridiques, en particulier au regard des dispositions du droit communautaire et du droit grec régissant la concurrence. Semblable grief n'entre pas dans les prévisions de l'art. 190 al. 2 let. c LDIP"*; cf. also BGer. 4A_218/2009 para. 4.2. (*"[…] l'art. 190 cpv. 2 LDIP […] non permette di fare valere che l'arbitro non si è pronunciato su tutti gli aspetti giuridici della vicenda"*).

[197] BGer. 4A_62/2009 para. 3.2, with reference to BGE 128 III 234 para. 4a.

[198] BGE 128 III 234 para. 4a: *"Lorsque la sentence rejette toutes autres ou plus amples conclusions, ce grief est exclu."*; confirmed in BGer. 4P.96/2002 para. 4.2; BGer. 4P.269/2003 para. 2.1: *"Wenn der Entscheid sämtliche anderen oder weitergehenden Anträge bzw. Begehren abweist, ist die Rüge ausgeschlossen."*; BGer. 4A_635/2012 para. 4.2; BGer. 4P.206/2006 para. 6; BGer. 4A_524/2009 para. 3.1.

such wording on a regular basis to avoid challenges based on *infra petita* violations,[199] and the Supreme Court has so far invariably endorsed[200] this form of self-protection on the part of arbitrators.[201]

3. *Timely Objection to Avoid Forfeiture*

66 As mentioned, the principle *ne eat judex ultra petita partium* within the meaning of Art. 190(2)(c) PILS is an aspect of the right to be heard in that it precludes the arbitral tribunal from ruling on any claims in the award on which the parties were not able to present their allegations.[202] Consequently, a party – in principle – must raise the alleged procedural violation forthwith before the arbitral tribunal.[203] A party that fails to raise an objection during the arbitration is deemed to have violated the principle of good faith[204] by not invoking the irregularity immediately (but only after the rendering of the adverse award),[205] with this failure resulting in the forfeiture of the right to subsequently challenge the award based on that flaw.[206]

67 There is, however, a self-evident *exception to the duty to immediately object* during the arbitral proceedings *if the (purported) violation only results from the award*. In such a case, it will normally not have been possible to previously object so that the setting aside proceedings before the Supreme Court will be the (first) point in time when this can be done. It should be noted that this exception will apply to the vast majority of cases where an award is challenged based on an *infra*, *ultra* or *extra petita* irregularity under Art. 190(2)(c) PILS, because only the award will, as a rule, reveal the irregularity.

68 Nonetheless, it is of critical importance that the (*ultra* or *extra petita*) irregularity not only be raised in the arbitration but also *against the next award* following the purported irregularity, be it a *partial or final* award. Failure of so proceeding might result in a forfeiture (or a waiver) of the right to object to the irregularity, with the defaulting party thus being precluded from challenging the subsequent (second partial or final) award on that basis.[207]

69 By contrast, and subject to the exception mentioned hereinafter, *partial awards are not open* to challenge for (purported) *infra petita* violations given that the claims or prayers for relief not addressed in the partial award will normally be dealt with in the next phase of the proceedings, i.e., in the final (or a further

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199 Kaufmann-Kohler/Rigozzi, para. 820; Bucher, para. 81 at Art. 190.

200 Cf. BGE 128 III 234 para. 4a; BGer. 4A_635/2012 para. 4.2; BGer. 4A_524/2009 para. 3.1; BGer. 4P.206/2006 para. 6; BGer. 4P.269/2003 para. 2.1; BGer. 4P.96/2002 para. 4.2.

201 For a harsh criticism of this case law, cf. Bucher, para. 81 at Art. 190 ("*Cette interprétation [...] n'est pas convaincante. On sait en effet que ce genre de formule, très courante dans le métier, est employé précisément pour 'se couvrir' au cas où son auteur aurait oublié de répondre à une conclusion. Elle n'a pas d'autre but que de prévenir l'hypothèse d'une décision s'avérant 'infra petita' [...]*"); critical also Voser/Petti, *PLC Arbitration Newsletter of 28 February 2013*: "*If arbitrators simply insert a catch-all statement in the operative part of their award, this has the effect that a decision can be rendered without arbitrators actually considering all of the claims in dispute. Based on the reasoning of the Swiss Supreme Court, the party concerned has no means to challenge this and the protection thereby offered by Article 190(2)(c) PILA would seem to be lost in such cases. Thus, as a minimum it should be possible to conclude from the reasoning in the award that the arbitrators have at least considered each of the claims raised by the parties*".

202 BGE 120 II 172 para. 3a; BGE 116 II 80 para. 3a.

203 BGer. 4A_234/2010 para. 4.1; BGer. 4A_150/2012 para. 4.1; BGE 119 II 386 para. 1a; BGE 116 II 639 para. 4c; BGE 113 Ia 67 para. 2a.

204 It is well established that this principle also applies in arbitration (cf. BGer. 4A_600/2010 para. 4.2; BGer. 4P.196/2003 para. 5.2).

205 Cf., e.g., BGer. 4A_150/2012 para. 4.1; BGE 119 II 386 para. 1a.

206 BGE 119 II 386 para. 1a; BGer. 4A_234/2010 para. 4.1 at the end ("*sous peine de forclusion*"); in same terms BGer. 4A_150/2012 para. 4.1; BGer. 4A_348/2009 para. 4; BGE 116 II 639 para. 4c; BGE 113 Ia 67 para. 2a; Schneider (*International Arbitration*, para. 71 at Art. 182) stresses that the right is forfeited and expressly rejects the term "waiver" in this context; other legal commentators apply both terms (i.e., waiver and forfeiture) in that a party not raising the objection during the arbitration will be deemed to have waived that right at a later stage, with the right to challenge the award being considered as forfeited (cf. Berger/Kellerhals, para. 1046).

207 This is so because a violation in terms of Art. 190(2)(c) PILS can only be brought against partial or final awards, but not against interim or preliminary awards, which follows from Art. 190(3) PILS (cf. Kaufmann-Kohler/Rigozzi, para. 817 a).

partial) award.[208] In other words, a party may not invoke that the (first, second or any subsequent) partial award did not deal with all claims or prayers for relief,[209] except if the arbitrators failed to rule on an issue which they were duty-bound to determine in the partial award.[210]

70 Finally, it is worth noting that many sets of arbitration rules provide for the possibility to request an *additional award* as to claims (or counterclaims) presented in the arbitration but not determined in any award.[211] In such a case, it has been submitted that the setting aside of the award should be subsidiary to the possibility of requesting an additional award, though – given that the 30-day term applies to both and starts to run upon notification (or receipt) of the award[212] – both the request for an additional award (from the arbitrators) and the setting aside motion (before the Supreme Court) will have to be filed in parallel,[213] with the possibility to subsequently ask for a stay of the setting aside proceedings.[214]

F. Article 190(2)(d) PILS

1. Introduction

71 The parties' right to be heard and to be treated equally throughout the proceedings form part of the idea that legal proceedings must be fair.[215] *Due process*, the generic term for this idea, encompasses all aspects of the parties' fundamental procedural rights. The intended purpose of the rights given to the parties (and the corresponding duties imposed on the arbitrators under Art. 182(3) PILS) always is the same: to secure procedural due process.[216]

72 After stating that the parties may determine the arbitral procedure,[217] Art. 182 PILS empowers the arbitral tribunal to determine the procedure in case the parties have not established it.[218] Under Art. 182(3) PILS,[219] the tribunal shall – irrespective of the chosen procedure – ensure *equal treatment* of the parties and their *right to be heard* in an adversarial procedure. The *adversarial principle* as provided for in Art. 182(3) PILS secures the party's right to deal with the opponent's case as well as to scrutinize and

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208 BGer. 4P.198/2002 para. 3.2; cf. also Bucher, paras. 75, 80 at Art. 190; Kaufmann-Kohler/Rigozzi, para. 818 a.

209 Cf. Berger/Kellerhals, para. 1571, footnote 70; see also Bucher, para. 75 at Art. 190.

210 BGer. 4P.198/2002 para. 3.2: "*Ce grief ne vaut en principe pas à l'égard d'une sentence partielle, par définition incomplète, à moins que les arbitres n'aient omis de statuer sur un point qu'ils devaient résoudre par cette sentence […]*"; cf. also Bucher, para. 80 at Art. 190.

211 E.g., Art. 37(1) Swiss Rules provides: "Within thirty days after the receipt of the award, a party, with notice to the Secretariat and the other parties, may request the arbitral tribunal to make an additional award as to claims presented in the arbitral proceedings but omitted from the award."; for a commentary on Art. 37 Swiss Rules, cf. above, Courvoisier, Chapter 3; see also Art. 39(1) UNCITRAL Arbitration Rules and Art. 27.3 LCIA Arbitration Rules, which also provide for this option; for further references, cf. Poudret/Besson, para. 765.

212 As to the additional award, Art. 37(1) Swiss Rules, Art. 39(1) UNCITRAL Arbitration Rules and Art. 27.3 LCIA Rules all provide for a 30-day term after receipt of the award (or the termination order). The same term applies under Art. 191 PILS to challenge the award before the Swiss Federal Supreme Court (cf. Art. 100(1) BGG).

213 Cf. Kaufmann-Kohler/Rigozzi, para. 819; concurring: Veit, para. 14 at Art. 37; Poudret/Besson, para. 765; Courvoisier, para. 18 at Art. 37 Swiss Rules above (Chapter 3).

214 See Poudret/Besson, para. 765; as to the different situation under the English Arbitration Act and the Netherlands Code of Civil Procedure, where the setting aside of the award can only be requested after the arbitrators refused to grant an additional award, cf. Veit, para. 13 at Art. 37; concurring: Courvoisier, para. 18 at Art. 37 Swiss Rules (Chapter 3 above).

215 Arroyo, *Jura Novit Arbiter*, p. 28.

216 Cf. Blessing, *J.Int.Arb. 1988*, p. 48; see in this context also Bernstein/Tackaberry/Marriott, Handbook of Arbitration Practice, 3rd ed., London 1998, pp. 81-82, where instead of *due process* the traditional term under English law, i.e. the *principles of natural justice*, is used to describe the minimum procedural standards to be observed.

217 Art. 182(1) PILS.

218 Art. 182(2) PILS.

219 Art. 182(3) PILS states: "*Regardless of the procedure chosen, the Arbitral tribunal shall ensure equal treatment of the parties and the right of both parties to be heard in adversarial proceedings.*"

refute the evidence submitted by the opposing party.[220] Non-compliance with the duty set forth in Art. 182(3) PILS will render the award open to challenge.[221]

73 Article 182(3) PILS[222] is mandatory.[223] The provision sets the minimum requirements to be met by the arbitrators in conducting the proceedings, i.e., the equal treatment of the parties and their right to be heard.[224] These two fundamental procedural guarantees[225] correspond to the international minimum standard[226] set forth, for example, in Art. 18 of the UNCITRAL Model Law on International Commercial Arbitration.[227] Both principles are, for instance, reflected in the notion that in the event of the respondent's default, the arbitrators shall nevertheless proceed with the arbitration and make an award based on the evidence before it, yet without taking the default itself as an admission of the claimant's allegations.[228] The sanctions provided in some national codes of procedure regarding the defendant's default may be legitimate in state court proceedings but excessive and incompatible with the principle of equality as understood in the framework of an international arbitration.[229]

74 As mentioned, the equal treatment of the parties and their right to be heard are axiomatic procedural principles. Yet, to the extent that the parties have not determined the procedure to be adopted,[230] it remains within the power of the arbitrators to establish the arbitral procedure. They will enjoy the so-called "*procedural law autonomy*"[231] which, amongst others, empowers them to set specific deadlines to the parties regarding the submission of legal arguments and the adducing of evidence.[232] For instance, ordering or refusing to order the stay of the proceedings (after due consideration of the parties' interests) are part of this autonomy and will thus generally not constitute a violation of the right to be heard or the equal treatment requirement under Supreme Court case law, given that the Court deems the decision on the stay to be left to the arbitral tribunal's discretion.[233]

2. Immediate Objection during Arbitral Proceedings as a Prerequisite for Challenge

75 Both the principle of equal treatment of the parties as well as their right to be heard constitute a ground for challenge.[234] Importantly, a party must raise the alleged due process violation forthwith before the arbitral tribunal. Procedural irregularities only raised in the setting aside proceedings before the Supreme Court are considered belated and will thus not be taken into account.[235] Under Swiss law, such party is deemed to have violated the principle of good faith[236] by not invoking the irregularity im-

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220 Cf. BGE 133 III 139 para. 6.1; BGE 130 III 35 para. 5; BGE 117 II 346 para. 1a; BGE 116 II 639 para. 4c; BGer. 4A_440/2010 para. 4.1; BGer. 4P.104/2004 para. 5.3.1; BGer. 4P.200/2001 para. 3a.

221 Vischer, para. 14 at Art. 182.

222 For a commentary on this provision, see Knoll above.

223 BGE 130 III 35 para. 5; BGE 119 II 386 para. 1b; BGE 117 II 346 para. 1a; BGE 116 II 373 para. 7b; BGer. 4A_360/2011 para. 4.1; BGer. 4P.17/2002 para. 2b; BGer. 4P.167/2002 para. 2.1; BGer. 4P.222/2001 para. 5a.

224 BGE 133 III 139 para. 6.1; BGer. 4P.129/2002 para. 7.1; Blessing, *Introduction*, p. 195; Schneider, *International Arbitration*, para. 33 at Art. 182.

225 Berger/Kellerhals, para. 1003.

226 BGE 133 III 139 para. 6.1; Schneider, *International Arbitration*, para. 50 at Art. 182.

227 See also Art. 17(1) UNCITRAL Arbitration Rules; cf. also Art. 15(1) Swiss Rules (2012); cf. further Schneider, *International Arbitration*, para. 50 at Art. 182.

228 Cf. also Art. 25(b) Model Law; Art. 30(1)(b) UNCITRAL Arbitration Rules.

229 Blessing, *J.Int.Arb. 1988*, pp. 48-49.

230 The principle of party autonomy is established in Art. 182(1) PILS.

231 Blessing, *Introduction*, p. 194; see also Bucher, para. 9 at Art. 182: "*Le tribunal arbitral est le maître de la procédure arbitrale.*"

232 Blessing, *J.Int.Arb. 1988*, p. 48.

233 BGE 133 III 139 para. 6.1 at the end; BGE 119 II 386 para. 1b; BGer. 4P.64/2004 para. 3.2.

234 Art. 190(2)(d) PILS.

235 BGer. 4A_234/2010 para. 4.1; BGer. 4A_150/2012 para. 4.1; BGE 119 II 386 para. 1a; BGE 116 II 639 para. 4c; BGE 113 Ia 67 para. 2a.

236 It is well established that this principle also applies in arbitration (cf. BGer. 4A_600/2010 para. 4.2; BGer. 4P.196/2003 para. 5.2).

mediately during the arbitral proceedings but only after the rendering of an adverse award.[237] The legal consequence of this failure to immediately raise an objection concerning the purported procedural flaw during the arbitration will be the forfeiture ("*Verwirkung*" in German; "*forclusion*" in French) of the right to challenge the award based on that flaw in prospective setting aside proceedings.[238]

76 It is further of critical importance that the procedural irregularity (i.e., an unequal treatment or a violation of the right to be heard) not only be raised in the arbitration but also against the next (partial or final) award following the purported irregularity. Failure of so proceeding might result in a forfeiture (or a waiver) of the right to object to the irregularity at issue, with the defaulting party thus being precluded from challenging the subsequent award on that basis.[239]

77 It is worth noting that under Art. 192 PILS parties from abroad[240] are free to conclude an exclusion agreement and thereby completely waive the right to bring a setting aside motion.[241] Needless to state, such an exclusion agreement will preclude a party from challenging an award before the Supreme Court even if it previously raised an immediate objection during the arbitration. Admittedly, a party agreement to dispense with the giving of reasons in the award will almost be tantamount to a waiver in terms of Art. 192 PILS,[242] even though the award will be open to challenge under Art. 190(2) PILS, as the Supreme Court recently held.[243]

3. *Unilateral Waivers and Mutually Agreed Amendments to the Procedure*

78 As stated, both the right to be heard and the right to be treated equally under Art. 182(3) PILS are mandatory procedural guarantees.[244] In fact, these are the only two mandatory procedural requirements.[245] As a result, the arbitral tribunal may not depart from these axiomatic guarantees (neither when determining the arbitral procedure at the outset of the arbitration nor when applying a given procedural rule during the arbitration). Likewise, the parties may not waive either right in advance.[246]

79 However, it has rightly been submitted that a waiver should be allowed in a particular procedural situation (i.e., not in advance but in the course of the proceedings).[247] For example, in not submitting a reply

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[237] Cf., e.g., BGer. 4A_150/2012 para. 4.1; BGE 119 II 386 para. 1a.

[238] BGE 119 II 386 para. 1a; BGer. 4A_234/2010 para. 4.1 at the end ("*sous peine de forclusion*"); in same terms BGer. 4A_150/2012 para. 4.1; BGer. 4A_348/2009 para. 4; BGE 116 II 639 para. 4c; BGE 113 Ia 67 para. 2a; Schneider (*International Arbitration*, para. 71 at Art. 182) stresses that the right is forfeited and expressly rejects the term "waiver" in this context; other legal commentators apply both terms (i.e., waiver and forfeiture) in that a party not raising the objection during the arbitration will be deemed to have waived that right at a later stage, with the right to challenge the award being considered as forfeited (cf. Berger/Kellerhals, para. 1046).

[239] Cf. Berger/Kellerhals, para. 1589, stressing that this is so because a violation of the right to be heard or the equality of the parties pursuant to Art. 190(2)(d) PILS can only be brought against partial or final awards, which follows from Art. 190(3) PILS.

[240] That is, parties that neither have their domicile, their habitual residence or a business establishment in Switzerland (Art. 192(1) PILS).

[241] For a commentary on Art. 192 PILS, cf. Baizeau above.

[242] The possibility of agreeing on such dispense exists under Swiss law (BGE 130 III 125 para. 2.2; BGer. 4P.207/2002 para. 4.1; cf. also Schneider, *International Arbitration*, para. 65 at Art. 190).

[243] BGer. 4A_198/2012 para. 2.2. The Supreme Court stressed that the chances to succeed will, however, be reduced significantly in case no reasons were given in the challenged award: "*[...] la renonciation à la notification des motifs d'une sentence arbitrale ne constitue pas un obstacle juridique au dépôt d'un recours contre cette sentence, même si elle réduit sensiblement en fait les chances de succès de la partie qui entend attaquer la sentence non motivée.*"

[244] This is what "*in all cases*" stands for in Art. 182(3) PILS when referring to the applicability of both principles (for a commentary on Art. 182 PILS, cf. Knoll above); see also BGE 117 II 346 para. 1a.

[245] BGE 130 III 35 para. 5; BGE 119 II 386 para. 1b; BGE 117 II 346 para. 1a; BGer. 4P.222/2001 para. 5a.

[246] BGE 133 III 139 para. 6.1; cf. also BGer. 4P.129/2002 para. 7.1; BGer. 4A_2/2007 para. 3.1; in same terms Berger/Kellerhals, para. 1018; critical, however, Bucher, para. 41 at Art. 182, who deems this statement to be *too absolute* given that the parties may either dispense with the exercise of a given right during the arbitration or may even exclude any challenge of the award issued after proceedings which did not comply with the minimum requirements of Art. 182(3) PILS by way of an agreement under Art. 192 PILS.

[247] Cf. Berger/Kellerhals, para. 1018; concurring: Bucher, para. 41 at Art. 182.

to a counterclaim, a party will (at least implicitly) be waiving its right to such submission. The same applies if, for instance, a party dispenses with the oral examination (including cross-examination) of a given witness, or if one party deliberately refrains from giving an opening or closing statement at the final hearing.

80 Despite a provision in the specific procedural rules to that effect and a pertinent indication in the provisional timetable, the parties may also agree at or after the final hearing that only post-hearing briefs but no rebuttal post-hearing briefs be filed, or that no post-hearing briefs be submitted at all – contrary to the originally agreed-upon procedure. In this type of scenario, the parties are not only waiving a part of their right to be heard, but are mutually agreeing on an amendment of the originally established procedure, which is covered by party autonomy. It also goes without saying that the parties may agree on a documents-only arbitration from the outset and thus dispense with holding any hearings whatsoever (including oral pleadings and witness examination).[248]

81 In the challenge proceedings before the Supreme Court, the parties might also be reminded of having confirmed that their right to be heard had been respected and that they had no objection regarding the way in which the hearing[249] or the proceedings[250] were conducted – a question regularly put by the chairman of the tribunal at the end of the final hearing. In other words, such confirmation might backfire when challenging the award.

82 In this context, it is worth stressing that party agreements regarding the procedure or the arbitration rules governing the proceedings (pursuant to the parties' arbitration agreement) do not become part of the minimal standard provided for in Art. 182(3) PILS, which sets forth the sole two mandatory procedural maxims (i.e., the right to be heard and the equal treatment requirement).[251] As a result, the Supreme Court has repeatedly held, a violation of the agreed-upon procedure (reflected, e.g., in a set of ad hoc or institutional arbitration rules) can only be challenged if a violation of Art. 182(3) PILS (right to be heard; equal treatment) or Art. 190(2)(e) PILS (procedural public policy) is contended.[252]

4. *Equal Treatment*

a. *Definition of the Equal Treatment Principle*

83 According to the *principle of equality* (Art. 182(3) PILS), the parties must be treated equally with regard to all procedural issues such as the exchange of written submissions, oral submissions and any witness hearings, as the case may be. [253] In short, the arbitral tribunal is required to treat the parties equally in all procedural matters *throughout the proceedings*,[254] i.e., from the beginning until the proceedings are

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[248] Cf. Schneider, *International Arbitration*, para. 68 at Art. 182.

[249] Cf. BGer. 4A_352/2009 para. 4.2.2; see also BGer. 4P.104/2004 para. 5.3.2.

[250] Cf. BGer. 4P.104/2004 para. 5.3.2, where the party that challenged the award did not object during the final hearing as to the direction of the tribunal that the post-hearing briefs be submitted simultaneously, but objected to this direction in the challenge proceedings before the Supreme Court only, which was deemed to be belated. Moreover, the party had not raised any objection with regard to the proceedings in general when asked by the chairman of the arbitral tribunal at the final hearing.

[251] BGE 130 III 35 para. 5; BGE 119 II 386 para. 1b; BGE 117 II 346 para. 1a; BGer. 4P.222/2001 para. 5a.

[252] BGE 117 II 346 para. 1a; confirmed in BGer. 4P.222/2001 para. 5a; very critical on this case law: Schneider, *International Arbitration*, para. 69 at Art. 182; by contrast, Berger/Kellerhals, paras. 1019/1580, seem to approve the Supreme Court's approach.

[253] Cf. BGE 133 III 139 para. 6.1; BGer. 4A_360/2011 para. 4.1; BGer. 4A_440/2010 para. 4.1; BGer. 4P.64/2004 para. 3.1.

[254] BGer. 4A_360/2011 para. 4.1; BGE 133 III 139 para. 6.1; BGer. 4A_488/2011 para. 4.4.1; BGer. 4A_360/2011 para. 4.1; BGer. 4P.64/2004 para. 3.1.

formally closed,[255] the tribunal's subsequent deliberations thus not forming part of the proceedings in this (narrow) sense.[256]

84 The principle of equal treatment is said to have a positive and a negative side.[257] On the one hand, the arbitrators are not to deny to a party a procedural right which they accorded to the opponent; on the other, they may not grant to a party a procedural right, which they denied to the opposing party.[258] No unequal treatment, for instance, results from the tribunal overlooking and thus not paying any regard to both parties' post hearing briefs.[259]

85 Furthermore, no party may exercise an overriding influence on the composition and constitution of the tribunal.[260] As to the arbitral procedure, it must be established and conducted in accordance with the equal treatment principle so as to ensure that each party has the same possibilities and means to present its case.[261] It has also been submitted that the tribunal must treat each party equally in like factual circumstances.[262]

86 According to the Swiss Federal Supreme Court, the parties' right to be treated equally and their right to be heard have, to a large extent, the same contents.[263] Legal commentators agree that both rights "overlap substantially".[264] Nonetheless, the two principles are not identical, as the Court itself has held,[265] and there are instances where only one of the two is violated,[266] even though this is the exception.[267] The aforementioned disregard of both parties' post-hearing briefs is such an example, which did not infringe the equal treatment principle, but which according to the Supreme Court did violate the losing party's right to be heard.[268] The same holds true if the tribunal precludes both parties from (cross-)examining witnesses.[269]

b. Case Law and Practical Examples

87 To begin with, a glaring example of unequal treatment would be allowing only one party to submit *written witness statements* in support of its arguments. Equally, if only one party was allowed to be advised and represented by an attorney-at-law, this obviously would amount to an unequal treatment.[270]

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[255] Where no post-hearing briefs are submitted, the closing of the proceedings normally occurs at the end of the final hearing. Otherwise, after the (simultaneous) submission of post-hearing briefs (or the subsequent filing of so-called rebuttal post-hearing briefs). As to the right to comment on newly submitted evidence with the opponent's post-hearing brief, cf. BGer. 4P.104/2004 para. 5.5; on this issue, cf. also Bucher, para. 22 at Art. 182.

[256] Cf. BGer. 4A_488/2011 para. 4.4.1; BGer. 4A_360/2011 para. 4.1.

[257] Schneider, para. 65 at Art. 182.

[258] Lalive/Poudret/Reymond, para. 7 at Art. 182; Schneider, *International Arbitration*, para 65 at Art. 182.

