ABSTRACTS OF SWISS SUPREME COURT CASES ON ARBITRATION 2018

REPORTED IN ASA BULLETINS 1-4/2018

Introduction to the Case Law Section 1/2018

1. Judgment 4A_150/2017[1] was handed down in a dispute between two **reinsurance** companies. One of them (Reinsurer A) made an offer to an international mining group to serve as its fronter, *i.e.* reinsurer of the group's primary insurer. The offer was turned down and the group took Reinsurer B as its fronter. However, the mining group accepted the Reinsurer A as the re-insurer of the fronter. Reinsurer A and Reinsurer B entered into an insurance contract which was to a large extent back-to-back with the main reinsurance contract between the primary insurer and the fronter (Reinsurer B).

However, the **dispute resolution clauses in the two contracts were different**. The former contained a forum selection clause, the latter an arbitration agreement. A dispute subsequently arose between the two reinsurers. Reinsurer B brought arbitration proceedings against its re-insurer (Reinsurer A) despite the forum selection clause in the contract between them. According to Reinsurer B, it was customary in the reinsurance business for the reinsurance contract to mirror the main insurance contract. In addition Reinsurer A had itself initially offered to reinsure the primary insurer and was prepared to accept arbitration as a dispute resolution mechanism under the main insurance contract. Reinsurer A resisted arbitral jurisdiction and argued that the forum selection clause was plainly applicable. The arbitral tribunal admitted its jurisdiction. It found that although there was no evidence for an actual meeting of minds, it had to be assumed in good faith that the plaintiff had agreed to be bound by the arbitration agreement. Reinsurer A sought to annul the award before the Swiss Federal Supreme Court.

The Court **set the award aside for lack of arbitral jurisdiction**. It found that the **existence of a forum selection clause was evidence that the parties had not meant to import the arbitration clause from the main contract**, whatever the usages in the reinsurance industry were. Nor was there room for the application of the principle of effective interpretation ("*Utilitätsprinzip*") according to which the courts should construe an alleged

[1] Swiss Federal Supreme Court, Decision 4A_150/2017 of 4 October 2017, ASA Bull. 1/2018, p. 116.

arbitration clause in a manner which affirms its validity. **The usefulness of an arbitration clause does not entail its existence where none is established.**

2. A football player challenged a CAS award on the ground of his agent's alleged **conflict of interest when representing the player** at the hearing. The sole arbitrator, he argued, should have realized that the agent represented not only the football player, but also the football club that wanted to engage the player. The Swiss Federal Supreme Court found that the player had not proven the existence of a conflict, nor established his second ground that the double mandate violated public policy. The Court recalled that the **mere violation of a FIFA regulation, even a regulation that is mandatory for the players, is not tantamount to a public policy violation**.[2]

3. In case 4A_672/2016,[3] the Swiss Federal Supreme Court found that the parties had submitted their disputes to resolution "***by the International Chamber of Commerce of Geneva, under the Rules of Conciliation and Arbitration of the International Chamber of Commerce***". The plaintiff before the Supreme Court (defendant in the arbitration) had taken the view (both in the arbitration and in Court) that this referred to arbitration administrated by the Geneva Chamber of Commerce and Industry, and had objected without success to the ICC arbitrator's jurisdiction.

4. B. SA and A. SA signed a Business Consultancy Agreement and a Due Diligence and Advisory Services Agreement with a view to a possible corporate acquisition. It appeared from these contracts that a further company, C. SA, was interested in acquiring shares of Company D. Both contracts contained an arbitration clause.

B. SA filed a request for arbitration against A. SA. In its answer to the request for arbitration, A. SA argued that the arbitrator had no jurisdiction since **A. SA had been acting merely as an agent on behalf of C. SA and therefore was not a party** to the arbitration clause. Moreover, A. SA argued that the contracts imposed a duty to seek an amicable solution prior to commencing arbitration proceedings.

By an interim award dated 6 May 2013, the sole arbitrator rejected A. SA's jurisdictional objections. A. SA filed a request to set aside the interim

---

2 Swiss Federal Supreme Court, Decision 4A_668/2016 of 24 July 2017, ASA Bull. 1/2018, p. 133.

3 Swiss Federal Supreme Court, Decision 4A_672/2016 of 24 January 2017, ASA Bull. 1/2018, p. 145. See also Philippe HOVAGUIMIAN, *Non-reviewable Facts in Swiss Annulment Proceedings: Undermining the Safeguards of Art. 190 PILA*, ASA Bull. 1/2018, p. 89.

award before the Swiss Federal Supreme Court. A. SA argued that the arbitral tribunal had wrongly allocated the burden of proving that it was not a party to the arbitration clause to it rather than requiring that its opponent prove that it was a party to the arbitration clause.

The Swiss Federal Supreme Court decided that the plaintiff's request was inadmissible, as the circumstances upon which the request was based did not appear in the award. Moreover, the Supreme Court observed that questions related to the **allocation of the burden of proof** become moot once the arbitrator has freely assessed the evidence. The Court also upheld the arbitrator's finding that the plaintiff was a party to the arbitration clause in accordance with the reliance principle, *i.e.* **B. SA was entitled to rely in good faith on the appearance created by A. SA that it was B. SA's contractual counterpart**, and not C. SA **(despite the fact that the first contract stated that A. SA was "acting on behalf of C. SA**").