[259] Cf. BGer. 4A_360/2011 para. 4.2, though the Supreme Court here rightly concluded that the right to be heard had been violated, which led to the setting aside of the award (cf. BGer. 4A_360/2011 para. 5); on this decision, cf. Stacher, *AJP 2013*, pp. 110-111.

[260] Blessing, *J.Int.Arb. 1988*, p. 48.

[261] Cf. BGE 133 III 139 para. 6.1; BGer. 4A_539/2008 para. 4.1; cf. also Kaufmann-Kohler/Rigozzi, para. 486.

[262] Lalive/Poudret/Reymond, para. 7 at Art. 182; cf. also Schneider, *International Arbitration*, para. 66 at Art. 182, rightly stressing that the "*primary difficulty in applying this principle lies in distinguishing between like and unlike factual situations*".

[263] BGer. 4A_424/2011 para. 2.2. ("*[…] stimmt inhaltlich weitgehend […] überein*"); BGer. 4P.64/2004 para. 3.1; BGer. 4P.208/2004 para. 5.1.

[264] Berger/Kellerhals, para. 1012; in similar terms: Schneider, *International Arbitration*, para. 64 at Art. 182 ("*large degree of identity*").

[265] BGer. 4P.196/2003 para. 4.2.1 at the end ("*[…] la violation du droit à la preuve et l'inégalité de traitement ne vont pas forcément de pair.*").

[266] For a number of such examples, cf. Lalive/Poudret/Reymond, para. 2 at Art. 25 Concordat; see also Schneider, *International Arbitration*, para. 64 at Art. 182.

[267] As Berger/Kellerhals (para. 1012, footnote 44) point out.

[268] BGer. 4A_360/2011 paras. 4.2 (no unequal treatment) and para. 5 (violation of the right to be heard).

[269] Example mentioned in BGer. 4P.196/2003 para. 4.2.1 at the end.

[270] Walter/Bosch/Brönnimann, p. 223.

Further, if a party is granted an *extension of a deadline*, while this is denied to the opposing party, this may – but need not – constitute an unequal treatment.[271] Moreover, if the opposing party does not request an extension, it will most likely be precluded from successfully arguing that the extension granted to the other party constitutes an unequal treatment in terms of Art. 190(2)(d) PILS given that it was not denied the right granted to the other party.[272] **88**

Above all, it should be kept in mind that the setting of *different time limits or deadlines* to the parties does not necessarily constitute an unequal treatment.[273] In other words, equal treatment is not tantamount to equally long terms for performing procedural acts (i.e., especially legal submissions), even though the rule is that the deadlines for filing legal submissions should be equal (i.e., provide each party with the same period of time starting from a given point such as the organizational meeting or the terms of reference meeting).[274] **89**

Ideally, and this is the regularly adopted approach in practice, the arbitral tribunal will set up the provisional timetable at the outset of the arbitration in consultation with the parties and their legal counsel. This will normally lead to a timetable providing both parties and their counsel with enough time for performing each procedural act (particularly the drafting and filing of legal submissions). However, there may be instances that will force the arbitral tribunal to suggest and set extremely tight deadlines – especially, but not only, if a document production phase is included in the timetable (e.g., if the proceedings are expedited and the award must be rendered within six months pursuant to Art. 42 Swiss Rules).[275] Further, there will be no unequal (procedural) treatment if the arbitral tribunal accepts a legal submission filed belatedly (i.e., after the deadline established in the procedural rules or terms of reference).[276] An unequal treatment would only result from the tribunal rejecting the other party's belated submission after it had accepted the opponent's belated submission.[277] **90**

All this is part of the arbitrators' "*procedural law autonomy*"[278] which, amongst others, empowers them to set specific deadlines to the parties to file legal submissions.[279] The arbitrators may also decide to *reopen the proceedings* and invite the parties for clarification regarding claims which continue to evolve (e.g., lost investment possibilities or reputational damages).[280] This will not amount to an unequal treatment, always provided that both parties are given the opportunity to submit allegations regarding the claims and issues on which the arbitral tribunal seeks clarification.[281] **91**

Equally, ordering (or refusing to order) the *stay of the proceedings* are part of this autonomy and will thus generally not constitute a violation of the right to be heard under Supreme Court case law.[282] Nor will the *interpretation of a contract* to the (allegedly) clear disadvantage of the party challenging the award lead to the setting aside of the award.[283] **92**

Finally, alleging before the Supreme Court that the arbitral tribunal treated the parties unequally when *assessing the evidence* before it, will normally be doomed to failure given that the Court will consider this **93**

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271 Lalive/Poudret/Reymond, para. 2 at Art. 25 Concordat, mention this example.

272 E.g., this was so in BGer. 4A_539/2008 para. 4.2.1.

273 Cf. BGer. 4A_539/2008 para. 4.2.1; Schneider, *International Arbitration*, para. 87 at Art. 182.

274 Cf. Kaufmann-Kohler/Rigozzi, para. 486.

275 On Art. 42 Swiss Rules, see the commentary of Müller-Chen/Pair at Chapter 3 below.

276 In the case at issue, a party had filed two legal submissions one day after the relevant deadline (cf. BGer. 4A_468/2007 para. 6).

277 BGer. 4A_468/2007 para. 7.1; see also Kaufmann-Kohler/Rigozzi, para. 486a.

278 Blessing, *Introduction*, p. 194; see also Bucher, para. 9 at Art. 182: "*Le tribunal arbitral est le maître de la procédure arbitrale.*"

279 Blessing, *J.Int.Arb. 1988*, p. 48.

280 BGer. 4A_468/2007 para. 7.2.

281 BGer. 4A_468/2007 paras. 7.1-7.2.

282 BGE 133 III 139 para. 6.1 at the end; BGer. 4P.64/2004 para. 3.2.

283 Cf. BGer. 4P.93/2004 para. 2.2.

an inadmissible[284] complaint regarding the assessment of evidence, which can only be challenged under Art. 190(2)(e) PILS, i.e., if a public policy violation is alleged.[285]

5. *Right to be Heard*

a. *Definition of the Right to be Heard (in Adversarial Proceedings)*

94 Under the long-standing Supreme Court case law, the *right to be heard* under Art. 182(3) PILS includes the parties' right to present their case, to put in evidence as well as counter-evidence, to have access to the case record, to participate in the proceedings and be present (or represented) at all hearings.[286] The parties must, *inter alia*, have the opportunity to comment on all relevant documents, expert opinions and witness statements.[287]

95 According to the Supreme Court, the *adversarial proceedings* guarantee of Art. 182(3) PILS in turn accords to the parties the right to examine and comment both the allegations and the evidence advanced by the opponent, including the possibility to rebut them with own contentions and own evidence.[288] It has rightly been submitted that this must also apply to any relevant legal[289] or factual issues which the arbitral tribunal, not the opposing party, has raised on its own motion during[290] the proceedings.[291]

96 Over the years, the due process requirements under Art. 182(3) PILS and Art. 190(2)(d) PILS have engendered a case law which today constitutes a *corpus of procedural guidelines on acceptable and unacceptable conduct of arbitrators*, and it is the intended purpose of this chapter to explore this case law with regard to the most often invoked ground in setting aside proceedings, that is, the violation of the right to be heard.[292]

b. *What the Right to be Heard Does Not Comprise*

i. Generally

97 To begin with, a party may not invoke the right to be heard to delay the proceedings arguing that it is entitled to as many submissions or extensions of deadlines as it wishes to present its case and deal with that of its opponent. Were it otherwise, arbitrations would never end. Nor can the right to be heard generally be relied on to challenge the arbitral tribunal's *decision ordering (or refusing to order) the stay* of the proceedings[293] (requested by a party).[294]

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[284] The taking and assessment of evidence by the arbitral tribunal is generally (i.e., subject to public policy violations) not open to challenge (see, e.g., BGer. 4A_360/2011 para. 4.1; BGer. 4P. 140/2004 paras. 2.1, 2.2.3; BGer. 4P.200/2001 para. 2b; see in detail below at paras. 188-189).

[285] Cf., e.g., BGer. 4A_360/2011 para. 4.1; BGer. 4A_539/2008 para. 4.2.2.

[286] BGE 133 III 139 para. 6.1; BGE 130 III 35 para. 5; BGE 127 III 576 para. 2c; BGE 117 II 346 para. 1a; BGE 116 II 639 para. 4c; BGer. 4A_150/2012 para. 4.1; BGer. 4A_682/2011 para. 4.1; BGer. 4A_600/2010 para. 4.1; BGer. 4A_2/2007 para. 3.1; BGer. 4P.88/2006 para. 3.1.

[287] BGer. 4P.235/2001 para. 3e ("*So müssen sich die Parteien vor der Urteilsfällung zum Beispiel zu den relevanten Dokumenten, Expertisen und Zeugeneinvernahmen äussern können.*"); cf. also BGer. 4A_600/2010 para. 4.2.

[288] BGE 133 III 139 para. 6.1; BGE 130 III 35 para. 5; BGE 117 II 346 para. 1a; BGE 116 II 639 para. 4c; BGer. 4A_440/2010 para. 4.1; BGer. 4P.104/2004 para. 5.3.1; BGer. 4P.200/2001 para. 3a.

[289] As to the arbitrators applying on their own motion a legal or contractual provision after the proceedings have been closed (in particular, during the deliberations), and which provision had not been raised during the proceedings, see the case law on *jura novit curia/arbiter* at paras. 148-152 below.

[290] If the arbitrators raise any legal issues (e.g., a legal or contractual provision not addressed during the proceedings) only at the deliberation stage, the principles under the case law on *jura novit curia/arbiter* apply (see below, paras. 148-152).

[291] Berger/Kellerhals, para. 1014; see also Poudret/Besson, para. 550.

[292] See Dasser, *ASA Bull. 2010*, pp. 86-87.

[293] BGE 133 III 139 para. 6.1 at the end; BGE 119 II 386 para. 1b; BGer. 4P.64/2004 para. 3.2.

[294] As to the joint request by both parties to stay the proceedings, which the tribunal will normally grant (e.g., because the parties have engaged in settlement negotiations), cf. Bucher, para. 24 at Art. 182.

98 The right to be heard does not entitle the parties to be informed that the evidence put in is, in the tribunal's view, insufficient to establish a crucial fact.[295] Nor is there a duty on the part of the tribunal to address all arguments which the parties submitted.[296]

99 Furthermore, the parties are not entitled to *reasons in the award*. Even though Art. 189(2) PILS provides that the award is to include reasons, the Supreme Court does not consider this a mandatory requirement under Art. 182(3) PILS, and given that this ground (i.e., the lack of reasons) is not mentioned in the exhaustive list of Art. 190(2) PILS as a ground for challenge, the lack of reasons cannot be invoked against an award.[297]

100 In addition, a party cannot invoke that the arbitral *tribunal did not deal with and discuss all arguments advanced* in support of its case.[298] The same holds true regarding *the interpretation of the contract* (or a given contractual clause) by the tribunal, which cannot be challenged if it was deemed to be arbitrary.[299]

101 Equally, the right to be heard does not comprise the right *to plead one's case orally* before the arbitral tribunal.[300] Nor is there a right to a *public hearing*.[301]

102 Further, the tribunal's decision to submit both parties' questions in writing to a witness from abroad (so as to avoid the summoning of the witness through a time-consuming international judicial assistance request[302]) – instead of having the witness attend the hearing in person (and submit him to cross-examination) – cannot be challenged.[303]

103 Likewise, the arbitral *tribunal may implicitly dismiss a request* (e.g., by simply accepting a belated legal submission from the opponent), without there being any need to expressly issue a (reasoned) decision rejecting the request (according to which the belated submission should be disregarded).[304] Put differently, the right to be heard does not entitle the parties to an express and reasoned decision of the tribunal on a given request.[305]

104 By contrast, if the arbitral tribunal on its own motion invites the parties to file a statement regarding the costs of legal representation, but then rules on the costs, without having heard the parties on this issue (i.e., without awaiting the parties' costs submissions after the parties had asked the tribunal to set a deadline for the submissions), this conduct – according to the Supreme Court – constitutes a violation of the right to be heard.[306] Further, if the tribunal afterwards contends that the parties deliberately refrained from filing costs submissions, though they could have done so quite swiftly, this will run counter

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295 BGer. 4A_450/2007 para. 4.2.2.

296 BGE 133 III 235 para. 5.2; BGer. 4A_635/2012 para. 5.2; BGer. 4A_150/2012 para. 3.1; BGer. 4A_360/2011 para. 5.1; BGer. 4A_433/2009 para. 2.1; cf. also BGE 116 II 639 para. 4c.

297 BGE 134 III 186 para. 6; BGer. 4A_360/2011 para. 5.1; BGer. 4A_404/2010 para. 5; cf. also BGE 133 III 235 para. 5.2; BGE 130 III 125 para. 2.2; BGE 128 III 234 para. 4b; BGE 116 II 373 para. 7b; BGer. 4A_635/2012 para. 4.2. This case law has met with stark criticism (cf. Bucher, paras. 93-101 at Art. 190; Berti/Schnyder, para. 65 at Art. 190; Zenhäusern, para. 15 at Art. 384; cf. also the commentators voicing criticism mentioned in BGE 134 III 186 para. 6.1 at the end). Fortunately, arbitral tribunals having their seat in Switzerland hardly ever dispense with the giving of reasons in the award, unless the parties empowered them to so proceed.

298 BGE 133 III 235 para. 5.2; BGer. 4A_635/2012 para. 5.2; BGer. 4A_150/2012 para. 3.1; BGer. 4A_360/2011 para. 5.1.

299 Cf. BGer. 4P.93/2004 para. 2.2.

300 Cf. BGE 117 II 346 para. 1b/aa; BGer. 4P.196/2003 para. 4.1; BGer. 4P.18/2004 para. 2.1.1; BGer. 4A_160/2007 para. 4.1; BGer. 4A_220/2007 para. 8.1; BGer. 4A_404/2010 para. 5; BGer. of 24 March 1997 para. 2a, *ASA Bull. 1997*, pp. 323-324.

301 BGer. 4A_612/2009 para. 4.1; BGer. 4A_320/2009 para. 2. In both decisions the Court stressed that the ECHR (including the procedural guarantees of Art. 6 ECHR) do not apply to arbitration.

302 I.e., a "*commission rogatoire*" in French (cf. BGer. 4P.114/2003 para. 2.3; witness domiciled in Libya).

303 BGer. 4P.114/2003 para. 2.3.

304 BGE 134 III 186 para. 6.2.

305 BGE 134 III 186 paras. 6, 6.1.-6.2.

306 BGer. 4A_600/2010 paras. 4.2-4.3. The CAS award at issue was thus set aside.

to the principle of (procedural) good faith,[307] which also applies in international arbitration,[308] if the parties, as in the case at issue, explained to the tribunal why they could not proceed immediately and both requested that a deadline be set to grant them some time for filing the submissions.[309]

ii. Departures from Procedural Rules in Particular

105 The right to be heard does not confer on the parties the right to request the appearance of witnesses who filed a written witness statement in order to question them.[310] According to the Supreme Court, *procedural rules established by the parties do not by that very act*[311] *become a mandatory procedural principle within the meaning of Art. 182(3) PILS,*[312] which provision does not confer upon the parties the right to put oral questions to the authors of written witness statements.[313] As a result, the right to be heard under Art. 182(3) PILS is not infringed if the arbitrators dispense with the hearing of witnesses, even if the terms of reference (e.g., under the ICC Rules) or the specific procedural rules so provide (i.e., if they enable the parties to put oral questions to the witnesses who filed a written statement).[314]

106 The same applies if the terms of reference provide that the parties will be allowed to oral pleadings prior to the arbitral tribunal's decision.[315] Even if such a freely agreed clause between the parties is binding on the tribunal, the agreed-upon provision is not a mandatory procedural principle in terms of Art. 182(3) PILS, and the award will thus not be set aside if the arbitral tribunal precluded the parties from oral pleadings before rendering the award.[316]

107 Equally, the arbitral tribunal may dispense with the taking of evidence even if it had previously informed the parties that it would so proceed prior to deciding the dispute; in such a case, the tribunal need not inform the parties beforehand as to its decision to not take the evidence in question, but may issue the award, without this violating the parties' right to be heard.[317] The same holds true even if the applicable arbitration rules[318] provide that a taking of evidence phase will follow after the second exchange of legal briefs, and the arbitral tribunal may therefore dispense with the taking of evidence and base its decision on the documents on record only.[319] Such renouncement may not be invoked under the right to be heard; nor can the tribunal's (allegedly) wrong application of procedural rules be challenged.[320]

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307 BGE 111 II 62 para. 3; BGer. 4A_600/2010 para. 4.2.

308 BGer. 4A_600/2010 para. 4.2; BGer. 4P.196/2003 para. 5.2; see also Art. 15(7) Swiss Rules (2012): "*All participants in the arbitral proceedings shall act in good faith, [...]*" (for a commentary on this provision, cf. Lazopoulos at Chapter 3 above).

309 BGer. 4A_600/2010 para. 4.2.

310 BGer. 4P.196/2003 para. 4.2.2.1.

311 I.e., *ipso facto* (BGer. 4P.196/2003 para. 4.2.2.2: "*[...] ne devient pas ipso facto un principe impératif de procédure au sens de l'art. 182 al. 3 LDIP.*").

312 BGer. 4P.196/2003 para. 4.2.2.2; confirmed in BGer. 4P.14/2004 para. 2.2.5; and BGer. 4P.93/2004 para. 2.1 (in same terms already BGE 117 II 346 para. 1b/aa; BGer. of 24 March 1997 para. 2a, *ASA Bull. 1997*, pp. 323-324). Nor will deviations from such procedural rules (including the arbitration rules chosen by the parties) by themselves amount to a violation of public policy under Art. 190(2)(e) PILS, even if the application of the procedural rules was wrong or arbitrary (cf. BGE 126 III 249 para. 3b; BGer. 4A_612/2009 para. 6.3.1; BGer. 4A_600/2008 para. 4.2.1.3; BGer. 4P.23/2006 para. 4.2).

313 BGer. 4P.196/2003 para. 4.2.2.2.

314 BGer. 4P.196/2003 para. 4.2.2.2.

315 Cf. BGE 117 II 346 (where the relevant clause in the terms of reference read as follows: "*les parties auront en tout état de cause encore la faculté de s'exprimer oralement avant que le Tribunal arbitral ne rende sa sentence*"); admittedly, the arbitral tribunal had invited the parties twice to comment in writing on the expert report prior to issuing the award, and – at the time it set the deadline for the second submission in writing (on some additional remarks filed by the expert) – it had informed the parties that no additional hearing would be held; for a similar case, see BGer. of 24 March 1997 para. 2, *ASA Bull. 1997*, pp. 323-325.

316 BGE 117 II 346 para. 1b/aa.

317 BGer. 4P.14/2004 para. 2.2.5.

318 E.g., the (former) Arbitration Rules of the Zurich Chamber of Commerce (BGer. 4P.93/2004 para. 2.1).

319 BGer. 4P.93/2004 para. 2.1.

320 BGer. 4P.23/2006 para. 4.3.

108 The arbitral tribunal may, but need not, accept a party's legal submission filed belatedly, with the opposing party's challenge of the award based on an alleged violation of the right to be heard being doomed to failure – especially if the applicable rules or terms of reference do not provide for a sanction (such as the non-acceptance of the submission) in case of non-compliance with a deadline. In other words, the arbitral tribunal is entitled to dismiss[321] the opposing party's request to reject the belated submission.[322]

109 To sum up, pursuant to the Supreme Court, *departures of the arbitral tribunal from the procedural rules established by the parties* (directly or indirectly by referring to ad hoc or institutional sets of arbitration rules) *do not per se amount to a violation* of the right to be heard.[323]

c. Prerequisites for Exercising the Right

110 The Supreme Court has repeatedly held that a party wishing to exercise its right to be heard – in particular with regard to the putting in or proffering of evidence – must do so *within the established deadlines and in compliance with any further formal requirements*, if any, applicable to the arbitral proceedings in question.[324] The right to be heard thus requires the parties to become active and meet the established deadlines, within which they must present their case and deal with that of the opposing party (i.e., allege the factual and legal arguments or counter-arguments, and submit the evidence in support of its case or the counter-evidence against the opponent's case).[325]

111 As mentioned, the parties must also comply with any other procedural requirements. This, for instance, includes advance payments the arbitral tribunal requests with regard to the costs of an expert report to determine the price of the goods at issue, as requested by a party. If that party refuses to pay the *advance on costs*, the tribunal is at liberty to dispense with the expert report, without violating the applicant's right to be heard[326] – always provided that the tribunal forewarned the party as to the consequences of non-payment in case the applicable arbitration (or specific procedural) rules are silent on the default consequences.[327] Nor will the refusal to order an expert report amount to an unequal treatment under Supreme Court case law.[328]

d. Findings of Fact

i. Rule 1: No Duty of Arbitrators to Allow the Parties to Comment on Intended Factual Inferences

112 The arbitral tribunal need not draw the parties' attention in advance to those alleged facts which it deems relevant for the decision of the case. Nor must the tribunal grant the parties an opportunity to comment on the legal or factual conclusions it intends to draw based on those facts.[329]

113 Equally, the tribunal need not address all arguments advanced by the parties.[330] Nor must it inform a party that the evidence put in is insufficient to establish a crucial fact.[331]

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[321] The dismissal may either be express or implied (i.e., by simply accepting the submission); cf. BGE 134 III 186 para. 6.2.

[322] BGE 134 III 186 para. 6.2.

[323] BGE 117 II 346 para. 1b/aa; BGer. 4A_612/2009 para. 6.3.1; BGer. 4P.23/2006 para. 4.2; BGer. 4P.14/2004 para. 2.2.5; BGer. 4P.93/2004 para. 2.1; cf. also BGer. 4A_612/2009 para. 6.3.1.

[324] BGE 119 II 386 para. 1b; BGer. 4A_150/2012 para. 4.1; BGer. 4A_600/2010 para. 4.1; BGer. 4A_234/2010 para. 4.1; BGer. 4A_352/2009 para. 4.2.1; BGer. 4A_539/2008 para. 5.1; BGer. 4P.17/2002 para. 2b.

[325] Cf. Bucher, para. 40 at Art. 182. Alleging before the Supreme Court that evidence submitted to the arbitral tribunal after the award has been served on the parties was disregarded, will not only be doomed to failure but even be considered bold (BGer. 4A_352/2009 para. 4.2.2: "*[…] le reproche fait […] de ne pas avoir pris en considération ces éléments de preuve confine à la témérité.*").

[326] BGer. 4P.270/2003 para. 3.3; cf. also BGer. 4A_600/2008 para. 5.2.

[327] BGer. 4P.2/2003 para. 3.4; BGer. 4A_600/2008 para. 5.2.2; see also Bucher, para. 16 at Art. 182.

[328] BGer. 4P.270/2003 para. 3.2.

[329] Cf. BGE 130 III 35 para. 5; BGer. 4A_108/2009 para. 2.1; BGer. 4P.134/2006 para. 6.

[330] BGE 133 III 235 para. 5.2; BGer. 4A_150/2012 para. 3.1; BGer. 4A_360/2011 para. 5.1; cf. also BGE 116 II 639 para. 4c.

[331] BGer. 4A_450/2007 para. 4.2.2.

ii. Rule 2: No Challenge of an Award Based on Incorrect Findings of Fact

114 It is well established that incorrect findings of fact normally do not amount to a violation of the right to be heard and thus cannot trigger the setting aside of an arbitral award.[332] Even a manifestly erroneous finding of fact or one which is in contradiction with the case record (and allegedly led to an obviously incorrect or unjust award) does not, as such, justify the setting aside of an international arbitral award, because the substantive examination of the award by the Supreme Court is limited to the question whether the award is compatible with public policy,[333] and manifestly erroneous findings of fact (or finding inconsistent with the record) do not pass the exacting test of Art. 190(2)(e) PILS.[334]

115 The Supreme Court has always emphasized that it is bound by the facts established by the arbitral tribunal[335] (even if these are obviously incorrect)[336] and reviewing with unfettered powers the arbitrators' findings of fact, as an appeal court is empowered to do, would be contrary to the spirit and purpose of Art. 190(2) PILS which aims at limiting the possibilities of setting aside international awards by means of an exhaustive list of grounds.[337] In the absence of a ground relating to factual findings, the Supreme Court, as a rule, does not entertain any complaints concerning such findings; a party may not even invoke that the arbitral tribunal's factual findings were arbitrary.[338]

116 Accordingly, the Supreme Court has repeatedly held that even a manifestly erroneous finding of fact (or one in evident contradiction with the record) which allegedly led to an obviously incorrect or unjust award does not as such justify the setting aside of an international arbitral award, because the substantive examination of the award by the Court is limited to the question whether the award is compatible with public policy, which is a significantly higher threshold than that of arbitrariness.[339] Therefore, the chances of a successful challenge based on a *substantive denial of justice*[340] lie within narrow limits.[341]

117 Under the Federal Statute on the Supreme Court (BGG), which came into force on 1 January 2007, the factual findings of the arbitral tribunal cannot be challenged in setting aside proceedings (Art. 77(2) in conj. with Art. 105(2) BGG).[342] Importantly, this rule applies even where the tribunal's factual findings are obviously wrong, e.g., because they result from a patently incorrect assessment of the evidence, or

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332 Cf. BGE 127 III 576 para. 2b; BGE 121 III 331 para. 3a; BGer. 4A_612/2009 para. 6.3.1; BGer. 4A_240/2009 para. 5.1; BGer. 4A_62/2009 para. 4.1; BGer. 4A_176/2008 para. 4.1.1; BGer. 4P.134/2006 para. 7; BGer. 4P.72/2001 para. 2b.

333 Cf., e.g., the decisions before the entering into force of the BGG: BGE 116 II 634 para. 4; BGE 120 II 155 para. 6a; BGE 121 III 331 para. 3a; BGE 129 III 727 para. 5.2.2; BGE 133 III 139 para. 5; BGer. 4P.260/2000 para. 6a; cf. also BGer. 4A_176/2008 para. 2.3, expressly referring to Art. 77 in conj. with Arts. 97 and 105(2) BGG (i.e., the Federal Statute on the Supreme Court); equally BGer. 4A_16/2012 para. 2.3; BGer. 4A_162/2011 para. 1.3; BGer. 4A_631/2011 para. 2.3; BGer. 4A_428/2010 para. 1.3; BGer. 4A_326/2010 para. 1.3.

334 BGer. 4P.54/2006 para. 3.1; BGer. 4P.48/2005 para. 3.4.2.2; BGer. 4P.99/2000 para. 3b/bb; BGE 121 III 331 para. 3a.

335 E.g., the domicile of one of the parties (cf. BGer. 4A_654/2011 para. 3.3: domicile of the opposing party in Spain as stated in the arbitral award, and not in Serbia as contended by the challenging party before the Supreme Court).

336 BGer. 4A_16/2012 para. 2.3; BGer. 4A_162/2011 para. 1.3; BGer. 4A_631/2011 para. 2.3; BGer. 4A_428/2010 para. 1.3; BGer. 4A_326/2010 para. 1.3; BGer. 4A_438/2008 para. 2.6.

337 Cf. BGE 119 II 380 para. 3c.

338 BGE 127 III 576 para. 2b; BGE 116 II 634 para. 4b; BGer. 4A_612/2009 para. 6.3.1; BGer. 4P.74/2006 para. 4; BGer. 4P.48/2005 para. 3.4.2.2.

339 BGE 138 III 322 para. 4.3.2 ("*[…] seine Verletzung wesentlich eingeschränkter zu würdigen ist als ein Verstoss gegen das Willkürverbot […]*"); BGE 132 III 389 para. 2.2.2 ("*[…] c'est une notion plus restreinte que celle d'arbitraire […]*"); BGE 126 III 249 para. 3b; BGE 120 II 155 para. 6a; BGE 116 II 634 para. 4; BGE 117 II 604 para. 3; BGer. 4A_150/2012 para. 5.1; BGer. 4P.154/2006 para. 3.1 ("*La nozione di ordine pubblico è più restrittiva di quella di arbitrio.*"); in even clearer terms BGE 115 II 288 para. 3a: "*[…] il s'agit d'un moyen beaucoup plus restrictif et beaucoup plus étroit que celui d'arbitraire […].*"

340 I.e., a "*materielle Rechtsverweigerung*" in German as opposed to a formal denial of justice ("*formelle Rechtsverweigerung*" in German).

341 BGE 121 III 331 para. 3a; BGer. 4P.54/2006 para. 3.3.

342 Cf. BGer. 4A_176/2008 para. 2.3 and BGer. 4A_654/2011 para. 2.3 (both decisions expressly referring to Art. 77 in conj. with Arts. 97 and 105(2) BGG).

the findings are manifestly contrary to the facts on record.[343] An exception to this rule applies only if the facts were established by the arbitral tribunal in violation of one of the grounds provided at Art. 190(2) PILS (e.g., in terms of a denial of justice[344] under Art. 190(2)(d) PILS), or in instances where new facts (so-called "*Noven*") can exceptionally be taken into consideration.[345]

118 Consequently, a party challenging an award before the Supreme Court may generally not present new facts. Nor can, as a rule,[346] new requests for the taking of evidence be submitted.[347]

iii. Exception: Erroneous Findings Constituting a Procedural Denial of Justice

119 Conversely, and notwithstanding the aforementioned two rules, the award will be set aside if the arbitrators' obviously erroneous factual findings constitute a procedural denial of justice. This is the case if the arbitrators negligently overlooked (relevant) evidence submitted by a party (in support of alleged facts) and thereby deprived the party of its right to both participate in the taking of evidence and to influence the outcome of the dispute.[348] The party, in other words, was disadvantaged in the proceedings because it could not (entirely) bring in its position.[349]

120 Such a violation of the procedural right to be heard will lead to the setting aside of the award regardless of the challenging party's chances to succeed on the merits, i.e., regardless of whether it would have obtained a different result in the arbitration had the arbitrators duly considered the omitted evidence (so-called *formal nature of the right to be heard*).[350] This is so because the right to be heard does not guarantee the substantive correctness of the award but simply confers the right to influence the outcome of the dispute by participating in the decision-making process.[351]

121 Showing that the party challenging the award was precluded from advancing and proving a certain argument on a relevant[352] (factual or legal) issue will be sufficient, yet also necessary for the challenge to be successful.[353] Simply invoking an erroneous or arbitrary assessment of evidence will therefore be insufficient.[354] Rather, the party challenging the award will have to establish that the overlooked

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343 Cf. BGE 133 III 235 para. 5.2; BGE 121 III 331 para. 3a; BGE 120 II 155 E. 6a; cf. Berger/Kellerhals, paras. 1585-1586, 1618.

344 Cf. BGE 127 III 576 para. 2e; BGE 121 III 331 para. 3b.

345 Cf. BGE 138 III 29 para. 2.2.1; BGE 134 III 565 para. 3.1; BGE 133 III 139 para. 5; BGE 129 III 727 para. 5.2.2; BGer. 4A_654/2011 para. 2.3; BGer. 4A_579/2010 para. 2.1; BGer. 4A_424/2008 para. 2.3.

346 On exceptional circumstances justifying a departure from this rule, see Berger/Kellerhals, para. 1644 (cf. also Art. 99(1) BGG).

347 It should also be noted that the Supreme Court may (exceptionally) decide to take further evidence on its own motion in the course of setting aside proceedings (cf. Berger/Kellerhals, para. 1645; see also Art. 55 BGG). However, this hardly ever happens in practice (as Bucher, para. 34 at Art. 191, rightly notes).

348 Cf. BGE 133 III 235 para. 5.2; BGE 127 III 576 para. 2e; BGE 121 III 331 para. 3b; BGer. 4A_240/2009 para. 5.1; BGer. 4A_176/2008 para. 4.1.1; BGer. 4P.105/2006 para. 7.4; BGer. 4A_433/2009 para. 2.1.

349 BGE 127 III 576 para. 2e; BGer. 4A_224/2008 para. 4.1; BGer. 4P.207/2002 para. 4; BGer. 4A_244/2007 para. 6.2.

350 Cf. BGE 133 III 235 para. 5.3: "*Etant donné la nature formelle de ce droit [...], la sentence attaquée doit être annulée, sans égard au sort qui sera réservé aux arguments subsidiaires avancés par le recourant.*"; confirmed in BGE 121 III 331 para. 3c; BGer. 4A_150/2012 para. 3.1 : "*[...] la nature formelle du droit d'être entendu et la nécessité, en cas de violation de ce droit, d'annuler la décision attaquée indépendamment des chances de la partie recourante d'obtenir un résultat différent [...]*"; in identical terms: BGer. 4A_360/2011 para. 5.1 and BGer. 4A_46/2011 para. 4.3.2.

351 BGE 127 III 576 paras. 2d, 2e; BGE 121 III 331 para. 3c; BGer. 4P.48/2005 para. 3.4.2.2: "*Dies allein rechtfertigt, den Entscheid ohne Rücksicht auf die materiellen Erfolgschancen der Beschwerde aufzuheben, da der Anspruch auf rechtliches Gehör nicht die materielle Richtigkeit, sondern das Recht auf Beteiligung der Parteien an der Entscheidfindung garantiert.*"

352 BGE 133 III 235 para. 5.2 ("*importants pour la décision à rendre*"); BGE 127 III 576 para. 2e and BGer. 4A_240/2009 para. 5.1 ("*zu einer entscheidwesentlichen Frage*"); BGE 121 III 331 para. 3b ("*entscheiderheblich*").

353 BGE 127 III 576 para. 2f; BGer. 4A_176/2008 para. 4.1.1; BGer. 4A_240/2009 para. 5.1; BGer. 4P.105/2006 para. 7.4.

354 BGE 127 III 576 para. 2f; BGer. 4P.74/2006 para. 4; BGer. 4P.48/2005 para. 3.4.2.2.

argument or fact concerned a relevant issue and could thus have had a bearing on the outcome of the dispute.[355]

122 This, for example, is the case if the arbitral tribunal – contrary to what both parties submitted – wrongly assumed that the contract at issue was no longer performed as from a given date (June 1991) and on this (erroneous) basis concluded that no contractual fees were due for the subsequent months (i.e., from July to September 1991).[356] In that instance, the award was set aside.[357]

123 It follows that the party invoking a violation of the right to be heard must establish that (i) the arbitrators actually did not consider at all an alleged fact, a legal argument or evidence submitted in due time in support of its case, and it must further demonstrate that (ii) the non-considered fact (argument or evidence) was pertinent in that it was fit to influence the outcome of the dispute.[358] The overlooked fact (argument or evidence) must, in other words, be relevant to the arbitration, i.e., concern a material issue.[359]

124 In summary, besides the rare cases of procedural denial of justice, which will moreover be difficult to prove, the findings of fact on which the arbitral tribunal bases its decision can only be challenged before the Supreme Court on the ground that they are incompatible with public policy under Art. 190(2)(e) PILS,[360] or that the facts have been established in violation of the procedural legal guarantees provided for in Art. 190(2)(d) PILS (i.e., the equality of the parties and their right to be heard).[361]

e. Taking and Assessment of Evidence

i. Limitation of the Right to be Heard to Legally Relevant Evidence

125 According to the long-standing practice of the Swiss Federal Supreme Court, the right to be heard, which confers on the parties the right to adduce evidence,[362] only encompasses evidence and counter-evidence that is legally relevant, i.e., evidence referring to facts which will have a bearing on the outcome of the dispute.[363] Moreover, the right to be heard does not entitle a party to request the taking of evidence which is unfit to produce proof.[364]

ii. Corresponding Limitation for the Parties to Comment on Legally Material Facts Only

126 In view of aforementioned limitation established by the Supreme Court, the parties' right to comment on the results of the taking of evidence is also limited to evidence concerning legally material facts in the mentioned sense.[365] The arbitrators may refuse to take evidence which they consider devoid of any persuasive or evidentiary force, and the same applies if the fact to be proven has already been established

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355 BGE 133 III 235 para. 5.2 ("*[…] que ces éléments étaient de nature à influer sur le sort du litige*"); BGE 127 III 576 para. 2f ("*[…] Standpunkt in Bezug auf ein prozessrelevantes Thema […]*"); in same terms: BGer. 4A_240/2009 para. 5.1; BGer. 4A_433/2009 para. 2.1; BGer. 4P.48/2005 para. 3.4.2.2.

356 BGE 121 III 331 para. 3b.

357 BGE 121 III 331 paras. 3c-3d.

358 BGE 133 III 235 para. 5.2; BGer. 4A_433/2009 para. 2.1; BGer. 4A_539/2008 para. 5.1.

359 BGE 127 III 576 para. 2f ("*[…] in Bezug auf ein prozessrelevantes Thema […]*"); in identical terms BGer. 4A_240/2009 para. 5.1; BGer. 4A_176/2008 para. 4.1.1; BGer. 4P.105/2006 para. 7.4; see also BGer. 4A_150/2012 para. 3.1 ("*[…] importants pour la décision à rendre […]*").

360 Cf. BGE 120 II 155 para. 6a; BGE 119 II 380 para. 3c.

361 Cf. BGE 119 II 380 para. 3c; BGer. of 30 December 1994 para. 2a, *ASA Bull. 1995*, p. 223.

362 Cf. BGE 130 III 35 para. 5.

363 Cf. BGE 133 III 235 para. 5.2; BGE 127 III 576 para. 2d; BGE 121 III 331 para. 3b; BGE 119 II 386 para. 1b.

364 BGer. 4A_150/2012 para. 4.1; BGer. 4A_600/2010 para. 4.1; BGer. 4P.117/2004 para. 2.1; BGer. 4P.114/2003 para. 2.2; BGer. 4P.196/2003 para. 4.1; BGer. 4P.167/2002 para. 2.2.

365 Cf. BGE 119 II 386 para. 1b; BGer. 4A_526/2011 para. 2.1; BGer. 4P.200/2001 para. 3a.

otherwise.[366] Further, arbitrators may refuse to take evidence (requested by a party) if that evidence is unfit to produce proof with respect to the fact(s) at issue.[367]

iii. No Challenge Based on a Defective Assessment of Evidence or Untenable Conclusions

127 The Swiss Supreme Court does not consider a defective evaluation of evidence by the arbitrators in and of itself to be a violation of the right to be heard.[368] A party may not even invoke that the arbitral tribunal's assessment of evidence was arbitrary.[369] As a consequence, the Supreme Court does not examine whether the conclusions drawn by the arbitral tribunal on the basis of the relevant evidence are tenable or not – always provided that the assessment and evaluation of evidence is not contrary to public policy in terms of Art. 190(2)(e) PILS, which is seldom, if ever, the case.[370]

128 The same applies if a party before the Supreme Court argues that the arbitral tribunal treated it unequally when assessing the evidence before it. As a rule, this argument will be doomed to failure given that the Court will consider this an inadmissible[371] complaint regarding the assessment of evidence, which can only be challenged under Art. 190(2)(e) PILS (i.e., if a public policy violation is alleged).[372]

129 For instance, it is for the arbitral tribunal to decide whether the witness statement of a party is persuasive or not, and whether documentary evidence of the opposing party is sufficient or not to establish payment of a given sum.[373] Likewise, assessing whether a medical certificate (regarding a witnesses' memory disorders) is conclusive, is a question of assessment of evidence, and a respective complaint will not be admitted by the Court.[374] Equally, it is for the tribunal to determine whether a clinical laboratory (carrying out doping tests during a given sports competition) is independent or not.[375]

130 The same holds true as to the arbitrators' (purportedly incorrect) determination of the will of the parties (to determine whether a given contract was assigned);[376] as well as to the arbitrators' factual conclusions drawn from witness statements and the witnesses' behavior (including their non-appearance at, or their remaining silent during, the hearing).[377] Complaints of this kind all refer to the evaluation of evidence and will thus not be heard by the Court.[378]

iv. Exception: Irregularities Constituting a Procedural Denial of Justice

131 The Swiss PILS (unlike, e.g., the English Arbitration Act)[379] does not expressly provide that the challenging party must have suffered injustice in order for the setting aside motion to succeed. In practice,

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[366] Cf. BGE 116 II 639 para. 4c; BGer. 4A_682/2011 para. 4.1; BGer. 4A_528/2011 para. 2.1; BGer. 4A_526/2011 para. 2.1; BGer. 4A_220/2007 para. 8.1; BGer. 4P.200/2001 para. 3d; see also BGer. of 10 June 1996 para. 2a (*Saudi Modern Foods Factory v. Pavan Mapimpianti S.p.A.*), *ASA Bull. 2000*, pp.770-771.

[367] BGer. 4A_150/2012 para. 4.1; BGer. 4A_528/2011 para. 2.1; BGer. 4A_526/2011 para. 2.1; BGer. 4A_600/2010 para. 4.1; BGer. 4P.117/2004 para. 2.1; BGer. 4P.114/2003 para. 2.2; BGer. 4P.196/2003 para. 4.1; BGer. 4P.167/2002 para. 2.2; BGer. of 10 June 1996 para. 2a (*Saudi Modern Foods Factory v. Pavan Mapimpianti S.p.A.*), *ASA Bull. 2000*, pp. 770-771.

[368] Cf. BGer. 4A_176/2008 para. 4.1.1; BGer. of 9 June 1998 para. 3a/bb, *ASA Bull. 1998*, p. 658.

[369] Cf. BGer. 4A_360/2011 para. 4.1; BGer. 4P.140/2004 paras. 2.1, 2.2.3; BGer. 4P.200/2001 para. 2b.

[370] Cf. BGer. 4P.200/2001 para. 2b.

[371] The taking and assessment of evidence by the arbitral tribunal is generally (i.e., subject to public policy violations) not open to challenge (see, e.g., BGer. 4P.200/2001 para. 2b; see in detail below at paras. 188-189).

[372] Cf., e.g., BGer. 4A_584/2009 para. 3.3; BGer. 4A_539/2008 para. 4.2.2; see also BGer. 4P.235/2001 para. 3e.

[373] BGer. 4A_539/2008 para. 4.2.2.

[374] BGer. 4P.167/2002 para. 2.2, *ASA Bull. 2003*, p. 388 (with reference to BGer. 4P.277/1998 para. 2b).

[375] BGer. 4P.105/2006 para. 7.4.

[376] BGer. 4P.124/2001 para. 3c/bb (cf. also *ASA Bull. 2002*, p. 95).

[377] BGer. of 27 July 1997 para. 2c, *ASA Bull.* 2000, p. 103.

[378] BGE 119 II 380 para. 3c; BGer. of 16 May 1995 para. 2b, *ASA Bull. 1996*, pp. 670-671.

[379] Under the English Arbitration Act of 1996, the challenging party has to show that it was prejudiced by the (allegedly) improper conduct of the arbitration; otherwise, the second requirement of Section 68 (i.e., the suffering of substantial injustice arising from the serious irregularity) will not be met (cf. *Aoot Kalmneft v. Glencore International A.G. and Another* [2002] 1 Lloyd's Rep. 128 [2002], para. 91; *Alphapoint Shipping Ltd. v. Rotem Amfert Negev Ltd. and*

however, the position is similar as if it did so provide, since simple irregularities in the taking of evidence as such do not lead to a violation of the right to be heard pursuant to Supreme Court case law, and the challenging party – additionally – must establish that the irregularities had (or, at least, could have had) an actual bearing on the outcome of the proceedings.[380]

132 In other words, it is not sufficient to allege that the arbitrators' refusal to order an expert opinion constitutes a violation of the challenging party's right to be heard. Nor will it suffice to contend that this amounts to an arbitrary evaluation of evidence.[381] Such complaints in themselves will not be heard by the Supreme Court, unless it is also contended that the alleged irregularities amounted to a procedural denial of justice[382] because the party was disadvantaged in the proceedings in that it could not (fully) present its position.[383]

133 To pass this test, the party invoking a violation of the right to be heard must establish that (i) the arbitrators actually did not consider and assess at all an alleged fact, a legal argument or evidence submitted in due time in support of its case; and it must further demonstrate that (ii) the non-considered evidence or fact (or legal argument) was pertinent in that it was fit to influence the outcome of the dispute.[384] Put differently, the overlooked evidence or fact (or argument) must be relevant to the arbitration (i.e., touch on a material issue).[385]

134 In a 2011 case, for example, the award was set aside because the arbitral tribunal had failed to address a statute of limitations objection raised by the supplier (and subsequent appellant).[386] The tribunal, in that instance, in vain submitted in the setting aside proceedings that it had implicitly rejected the supplier's statute of limitations objection,[387] i.e., a relevant legal argument.[388] On the other hand, one should bear in mind that if the evidence submitted by the opposing party in a post-hearing brief concerns points on which the challenging party prevailed in the arbitration, the Supreme Court will not deem the right to be heard to have been violated if the party was not granted the possibility to address the newly-submitted evidence in a rebuttal post-hearing brief.[389]

Another [2005] 1 Lloyd's Rep. 23 [2004], para. 27; cf. also *Lincoln National Life Insurance Co. v. Sun Life Assurance Co. of Canada, American Phoenix Life and Reassurance Co., Phoenix Home Life Mutual Insurance Co.* [2004] 1 Lloyd's Rep. 737 [2004], para. 102.

[380] Cf. BGE 133 III 235 para. 5.2; BGE 127 III 576 paras. 2(e)-(f); BGer. 4P.207/2002 para. 4.1; see also BGer. 4A_539/2008 para. 5.1. In same terms already BGer. of 9 June 1998 para. 3a/bb, *ASA Bull. 1998*, p. 658: "*Le recourant devrait encore démontrer que celles-ci [les simples irrgularités dans l'administration des preuves] ont eu une réelle influence sur l'issue de la cause, à son prejudice.*"

[381] BGer. of 6 September 1996 para. 3b, *ASA Bull. 1997*, p. 308; it is well-established that an erroneous or even arbitrary assesment of evidence is not open to challenge (BGE 127 III 576 para. 2f; BGer. 4P.74/2006 para. 4; BGer. 4P.48/2005 para. 3.4.2.2).

[382] Admittedly, a violation of public policy may also (additionally or alternatively) be invoked (cf. BGer. of 6 September 1996 para. 3b, *ASA Bull. 1997*, p. 308), which, however, is a far more exacting test.

[383] BGE 127 III 576 para. 2e; BGer. 4A_224/2008 para. 4.1; BGer. 4P.207/2002 para. 4; BGer. 4A_244/2007 para. 6.2.

[384] BGE 133 III 235 para. 5.2; BGer. 4A_150/2012 para. 3.1; BGer. 4A_433/2009 para. 2.1; BGer. 4A_539/2008 para. 5.1; cf. also BGE 127 III 576 para. 2d.

[385] BGE 127 III 576 para. 2f ("*[…] in Bezug auf ein prozessrelevantes Thema […]*"); in same terms BGer. 4A_240/2009 para. 5.1; BGer. 4A_176/2008 para. 4.1.1; BGer. 4P.105/2006 para. 7.4; see also BGer. 4A_150/2012 para. 3.1 ("*[…] importants pour la décision à rendre […]*").

[386] BGer. 4A_46/2011 para. 4. In that instance, the arbitral tribunal only addressed the (relative) contractual 12-month limitation of action period, but not the (absolute) contractual 22-month limitation period.

[387] Cf. BGer. 4A_46/2011 para. 4.3.2: "*Or, on cherche en vain, dans le texte de la sentence, une réfutation, même implicite, des arguments développés par la recourante en ce qui concerne le délai de prescription absolu.*"

[388] Cf. BGer. 4A_46/2011 para. 4.3.2: "*[…] la pertinence d'un tel moyen est indéniable, puisque l'admission de celui-ci entraînerait le rejet de l'action au fond.*"

[389] BGer. 4P.104/2004 para. 5.5. In the case at hand, Respondent filed 45 new documents along with its post-hearing brief. In the award, the arbitral tribunal explained why it had not granted Claimant the opportunity to comment on these documents: "*[…] but since they related to points on which Claimant succeeds, it was not necessary to grant Claimant the possibility to comment on them.*" The Supreme Court stressed that the challenging party (Claimant) had omitted

135 A violation of the right to be heard in terms of a procedural denial of justice will lead to the setting aside of the award regardless of the challenging party's chances to succeed on the merits, i.e., regardless of whether it would have obtained a different result in the arbitration had the arbitrators duly considered the omitted evidence (so-called *formal nature of the right to be heard*).[390] As mentioned, this is so because the right to be heard does not guarantee the substantive correctness of the award but confers the right to influence the outcome of the dispute by participating in the decision-making process.[391]

v. Power of Arbitrators to Disregard Evidence Considered Irrelevant

136 The arbitral tribunal may refuse to take evidence, without violating the right to be heard, if the fact to be proven is irrelevant for the decision of the dispute.[392] The same applies to arguments advanced by the parties, which the tribunal deems to be irrelevant. Here too, the tribunal may disregard such arguments.[393]

vi. Power of Arbitrators to Undertake an Anticipated Assessment of Evidence

137 Under Supreme Court case law, arbitrators may undertake a so-called anticipated assessment of evidence ("*antizipierte Beweiswürdigung*"), i.e., decline to take further evidence (e.g., an expert opinion)[394] if they have already formed a firm opinion with respect to the point in question and the proffered evidence is deemed to be unfit to alter that opinion.[395] As a rule, such anticipated assessment may not be challenged based on Art. 190(2)(d) PILS, but will only be subject to the (very exacting) public policy test under Art. 190(2)(e) PILS.[396]

vii. Exception: Restrictions with regard to Expert Opinions

138 In principle, the arbitrators' power of excluding evidence which they consider unfit to modify the results of evidence already taken also applies to expert opinions,[397] which any party can request based on the right to be heard[398] under certain conditions.[399]

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this reason given by the arbitral tribunal and that it had failed to rebut that the acceptance of the documents on the part of the tribunal had not been detrimental to its case (BGer. 4P.104/2004 para. 5.5 at the end).

390 BGE 133 III 235 para. 5.3: "*Etant donné la nature formelle de ce droit [...], la sentence attaquée doit être annulée, sans égard au sort qui sera réservé aux arguments subsidiaires avancés par le recourant.*"; confirmed in BGE 121 III 331 para. 3c; BGer. 4A_150/2012 para. 3.1: "*[...] la nature formelle du droit d'être entendu et la nécessité, en cas de violation de ce droit, d'annuler la décision attaquée indépendamment des chances de la partie recourante d'obtenir un résultat différent [...]*"; in identical terms: BGer. 4A_360/2011 para. 5.1 and BGer. 4A_46/2011 para. 4.3.2.

391 BGE 127 III 576 paras. 2d, 2e; BGE 121 III 331 para. 3c; BGer. 4P.48/2005 para. 3.4.2.2: "*Dies allein rechtfertigt, den Entscheid ohne Rücksicht auf die materiellen Erfolgschancen der Beschwerde aufzuheben, da der Anspruch auf rechtliches Gehör nicht die materielle Richtigkeit, sondern das Recht auf Beteiligung der Parteien an der Entscheidfindung garantiert.*"

392 Cf. BGE 124 I 208 para. 4a; BGE 116 II 639 para. 4c; BGer. 4A_682/2011 para. 4.1; BGer. 4A_528/2011 para. 2.1; BGer. 4A_526/2011 para. 2.1; BGer. 4A_220/2007 para. 8.1.

393 BGE 116 II 639 para. 4c; cf. also BGE 133 III 235 para. 5.2; BGer. 4A_150/2012 para. 3.1; BGer. 4A_360/2011 para. 5.1; BGer. 4A_682/2011 para. 4.1.

394 BGer. of 10 June 1996 para. 2b/cc, *ASA Bull. 2000*, p. 774.

395 Cf. BGE 124 I 208 para. 4a; BGer. 4A_150/2012 para. 4.1; BGer. 4A_682/2011 para. 4.1; BGer. 4A_528/2011 para. 2.1; BGer. 4A_526/2011 para. 2.1; BGer. 4P.23/2006 para. 3.1; BGer. 4A_2/2007 para. 3.3; BGer. 4A_220/2007 para. 8.1.

396 See BGer. 4A_150/2012 para. 4.1; BGer. 4A_682/2011 para. 4.1; BGer. 4A_528/2011 para. 2.1; BGer. 4A_526/2011 para. 2.1; BGer. 4A_600/2010 para. 4.1; BGer. 4P.23/2006 para. 3.1; BGer. 4P.114/2003 para. 2.2.

397 BGer. 4A_220/2007 para. 8.2.8; BGer. 4P.115/2003 para. 4.2 (with further case law references); BGer. of 6 September 1996 para. 3b, *ASA Bull. 1997*, p. 308; BGer. of 10 June 1996 para. 2b/cc (*Saudi Modern Foods Factory v. Pavan Mapimpianti S.p.A.*), *ASA Bull. 2000*, p. 774.

398 BGer. 4P.115/2003 para. 4.2; see also BGer. 4A_2/2007 para. 3.1; BGer. of 6 September 1996 para. 3b, *ASA Bull. 1997*, p. 307; BGer. of 10 June 1996 para. 2a (*Saudi Modern Foods Factory v. Pavan Mapimpianti S.p.A.*), *ASA Bull. 2000*, p. 769.

399 As to the six prerequisites regarding the parties' right to an expert opinion, cf. BGer. 4P.115/2003 para. 4.2 (with further case law references): (i) express request; (ii) request filed in time and in compliance with any further formal

139 However, if the requested expert opinion concerns a relevant point in dispute, and the arbitrators do not have the technical knowledge required to decide that point, they may not dismiss a pertinent motion from a party, as such dismissal would constitute a violation of the applicant's right to be heard under Art. 190(2)(d) PILS.[400]

140 In a 1992 decision, the Supreme Court held that arbitrators, in such an event, are even duty-bound to solicit an expert opinion on their own motion (i.e., even if none of the parties so requested).[401] This decision met with stark criticism[402] given that in arbitration, it was submitted, it is the parties' duty to present their case.[403] Be that as it may, the Supreme Court in several subsequent decisions[404] stressed that one of the prerequisites to order an expert opinion is that a party must have submitted a pertinent request and thus (at least impliedly) reversed the 1992 precedent.[405]

f. Conclusions and Comments

141 Under Supreme Court case law, findings of facts and factual inferences drawn from the submitted evidence are not challengeable. Nor is there any duty of the arbitrators to forewarn the parties as to the factual inferences they intend to derive or any right of the parties to comment on them prior to making the award, the sole exception being an erroneous factual finding amounting to a procedural denial of justice.

142 Equally, a defective evaluation of evidence, as a rule, does not constitute a due process violation, subject to the defect constituting a procedural denial of justice. Arbitrators are further entitled to disregard irrelevant evidence, and they are free to evaluate the weight of the evidence and draw conclusions on the basis of that evaluation.

143 As far as the arbitrators' taking and evaluation of evidence is concerned, the Supreme Court case law perfectly reflects the internationally acknowledged view that the consensual and private nature of arbitration demands a restrictive approach to the parties' right to have recourse to the courts of law. Also, it

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requirements; (iii) commitment of the requesting party to advance the costs of the expert opinion; (iv) specific indication of the facts on which an expert opinion is sought; (v) reason(s) why the facts are relevant for the resolution of the dispute; (vi) the expert opinion must be fit to establish those facts, which will only be the case if (a) the facts are of a technical nature (or otherwise require special knowledge) so that they cannot be established through other means, and (b) the arbitral tribunal lacks the requisite expertise (or special knowledge); see also BGer. of 6 September 1996 para. 3b, *ASA Bull. 1997*, pp. 307-308; BGer. of 10 June 1996 para. 2a (*Saudi Modern Foods Factory v. Pavan Mapimpianti S.p.A.*), *ASA Bull. 2000*, p. 770.

[400] BGer. of 11 May 1992 para. 5b, *ASA Bull. 1992*, p. 397; confirmed in BGer. 4A_2/2007 para. 3.1.

[401] BGer. of 11 May 1992 para. 5b, *ASA Bull. 1992*, p. 397; see also BGer. 4A_2/2007 para. 3.1, where the Court simply referred to the 11 May 1992 decision, though in the case at issue a party had requested an expert opinion, which request the sole arbitrator had rejected (without, in the Court's view, violating the right to be heard since the party challenging the award had failed to demonstrate which particular technical knowledge the sole arbitrator lacked; cf. BGer. 4A_2/2007 para. 3.3).

[402] Cf., in particular, Poudret, *Expertise*, p. 614.

[403] See Berger/Kellerhals, para. 1232; cf. also Zuberbühler/Hofmann/Oetiker/Rohner, para. 8 at Art. 6, who consider the Court's approach to be "*irreconcilable with the nature of arbitration*"; critical also Poudret, *Expertise*, p. 614.

[404] See BGer. of 10 June 1996 para. 2a (*Saudi Modern Foods Factory v. Pavan Mapimpianti S.p.A.*), *ASA Bull. 2000*, p. 769; BGer. 4P.115/2003 para. 4.2 (with further case law references).

[405] BGer. of 10 June 1996 para. 2a (*Saudi Modern Foods Factory v. Pavan Mapimpianti S.p.A.*), *ASA Bull. 2000*, p. 769: "*A cet égard, l'auteur précité [Poudret] est dans le vrai lorsqu'il relève que l'opinion – émise dans certains des arrêts susmentionnés –, selon laquelle l'arbitre qui ne possède pas lui-même les connaissances techniques permettant de résoudre le problème posé devrait commettre un expert même à défaut de requête d'une partie, repose sur une confusion entre le droit à la preuve et la maxime inquisitorale*"; cf. also BGer. 4P.115/2003 para. 4.2 (and especially para. 4.3.2: "*Cela ne signifie pas pour autant [...] que les arbitres auraient dû impartir de leur propre initiative un délai complémentaire à l'expert pour qu'il poursuive ses recherches. De fait, il n'est pas établi [...] que la procédure arbitrale en cause ait été régie par la maxime d'office. Il appartenait donc aux recourants de requérir un complément d'instruction portant sur des points laissés en suspens par l'expert F.*"); see also Zuberbühler/Hofmann/Oetiker/Rohner, para. 8 at Art. 6, who interpret the aforementioned two decisions as an *answer in the negative* (i.e., as a reversal of the 11 May 1992 Supreme Court precedent).

is an inherent part of the arbitrators' adjudication powers to freely assess the evidence before them and draw the conclusions they deem appropriate. The same applies to their findings of facts.

g. Application of the Law

i. Rule: Arbitrators May Apply the Law on Their Own Motion (*Jura Novit Curia*)

144 Whether arbitrators are entitled to take into consideration *on their own motion* a legal provision or principle not advanced by the parties has always been, and still is, a much debated issue in international arbitration. Under the long-standing case law of the Swiss Supreme Court, the rule *jura novit curia* ("*the court knows the law*") not only applies to courts of law but also to arbitral tribunals.[406]

145 The rule namely allows an *ex officio* application of legal provisions by arbitrators. Thus, important restrictions are imposed on the parties' right to be heard in international arbitrations conducted in Switzerland based on *jura novit curia*[407] given that arbitrators are, in principle, not bound by the legal arguments advanced by the parties and may apply *ex officio* a legal provision not invoked in the parties' submissions to allow or dismiss a given claim. Above all, arbitrators, like state court judges, need not submit for comment to the parties the legal principles or provisions on which they intend to base their decision on the merits.[408]

ii. Exception 1: Express Party Agreement Excluding *Jura Novit Curia*

146 If the parties expressly limited the arbitrators' mandate to the legal arguments advanced by the parties, *jura novit curia* does not apply. The Supreme Court has always stressed this.[409] Admittedly, the parties to international arbitration rarely, if ever, provide for such express restriction. As a consequence, this exception can be considered moot in practice.[410]

iii. Exception 2: Submissions on the (Foreign) Applicable Law by the Parties upon Request of the Arbitrators

147 Furthermore, *juria novit curia* does not come into play where the arbitrators request the parties to establish in what way a foreign (i.e., non-Swiss) substantive law is supposed to deviate from Swiss law. As a result, a challenge of the award on the ground that the arbitrators – in asking the parties to establish the contents of the applicable law and the alleged deviations from Swiss law – violated *jura novit curia*, will be doomed to failure.[411]

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406 Cf. BGE 130 III 35 para. 5; BGE 120 II 172 para. 3a; BGer. 4A_46/2011 para. 5.1.1; BGer. 4A_254/2010 para. 3.1; BGer. 4A_392/2010 para. 5.1; BGer. 4A_10/2010 para. 2.1; BGer. 4A_440/2010 para. 3.1; BGer. 4A_3/2009 para. 7.1; BGer. 4A_400/2008 para. 3.1; BGer. 4A_42/2007 para. 7.1; BGer. 4A_464/2009 para. 6.1; BGer. 4A_240/2009 para. 3.2; BGer. 4P.168/2006 para. 7.1; BGer. 4P.260/2000 para. 6a; BGer. 4P.260/2000 para. 6a.

407 Cf. BGer. 4P.100/2003 para. 5.

408 BGE 130 III 35 para. 5; BGE 120 II 172 para. 3a; BGer. 4A_46/2011 para. 5.1.1; BGer. 4A_10/2010 para. 2.1; BGer. 4A_254/2010 para. 3.1; BGer. 4A_392/2010 para. 5.1; BGer. 4A_440/2010 para. 3.1; BGer. 4A_3/2009 para. 7.1; BGer. 4A_400/2008 para. 3.1; BGer. 4A_42/2007 para. 7.1; BGer. 4A_464/2009 para. 6.1; BGer. 4A_240/2009 para. 3.2; BGer. 4P.168/2006 para. 7.1; BGer. 4P.260/2000 para. 6a; BGer. 4P.260/2000 para. 6a.

409 Cf. BGE 130 III 35 para. 5; BGer. 4A_46/2011 para. 5.1.1; BGer. 4A_392/2010 para. 5.1; BGer. 4A_3/2009 para. 7.1; BGer. 4A_400/2008 para. 3.1; BGer. 4P.168/2006 para. 7.1; BGer. 4P.4/2007 para. 4.1; BGer. 4P.100/2003 para. 5.

410 If the parties include a provision to that effect in the specific procedural rules (or in the terms of reference in ICC arbitrations) at the outset of the arbitration, this will trigger the same effect (i.e., exclude *jura novit arbiter*). In a recent arbitration under the ICC Rules in which the author was involved, the chairman of the tribunal suggested a wording according to which the tribunal (in case it intended to apply a legal provision on its own motion) committed itself to previously invite the parties to comment on the provision in question. The parties agreed to this clause, which was incorporated in the Terms of Reference.

411 BGer. 4P.242/2004 para. 7.3 (concerning the differences between Croatian and Swiss bill of exchange law), with a reference to BGer. 4P.119/1998 para. 1b/bb.

iv. Exception 3: Unforeseeability for the Parties

148 Since the above two exceptions seldom play a role in practice, this is the main exception. Even though, as a rule, arbitrators may apply the law on their own motion, without there being any need to afford the parties an opportunity to comment on the point of law not advanced by either of them, an exception applies under Supreme Court case law if the parties could not reasonably have foreseen that the legal provision or principle not invoked would be relevant for the decision.[412] This, according to the Supreme Court, namely is the case if the legal analysis of the tribunal is not related at all to the issues which the parties addressed in the proceedings.[413]

149 In case of such unforeseeability, arbitrators are duty-bound to grant the parties the opportunity to comment if they intend to base their award on a legal provision not advanced or discussed in the arbitration. Otherwise, the tribunal violates the right to be heard and renders the award open to challenge under Art. 190(2)(d) PILS.[414]

150 Whether the application of the law by the tribunal came as an unforeseeable surprise to a party is a determination left to the discretion of the Supreme Court, which in this regard adopts a narrow approach. The Court justifies this restrictiveness with the need of taking into account the particularities of international arbitrations (such as the intent of the parties to arbitrate and not litigate the dispute before the courts of law, and the different legal and cultural background of the arbitrators).[415] The restrictive approach, in the Court's view, also prevents a party from exploiting the argument of surprising application of the law to obtain a review of the merits of the award in the challenge proceedings.[416]

151 As a rare example of a successful challenge on this ground, a 2009 decision is worth mentioning.[417] In that instance, the Court of Arbitration for Sport (CAS) had applied the Federal Statute on Employment Agency,[418] even though the Statute is only applicable if the agent resides in Switzerland, which was not the case here. Actually, there was no connection whatsoever with Switzerland, except for the seat of the CAS being in Lausanne. For this reason, the challenging party (i.e., the Spanish agent residing in Spain) could not expect that the CAS tribunal would apply the Statute to hold that the exclusivity clause at issue was null and void. He could have expected such application the less so because neither party had invoked the Statute during the arbitration. The CAS tribunal should, at the very least, have forewarned the parties and given them (especially the agent) the opportunity to comment on and object to the application of the Statute. In not granting such opportunity, the CAS tribunal had violated the agent's right to be heard, the Supreme Court concluded.[419]

152 Importantly, the unforeseeability test also applies to *contractual clauses*. For instance, in a 2003 case, the arbitrators had based their reasoning on a contractual clause which neither party considered material

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412 BGE 130 III 35 para. 5; BGer. 4A_46/2011 para. 5.1.1; BGer. 4A_254/2010 para. 3.1; BGer. 4A_10/2010 para. 2.1; BGer. 4A_400/2008 para. 3.1; BGer. 4A_3/2009 para. 7.1; BGer. 4A_240/2009 para. 3.2; BGer. 4A_42/2007 para. 7.1; BGer. 4P.168/2006 para. 7.1; BGer. 4P.104/2004 para. 5.4; BGer. 4P.260/2000 para. 6a; BGer. 4P.17/2002 para. 2b.

413 BGer. 4P.14/2004 para. 2.2.4 (unforseeability not affirmed); BGE 130 III 35 para. 6.2 (unforseeability affirmed and award set aside).

414 Cf. BGE 130 III 35 para. 5; BGer. 4A_46/2011 para. 5.1.1; BGer. 4A_254/2010 para. 3.1; BGer. 4A_10/2010 para. 2.1; BGer. 4A_400/2008 para. 3.1; BGer. 4A_3/2009 para. 7.1; BGer. 4A_240/2009 para. 3.2; BGer. 4A_42/2007 para. 7.1; BGer. 4P.168/2006 para. 7.1; BGer. 4P.104/2004 para. 5.4; BGer. 4P.260/2000 para. 6a; BGer. 4P.17/2002 para. 2b.

415 BGE 130 III 35 para. 5; BGer. 4A_240/2009 para. 3.2; BGer. 4A_42/2007 para. 7.1; BGer. 4P.104/2004 para. 5.4.

416 BGE 130 III 35 para. 5; BGer. 4A_46/2011 para. 5.1.1; BGer. 4A_254/2010 para. 3.1; BGer. 4A_10/2010 para. 2.1; BGer. 4A_392/2010 para. 5.1; BGer. 4A_400/2008 para. 3.1; BGer. 4A_42/2007 para. 7.1; BGer. 4A_240/2009 para. 3.2; BGer. 4P.104/2004 para. 5.4; BGer. 4P.114/2001 para. 5a.

417 BGer. 4A_400/2008 (the decision to set aside the award was rendered on 9 February 2009); for another case in which the lack of foreseeability led to the setting aside of the award, see BGE 130 III 35 paras. 5-6.

418 SR 823.11: *Loi fédérale sur le service de l'emploi et la location de services* (LSE) in French; *Arbeitsvermittlungsgesetz* (AVG) in German; *Legge sul collocamento* in Italian (LC).

419 BGer. 4A_400/2008 para. 3.2.

and which had not been put forward or discussed in the arbitral proceedings. Based on this clause, the arbitrators had concluded that – contrary to the respondent's allegations – the relevant contract was not null and void. The latter's challenge of the award was allowed by the Supreme Court, and the award was set aside on the ground that the arbitrators' conduct constituted a violation of the right to be heard in adversarial proceedings under Art. 190(2)(d) PILS.[420]

v. Conclusion and Comments

153 In conclusion, the Swiss Supreme Court, as a rule, allows arbitrators to apply a legal provision or principle on their own motion, without having to give the parties an opportunity to comment.[421]

154 Among legal commentators, there is no unanimity in Switzerland regarding the Supreme Court practice on *jura novit curia*. While one group of commentators seems to endorse this case law,[422] two (diverging) groups query the Supreme Court practice: on the one extreme, the *jura novit curia* is not considered suitable for arbitrations,[423] while, on the other, the Court's unforeseeability test is disapproved and an absolute application of the maxim advocated.[424]

155 In the author's view, the parties' deliberate choice of arbitrating their dispute, to the exclusion of state courts, runs counter to applying a procedural maxim of the courts at the seat of the arbitration. Therefore, transferring offhandedly a state court maxim (*jura novit curia*) applied in domestic litigations to international arbitrations (and transmuting it into *jura novit arbiter*) seems questionable in the first place.

156 More importantly, without the parties' agreement to arbitrate, there would be no arbitrations. Nor would there be any arbitration without the parties entirely financing it – particularly the arbitrators' fees and expenses. For this reason, arbitrators invariably should take into consideration the parties' legitimate

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420 BGE 130 III 35 para. 6.2. Conversely, in BGer. 4A_108/2009 (paras. 2.2 and 2.3), the Court dismissed the setting aside motion given that the arbitrators had not applied the contractual clauses in question in a surprising way, since the first clause had expressly been invoked by the opposing party in the arbitration, and the second clause at issue – even though not expressly mentioned by the opposing party – dealt with the requirements of a unilateral withdrawal from the contract, which was an issue in the arbitration so that the challenging party had to count on the arbitrators applying the clause.

421 By contrast, the English Commercial Court disapproves a *sua sponte* application of the law and considers it a serious irregularity rendering the award open to challenge, unless the irregularity was cured by way of the arbitrators having submitted the legal point to the parties for comment prior to making the award. Under English law, it is well established that if an arbitrator is inclined to adopt an approach or rely on a point that has never been raised by either side, *it is his duty to put it to them so that they have an opportunity to comment* (cf. *Vee Networks Ltd. v. Econet Wireless International Ltd.* [2005] 1 Lloyd's Rep. 192 [2004], para. 83; *Zermalt Holdings S.A. v. Nu Life Upholstery Repairs Ltd.* [1985] 2 E.G.L.R. 14, p. 15; *London Underground Ltd v. Citylink Telecommunications Ltd Rev 1* [2007] EWHC 1749 (TCC), para. 37; *OAO Northern Sipping Co v. Remolcadores De Marin SL* [2007] 2 Lloyd's Rep. 302, para. 21; *ABB AG v. Hochtief Airport GmbH* [2006] 2 Lloyd's Rep., para. 72; *Bottiglieri di Navigazione SpA v. Cosco Qingdao Ocean Shipping Company* [2005] 2 Lloyd's Rep. 1 [2005], para. 19; *Modern Engineering (Bristol) Ltd v. C Miskin & Son Ltd* [1981] 1 Lloyd's Rep. 135 (CA), p. 139). For a detailed comparison of English and Swiss case law on this issue, cf. Arroyo, *Jura Novit Arbiter*, pp. 38-49.

422 Cf. Kellerhals/Berger, *Iura novit arbiter*, in Norm und Wirkung, Festschrift für Wolfgang Wiegand zum 65. Geburtstag, Eugen Bucher et al. (eds.), Bern 2005, pp. 387-405, though these authors are critical as to the uncertainty of the Supreme Court's unforeseeability test (p. 392); Berger, *Swiss Rules*, p. 171; see also Poudret/Besson, who, on the one hand, endorse the unforeseeability test since "*it is fair to mitigate the effects of the principle jura novit curia*" (para. 551, p. 477), but, on the other, query the Court's narrow(er) approach in international arbitrations and submit that arbitrators should "*rather show more caution (rather than be more audacious) than the courts before substituting their legal arguments for those of the parties.*" (para. 551, p. 476).

423 Cf. Kaufmann-Kohler, *The Governing Law: Fact or Law? – A Transnational Rule on Establishing its Content*, in Best Practices in International Arbitration, *ASA Special Series No. 26*, 2006, p. 84, who considers a "*hard and fast iura novit curia rule*" inappropriate in international arbitration; similarly critical: Schneider, para. 60 at Art. 182; see also Kaufmann-Kohler, *iura novit arbiter*, pp. 74-75.

424 Cf. Wiegand, p. 143; Perret, *SZZP 2005*, p. 231; Schweizer, *SZIER 2002*, p. 583 (para. 44.2): "*[…] que le principe jura novit curia s'applique sans réserve*"; see also, though in less categorical terms, Karrer, para. 189 at Art. 187.

interests and expectations, and these certainly include not being taken by surprise and learn only in the award about a material legal provision not addressed in the arbitration. Granting the parties an opportunity to comment is all the more justified if the relevant *lex arbitri* does not allow an appeal on a point of law.[425]

157 The Supreme Court's justification of its restrictive approach with the need of taking into account the particularities of international arbitrations (such as the intent of the parties to arbitrate and not litigate the dispute before the courts, and the different legal and cultural background of the arbitrators)[426] is anything but convincing. Fortunately, in more recent decisions, this argument is no longer mentioned, and the Court normally just states that reopening the merits of the case based on the lack of foreseeability must be avoided,[427] or simply reiterates that the Court is particularly strict when assessing the (non-)foreseeability.[428] The different origin of the arbitrators and the parties, who normally are not familiar with Swiss court maxims, on the very contrary, militates against the application of a maxim applied in domestic litigation. Moreover, numerous (chiefly common law) jurisdictions either do not know the *jura novit curia* maxim at all or, at least, do not transfer it to arbitrations. The maxim, from this perspective, also impairs legal certainty and predictability given that the parties in most international arbitrations conducted in Switzerland are *all* from abroad.[429]

158 Yet above all, it simply does not seem fair and just that the dispute be decided on a legal ground that the parties had no possibility to address. As a result, allowing a *sua sponte* application of the law only on the condition that the parties were granted an opportunity to comment seems preferable.[430]

159 To sum up, regardless of how arbitrators *may* proceed under Supreme Court case law, they *should*, in the author's view, avoid that an award – insofar as its legal basis is concerned – comes as a surprise to the parties. It cannot be overstated that this approach, by no means, prevents arbitrators from applying on their own motion material legal provisions not invoked by the parties. Since arbitrators conducting commercial arbitrations in Switzerland are usually lawyers, and good lawyers apply good law, they should certainly base their award on laws that are in force (e.g., on an amended statutory provision, which was not advanced by the parties). Likewise, it goes without saying that arbitrators should not award claims based on a contract that pursuant to a (non-invoked) mandatory provision of the applicable law is null and void. At the same time, the arbitrators should in such cases afford the parties the opportunity to comment on the point of law at issue prior to making the award. True, it could be objected that affording the parties the possibility of a further legal submission will add time and expense. However, the additional time and costs involved appear to be both negligible compared with the overall duration and costs of a full-fledged arbitration (especially if simultaneous submissions are filed within just a few weeks) and outweighed by the parties' legitimate interests.[431]

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[425] While such a possibility exists under Art. 69 of the 1996 English Arbitration Act, there is no congruent provision in the Swiss PILS. Admittedly, an award could, in principle, be successfully challenged if it were established that the award violates public policy in terms of Art. 190(2)(e). Yet there has, so far, only been a successful challenge on this often advanced ground in two cases (concerning two CAS awards) in 2010 (BGE 136 III 345) and 2012 (BGE 138 III 322); before that, no award was ever set aside in the 21 years following the coming into force of the PILS in 1989 (cf. Dasser, *ASA Bull. 2010*, pp. 87-88).

[426] See, e.g., BGE 130 III 35 para. 5; BGer. 4A_240/2009 para. 3.2; BGer. 4A_42/2007 para. 7.1; BGer. 4P.104/2004 para. 5.4.

[427] Cf. BGer. 4A_46/2011 para. 5.1.1 ("*[…] parce qu'il convient d'avoir égard aux particularités de ce type de procédure en évitant que l'argument de la surprise ne soit utilisé en vue d'obtenir un examen matériel de la sentence […]*"); in same terms BGer. 4A_254/2010 para. 3.1; BGer. 4A_10/2010 para. 2.1; BGer. 4A_400/2008 para. 3.1.

[428] BGer. 4A_3/2009 para. 7.1 ("*[…] le Tribunal fédéral se montre-t-il restrictif dans l'application de ladite règle.*").

[429] Statistically, in 68 per cent of international arbitrations conducted in Switzerland, all parties involved are non-Swiss (cf. Dasser, *ASA Bull. 2010*, pp. 98-99).

[430] This corresponds to the English approach (for an overview of English case law on this issue, cf. Arroyo, *Jura Novit Arbiter*, pp. 38-44).

[431] Cf. Arroyo, *Jura Novit Arbiter*, p. 54: "*So yes, jura novit arbiter – but always in conjunction with audiatur et altera pars.*" The *other side* (*altera pars*) in the present context, of course, referring to both parties (or all parties in multi-party arbitrations).

G. *Article 190(2)(e) PILS*

1. *Introduction*

160 As stated previously, the substantive review of the award by the Supreme Court is limited to the question whether the award is compatible with public policy.[432] Put differently, public policy is the only ground that a party may invoke to have the Supreme Court scrutinize the merits of the case. All other grounds provided for in Art. 190(2) PILS (including procedural public policy)[433] refer to procedural flaws or irregularities that do not allow for a challenge of the award on the merits.[434] Therefore, the chances of a successful challenge based on a *substantive denial of justice*[435] lie within narrow limits[436] – especially given that public policy is a very distinct and far more restrictive concept than arbitrariness.[437]

161 There is no universally recognized or determined definition of public policy so that the notion often varies from jurisdiction to jurisdiction. Given that addressing these different notions would go beyond the scope of this commentary, which is limited to setting aside proceedings before the Swiss Federal Supreme Court, it seems justified to first address the Court's understanding and definition of public policy.

162 In general, it can be said that public policy (*ordre public*) seeks *to ensure a minimum quality of awards* rendered in international arbitrations having their seat in Switzerland.[438] According to the Supreme Court, public policy has both a substantive and a procedural content.[439]

2. *Definition of Public Policy*

a. *Substantive Public Policy*

163 An award is contrary to substantive public policy[440] if it violates fundamental legal principles and thus disregards essential and widely recognized values, which from a Swiss perspective (i.e., according to the conceptions prevalent in Switzerland) should be part of any legal order. Principles of this kind are, for example, *pacta sunt servanda* (agreements must be honored), the prohibition of abuse of rights,

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432 BGE 133 III 139 para. 5; BGE 129 III 727 para. 5.2.2; BGE 121 III 331 para. 3a; BGE 120 II 155 para. 6a; BGE 116 II 634 para. 4; BGer. 4A_150/2012 paras. 5.1; BGer. 4A_16/2012 para. 2.3; BGer. 4A_162/2011 para. 1.3; BGer. 4A_631/2011 para. 2.3; BGer. 4A_428/2010 para. 1.3; BGer. 4A_326/2010 para. 1.3; BGer. 4A_176/2008 para. 2.3; BGer. 4P.114/2006 para. 6.5.3; BGer. 4P.134/2006 para. 5.1; BGer. 4P.260/2000 para. 6a.

433 It has rightly been submitted that *procedural* public policy complements the ground for challenge under Art. 190(2)(d), i.e., the right to be heard, while *substantive* public policy has an independent and autonomous character (Bucher, para. 102 at Art. 190).

434 Berger/Kellerhals, para. 1594.

435 I.e., a "*materielle Rechtsverweigerung*" in German as opposed to a formal denial of justice ("*formelle Rechtsverweigerung*" in German).

436 BGE 121 III 331 para. 3a; BGer. 4P.54/2006 para. 3.3.

437 Cf. Poudret/Besson, paras. 825, 827. The Supreme Court has repeatedly held that *public policy* is a much more exacting test than *arbitrariness* (BGE 138 III 322 para. 4.3.2; BGE 132 III 389 para. 2.2.2 ; BGE 126 III 249 para. 3b; BGE 120 II 155 para. 6a; BGE 116 II 634 para. 4; BGE 117 II 604 para. 3; see also BGer. 4A_14/2012 para. 5.2.1; BGer. 4A_150/2012 para. 5.1; BGer. 4P.154/2006 para. 3.1; BGE 115 II 288 para. 3a: "*[…] il s'agit d'un moyen beaucoup plus restrictif et beaucoup plus étroit que celui d'arbitraire […]*").

438 Cf. BGer. 4A_612/2009 para. 6.2.2: "*[…] Art. 190 Abs. 2 lit. e IPRG auch bezwecke, eine gewisse Mindestqualität der schweizerischen internationalen Schiedsentscheide zu gewährleisten […]*", with reference to BGer. 4P.198/1998 para. 4a, BGer. 4P.99/2000 para. 3b/aa, and BGer. 4P.115/1994 para. 2b; cf. also BGer. 4A_464/2009 para. 5.1: "*[…] l'art. 190 al. 2 let. e LDIP vise aussi à garantir que les sentences internationales suisses ne descendent pas au-dessous d'un seuil de qualité minimum.*"; see also BGer. 4A_386/2010 (of 3 January 2011) para. 8.3.1, where the Supreme Court again referred to the criterion of the award's quality ("*La jurisprudence actuelle est fondée sur la prémisse que, du point de vue qualitatif, […] une sentence […]*").

439 BGE 138 III 322 para. 4.1; BGE 136 III 345 para. 2.1; BGE 132 III 389 para. 2.2.1; BGE 129 III 445 para. 4.2.1; BGE 128 III 191 para. 4a; BGE 126 III 249 para. 3b; BGer. 4A_14/2012 paras. 5.2.1-5.2.2; BGer. 4A_558/2011 para. 4.1; BGer. 4P.154/2005 para. 6.1; BGer. 4P.124/2001 para. 3b.

440 In French: "*ordre public matériel*"; in German:"*materieller Ordre public*"; in Italian:"*ordine pubblico materiale*".

the principle of good faith, the prohibition of expropriation without compensation, the prohibition of discrimination and the protection of persons lacking the capacity to act.[441]

164 The aforementioned enumeration is not exhaustive, the Court has repeatedly held.[442] Therefore, also the pledge to pay bribe money[443] infringes public policy.[444] Equally, a decision that (even if only indirectly) violates a fundamental principle such as the prohibition of forced labor is incompatible with public policy.[445] Further, a violation of Art. 27 Civil Code (*protection against excessive commitments*) may,[446] but need not,[447] run counter to public policy.[448]

165 Importantly, the Supreme Court will only set aside the challenged award if its result is contrary to public policy. Put differently, it is insufficient if only the reasons in the award violate public policy but the award in the end (i.e., in its result as determined in the award's operative part)[449] is compatible with public policy.[450] Also, and for the same underlying reason, an intrinsic contradiction within the reasons given in the award will (even if irresolvable) not suffice to set aside the award.[451] Nor will an intrinsic contradiction within the operative part of the award constitute a public policy violation.[452]

b. Procedural Public Policy

166 As mentioned, public policy has both a substantive and a procedural content.[453] In the Supreme Court's view, an award is contrary to procedural public policy[454] if it infringes fundamental and generally recognized principles of procedure, the disregard of which is intolerably contrary to the sense of justice so

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441 BGE 138 III 322 para. 4.1; BGE 132 III 389 para. 2.2.1; BGE 128 III 191 para. 6b; BGer. 4A_14/2012 para. 5.2.1; BGer. 4A_16/2012 para. 4.1; BGer. 4A_150/2012 para. 5.1; BGer. 4A_654/2011 para. 4.1; BGer. 4A_320/2009 para. 4.1.

442 BGE 138 III 322 para. 4.1; BGer. 4A_558/2011 para. 4.1; BGer. 4A_458/2009 para. 4.1.

443 Therefore, "*an award is incompatible with public policy if, in its result, it orders a party to pay bribes*" (Berger/Kellerhals, para. 1602). If, however, the arbitral tribunal concludes that no bribery or corruption was involved in a given case, that (factual) finding will normally not be open to challenge (Berger/Kellerhals, para. 232, footnote 96, with reference to BGer. 4P.240/1996 para. 2 and BGer. 4P.115/1994 para. 2).

444 BGE 138 III 322 para. 4.1; BGE 119 II 380 para. 4b; BGer. 4A_558/2011 para. 4.1; BGer. 4P.208/2004 para. 6.1.

445 BGE 138 III 322 para. 4.1; BGer. 4A_558/2011 para. 4.1; BGer. 4A_370/2007 para. 5.3.2.

446 For a case where an infringement of Art. 27(2) CC as well as a public policy violation was affirmed (BGE 138 III 322 para. 4.3, *Matuzalem*), see the detailed summary at paras. 219-232 below.

447 For a case where the Supreme Court denied that the contractual commitment (five-year engagement as professional football player) was excessive within the meaning of Art. 27(2) CC, see BGer. 4A_458/2009 para. 4.4.3.2 (*Mutu*); equally, in BGer. 4A_320/2009 para. 4.4 a five-year contractual commitment was not considered excessive. In both cases, the Court expressly mentioned and took into account the (high) salary of the football players.

448 BGE 138 III 322 para. 4.1; BGer. 4A_558/2011 para. 4.1; BGer. 4A_458/2009 para. 4.4.3.2; BGer. 4A_320/2009 para. 4.4; BGer. 4P.12/2000 para. 5b/aa.

449 BGE 120 II 155 para. 6a ("*[…] la sentence attaquée ne sera annulée que si le résultat auquel elle aboutit est incompatible avec l'ordre public. Il ne suffit donc pas que ses motifs le soient […]; encore faut-il pouvoir tirer la même conclusion relativement à son dispositif […]*").

450 BGE 116 II 634 para. 4: "*[…] sich […] die Aufhebung eines Entscheids nur dann rechtfertigt, wenn er im Ergebnis gegen den Ordre public verstösst, nicht aber bereits dann, wenn bloss die Begründung als ordre-public-widrig erscheint […].*"; confirmed in BGE 138 III 322 para. 4.1; BGE 128 III 191 para. 6b; BGE 120 II 155 para. 6a; BGer. 4A_16/2012 para. 4.1; BGer. 4A_558/2011 para. 4.1; BGer. 4A_654/2011 para. 4.1; BGer. 4A_320/2009 para. 4.1; BGer. 4A_284/2009 para. 3.1; BGer. 4A_17/2007 para. 4.1; BGer. 4P.134/2006 para. 5.1.

451 BGer. 4A_150/2012 para. 5.2.1; BGer. 4A_654/2011 para. 4.2; BGer. 4A_386/2010 para. 8.3.1; BGer. 4A_481/2010 para. 4; BGer. 4A_320/2009 para. 4.3; BGer. 4A_612/2009 para. 6.2.2; BGer. 4A_464/2009 para. 5.1. As to the (differing) previous case law (i.e., BGer. 4P.198/1998 para. 4a; BGer. 4P.99/2000 para. 3b/aa), which was reversed in BGer. 4A_464/2009, see Müller, *Swiss Case Law*, p. 300.

452 BGE 128 III 191 para. 6b; BGer. 4A_612/2009 para. 6.2.2.

453 Cf. BGE 138 III 322 para. 4.1; BGE 136 III 345 para. 2.1; BGE 132 III 389 para. 2.2.1; BGE 129 III 445 para. 4.2.1; BGE 128 III 191 para. 4a; BGE 126 III 249 para. 3b; BGer. 4A_14/2012 paras. 5.2.1-5.2.2; BGer. 4A_558/2011 para. 4.1; BGer. 4P.154/2005 para. 6.1; BGer. 4P.124/2001 para. 3b.

454 In French: "*ordre public procédural*"; in German: "*verfahrensrechtlicher Ordre public*"; in Italian:"*ordine pubblico procedurale*".

that the award seems to be absolutely incompatible with the legal system and values applying in a state of law.[455]

167 For instance, an award violates procedural public policy if it disregards the final and binding force of a previous decision, or if the award deviates from the arbitral tribunal's own previously expressed view, which was part of an interim decision in which the tribunal determined a substantive preliminary question.[456] In fact, the only case where a violation of *procedural* public policy was affirmed so far concerned an award that disregarded the fundamental procedural principle of *res judicata*.[457] The principle *ne bis in idem* also forms part of public policy,[458] though in the case at issue a violation of that principle was denied because the Supreme Court concluded that one measure was of a preventive nature and the other was punitive so that it could not be said that the party in question (i.e., a professional racing cyclist) had been punished twice within the meaning of *ne bis in idem*.[459]

168 Here too, the award will only be set aside if its result is contrary to public policy. It is, in other words, insufficient if only the reasons in the award violate (procedural) public policy. Rather, the award must in the end – i.e., in its result as determined in the award's operative part[460] – be contrary to procedural public policy.[461]

3. *Immediate Objection during Arbitral Proceedings as Prerequisite for Challenge*

a. *The Rule*

169 As mentioned previously, *procedural* public policy complements the ground for challenge under Art. 190(2)(d), that is, the right to be heard.[462] Therefore, a *party must raise the alleged procedural violation*

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455 BGE 136 III 345 para. 2.1; BGE 132 III 389 para. 2.2.1; BGE 128 III 191 para. 4a; BGE 126 III 249 para. 3b; BGer. 4A_392/2010 para. 6.1; BGer. 4A_258/2008 para. 4.1; BGer. 4A_600/2008 para. 5.1; BGer. 4P.154/2005 para. 6.1; BGer. 4P.280/2005 para. 2.1; BGer. 4P.196/2002 para. 4.2; BGer. 4P.143/2001 para. 3a/aa.

456 BGE 136 III 345 para. 2.1; BGE 128 III 191 para. 4a; cf. also BGE 127 III 279 para. 2b.

457 For a detailed summary of that case and the Supreme Court's setting aside decision in BGE 136 III 345, cf. below, paras. 209-218; for a detailed summary of the so far only case where *substantive* policy was successfully invoked (i.e., BGE 138 III 322), cf. below, paras. 219-232.

458 Cf. BGer. 4A_386/2010 para. 9.3.1 (*Valverde*). Even though the Court expressly left open whether *ne bis in idem* forms part of substantive or procedural public policy ("*Dire si ce principe relève de l'ordre public procédural ou de l'ordre public matériel est une question plus délicate, qu'il n'est cependant pas nécessaire de trancher ici.*"), it is addressed here in connection with procedural public policy, which seems justified because the Supreme Court held that case law considers *ne bis in idem* to be a corollary or negative aspect of *res judicata* ("*La jurisprudence qualifie le principe ne bis in idem de corollaire (arrêt 2P.35/2007 du 10 septembre 2007 consid. 6) ou d'aspect négatif (arrêt 6B_961/2008 du 10 mars 2009 consid. 1.2) de l'autorité de la chose jugée.*"); cf. Wiebecke, p. 490, who refers to *ne bis in idem* as "negative complement" of *res judicata*; cf. also Berger, *ZBJV 2013*, pp. 285-286, righly stressing that it is ultimately irrelevant whether *ne bis in idem* is part of substantive or procedural public policy since Art. 190(2)(e) PILS encompasses both aspects of public policy.

459 Cf. BGer. 4A_386/2010 para. 9.3.2 (*Valverde*): "*[…], l'inibizione est une mesure d'ordre essentiellement préventif […] qui vise principalement à faire en sorte que le déroulement des compétitions sportives sur le territoire de l'Italie ne soit pas faussé par la participation de personnes convaincues de violation des règles antidopage et qui déploie des effets limités au territoire de ce pays. En cela, elle se distingue de la suspension qui a été infligée au coureur cycliste […], cette mesure-ci revêtant avant tout un caractère répressif en tant qu'elle a pour objet de sanctionner, avec effet sur le plan mondial, un sportif professionnel affilié à une fédération sportive.*"; cf. also Wiebecke, p. 490.

460 BGE 120 II 155 para. 6a ("*[…] la sentence attaquée ne sera annulée que si le résultat auquel elle aboutit est incompatible avec l'ordre public. Il ne suffit donc pas que ses motifs le soient […]; encore faut-il pouvoir tirer la même conclusion relativement à son dispositif […]*").

461 BGE 116 II 634 para. 4: "*[…] sich […] die Aufhebung eines Entscheids nur dann rechtfertigt, wenn er im Ergebnis gegen den Ordre public verstösst, nicht aber bereits dann, wenn bloss die Begründung als ordre-public-widrig erscheint […].*"; confirmed in BGE 138 III 322 para. 4.1; BGE 128 III 191 para. 6b; BGE 120 II 155 para. 6a; BGer. 4A_16/2012 para. 4.1; BGer. 4A_654/2011 para. 4.1; BGer. 4A_320/2009 para. 4.1; BGer. 4A_284/2009 para. 3.1; BGer. 4A_17/2007 para. 4.1; BGer. 4P.134/2006 para. 5.1.

462 Cf. Bucher, para. 102 at Art. 190.

forthwith before the arbitral tribunal.[463] Procedural irregularities only raised in the setting aside proceedings before the Supreme Court are considered belated and will thus not be taken into account.[464] A party that fails to raise an objection during the arbitration is deemed to have violated the principle of good faith[465] by not invoking the irregularity immediately but only after the rendering of the (adverse) award.[466] The legal consequence of this failure will be the forfeiture of the right to challenge the award based on that flaw in the setting aside proceedings.[467]

170 Also, it is of critical importance that the procedural irregularity (i.e., the violation of the procedural public policy) not only be raised in the arbitration but also against the next (partial or final) award following the purported irregularity. Failure of so proceeding might result in a forfeiture (or a waiver) of the right to object to the irregularity at issue, with the defaulting party thus being precluded from challenging the subsequent award on that basis.[468]

b. The Exception

171 There is an *exception to the duty to immediately object* during the arbitral proceedings *in case of particularly serious flaws* which need to be considered and rectified ex officio (i.e., on the tribunal's own motion), and which flaws may be invoked at any stage of the proceedings, that is, even at the end of the arbitration[469] or before the Supreme Court only.[470] For instance, a party's lack of legal personality as well as the want of capacity to sue and be sued constitute such flaws.[471] Were it otherwise, the capacity to be a party to the proceedings would have to be accorded to an entity that legally does not exist.[472]

172 In addition, and needless to state, *if the (purported) public policy violation only results from the award*, it will normally not have been possible to previously object, so that the *setting aside proceedings* before the Supreme Court will be the (first) point in time when this can be done.

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463 Kaufmann-Kohler/Rigozzi, para. 825.

464 BGer. 4A_234/2010 para. 4.1; BGer. 4A_150/2012 para. 4.1; BGE 119 II 386 para. 1a; BGE 116 II 639 para. 4c; BGE 113 Ia 67 para. 2a.

465 It is well established that this principle also applies in arbitration (cf. BGer. 4A_600/2010 para. 4.2; BGer. 4P.196/2003 para. 5.2).

466 Cf., e.g., BGer. 4A_150/2012 para. 4.1; BGE 119 II 386 para. 1a.

467 BGE 119 II 386 para. 1a; BGer. 4A_234/2010 para. 4.1 at the end ("*sous peine de forclusion*"); in same terms BGer. 4A_150/2012 para. 4.1; BGer. 4A_348/2009 para. 4; BGE 116 II 639 para. 4c; BGE 113 Ia 67 para. 2a; Schneider (*International Arbitration*, para. 71 at Art. 182) stresses that the right is forfeited and expressly rejects the term "waiver" in this context; other legal commentators apply both terms (i.e., waiver and forfeiture) in that a party not raising the objection during the arbitration will be deemed to have waived that right at a later stage, with the right to challenge the award being considered as forfeited (cf. Berger/Kellerhals, para. 1046).

468 Cf. Berger/Kellerhals, para. 1589, stressing that this is so because a violation of the right to be heard or the equality of the parties pursuant to Art. 190(2)(d) PILS can only be brought against partial or final awards, which follows from Art. 190(3) PILS. The same applies if a violation of procedural public policy within the meaning of Art. 190(2)(e) PILS is invoked since this ground complements the right to be heard under Art. 190(2)(d) PILS; cf. also Kaufmann-Kohler/Rigozzi, para. 825.

469 Cf. BGer. 4P.282/2001 para. 8: "*[...] une exception doit être faite pour les vices particulièrement graves qui doivent être redressés d'office et qui peuvent être invoqués jusqu'en fin de cause [...]. Or, le défaut de capacité d'être partie et d'ester en justice entre de toute évidence dans cette catégorie de vices. On ne voit donc pas que le juge puisse y remédier, même par le recours à l'interdiction de l'abus de droit, en donnant vie à une entité juridiquement inexistante.*"; BGer. 4P.146/2005 para. 5.2.1: "*[...] un'eccezione in caso di vizi particolarmente gravi, cui è necessario porre rimedio d'ufficio e in ogni stadio della causa. Fra questi il difetto di personalità giuridica e della capacità di essere parte in un procedimento giudiziario, perché altrimenti ci si troverebbe nella situazione di dover riconoscere la qualità di parte a un'entità giuridicamente inesistente.*"

470 Cf. BGer. 4P.146/2005 para. 5.2.1: "*[...] Anche se presentata per la prima volta in questa sede, la censura è pertanto ammissibile.*"

471 Cf. BGer. 4P.282/2001 para. 8 (objection raised before the arbitral tribunal on the second to last day of the hearing only); BGer. 4P.146/2005 para. 5.2.1 (objection raised for the first time before the Supreme Court).

472 BGer. 4P.282/2001 para. 8 ("*en donnant vie à une entité juridiquement inexistante*"); BGer. 4P.146/2005 para. 5.2.1 ("*riconoscere la qualità di parte a un'entità giuridicamente inesistente*"); cf. also Müller, *Swiss Case Law*, p. 303.

4. *Grounds that May Be Invoked as Public Policy Violation*

173 To begin with, party agreements regarding the procedure or the arbitration *rules governing the proceedings* (pursuant to the parties' arbitration agreement) are not part of the minimal standard provided for in Art. 182(3) PILS, which sets forth the sole two mandatory procedural maxims, i.e., the right to be heard and the equal treatment requirement.[473] Therefore, a violation of the agreed-upon procedure can only be challenged if a violation of these two maxims of procedural public policy within the meaning of Art. 190(2)(e) PILS is alleged.[474]

174 However, it cannot be overstated that procedural public policy under Supreme Court case law *only* serves as a *means of defense*, and Art. 190(2)(e) PILS does *not* constitute a *procedural code of arbitration*, which the arbitral proceedings have to comply with.[475] Procedural (just like substantive) public policy is an incompatibility test.[476] Thus, this ground can, so to speak, only be used as a *shield* against the award, but *not* as a *sword* to impose procedural duties on the arbitrators. It is also worth recalling in this context that public policy – within the Supreme Court's understanding – inter alia, seeks *to ensure a minimum quality of awards* rendered in international arbitrations having their seat in Switzerland.[477]

175 Furthermore, contending that the arbitral tribunal treated the parties unequally (or was arbitrary) when *assessing the evidence* before it, will normally be doomed to failure given that the Supreme Court will consider this an inadmissible[478] complaint regarding the assessment of evidence, which can only be challenged if, and to the extent that, a public policy violation under Art. 190(2)(e) PILS is invoked.[479] Also, arbitrators may undertake a so-called anticipated assessment of evidence ("*antizipierte Beweiswürdigung*"), i.e., decline to take further evidence if they have already formed a firm opinion with respect to the point in question and the proffered evidence is deemed to be unfit to alter that opinion.[480] Such anticipated assessment, as a rule, may not be challenged based on Art. 190(2)(d) PILS, but will only be subject to the very exacting public policy test under Art. 190(2)(e) PILS.[481]

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[473] BGE 130 III 35 para. 5; BGE 119 II 386 para. 1b; BGE 117 II 346 para. 1a; BGer. 4P.222/2001 para. 5a.

[474] BGE 117 II 346 para. 1a; confirmed in BGer. 4P.222/2001 para. 5a; very critical on this case law: Schneider, *International Arbitration*, para. 69 at Art. 182; by contrast, Berger/Kellerhals, paras. 1019/1580, seem to approve the Supreme Court's approach.

[475] BGE 126 III 249 para. 3b: "*Der verfahrensrechtliche Ordre public […] stellt wie der materiellrechtliche eine reine Unvereinbarkeitsklausel dar, mithin kommt ihm lediglich eine Abwehrfunktion zu […]. Namentlich darf eine extensive Auslegung nicht dazu führen, dass aus dem verfahrensrechtlichen Ordre public ein eigentlicher 'code de procédure arbitrale' abgeleitet wird, welchem das von den Parteien frei gewählte Verfahren genügen müsste.*"; BGer. 4P.115/1994 para. 1b, *ASA Bull. 1995*, p. 221: "*[…] l'ordre public procédural ne constitue qu'une simple clause de réserve, à savoir qu'il a uniquement une fonction protectrice et ne déploie aucun effet normatif […] car le législateur n'a pas voulu que ce principe soit interprété de manière extensive et qu'on en déduise un code de procédure arbitrale auquel serait soumise la procédure choisie librement par les parties […].*"; cf. also BGE 132 III 389 para. 2.2.2; BGE 120 II 155 para. 6a; BGer. 4P.222/2001 para. 2a; BGer. 4P.99/2000 para. 3b/bb.

[476] Cf. BGE 126 III 249 para. 3b; BGer. 4P.99/2000 para. 3b/bb; see also Berger/Kellerhals, para. 1612; Kaufmann-Kohler/Rigozzi, para. 841.

[477] Cf. BGer. 4A_612/2009 para. 6.2.2, with reference to BGer. 4P.198/1998 para. 4a, BGer. 4P.99/2000 para. 3b/aa, and BGer. 4P.115/1994 para. 2b; cf. also BGer. 4A_464/2009 para. 5.1: "*[…] garantir que les sentences internationales suisses ne descendent pas au-dessous d'un seuil de qualité minimum.*"; see also BGer. 4A_386/2010 (of 3 January 2011) para. 8.3.1, where the Supreme Court again referred to the criterion of the award's quality ("*[…] du point de vue qualitatif, […] une sentence […]*").

[478] The taking and assessment of evidence by the arbitral tribunal is generally (i.e., subject to public policy violations) not open to challenge (see, e.g., BGer. 4A_360/2011 para. 4.1; BGer. 4P. 140/2004 paras. 2.1, 2.2.3; BGer. 4P.200/2001 para. 2b; see in detail below, paras. 188-189).

[479] Cf., e.g., BGer. 4A_360/2011 para. 4.1; BGer. 4A_539/2008 para. 4.2.2.

[480] Cf. BGE 124 I 208 para. 4a; BGer. 4A_150/2012 para. 4.1; BGer. 4A_682/2011 para. 4.1; BGer. 4A_528/2011 para. 2.1; BGer. 4A_526/2011 para. 2.1; BGer. 4P.23/2006 para. 3.1; BGer. 4A_2/2007 para. 3.3; BGer. 4A_220/2007 para. 8.1.

[481] See BGer. 4A_150/2012 para. 4.1; BGer. 4A_682/2011 para. 4.1; BGer. 4A_528/2011 para. 2.1; BGer. 4A_526/2011 para. 2.1; BGer. 4A_600/2010 para. 4.1; BGer. 4P.23/2006 para. 3.1; BGer. 4P.114/2003 para. 2.2.

176 As stated above, subject to the rare cases of procedural denial of justice, the *findings of fact* on which the arbitral tribunal bases its decision can – even if manifestly wrong or contrary to the record – only be challenged on the ground that they are incompatible with public policy under Art. 190(2)(e) PILS,[482] or that the facts have been established in violation of the procedural legal guarantees provided for in Art. 190(2)(d) PILS (i.e., the equality of the parties and their right to be heard).[483]

177 Though there has so far not been a single case where the Supreme Court affirmed a violation of procedural public policy in connection with (allegedly) wrong factual findings or with a (purportedly) erroneous assessment of evidence,[484] such violation could – according to legal commentators – occur if the arbitral tribunal, e.g., relied on the report of a (demonstrably) biased tribunal-appointed expert or in case that expert on whom the tribunal relied (demonstrably) had a conflict of interests.[485]

178 Lastly, a *violation of Art. 27(2) CC* may also be invoked. In fact, the violation of this provision led to the first case ever where substantive public policy was deemed to be infringed.[486] This case is described in detail below.[487] Pursuant to Art. 27(2) CC, which is captioned "*Protection of the personality against excessive commitments*", nobody can divest himself (or herself) of his (or her) freedom or restrict the exercise of that freedom to an extent incompatible with law or morality.[488]

179 Importantly, not any violation of that provision will be incompatible with public policy.[489] According to the Supreme Court, a contractual commitment is only excessive within the meaning of Art. 27(2) CC if (i) the obligee is left at the mercy of somebody else, or if (ii) the obligee's economic freedom is abrogated or limited to an extent which puts at risk his or her financial subsistence.[490] Even though public policy is not tantamount to unlawfulness and a public policy violation is subject to much narrower conditions than arbitrariness, an excessive engagement of the aforementioned kind can infringe public policy if it constitutes an obvious and severe violation of the obligee's personality.[491]

180 Lastly, it is sometimes invoked before the Supreme Court that the arbitral *tribunal (wrongly) decided the dispute based on equity*, instead of applying the law chosen by the parties. The party challenging the award is, in other words, querying a *usurpation of power* on the part of the tribunal.[492] The Supreme Court has repeatedly left open the (controversial) question whether this flaw is part of public policy within the meaning of Art. 190(2)(e) PILS.[493] At any rate, the party challenging the award would have to

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482 Cf. BGE 120 II 155 para. 6a; BGE 119 II 380 para. 3c.

483 Cf. BGE 119 II 380 para. 3c; BGer. of 30 December 1994 para. 2a, *ASA Bull. 1995*, p. 223.

484 Regarding the only two cases where public policy violations were successfully invoked, see below, paras. 209-232.

485 Berger/Kellerhals, para. 1618 at the end.

486 Cf. BGE 138 III 322.

487 See below, paras. 219-232.

488 In German: "*Niemand kann sich seiner Freiheit entäussern oder sich in ihrem Gebrauch in einem das Recht oder die Sittlichkeit verletzenden Grade beschränken.*"; in French: "*Nul ne peut aliéner sa liberté, ni s'en interdire l'usage dans une mesure contraire aux lois ou aux moeurs.*"; in Italian: "*Nessuno può alienare la propria libertà, né assoggettarsi nell'uso della medesima ad una limitazione incompatibile col diritto o con la morale.*"

489 BGer. 4A_320/2009 para. 4.4, with reference to BGer. 4A_458/2009 para. 4.4.3.2 and BGer. 4P.12/2000 para. 5b/aa.

490 BGE 138 III 322 para. 4.3.2; BGE 123 III 337 para. 5; BGer. 4P.167/1997 para. 2a; BGer. 4A_320/2009 para. 4.4.

491 BGE 138 III 322 para. 4.3.2 at the end, with reference to BGer. 4A_458/2009 para. 4.4.3.2 and BGer. 4A_320/2009 para. 4.4; BGer. 4P.12/2000 para. 5b/aa.

492 Kaufmann-Kohler/Rigozzi, paras. 651, 847 m; BGer. 4A_14/2012 para. 3.2.2 ("*l'usurpation du pouvoir de statuer en équité*"); in same terms BGer. 4A_370/2007 para. 5.6.

493 Cf. BGer. 4A_14/2012 para. 3.2.2: "*Tout au plus relève-t-il de l'art. 190 al. 2 let. e LDIP, encore que ce dernier point soit controversé [...]. Il n'est cependant pas nécessaire de pousser plus avant l'analyse à cet égard, puisque la recourante n'invoque pas cette dernière disposition à l'appui du grief considéré.*"; BGer. 4A_370/2007 para. 5.6: "*La question est controversée [...]. Elle peut demeurer indécise en l'espèce.*"; BGE 116 II 634 para. 4a: "*Ein aufgrund von Billigkeitserwägungen statt des vereinbarten Rechts gefällter Entscheid verstösst jedenfalls dann nicht gegen den Ordre public, wenn das Ergebnis nicht grundlegend vom Ergebnis abweicht, zu dem das vereinbarte Recht geführt hätte, sich die Abweichung also mit dem Ordre public vereinbaren lässt. Eine ordre-public-widrige Abweichung im Ergebnis macht die Beklagte aber nicht geltend, wenn sie*"

additionally establish that the award's result is contrary to public policy,[494] which makes the setting aside of the award appear very unlikely.[495]

5. *Grounds that May Not Be Invoked as Public Policy Violation*

a. *Preliminary Remarks*

181 The Supreme Court itself admits that public policy is a *quite intangible concept*.[496] Given the very general and broad definition of public policy within the understanding of the Supreme Court, this does not come as a surprise.[497] It is – as the Court itself concedes – difficult to (positively) circumscribe the scope of public policy, and it is, by contrast, easier to exclude a number of given flaws.[498]

182 Put differently, and subject to the few principles the Supreme Court expressly mentions in the aforementioned definition,[499] it is easier to determine what (procedural or substantive) flaws do not run counter to public policy than to define its contents and scope positively. Therefore, it seems justified to itemize below – on a non-exhaustive basis – a series of flaws that the Court will not deem to be contrary to public policy.

b. *Departures from Procedural Rules*

183 As stated previously, *procedural rules established by the parties* under Supreme Court case law do not by that very act[500] become a mandatory procedural principle.[501] Nor will deviations from such rules, including the arbitration rules chosen by the parties, by themselves amount to a violation of public policy in terms of Art. 190(2)(e) PILS – even where the application of the procedural rules at issue was wrong or arbitrary.[502] As mentioned, procedural public policy is merely a means of defense. Art. 190(2)(e) PILS does not constitute a procedural code of arbitration, which the arbitral proceedings have to adhere to.[503] Also,

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sich damit begnügt, dem Schiedsgericht nebst groben Rechtsverletzungen krasse Unbilligkeit vorzuwerfen."; cf. also BGer. 4P.96/2002 para. 6.2.

[494] BGE 116 II 634 para. 4: "*[…] sich […] die Aufhebung eines Entscheids nur dann rechtfertigt, wenn er im Ergebnis gegen den Ordre public verstösst, nicht aber bereits dann, wenn bloss die Begründung als ordre-public-widrig erscheint […].*"; confirmed in BGE 138 III 322 para. 4.1; BGE 128 III 191 para. 6b; BGE 120 II 155 para. 6a; BGer. 4A_16/2012 para. 4.1; BGer. 4A_558/2011 para. 4.1; BGer. 4A_654/2011 para. 4.1; BGer. 4A_320/2009 para. 4.1; BGer. 4A_284/2009 para. 3.1; BGer. 4A_17/2007 para. 4.1; BGer. 4P.134/2006 para. 5.1.

[495] Kaufmann-Kohler/Rigozzi, para. 847 m ("*ce qui rend une annulation de ce chef pour le moins peu probable*"), para. 651 ("*hautement improbable*"). By contrast, Berger/Kellerhals (para. 1603) are of the opinion that such usurpation of power on the part of arbitrators does not fall within the definition of public policy under Art. 190(2)(e) PILS in the first place.

[496] Cf. BGE 132 III 389 para. 2.2.3: "*Ce bref survol de la notion d'ordre public démontre, une fois de plus, la relative insaisissabilité de celle-ci.*"

[497] On the Court's definition of public policy, cf. paras. 163-164 and 166-167 above.

[498] Cf. BGer. 4A_458/2009 para. 4.1 (*Mutu*): "*S'il n'est pas aisé de définir positivement l'ordre public matériel, de cerner ses contours avec précision, il est plus facile, en revanche, d'en exclure tel ou tel élément.*"; concurring Bucher, para. 136 at Art. 190.

[499] See paras. 163-164 and 166-167 above.

[500] I.e., *ipso facto* (BGer. 4P.196/2003 para. 4.2.2.2: "*[…] ne devient pas ipso facto un principe impératif de procédure au sens de l'art. 182 al. 3 LDIP.*").

[501] I.e., a mandatory principle within the meaning of Art. 182(3) PILS (BGer. 4P.196/2003 para. 4.2.2.2; confirmed in BGer. 4P.14/2004 para. 2.2.5 and BGer. 4P.93/2004 para. 2.1; in same terms already BGE 117 II 346 para. 1b/aa; BGer. of 24 March 1997 para. 2a, *ASA Bull. 1997*, pp. 323-324).

[502] Cf. BGE 126 III 249 para. 3b (with further references); BGer. 4A_612/2009 para. 6.3.1; BGer. 4A_600/2008 para. 4.2.1.3; BGer. 4P.23/2006 para. 4.2.

[503] BGE 126 III 249 para. 3b; BGer. 4P.115/1994 para. 1b, *ASA Bull. 1995*, p. 221; cf. also BGE 132 III 389 para. 2.2.2; BGE 120 II 155 para. 6a; BGer. 4P.222/2001 para. 2a; BGer. 4P.99/2000 para. 3b/bb; see also Berger/Kellerhals, para. 1612; Kaufmann-Kohler/Rigozzi, para. 841.

public policy simply seeks to ensure a minimum quality of awards rendered in international arbitrations having their seat in Switzerland.[504]

c. Lack of Reasons in the Award

184 Further, the tribunal's *failure* (be it through negligence or deliberate renunciation) *to provide any reasons in the award* does not amount to a violation of (procedural) public policy. This position is based on the Supreme Court's finding that this ground is not part of the exhaustive list of Art. 190(2) PILS. Given that the aforementioned provision does not include this ground (i.e., the lack of reasons), the lack of reasons cannot be invoked as a public policy violation against an award.[505] Nor will the lack of reasons in the award be deemed to infringe the parties' right to be heard.[506]

d. Contradictions in the Award

185 According to the Supreme Court's recent case law,[507] an intrinsic *contradiction within the award's reasons* does not violate public policy in terms of Art. 190(2)(e) PILS.[508] A party may thus not argue that the award is flawed due to an intrinsic and insolvable contradiction.[509] This flaw, even if established, will not amount to a public policy violation within the Supreme Court's understanding and definition. Nor will an intrinsic *contradiction within the operative part* of the award be contrary to public policy.[510]

186 The Supreme Court justifies this recent case law with the incompatibility of applying a stricter approach towards this kind of flaw, when untenable factual findings or an arbitrary application of law do not violate public policy.[511] Moreover, and as stated previously, the Supreme Court will only set aside the challenged award if its result is contrary to public policy. It is, in other words, insufficient if only the

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[504] Cf. BGer. 4A_612/2009 para. 6.2.2: "*[…] Art. 190 Abs. 2 lit. e IPRG auch bezwecke, eine gewisse Mindestqualität der schweizerischen internationalen Schiedsentscheide zu gewährleisten […]*", with reference to BGer. 4P.198/1998 para. 4a, BGer. 4P.99/2000 para. 3b/aa, and BGer. 4P.115/1994 para. 2b; cf. also BGer. 4A_464/2009 para. 5.1: "*[…] l'art. 190 al. 2 let. e LDIP vise aussi à garantir que les sentences internationales suisses ne descendent pas au-dessous d'un seuil de qualité minimum.*"; see also BGer. 4A_386/2010 (of 3 January 2011) para. 8.3.1 where the Supreme Court again referred to the criterion of the award's quality ("*La jurisprudence actuelle est fondée sur la prémisse que, du point de vue qualitatif, […] une sentence […]*").

[505] BGE 130 III 125 para. 2.2; BGE 116 II 373 para. 7b (at the end); BGE 101 Ia 521 para. 4f; BGer. 4P.114/2004 para. 4. In the Supreme Court's view, the parties are not entitled to reasons in the award. Even though Art. 189(2) PILS provides that the award is to include reasons, the Supreme Court does not consider this a mandatory requirement under Art. 182(3) PILS. This case law has met with criticism (cf. Bucher, paras. 93-101 at Art. 190; Walter/Bosch/Brönnimann, pp. 240-241; Berti/Schnyder, para. 65 at Art. 190; Zenhäusern, para. 15 at Art. 384; cf. also the commentators voicing criticism mentioned in BGE 134 III 186 para. 6.1 at the end; see, by contrast, Berger/Kellerhals, para. 1617, who consider the rationale of the Supreme Court – i.e., the lack of this ground in Art. 190(2) PILS – to be "*hardly contestable*"). However, and fortunately, arbitral tribunals hardly ever dispense with the giving of reasons in the award in arbitrations conducted in Switzerland (unless the parties empowered them to so proceed).

[506] As a result, such lack cannot be invoked under Art. 190(2)(d) PILS either. As mentioned, the parties under Supreme Court case law are not entitled to reasons in the award. Although by virtue of Art. 189(2) PILS the award is to include reasons, this is not deemed to be a mandatory requirement under Art. 182(3) PILS (cf. BGE 134 III 186 para. 6; BGE 133 III 235 para. 5.2; BGE 128 III 234 para. 4b; BGer. 4A_360/2011 para. 5.1; BGer. 4A_404/2010 para. 5).

[507] As to the (differing) previous case law (i.e., BGer. 4P.198/1998 para. 4a; BGer. 4P.99/2000 para. 3b/aa), see Müller, *Swiss Case Law*, p. 300.

[508] BGer. 4A_150/2012 para. 5.2.1: "*[…] l'incohérence intrinsèque des considérants d'une sentence n'entre pas dans la définition de l'ordre public matériel […]*"; in same terms already BGer. 4A_654/2011 para. 4.2; BGer. 4A_386/2010 para. 8.3.1; BGer. 4A_481/2010 para. 4; BGer. 4A_320/2009 para. 4.3; BGer. 4A_612/2009 para. 6.2.2; BGer. 4A_464/2009 para. 5.1.

[509] Cf. BGer. 4A_320/2009 para. 4.3 (regarding the tribunal's determination of damages); see also BGer. 4A_612/2009 para. 6.2.2; BGer. 4A_464/2009 para. 5.1 (on this decision, cf. Johnson, pp. 148-149).

[510] BGE 128 III 191 para. 6b; BGer. 4A_612/2009 para. 6.2.2.

[511] BGer. 4A_386/2010 para. 8.3.1: "*[…] il n'est guère justifiable de considérer une sentence affectée de pareil vice avec plus de sévérité qu'une sentence reposant sur des constatations de fait insoutenables ou sur l'application arbitraire d'une règle de droit, sentence qui, elle, n'entre pas dans les prévisions de l'art. 190 al. 2 let. e LDIP.*"; BGer. 4A_612/2009 para. 6.2.2: "*Es erscheint auch unter dem Gesichtspunkt der Qualität internationaler Schiedsurteile nicht gerechtfertigt, einen an einem*

reasons in the award violate public policy but the award in the end (i.e., in its result as determined in the award's operative part)[512] is compatible with public policy.[513] In the author's view, this is the underlying reason why a contradiction within the reasons given in the award will – even if irresolvable – not suffice to set aside the award.[514]

187 Equally, challenging a *contradiction between the reasons and the operative part* of the award as a public policy violation will, most probably, be doomed to failure.[515]

e. Arbitrary Assessment of Evidence and Manifestly Erroneous Factual Findings

188 Nor will it be sufficient to establish a violation of public policy if a party submits that the arbitral tribunal's *assessment of evidence*[516] or the tribunal's *factual findings*[517] were *arbitrary*. As stated above, the threshold of public policy is different and significantly higher than that of arbitrariness.[518]

189 Even a manifestly erroneous finding of fact or one which is in contradiction with the case record – and purportedly led to an obviously incorrect or unjust award – does not, as such, justify the setting aside of an international arbitral award.[519] This is so because the substantive examination of the award by the Supreme Court is limited to the question whether the award is compatible with public policy,[520] and

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inneren Widerspruch leidenden Entscheid anders zu behandeln als solche, die auf unhaltbaren Sachverhaltsfeststellungen oder einer willkürlichen Rechtsanwendung beruhen, die ebenfalls nicht unter Art. 190 Abs. 2 lit. e IPRG fallen."

512 BGE 120 II 155 para. 6a ("*[…] la sentence attaquée ne sera annulée que si le résultat auquel elle aboutit est incompatible avec l'ordre public. Il ne suffit donc pas que ses motifs le soient […]; encore faut-il pouvoir tirer la même conclusion relativement à son dispositif […]*").

513 BGE 116 II 634 para. 4: "*[…] sich […] die Aufhebung eines Entscheids nur dann rechtfertigt, wenn er im Ergebnis gegen den Ordre public verstösst, nicht aber bereits dann, wenn bloss die Begründung als ordre-public-widrig erscheint […].*"; confirmed in BGE 138 III 322 para. 4.1; BGE 128 III 191 para. 6b; BGE 120 II 155 para. 6a; BGer. 4A_16/2012 para. 4.1; BGer. 4A_558/2011 para. 4.1; BGer. 4A_654/2011 para. 4.1; BGer. 4A_320/2009 para. 4.1; BGer. 4A_284/2009 para. 3.1; BGer. 4A_17/2007 para. 4.1; BGer. 4P.134/2006 para. 5.1.

514 BGer. 4A_654/2011 para. 4.2; BGer. 4A_320/2009 para. 4.3; BGer. 4A_612/2009 para. 6.2.2; BGer. 4A_464/2009 para. 5.1 (on this decision, cf. Johnson, pp. 148-149).

515 See BGer. 4A_386/2010 para. 8.3.1 (*Valverde*), where the Court, at least impliedly, decided so, even though the Court went on to assess in the subsequent paragraph whether such contradiction (between the operative part and the reasons) had to be affirmed, which it denied (cf. BGer. 4A_386/2010 para. 8.3.2). But above all, the Court held that, in its view, an intrinsic contradiction between the reasons of the award (or one within the award's operative part) could not be considered *prima facie* less severe than a contradiction between the reasons and the award's operative part, and that the appellant had failed to set forth why a different threshold should apply in the latter case (cf. para. 8.3.1).

516 BGer. 4A_360/2011 para. 4.1; BGer. 4P.140/2004 paras. 2.1, 2.2.3; BGer. 4P.200/2001 para. 2b.

517 BGE 127 III 576 para. 2b; BGE 116 II 634 para. 4b.

518 Cf. BGE 138 III 322 para. 4.3.2 ("*[…] seine Verletzung wesentlich eingeschränkter zu würdigen ist als ein Verstoss gegen das Willkürverbot […]*"); BGE 132 III 389 para. 2.2.2 ("*[…] c'est une notion plus restreinte que celle d'arbitraire […]*"); BGE 126 III 249 para. 3b; BGE 120 II 155 para. 6a; BGE 116 II 634 para. 4; BGE 117 II 604 para. 3; BGer. 4A_150/2012 para. 5.1; BGer. 4P.154/2006 para. 3.1 ("*La nozione di ordine pubblico è più restrittiva di quella di arbitrio.*"); in similar terms already BGE 115 II 288 para. 3a ("*[…] il s'agit d'un moyen beaucoup plus restrictif et beaucoup plus étroit que celui d'arbitraire […]*"); see also BGE 121 III 331 para. 3a.

519 As stated above, incorrect findings of fact normally do not amount to a violation of the right to be heard and thus cannot trigger the setting aside of an arbitral award (cf. BGE 127 III 576 para. 2b; BGE 121 III 331 para. 3a; BGer. 4A_612/2009 para. 6.3.1; BGer. 4A_240/2009 para. 5.1; BGer. 4A_62/2009 para. 4.1; BGer. 4A_176/2008 para. 4.1.1; BGer. 4P.134/2006 para. 7; BGer. 4P.72/2001 para. 2b).

520 Cf., e.g., the decisions before the entering into force of the BGG: BGE 116 II 634 para. 4; BGE 120 II 155 para. 6a; BGE 121 III 331 para. 3a; BGE 129 III 727 para. 5.2.2; BGE 133 III 139 para. 5; BGer. 4P.114/2006 para. 6.5.3; BGer. 4P.134/2006 para. 5.1; BGer. 4P.260/2000 para. 6a; cf. also BGer. 4A_176/2008 para. 2.3, expressly referring to Art. 77 in conj. with Arts. 97 and 105(2) BGG (i.e., the Federal Statute on the Supreme Court); equally BGer. 4A_16/2012 para. 2.3; BGer. 4A_150/2012 para. 5.1; BGer. 4A_162/2011 para. 1.3; BGer. 4A_631/2011 para. 2.3; BGer. 4A_428/2010 para. 1.3; BGer. 4A_326/2010 para. 1.3.

manifestly erroneous findings of fact (or findings inconsistent with the record) do not pass the exacting test of Art. 190(2)(e) PILS.[521]

f. Interpretation and Application of the Contract

i. In General

190 Likewise, a party may not argue that the arbitral tribunal's *interpretation or application of the contract* (or a given contractual provision) in dispute, including the legal consequences derived therefrom, was incorrect, even if the tribunal's interpretation or application (demonstrably) was wrong and untenable.[522] The same holds true if the interpretation was *arbitrary*.[523] This is so because it may not be invoked in setting aside proceedings that the award is arbitrary as this ground is not provided for in Art. 190(2) PILS.[524]

191 Equally, a party may not invoke that the *tribunal applied the wrong contractual provision*, because such (alleged) flaws are not open to challenge under Art. 190(2)(e) PILS and can thus not lead to the setting aside of an award based on a public policy infringement.[525]

192 It is a completely distinct question whether the tribunal committed an unforeseeable application of a contractual provision contrary to due process. This, however, may only be challenged as a violation of the right to be heard within the meaning of Art. 190(2)(d) PILS[526] but not under Art. 190(2)(e) PILS.[527]

ii. *Pacta Sunt Servanda* in Particular

193 In this context, it is worth recalling that the principle *pacta sunt servanda* (agreements must be honored), in the Supreme Court's view, only means that the agreed terms of a contract must be complied with.[528] The principle may, however, not be relied on to challenge the way in which the arbitral tribunal construed a given clause to, e.g., conclude in the award that the prerequisites of a provision establishing a duty or right were (or were not) met. Put differently, *pacta sunt servanda* may not be advanced to challenge the

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[521] BGer. 4P.54/2006 para. 3.1; BGer. 4P.48/2005 para. 3.4.2.2; BGer. 4P.99/2000 para. 3b/bb; BGE 121 III 331 para. 3a.

[522] BGer. 4A_150/2012 paras. 5.1, 5.2.1; BGer. 4A_14/2012 para. 5.2.1; BGer. 4A_46/2011 para. 4.2.1; BGer. 4A_458/2009 para. 4.1; BGer. 4A_256/2009 para. 4.2.2; BGer. 4A_258/2009 para. 4.2.2; BGer. 4A_176/2008 para. 5.2; BGer. 4P.134/2006 para. 5.2; BGer. 4P.154/2006 para. 3.2; BGer. 4P.314/2005 para. 3.2; BGer. 4P.104/2004 para. 6.3; BGer. 4P.242/2004 para. 7.1; BGer. 4P.93/2004 para. 2.2; BGer. 4P.250/2002 para. 2.1 ("*[...] il n'appartient pas au Tribunal fédéral de rechercher si l'arbitre a interprété correctement une clause contractuelle [...]*"; BGE 117 II 604 para. 3; BGE 116 II 634 para. 4b; see also BGer. 4A_14/2012 para. 5.2.1: "*[...] le Tribunal arbitral, quand bien même il aurait interprété ou appliqué de manière insoutenable [...] les clauses topiques du Contrat, notamment en ne se fondant pas sur les règles de droit censées régir la question litigieuse ou en confondant des termes distincts figurant dans une clause contractuelle, ne saurait se voir imputer une violation de l'ordre public matériel au sens restrictif que lui donne la jurisprudence y relative.*"

[523] BGE 117 II 604 para. 3; BGer. 4P.93/2004 para. 2.2.

[524] BGE 127 III 576 para. 2.b; BGE 121 III 331 para. 3a; BGE 116 II 634 para. 4; see also Berger/Kellerhals, paras. 1544-1545.

[525] Cf. BGer. 4A_176/2008 para. 5.2 and BGer. 4P.134/2006 para. 5.2: "*[...] mit einer Rüge nach Art. 190 Abs. 2 lit. e IPRG kann nicht geltend gemacht werden, das Schiedsgericht habe nicht die zutreffende Vertragsbestimmung angewendet [...].*" As mentioned, an (allegedly) erroneous interpretation of contractual provisions cannot be challenged either on the basis of Art. 190(2)(e) PILS (cf. BGer. 4A_150/2012 paras. 5.1, 5.2.1; BGer. 4P.154/2006 para. 3; BGer. 4A_256/2009 para. 4.2.2; BGer. 4A_258/2009 para. 4.2.2; BGer. 4A_176/2008 para. 5.2; BGer. 4P.134/2006 para. 5.2; BGer. 4P.104/2004 para. 6.3; BGer. 4P.242/2004 para. 7.1; BGer. 4P.93/2004 para. 2.2; BGer. 4P.250/2002 para. 2.1; BGE 117 II 604 para. 3; BGE 116 II 634 para. 4b).

[526] E.g., in 2003, an award was set aside because the arbitrators had based their decision on a contractual clause which neither party considered material and which had not been put forward or discussed in the arbitral proceedings. Based on that clause, the arbitrators had concluded that (contrary to the respondent's allegations) the relevant contract was not null and void (BGE 130 III 35 para. 6.2). For a case where the Supreme Court denied a surprising application of contractual provisions, see BGer. 4A_108/2009 paras. 2.2-2.3.

[527] For a comprehensive overview of the germane case law, cf. paras. 148-152 above.

[528] BGE 116 II 634 para. 4b: "*Wohl sind Verträge einzuhalten. Einzuhalten ist aber nur das, was die Parteien vereinbart haben.*"

tribunal's contract interpretation, which is not open to challenge under Art. 190(2)(e) PILS, even if the interpretation was incorrect, untenable or even arbitrary.[529]

194 Under Supreme Court case law, a violation of *pacta sunt servanda* would require that the arbitral tribunal first affirmed that the prerequisites for a given contractual (payment) duty were not met, but then nonetheless ordered the debtor to comply with the duty (i.e., to pay the sum in dispute),[530] or vice versa (in that the tribunal first found that the contractual conditions for a duty to pay were met, but subsequently – and contrary to this own finding – abstained from ordering payment).[531] The tribunal, in other words, would have to apply (or refuse to apply) a contractual clause and thereby contradict its own finding according to which the clause in question was not (or was) binding on the parties.[532]

195 The aforementioned Supreme Court's understanding and definition of *pacta sunt servanda* has met with criticism[533] – particularly given that there are no arbitrators in the real world who would first consider null and void a given contract and then award claims based on that contract (or vice versa). It therefore does not come as a surprise that no award was ever set aside because of a purported violation of *pacta sunt servanda*.[534]

g. Interpretation and Application of the Law (Governing the Merits of the Case)

196 The tribunal's *interpretation and application of legal provisions* is also not open to challenge under Art. 190(2)(e) PILS, even if the interpretation or application was untenable.[535] For example, if the contract in dispute is governed by Swiss law, a party may not challenge the tribunal's (untenable) interpretation and application of Arts. 97, 201 or 210 Swiss Code of Obligations (CO) – including, in particular, the legal consequences deriving from said provisions in the case at issue (e.g., the liability or non-liability of the seller, the forfeiture of a given right, etc.).[536] Here too, an *arbitrary interpretation or application of the law* may not be invoked.[537]

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[529] Cf. BGE 117 II 604 para. 3; BGE 116 II 634 para. 4b; BGer. 4A_150/2012 paras. 5.1, 5.2.1; BGer. 4A_256/2009 para. 4.2.2; BGer. 4A_258/2009 para. 4.2.2; BGer. 4P.134/2006 para. 5.2; BGer. 4P.154/2006 para. 3.2; BGer. 4P.314/2005 para. 3.1; BGer. 4P.104/2004 para. 6.3; BGer. 4P.242/2004 para. 7.1; BGer. 4P.93/2004 para. 2.2; BGer. 4P.250/2002 para. 2.1; see, in particular, BGer. 4P.253/2004 para. 3.2: "*Juste ou fausse, soutenable ou non, cette interprétation [du contrat] ne peut pas être revue par le Tribunal fédéral lorsqu'il examine si la sentence attaquée est incompatible avec l'ordre public.*"

[530] BGE 116 II 634 para. 4b ("*Der Grundsatz pacta sunt servanda wäre nur dann verletzt, wenn das Schiedsgericht den Eintritt der Bedingung für die Zahlungsverpflichtung der Beklagten verneint und der Klägerin trotzdem den Werklohn zuerkannt hätte.*").

[531] BGer. 4A_150/2012 paras. 5.1, 5.2.1; BGer. 4A_256/2009 para. 4.2.2; BGer. 4A_258/2009 para. 4.2.2; BGer. 4P.134/2006 para. 5.2; BGer. 4P.154/2006 para. 3.2; BGer. 4P.314/2005 para. 3.1; BGer. 4P.104/2004 para. 6.3; BGer. 4P.242/2004 para. 7.1.

[532] Cf. BGer. 4P.154/2006 para. 3.2: "*[…] l'autorità arbitrale deve aver applicato o rifiutato di applicare una disposizione contrattuale ponendosi in contraddizione con il risultato della propria interpretazione in merito all'esistenza e/o al contenuto dell'atto giuridico litigioso […].*"; cf. also BGer. 4P.314/2005 para. 3.1: "*[…] le tribunal arbitral doit avoir appliqué ou refusé d'appliquer une disposition contractuelle en se mettant en contradiction avec le résultat de son interprétation à propos de l'existence ou du contenu de l'acte juridique litigieux.*"; in similar terms BGer. 4P.253/2004 para. 3.2; cf. further BGer. 4P.104/2004 para. 6.3: "*[…] wenn das Schiedsgericht zwar die Existenz eines Vertrages bejaht, die daraus sich ergebenden Konsequenzen jedoch missachtet, oder – umgekehrt – die Existenz eines Vertrages verneint, jedoch trotzdem eine vertragliche Verpflichtung bejaht […].*"

[533] Cf. especially Bucher, paras. 150-158 at Art. 190.

[534] Bucher, para. 150 at Art. 190: "*De tels arbitres n'existent pas, et le rejet systématique du grief par le Tribunal fédéral montre qu'il n'en a jamais rencontré.*"

[535] BGer. 4A_654/2011 para. 4.2; BGer. 4A_62/2009 para. 5.2 at the end; BGer. 4A_14/2012 para. 5.2.1.

[536] Cf. BGer. 4A_14/2012 para. 5.2.1: "*[…] le Tribunal arbitral, quand bien même il aurait interprété ou appliqué de manière insoutenable les dispositions pertinentes de la loi entrant en ligne de compte (i.c. les art. 97, 201 et 210 CO) […], ne saurait se voir imputer une violation de l'ordre public matériel au sens restrictif que lui donne la jurisprudence y relative.*"

[537] BGE 117 II 604 para. 3; BGer. 4A_654/2011 para. 4.2. As stated previously, it may not be invoked in setting aside proceedings that the award is arbitrary given that this ground is not provided for in Art. 190(2) PILS (cf. BGE 127 III 576 para. 2.b; BGE 121 III 331 para. 3a; BGE 116 II 634 para. 4; see also Berger/Kellerhals, paras. 1544-1545, 1594).

197 The same holds true if the arbitral tribunal (demonstrably) *applied the wrong legal provision(s) or failed to apply the pertinent one(s)*, which irregularities are not open to challenge.[538] Equally, the purported application of *the wrong law* (e.g., Swiss law instead of Serbian law) by the tribunal does not violate public policy within the meaning of Art. 190(2)(e) PILS.[539]

198 An entirely different question is whether the tribunal committed an unforeseeable application of the law constituting a due process infringement. This, however, may only be challenged as a violation of the right to be heard pursuant to Art. 190(2)(d) PILS[540] but not under Art. 190(2)(e) PILS.[541]

199 It may further not be argued that the tribunal having its seat in Switzerland violated the principle *jura novit curia* (the tribunal knows the law) in asking the parties to ascertain the contents of the applicable foreign law (i.e., non-Swiss law) given that by virtue of Art. 16(1) PILS arbitral tribunals – just like a Swiss state court – may request this from the parties.[542] Accordingly, such request does not violate public policy.[543] For this reason, a tribunal may also request the parties to establish the differences between the foreign (non-Swiss) law governing the contract and Swiss (substantive) law.[544] Where an arbitral tribunal so proceeds, the challenging party's contention that the tribunal asked the parties to answer questions of law in violation of *jura novit curia* (and thus infringed public policy) will be doomed to failure.[545]

h. Interpretation and Application of (Mandatory) EU Law or the Law of a Third Country

200 Even though an arbitral tribunal having its seat in Switzerland is duty-bound to take into consideration (non-Swiss) mandatory competition law (i.e., *antitrust law*),[546] the tribunal's interpretation and (non-) application of EU law in general, and EU *competition law* in particular, will not be open to challenge under Art. 190(2)(e) PILS either. This is so because *EU (or national) competition law is not part of public policy* within the Supreme Court's understanding and definition.[547] Provisions of any competition law are, in other words, not part of the essential and widely recognized values, which from a Swiss perspective should be part of any legal order.[548] An exception, in the Court's view, only applies where a violation of competition law would infringe a principle that case law has derived from public policy.[549]

201 As a rule, an arbitral tribunal having its seat in Switzerland is under a duty to pay regard to (non-Swiss) *mandatory rules of law*, including so-called *lois de police* or *lois d'application immédiate*, that may apply

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538 See, in particular, BGer. 4A_14/2012 para. 5.2.1: "*[…] le Tribunal arbitral, quand bien même il aurait interprété ou appliqué de manière insoutenable les dispositions pertinentes de la loi entrant en ligne de compte […], notamment en ne se fondant pas sur les règles de droit censées régir la question litigieuse […], ne saurait se voir imputer une violation de l'ordre public matériel au sens restrictif que lui donne la jurisprudence y relative.*"

539 BGer. 4A_654/2011 para. 4.2; in same terms BGE 132 III 389 para. 2.2.2: "*[…] ne tend à sanctionner le défaut d'application ou la mauvaise application du droit étranger applicable au fond du litige […].*"

540 This is the case if the parties could not reasonably have foreseen that the legal provision in question, which was not invoked or addressed during the entire proceedings, would be relevant for the tribunal's decision on the merits (BGE 130 III 35 para. 5; BGer. 4A_46/2011 para. 5.1.1; BGer. 4A_254/2010 para. 3.1; BGer. 4A_10/2010 para. 2.1; BGer. 4A_400/2008 para. 3.1; BGer. 4A_3/2009 para. 7.1; BGer. 4A_240/2009 para. 3.2; BGer. 4A_42/2007 para. 7.1; BGer. 4P.168/2006 para. 7.1; BGer. 4P.104/2004 para. 5.4; BGer. 4P.260/2000 para. 6a; BGer. 4P.17/2002 para. 2b).

541 For a comprehensive overview of the germane case law, cf. paras. 148-152 above.

542 BGer. 4P.242/2004 para. 7.3.

543 BGer. 4P.242/2004 para. 7.3, with reference to BGer. 4P.119/1998 para. 1b/bb.

544 I.e., in the case at issue (BGer. 4P.242/2004) the differences between Croatian and Swiss bill of exchange law.

545 BGer. 4P.242/2004 para. 7.3.

546 Berger/Kellerhals, para. 1609.

547 Cf. BGE 132 III 389 para. 3.2 (see also para. 4 of BGer. 4P.278/2005, not published in BGE 132 III 389: "*[…] le droit – européen ou italien – de la concurrence ne fait pas partie de l'ordre public visé à l'art. 190 al. 2 let. e LDIP […].*"); previously, the Court had held that it seemed doubtful that EU or national competition law were part of public policy (cf. BGer. 4P.226/2001 para. 4c; BGer. 4P.119/1998 para. 1b/bb).

548 BGE 132 III 389 para. 3.2.

549 Cf. BGE 132 III 389 para. 3.2.

to the dispute at issue (e.g., on import or export restrictions, embargos, tax regulations).[550] However, and notwithstanding the aforementioned duty of the arbitrators to consider such mandatory rules, their non-application (or non-observance) will not violate public policy within the definition and meaning of Art. 190(2)(e) PILS.[551]

202 The Supreme Court justifies this approach towards foreign (i.e., non-Swiss) laws by stressing that the notion of public policy within the meaning of Art. 190(2)(e) PILS is not linked to any national law, be it Swiss law or the law of a third state – regardless of whether the provisions of those (Swiss or foreign) laws are mandatory or directly apply *erga omnes*. It is, in other words, a question of coherence in that the arbitrators' non-application (or wrong application) of the law (be it Swiss or non-Swiss) as such is not open to challenge under Art. 190(2)(e) PILS.[552]

203 As stated previously, an exception to the foregoing applies if a violation of the laws of a third country would infringe a principle that case law has derived from *public policy*.[553] Also, if an arbitral tribunal that has to determine the validity of a contract governed by Swiss law but affecting the European Common Market refuses to examine this question pursuant to Art. 81 (formerly Art. 85) of the Treaty establishing the European Community, this non-application will lead to the setting aside of the award (declining jurisdiction in this regard) under Art. 190(2)(b) PILS if one of the parties invoked the nullity of the contract.[554]

i. Interpretation and Application of Statutes and Regulations of a Private Corporation

204 The aforementioned principles established by case law also apply to the arbitral tribunal's interpretation and application of the statutes and regulations of private corporations such as an international sports federation.[555] The tribunal's interpretation of statutes or regulations of this kind (e.g., those of FIFA), including the legal consequences derived therefrom, are not open to challenge.[556]

j. Invoking the Federal Constitution or an International Convention such as the ECHR

205 Directly invoking the violation of a right under the *Swiss Federal Constitution* (FC) or the *European Convention on Human Rights* (ECHR) or another international convention will also be doomed to failure, for none of these grounds are mentioned in the exhaustive list of Art. 190(2) PILS.[557] At the most, the principles deriving from the FC or the ECHR may serve as a reference for determining the guarantees provided for in Art. 190(2) PILS[558] such as, in particular, public policy.[559]

206 For instance, in the below-mentioned case[560] where a violation of substantive public policy was successfully invoked, a professional football player argued (and the Supreme Court took up the argument) that

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550 See Berger/Kellerhals, paras. 1300-1308.

551 BGE 132 III 389 para. 2.2.2; in this sense already BGE 60 II 294 para. 5a (non-application of German exchange regulations).

552 BGE 132 III 389 para. 2.2.2.

553 Cf. BGE 132 III 389 para. 3.2.

554 See BGE 132 III 389 para. 3.3; BGE 118 II 193 para. 5; BGer. 4P.119/1998 para. 1a.

555 BGer. 4A_258/2008 para. 4.2; cf. also Bucher, para. 147 at Art. 190; see also BGer. 4A_260/2009 para. 3.1; BGer. 4A_458/2009 para. 4.1; BGer. 4A_370/2007 para. 5.6.

556 BGer. 4A_458/2009 para. 4.1; BGer. 4A_260/2009 para. 3.1; BGer. 4A_258/2008 para. 4.2; cf. also BGer. 4A_370/2007 para. 5.6.

557 BGer. 4A_238/2011 para. 3.1.2; BGer. 4A_404/2010 para. 3.5.3; BGer. 4A_43/2010 para. 3.6.1; BGer. 4A_320/2009 paras. 1.5.3, 2; BGer. 4A_612/2009 paras. 2.4.1, 4.1; BGer. 4A_370/2007 para. 5.3.2.

558 Cf. BGer. 4A_238/2011 para. 3.1.2; BGer. 4A_404/2010 para. 3.5.3; BGer. 4A_43/2010 para. 3.6.1; BGer. 4A_320/2009 para. 1.5.3; BGer. 4A_612/2009 para. 2.4.1; BGer. 4A_370/2007 para. 5.3.2; see also BGer. 4P.64/2001 para. 2d/aa; for a criticism of this approach, cf. Bucher, paras. 42-44 at Art. 190.

559 BGer. 4A_458/2009 paras. 4.1, 4.4.3.3, where the Supreme Court stated that public policy under Art. 190(2)(e) PILS encompassed the respect for and protection of human dignity in terms of Art. 7 FC. Similarly, the Court held that forced labor in terms of Art. 4(2) ECHR would be contrary to public policy under Art. 190(2)(e) PILS (BGer. 4A_370/2007 para. 5.3.2).

560 For a detailed summary of this decision (BGE 138 III 322, *Matuzalem*), cf. below, paras. 219-232.

an indefinite worldwide occupational ban to be imposed on him would constitute a serious violation of the freedom of profession provided for in Art. 27(2) of the Swiss Federal Constitution.[561]

6. The Only Two (Sports Arbitration) Cases where Public Policy was Invoked Successfully

a. Preliminary Remarks

207 Much has been written on public policy under Art. 190(2)(e) PILS.[562] By the same token, the case law referring to this setting aside ground is extensive, with public policy being one of the two most often invoked grounds.[563] However, the truth of the matter is that there have so far (i.e., between 1989 and 2013) only been two cases where an award was challenged with success on this ground. Both challenges were directed against an award of the Court of Arbitration for Sport (CAS), the first in 2010,[564] the second in 2012.[565]

208 Until 2010 (i.e., in the first 21 years following the coming into force of the PILS in 1989), no award had ever been set aside[566] which is why public policy was rightly considered to be a toothless means of challenge.[567] Against this background, it seems justified to set forth in detail the two recent cases where public policy led to the setting aside of the award. It should further be noted that to date *no award issued in an international commercial arbitration*, which makes out the vast majority of arbitrations conducted in Switzerland, *has been set aside* based on a public policy violation. The only two awards set aside on this ground concerned *sports arbitration*, and it is these two cases we now turn to.

b. The First CAS Award Violating (Procedural) Public Policy (2010)

i. Facts and Procedural History

209 In September 2000, the football club *Sport Lisboa E Benfica – Futebol SAD* (*Benfica*) concluded an employment contract with a professional football player (*the player*). Shortly after, the parties got into an argument, whereupon the player terminated the contract with immediate effect. In December of 2000, the player entered into a new employment contract with *Club Atlético Madrid SAD* (*Atlético*).[568]

210 On 1 June 2001, *Benfica* – based on the 1997 FIFA Regulations for the Status and Transfer of Players – requested compensation from *Atlético* before the competent institution, i.e., FIFA (*Fédération Internationale de Football Association*). On 26 April 2002, the FIFA Special Committee awarded to *Benfica* compensation of USD 2.5 million for having trained and promoted the player. *Atlético* then appealed against that decision in June 2002 before the Commercial Court of the Canton of Zurich (*Zurich Commercial Court*). In the decision of 21 June 2004, the Court held that the 1997 FIFA Regulations for the Status

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561 BGE 138 III 322 para. 4.2. The personal development of any person, the Court held, is also protected by the constitutional right of economic freedom, which in particular comprises the right to freely choose a given profession and to have free access to an occupation and the freedom to exercise that occupation under Art. 27(2) FC (cf. BGE 138 III 322 para. 4.3.1).

562 See, e.g., Bucher, paras. 103-158 at Art. 190; Berger/Kellerhals, paras. 1594-1618; Kaufmann-Kohler/Rigozzi, pp. 303-304, 522-532; and, in particular, the doctoral thesis of Arfazadeh (*Ordre Public et Arbitrage International à l'Epreuve de la Mondialisation*, Zurich 2006).

563 I.e., right after the right to be heard under Art. 190(2)(d) PILS from 1989 to 2009 (in the period from 2006 to 2009, public policy even was the most often invoked ground; cf. Dasser, *ASA Bull. 2010*, pp. 86-87).

564 BGE 136 III 345 (for a detailed summary of this case, cf. below, paras. 209-218).

565 BGE 138 III 322 (for a detailed summary, cf. below, paras. 219-232).

566 Cf. Dasser, *ASA Bull. 2010*, pp. 87-88.

567 Cf. Dasser, *ASA Bull. 2010*, p. 87; Dasser, *ASA Bull. 2007*, p. 456: "*Although the public-policy defense is rather popular with parties and notoriously popular in legal writing, it is virtually toothless: Not once over the entire 17-year period has the Federal Court deemed a Swiss arbitral award to violate public policy.*"; cf. also BGE 132 III 389 para. 2.1: "*[...] l'annulation d'une sentence arbitrale internationale pour ce motif de recours est chose rarissime [...].*"; in similar terms BGer. 4P.54/2006 para. 3.1: "*Derart schwerwiegende Verstösse sind immerhin so selten, dass sie in der Praxis kaum je bejaht worden sind [...].*"; cf. further Johnson, p. 153.

568 BGE 136 III 345 para. A.

and Transfer of Players (*FIFA Regulations*) were in violation of both European and Swiss competition law. Therefore, the Court concluded, the FIFA Regulations were null and void. As a consequence, the FIFA Special Committee decision of 26 April 2002 was also deemed to be null and void. No appeal was filed against the 21 June 2004 decision of the Zurich Commercial Court.[569]

211 Subsequently, *Atlético* entered into an agreement with FIFA in August 2004 through which FIFA committed itself to take into consideration the Zurich Commercial Court decision should *Benfica* again advance claims in the same matter.[570] In October 2004, *Benfica* – once again – advanced a claim in connection with the same dispute and requested a compensation in the amount of approximately EUR 3.1 million for training and/or promoting the player. The FIFA Special Committee dismissed *Benfica's* request in February 2008.[571]

212 In January 2009, *Benfica* filed an appeal with the Court of Arbitration for Sport (CAS). The appeal was directed against the FIFA Special Committee decision of February 2008. *Atlético* moved for the dismissal of the appeal and, amongst others, invoked the *res judicata* effect of the Zurich Commercial Court decision.[572]

213 On 31 August 2009, the CAS allowed the appeal in part and ordered *Atlético* to pay EUR 400'000 to *Benfica*.[573] *Atlético* then challenged the CAS award before the Swiss Federal Supreme Court and requested that the CAS award be set aside[574] because it infringed public policy under Art. 190(2)(e) PILS in that it failed to respect the *res judicata* effect of the Zurich Commercial Court decision.[575]

ii. The Supreme Court Decision

214 The Supreme Court first reiterated that public policy had a substantive as well as a procedural content. An infringement of procedural public policy presupposes that the award be in breach of fundamental and generally recognized principles of procedure, the disregard of which is intolerably contrary to the sense of justice so that the award seems to be absolutely incompatible with the legal system and values applying in a state of law.[576] An arbitral tribunal, the Court further held, violates procedural public policy if it disregards in its award the final and binding force[577] of a previous decision, or if it deviates in its final award from its own previously expressed view, which was part of an interim decision in which it determined a substantive preliminary question.[578]

215 The Court further emphasized that the legal effects of a final and binding decision were limited to, and only encompassed, the operative part of the decision at issue.[579] The reasons of the decision, by contrast, had no binding effect with regard to another dispute but, if need be, could be considered to determine the scope of the operative part.[580]

216 The Supreme Court then found that the CAS had wrongly rejected *Atlético's res judicata* objection.[581] In summary, the Court held that – contrary to the allegations advanced by the CAS – it was irrelevant with regard to the legal force of the Zurich Commercial Court decision that those proceedings were not

569 BGE 136 III 345 para. B.a.
570 BGE 136 III 345 para. B.a (at the end).
571 BGE 136 III 345 para. B.b.
572 BGE 136 III 345 para. B.c.
573 BGE 136 III 345 para. B.c (at the end).
574 BGE 136 III 345 para. C.
575 BGE 136 III 345 para. 2.
576 BGE 136 III 345 para. 2.1, with reference to BGE 132 III 389 para. 2.2.1; BGE 128 III 191 para. 4a; BGE 126 III 249 para. 3b.
577 I.e., "*materielle Rechtskraft*" in German; "*forza di cosa giudicata materiale*" in Italian; "*autorité de la chose jugée*" in French.
578 BGE 136 III 345 para. 2.1, with reference to BGE 128 III 191 para. 4a; cf. also BGE 127 III 279 para. 2b.
579 I.e., the "*Urteilsdipositiv*" in German.
580 BGE 136 III 345 para. 2.1, with references to BGE 128 III 191 para. 4a; BGE 125 III 8 para. 3b; BGE 123 III 16 para. 2a.
581 BGE 136 III 345 para. 2.2: "*Das TAS hat den Einwand der res iudicata im schiedsgerichtlichen Verfahren zu Unrecht verworfen.*"

an arbitral procedure but "*an independent Swiss domestic procedure aiming to contest a decision rendered by a Swiss law association*", as the CAS put it. The only reason why *Atlético*, at the time, did not challenge the original FIFA Special Committee decision of 26 April 2002 before an arbitral tribunal was that the challenge of such decisions before the CAS was not yet provided for in the FIFA statutes. As a result, the FIFA Special Committee decision had to be challenged before a state court pursuant to Art. 75 CC.[582]

217 In both the Zurich Commercial Court as well as the CAS proceedings the question at stake was the lawfulness of the FIFA Special Committee decision on the remuneration which *Benfica* claimed from *Atlético*. The Zurich Commercial Court, for the reasons set forth above, nullified the (first) Special Committee decision, and this decision was final and binding so that the (second) Special Committee decision had to be based on the Zurich Commercial Court's decision. At any rate, it would not have been admissible for the Committee to disregard that decision and award a remuneration to *Benfica* based on the very FIFA Regulations of 1997 which the Commercial Court had expressly declared to be null and void. Therefore, the (second) Committee rightly dismissed *Benfica's* request, the Supreme Court found. In awarding to *Benfica* EUR 400'000 based on Art. 14 of the 1997 FIFA Regulations, the CAS disregarded the Zurich Commercial Court decision, which had nullified the Special Committee's decision. The Supreme Court, in passing, also mentioned that the aim of the *res judicata* rule was to avoid conflicting decisions on the same matter in different proceedings.[583]

218 The CAS decision awarding a remuneration based on the 1997 FIFA Regulations disregarded the legal force of the Zurich Commercial Court decision, and thus violated the *res judicata* principle, the Court concluded. Accordingly, the CAS award was incompatible with procedural public policy[584] and therefore was set aside.[585]

c. *The Second CAS Award Violating (Substantive) Public Policy (2012)*

i. Facts and Procedural History

219 On 2 July 2007, a professional football player from Brazil (F. da Silva Matuzalem, *the player*), terminated the employment contract concluded with a Ukrainian football club (FC *Shakhtar* Donetsk) with immediate effect two years before the agreed duration. The termination was neither based on just cause[586] nor on sporting just cause.[587] On 16 July 2007, the Spanish football club Real Zaragoza SAD (*Zaragoza*) warranted to the player to indemnify the player for any compensation claims deriving from his premature termination of the contract. On 19 July 2007, the player entered into a new three-year employment contract with *Zaragoza*. A year later, the player was transferred temporarily from *Zaragoza* to the Italian football club SS Lazio Spa (*Lazio*) for the 2008/2009 season. On 23 July 2009, *Zaragoza* consented to the definite transfer of the player to *Lazio*.[588]

220 On 2 November 2007, the FIFA Dispute Resolution Chamber awarded to *Shakhtar* damages of EUR 6.8 million (plus 5 % interest) due to the player's termination in breach of contract. In May 2009, the CAS partly annulled the FIFA decision and ordered the player and *Zaragoza* – as joint and several debtors – to payment of approximately EUR 11.8 million (plus 5 % interest). In June 2010, the Supreme Court rejected an appeal filed against this decision by the player and *Zaragoza*.[589]

221 On 14 July 2010, the FIFA Disciplinary Committee informed the player and *Zaragoza* that (i) disciplinary proceedings were about to be instigated because they had not complied with the CAS award of

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[582] BGE 136 III 345 para. 2.2.1.
[583] BGE 136 III 345 para. 2.2.2.
[584] BGE 136 III 345 para. 2.2.4.
[585] Cf. BGer. 4A_490/2009 para. 3 (not published in BGE 136 III 345); on this decision, cf. also Johnson, p. 153.
[586] I.e., "*wichtiger Grund*" in German.
[587] I.e., "*sportlich triftige Gründe*" in German.
[588] BGE 138 III 322 paras. A.a.-A.b.
[589] BGE 138 III 322 para. A.c.

May 2009 and (ii) sanctions pursuant to Art. 64 of the 2009 FIFA Disciplinary Code would be imposed. The Code, inter alia, provided the following:

> "Article 22 Ban on taking part in any football-related activity"
>
> A person may be banned from taking part in any kind of football-related activity (administrative, sports or any other). (…)
>
> Section 8. Failure to respect decisions
>
> Article 64
>
> 1. Anyone who fails to pay another person (such as a player, a coach or a club) or FIFA a sum of money in full or part, even though instructed to do so by a body, a committee or an instance of FIFA or CAS (financial decision), or anyone who fails to comply with another decision (non-financial decision) passed by a body, a committee or an instance of FIFA or CAS:
>
> a) will be fined at least CHF 5,000 for failing to comply with a decision;
>
> b) will be granted a final deadline by the judicial bodies of FIFA in which to pay the amount due or to comply with the (non-financial) decision;
>
> c) (only for clubs:) will be warned and notified that, in the case of default or failure to comply with a decision within the period stipulated, points will be deducted or demotion to a lower division ordered. A transfer ban may also be pronounced.
>
> 2. If the club disregards the final time limit, the relevant association shall be requested to implement the sanctions threatened.
>
> 3. If points are deducted, they shall be proportionate to the amount owed.
>
> 4. A ban on any football-related activity may also be imposed against natural persons. (…)"

222 *Zaragoza* subsequently informed the FIFA Disciplinary Committee that it was having serious financial difficulties, which could lead to bankruptcy. The player, on his part, sent to the Committee a copy of a letter in which he asked *Zaragoza* to pay to *Shakhtar* the amount due and a further copy of the above-mentioned warranty *Zaragoza* had issued in favor of the player to indemnify him for any compensation claims deriving from the contract termination.[590]

223 On 31 August 2010, the FIFA Disciplinary Committee, amongst others, condemned both the player and *Zaragoza* for non-compliance with the CAS May 2009 decision. The Committee granted the player a final deadline to pay the amount due within 90 days, failing which the player – upon simple request from the creditor *Shakhtar* – would be banned from any football-related activity:

> "If payment is not made by this deadline, the creditor may demand in writing from FIFA that a ban on taking part in any football related activity be imposed on the player (…) and/or six (6) points be deducted from the first team of the club Real Zaragoza SAD in the domestic league championship. Once the creditor has filed this/these requests, the ban on taking part in any football-related activity will be imposed on the player (…) and/or the points will be deducted automatically from the first team of the club Real Zaragoza SAD without further formal decisions having to be taken by the FIFA Disciplinary Committee. The association(s) concerned will be informed of the ban on taking part in any football-related activity. Such ban will apply until the total outstanding amount has been fully paid."

224 A payment of *Zaragoza* in the amount of EUR 500'000 followed on 1 September 2010. However, neither *Zaragoza* nor the player made any further payments.[591] Both *Zaragoza* and the player then challenged the decision of the FIFA Disciplinary Committee in vain before the CAS. On 29 June 2011, the CAS not

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590 BGE 138 III 322 para. B.a.

591 BGE 138 III 322 para. B.a.

only rejected both appeals but also confirmed the challenged decision,[592] whereupon the player moved for the setting aside of the CAS award.[593]

ii. The Supreme Court Decision

225 The Court first reiterated the standard definition of substantive public policy[594] but stressed that the list of principles mentioned in that definition (such as *pacta sunt servanda*) was not exhaustive. In particular, a violation of Art. 27 Swiss Civil Code (CC) could potentially constitute a public policy infringement, the Court held.[595]

226 Given that he was not in a position to pay EUR 11.8 million to his former employer *Shakhtar*, an indefinite worldwide occupational ban would be imposed on him as professional football player in case *Shakhtar* as creditor so requested, the player submitted. This, the player further argued, constituted (i) a serious violation of the freedom of profession provided for in Art. 27(2) Swiss Federal Constitution (FC) as well as in international conventions; and (ii) an excessive restriction of his personal freedom as established in Art. 27 CC.[596]

227 The Court stated that the personality of human beings as fundamental legal value must be protected by the legal system. In Switzerland, the personality is protected under the constitutional right of personal freedom (Art. 10(2) FC), which includes all liberties that are essential elements of a person's free development.[597] The personal development, inter alia, is also protected by the constitutional right of economic freedom, which in particular comprises the right to freely choose a given profession and to have free access to an occupation and the freedom to exercise that occupation (Art. 27(2) FC).[598] Such protection of the personal development not only exists towards limitations imposed by the state, but also towards interferences of private persons, and it is widely recognized that a person cannot fully divest himself (or herself) of this freedom and that there are limits as to restricting that freedom through a contract. The principle provided for in Art. 27(2) CC is one of the fundamental and widely recognized values, which according to the prevailing view in Switzerland should be basic to any legal system, the Court held.[599]

228 From a Swiss legal perspective, a contractual restriction is excessive in terms of Art. 27(2) CC if the obligee is left at the mercy of somebody else, or where the obligee's economic freedom is abrogated or limited to an extent which puts at risk his or her financial subsistence,[600] the Court further held.[601] Although public policy is not tantamount to unlawfulness, and a public policy violation is subject to much narrower conditions than arbitrariness, an excessive engagement of the mentioned type can infringe public policy if it constitutes an obvious and severe violation of the obligee's personality.[602]

229 The Court then emphasized that the aforementioned limits for engagements not only applied to contractual agreements, but also to statutes and decisions of corporate bodies.[603] Pursuant to the long-

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592 BGE 138 III 322 para. B.b.

593 BGE 138 III 322 para. C.

594 On this definition, see para. 163 above.

595 BGE 138 III 322 para. 4.1, with references to BGer. 4A_458/2009 para. 4.4.3.2; BGer. 4A_320/2009 para. 4.4; BGer. 4P.12/2000 para. 5b/aa.

596 BGE 138 III 322 para. 4.2.

597 The Court referred to its established case law, i.e., BGE 134 I 209 para. 2.3.1 and BGE 133 I 110 para. 5.2 (cf. BGE 138 III 322 para. 4.3.1).

598 In this regard, the Court referred to BGE 136 I 1 para. 5.1 and BGE 128 I 19 para. 4c/aa (cf. BGE 138 III 322 para. 4.3.1).

599 BGE 138 III 322 para. 4.3.1 at the end.

600 For a case, where an excessive restriction within the meaning of Art. 27(2) CC was denied, see BGer. 4A_320/2009 para. 4.4 (5-year commitment of professional football player as high salary earner with a football club).

601 Reference was made to BGE 123 III 337 para. 5 and BGer. 4P.167/1997 para. 2a (cf. BGE 138 III 322 para. 4.3.2).

602 The Court, inter alia, referred to BGer. 4A_458/2009 para. 4.4.3.2; BGer. 4A_320/2009 para. 4.4; and BGer. 4P.12/2000 para. 5b/aa (cf. BGE 138 III 322 para. 4.3.2 at the end).

603 This was already established in BGE 104 II 6 para. 2.

standing Supreme Court case law, sanctions imposed by associations which not only ensure the proper course of the game, but actually touch on the legal interests of the persons concerned are subject to judicial review.[604] This particularly applies where such sanctions seriously impair the personal right to economic development. The Court referred to its case law under which an association's right to exclude a member is restricted by the personality right of its members if the association appears in public as the authoritative body in the pertinent professional or economic branch.[605]

230 This, the Court further stated, especially applies to sports associations.[606] In this type of scenario, the association's right to exclude a member not only is scrutinized from the abuse of right perspective. Rather, in light of the personality right, a balance must be struck between the interests at stake to decide whether an important reason justifies the exclusion.[607] The aforementioned principles, the Court stressed, also apply to associations incorporated under Swiss law having their seat in Switzerland, who – like FIFA – regulate international sports. Measures of such sports associations seriously impairing the economic development of natural persons are admissible only in cases where the interests of the association in question outweigh the interests of the member whose personality right would be infringed.[608]

231 The Court held that the sanction in dispute – which the CAS based on Art. 64 FIFA Disciplinary Code – served the purpose of enforcing the decision on the damage claim for breach of contract. Pursuant to the sanction, the player would, upon simple request of the creditor (*Shakhtar*), be banned from any and all football-related activity until the claim of over EUR 11 million (plus interests of 5 %, i.e., yearly EUR 550'000) is paid. The Court then questioned whether the measure was fit for accomplishing the envisaged goal (i.e., the payment of the amount due) given that the player had assured that he was not in a position to pay the sum and in view of the fact that the ban would preclude the player from earning any income in his own profession to fulfill his payment obligation. Be that as it may, the Court concluded that the sanction – in any event – was not necessary for enforcing the damage claim given that the former employer of the player (*Shakhtar*) was at liberty to seek enforcement through the *1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, which also applied in Italy, the country where the player currently resided. But the sanction, in the Court's view, was also inadmissible in that the interests which FIFA was intending to force through could not justify the serious infringement of the player's personality right. The abstract goal of enforcing the principle that contracts must be kept (*pacta sunt servanda*) insofar as the commitments of football players towards their employers are concerned clearly carried much less weight than the indefinite and geographically unlimited professional ban of the player from all football-related activity.[609]

232 The unlimited occupational ban based on Art. 64(4) FIFA Disciplinary Code constituted an obvious and severe impairment of the player's personality right and disregarded the essential limitations that contractual engagements must respect under Art. 27(2) CC. In case of non-payment, the challenged award not only would leave the player at the mercy of his former employer, but would curtail his economic freedom to an extent that would put at risk his financial subsistence, without this being justified by any predominant interests of FIFA (or any of its members). In view of the announcement of such sanction by the CAS in the challenged award, the award amounted to an obvious and severe violation of the personality right and was incompatible with public policy within the meaning of Art. 190(2)(e) PILS, the Court concluded.[610] Consequently, the player's challenge was allowed and the CAS award set aside.[611]

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[604] BGE 120 II 369 para. 2; BGE 119 II 271 para. 3c; BGE 118 II 12 para. 2; BGE 108 II 15 para. 3 were referred to (cf. BGE 138 III 322 para. 4.3.3).

[605] Reference was made to BGE 123 III 193 paras. 2c/bb, 2c/cc (cf. BGE 138 III 322 para. 4.3.3).

[606] The Court expressly mentioned BGE 123 III 193 para. 2c/bb and BGE 134 III 193 para. 4.5 (cf. BGE 138 III 322 para. 4.3.3).

[607] Reference was made to BGE 123 III 193 para. 2c/cc and BGE 134 III 193 para. 4.4 (cf. BGE 138 III 322 para. 4.3.3).

[608] BGE 138 III 322 para. 4.3.3 at the end.

[609] BGE 138 III 322 para. 4.3.4.

[610] BGE 138 III 322 para. 4.3.5.

[611] Cf. BGer. 4A_558/2011 para. 5 (not published in BGE 138 III 322).

d. Comments

233 As mentioned, the foregoing two sports arbitration cases have so far been the only ones where an award was challenged with success based on Art. 190(2)(e) PILS. In the 21 years following the coming into force of the PILS in 1989, no award was ever set aside on this ground.[612] It must be reiterated that to date no award issued in an international *commercial* arbitration has been set aside on a public policy violation.[613] Moreover, the aforementioned two cases are particularly glaring examples of violations of fundamental and generally recognized principles (i.e., *res judicata* on the one hand, and a severe personality right infringement through an unlimited worldwide occupational ban on the other). Thus, there is no reason to assume that the Supreme Court will lower the threshold with regard to public policy, and the test will continue to be as exacting as before.

IV. Article 190(3) PILS

234 There are three types of awards that are open to challenge under Art. 190 PILS:[614] final awards, partial awards and interim awards.[615] Interim (or preliminary) awards can solely be challenged on the grounds mentioned in Art. 190(2)(a) and (b) PILS.[616] This is the main difference of interim awards compared with partial and final awards, which are open to challenge on any of the grounds stated in Art. 190(2)(a)-(e) PILS. One important common feature remains, however, in that interim awards must be challenged immediately as well (i.e., with the 30-day term mentioned above).[617]

235 Only the improper constitution of the arbitral tribunal or findings regarding its jurisdiction may thus be invoked against an interim award, while partial or final awards may be challenged on any of the grounds provided for in Art. 190(2) PILS.[618] If, for instance, only a violation of public policy under Art. 190(2)(e) is invoked, the Supreme Court will not even hear the challenge.[619]

236 However, if a party wishes to invoke another ground than Art. 190(2)(a) or (b) PILS – e.g., Art. 190(2)(d) PILS, which it cannot raise against a given interim award by virtue of Art. 190(3) PILS –, then that interim award may be challenged along with the (subsequent) final award.[620] Put differently, when challenging the final award within the 30-day term, the interim award against which the grounds not provided in Art. 190(3) PILS are raised (such as a violation of the right to be heard under Art. 190(2)(d) PILS), may also be challenged.[621]

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612 Cf. Dasser, *ASA Bull. 2010*, pp. 87-88.

613 See also Magliana, p. 171, rightly stressing that the decision in *Matuzalem* (BGE 138 III 322) is "in many respects particular to the field of sports arbitration where sanctions imposed by the relevant federations can in fact restrict the individual freedoms of the ahtletes subject to their rules and regulations. These same personal freedoms are unlikely to be at issue or otherwise implicated in commercial arbitration."; cf. also Johnson, p. 153.

614 For a detailed definition of each type, cf. the below commentary on 191 PILS, paras. 16-24.

615 BGE 136 III 597 para. 4.1; BGE 136 III 200 para. 2.3.1; BGE 130 III 755 para. 1.2.2; BGer. 4A_428/2011 para. 1.1; see also Kaufmann-Kohler/Rigozzi, paras. 671b–671 d.

616 BGE 136 III 597 para. 4.1; BGE 130 III 755 para. 1.2.2; BGer. 4A_428/2011 para. 1.1.

617 BGE 130 III 66 para. 4.3; BGE 130 III 76 para. 3.2.1; BGE 116 II 80 para. 3a; BGer. 4A_370/2007 para. 2.3.1; BGer. 4P.40/2002 para. 1a; cf. also Klett, para. 4 at Art. 77, advocating that any interim award – even one not ruling on jurisdiction or the tribunal's constitution – must immediately be challenged based on the principle of good faith. Today, this procedural maxim is expressly stated in Art. 92(2) BGG.

618 Berger/Kellerhals, paras. 1526, 1530.

619 BGer. 4P.298/2006 para. 5; cf. also BGE 130 III 76 para. 4.6; BGer. 4A_210/2008 para. 5.2.

620 BGer. 4P.140/2004 para. 1.3.

621 BGer. 4P.140/2004 para. 1.3; for a criticism of this case law, cf. Berger/Kellerhals, para. 1537; concurring: Kaufmann-Kohler/Rigozzi, para. 717; in a recent decision of 11 December 2012, the Supreme Court referred to this criticism – according to which also the grounds under Art. 190(2)(c)-(e) PILS may be invoked against an interim award if the challenge based on Art. 190(2)(a) or (b) PILS is not manifestly inadmissible (or unfounded) –, but expressly left open this question since it was not necessary to make a determination in the case at hand (cf. BGer. 4A_414/2012 para. 3.2: "*Point n'est besoin de trancher ici cette question pour deux raisons [...]*").

237 An interim (or preliminary)[622] award is a decision addressing a preliminary question, but which does not (definitely) rule on a given claim or prayer for relief. It is often stated that interim awards rule upon a *qualitative* aspect of the dispute, but *not* on a *quantitative* one (as partial and final awards do).[623] If the arbitral tribunal, for example, affirms jurisdiction, it renders an interim award. The same holds true where the tribunal finds that a given claim is not time-barred or that it affirms the liability of a party, without ruling on *quantum*.[624]

238 Interim awards do not put an end to the arbitration (neither with respect to all nor part of the claims submitted). Rather, they clarify a preliminary question, which relates to a plea aiming at terminating the arbitral proceedings either on procedural grounds (as, e.g., the tribunal's jurisdiction) or on substantive grounds (such as the principle of liability, but not quantum, or a statute of limitations), with such clarification not terminating the arbitral proceedings.[625] For this reason, interim awards do not have *res judicata effects*, even though they are binding on the arbitral tribunal that rendered the interim award in the further arbitration proceeding.[626] Nor are interim awards enforceable.[627] If the interim award confirms jurisdiction, it is however deemed to be binding on a Swiss state court or an arbitral tribunal subsequently seized with the same dispute.[628]

239 Importantly, the denomination of a decision, ruling or order as "award" is irrelevant.[629] Under the long-standing Supreme Court case law, it is not the denomination but the contents which is essential in this respect, and only decisions constituting awards in terms of Art. 189 PILS are open to challenge.[630] By contrast, a decision designated as "Procedural Order" might qualify as award and thus be open to challenge under Art. 190 PILS.[631] If the arbitral tribunal, for example, in a decision titled "procedural order" allows – or dismisses – a party's request to stay the proceedings but at the same time, and in the same "order", finds jurisdiction, this will constitute an interim award in terms of Art. 190(3) PILS, which is open to challenge in conjunction with Art. 190(2)(b) PILS.[632] The same holds true if the arbitral tribunal decides on the (contested) constitution of the arbitral tribunal in a "procedural order", which mainly deals with the stay of the proceedings. Such an "order" would be challengeable pursuant to Art. 190(3) in conjunction with Art. 190(2)(a) PILS.[633] Conversely, a request of the arbitral tribunal for payment of an advance of costs denominated as "Interim Award" (after lengthy procedural discussions on security

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622 The distinction between preliminary and interim awards has no practical relevance and both fall within the scope of Art. 190(3) PILS (cf. BGE 130 III 76 para. 3.1.3; see also Berger/Kellerhals, para. 1532; and Arroyo, *ZPO*, para. 21 at Art. 383).

623 See, e.g., BGE 130 III 76 paras. 3.1.2-3.1.3.

624 BGE 130 III 76 paras. 3.1.3; cf. also Berger/Kellerhals, para. 1531; Arroyo, *ZPO*, para. 20 at Art. 383.

625 BGE 130 III 76 para. 3.1.3; BGE 136 III 597 para. 4.1; cf. also BGer. 4P.114/2006 para. 4.2.

626 BGE 128 III 191 para. 4.a; BGE 122 III 492 para. 1b/bb; Wirth, para. 23 at Art. 188; Arroyo, *ZPO*, para. 24 at Art. 383.

627 Patocchi/Jermini, para. 8 at Art. 194; Josi, p. 34.

628 See Poudret/Besson, paras. 477, 854.

629 Cf., e.g., BGE 136 III 597 paras. 4.2, 5.1 ("Interim Award" on the advance on costs and the stay of the arbitration, which, the Court found, was not open to challenge given that it constituted a mere procedural order, and not an award).

630 BGE 136 III 597 paras. 4, 5.1; BGE 136 III 200 para. 2.3.3; BGer. 4A_428/2011 para. 1.1; BGer. 4A_614/2010 para. 2.2; BGer. 4A_600/2008 para. 2.3.

631 For a case where a decision titled "Procedural Order No. 4" was considered an award given that the arbitrators, amongst others (i.e., the refusal to stay the proceedings), had – at least impliedly – found jurisdiction, cf. BGer. 4A_210/2008 para. 2.1; concurring BGer. 4A_614/2010 para. 2.1. In the latter case, however, the "*Ordonnance de Procédure*" at issue (rejecting a request to stay the proceedings) was considered a procedural order *stricto sensu*, without the arbitral tribunal having (not even impliedly) rendered any decision as to its jurisdiction (BGer. 4A_614/2010 paras. 2.3.2, 2.4). In BGE 136 III 597 para. 4.2, the Supreme Court reaffirmed that decisions of the arbitral tribunal on the stay of the arbitral proceedings (which in and of themselves constitute procedural orders) may be challenged under Art. 190(3) PILS if the tribunal (besides deciding on the stay) also decided, even if only impliedly, on its jurisdiction.

632 BGE 136 III 597 para. 4.2; BGer. 4A_614/2010 para. 2.1; BGer. 4A_210/2008 para. 2.1.

633 Cf. BGer. 4A_614/2010 para. 2.1; BGer. 4A_210/2008 para. 2.1.

for costs) is a procedural order, which is not a definitive decision on costs. As a consequence, such decision of the arbitrators aiming at ensuring their fees is not open to challenge before the Supreme Court. Even if the arbitrators intended to authoritatively fix their fees through the said order, that would constitute an unacceptable decision in the arbitrators' own affairs.[634] The arbitrators' claims for their own fees are based on their mandate, and not on the arbitration agreement. Disputes between arbitrators and the parties arising from the *receptum arbitri* cannot be subject to the jurisdiction of the arbitral tribunal, for its jurisdiction is limited to deciding the subject-matter in dispute among the parties. Therefore, disputes among the arbitrators and the parties regarding the arbitrators' fees must be submitted to the competent state courts.[635]

240 As mentioned, interim awards are (only) open to challenge based on the grounds of Art. 190(2)(a)-(b) PILS because procedural efficiency demands that the important issues of proper constitution (including independence and impartiality)[636] and jurisdiction of the arbitral tribunal be subject to judicial review at the earliest possible stage of the arbitration.[637] The aim is to avoid the continuation of proceedings that are flawed from the outset. Consequently, interim awards on jurisdiction or the tribunal's constitution must be challenged immediately, failing which this right will be forfeited.[638]

241 If a party intends to raise a plea under Art. 190(2)(a) or (2)(b) PILS, it is of utmost importance that the interim award be challenged within the 30-day term following its notification,[639] failing which that party will forfeit the right to challenge any subsequent award (in particular, the final award) on the basis of those grounds.[640] Put differently, the plea of irregular constitution or want of jurisdiction must be raised against the (next) interim award.[641]

242 It cannot be overstated that under Supreme Court case law this duty not only applies to interim awards where the tribunal expressly recognizes its jurisdiction (or constitution), but also where it only impliedly affirms its jurisdiction (or proper constitution) when deciding a preliminary question (e.g., by refusing to stay the arbitration as requested by one of the parties).[642]

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[634] BGE 136 III 597 para. 5.2.1.

[635] BGE 136 III 597 para. 5.2.2. For an analyis of this decision, cf. Lötscher/Buhr, *ASA Bull. 2011*, pp. 120-128.

[636] Under Supreme Court case law, an arbitral tribunal lacking independence or impartiality is irregularly constituted in terms of Art. 190(2)(a) PILS (BGE 129 III 445 para. 3.1).

[637] Berger/Kellerhals, para. 1535, footnote 20.

[638] BGE 130 III 76 para. 3.2.1; BGE 130 III 66 para. 4.3; BGE 116 II 80 para. 3a; BGer. 4P.40/2002 para. 1a.

[639] Cf. Art. 100(1) BGG; see Amstutz/Arnold, para. 8 at Art. 44; Art. 190(3) PILS expressly mentions this start of the term regarding the challenge of interim awards. However, this principle applies by virtue of Art. 100(1) BGG to the challenge of any award (cf. Klett, para. 4 at Art. 77 BGG; cf. also BGer. 4A_582/2009 para. 2.1.2).

[640] BGE 120 II 155 para. 3a; BGE 118 II 508 para. 2b/bb; BGE 116 II 80 para. 3b.

[641] BGE 130 III 76 para. 3.2.1; BGE 116 II 80 para. 3a; cf. also BGer. 4A_370/2007 para. 2.3.1; Berger/Kellerhals, para. 1536.

[642] BGE 136 III 597 para. 4.2; BGE 130 III 76 para. 3.2.1; BGer. 4A_428/2011 para. 1.1; BGer. 4A_614/2010 para. 2.1; BGer. 4A_210/2008 para. 2.1; BGer. 4A_370/2007 para. 2.3.1.