In a second line of argument, A. SA alleged again before the Supreme Court that the sole arbitrator had disregarded **the parties' pre-arbitral obligation to seek an amicable solution**, as provided for in the arbitration clauses. The mere fact that the parties were not even able to arrange a meeting in order to discuss an amicable settlement proves that it would have been impossible to find such a solution. This clause could therefore not be invoked as a ground for challenging the admissibility of the Request for Arbitration. The Court considered that it was not necessary, given this outcome, to analyse which party would have been required to ask for the suspension of the arbitration proceedings to allow settlement talks to take place.[4]

5. In this post-M&A dispute, the buyer, who had acquired the shares of a bank from the seller, brought (domestic) arbitration proceedings against the seller.[5] The sole arbitrator held that the relevant **share purchase contract was not binding upon the buyer due to the seller's fraud (Arts. 23 and 28 CO)**, the price of the shares being based on a false balance sheet. Criminal proceedings were also initiated. The seller (respondent in the arbitration), and plaintiff before the Swiss Federal Supreme Court, challenged the award for arbitrariness on two grounds.

First, the seller argued that the award was based on inconclusive witness statements (*i.e.* the witnesses were interested in protecting their own

---

4 Swiss Federal Supreme Court, Decision 4A_302/2013 of 5 June 2014, ASA Bull. 1/2018, p. 154. An English translation is available on www.swissarbitrationdecisions.com.

5 Swiss Federal Supreme Court, Decision 4A_377/2013 of 11 February 2014, ASA Bull. 1/2018, p. 162. An English translation is available on www.swissarbitrationdecisions.com.

position rather than assisting the arbitral tribunal). The arbitral tribunal should therefore not have relied exclusively on the witness evidence, but should instead have sought additional evidence to corroborate the witnesses' statements. The Supreme Court rejected the plaintiff's claim under this ground on the basis that it was tantamount to an inadmissible attack on the arbitral tribunal's weighing of evidence.

Second, the buyer had not offered to return the shares in exchange for the reimbursement of the purchase price, and the arbitral tribunal had ordered the reimbursement of the purchase price without ordering the buyer to return the shares. According to the seller, this constituted a breach of federal law. The Court found that federal law does not require a party who seeks to unwind a bilateral contract to make the unwinding conditional upon the return of its own payment. Moreover, even if legal writers and case law required the arbitrator to order the restitution of the shares, her failure to do so was not sufficient to justify annulling the award for arbitrariness.

6. In Decision 4A_316/2017,[6] the Swiss Federal Supreme Court rejected a challenge against a CAS award. A football player had sued his former club for unpaid salary. The arbitral tribunal found that the team had not established the amount of salary actually paid and had not objected to the player's calculation. Before the Supreme Court, the club challenged these findings as violations of its right to be heard. The Court ruled that, in principle, **the arbitral tribunal's assessment of the evidence, even if wrong, cannot be reviewed** before the Supreme Court. In addition, it found that the **findings made by the arbitral tribunal in relation to such matters as the admissions made by a party, the evidence tendered, the legal arguments raised or the relief sought are binding on the Court**.

This is somewhat unsatisfactory in cases where the arbitral tribunal's findings are plainly mistaken. It is submitted that, in such cases, the Court should examine whether the arbitrators have overlooked a relevant argument (which is a ground to set aside an award).

7. In Decision 4A_40/2017,[7] the plaintiff alleged that the arbitral tribunal had issued an ***ex aequo et bono*** **award without being authorised to do so**. The award was not based on *ex aequo et bono*. Moreover, this was not

---

6 Swiss Federal Supreme Court, Decision 4A_316/2017 of 2 August 2017, ASA Bull. 1/2018, p. 167.

7 Swiss Federal Supreme Court, Decision 4A_40/2017 of 8 March 2017, ASA Bull. 1/2018, p. 172.

an issue of arbitral jurisdiction, the ground for setting aside which the plaintiff had asserted.

8. The (Swiss Rules) award under scrutiny in Supreme Court case 4A_12/2017[8] found in the operative part that a "*freezing order dated 14 January 2014 … has been validly validated*". **Validating freezing orders, however, is the sole prerogative of the debt collection offices, and whether or not a freezing order had been validated is not arbitrable.** The Supreme Court did not annul the award, instead finding that it had no legal effect and that the plaintiff therefore had no reasonable interest in having the award set aside. The Court also expanded on a few interesting points including **whether a party needs to specifically raise the argument that the matter is not arbitrable** (just as it must specifically object to the arbitral tribunal's jurisdiction (art. 186(2) PIL Act)) or whether the arbitral tribunal should examine arbitrability on its own motion, a question which the Court ultimately left open.

The plaintiff also complained that its right to be heard had been violated. The arbitral tribunal had not heard the ultimate owner of the defendant company as a witness, because the procedural rules required all witnesses to submit a written witness statement which the ultimate owner of the defendant had not done. The Court expressed doubts that the procedural rules had the effect of denying the plaintiff's right to be heard. It noted that the **plaintiff had not tried to obtain a written statement from the owner, nor sought the assistance of the arbitral tribunal or the *juge d'appui*** (Article 186 PIL Act) to have him appear at the hearing.

9. In case 4A_277/2017,[9] the Swiss Federal Supreme Court recalled the principles governing a party's (limited) right to request the appointment of an expert by the arbitral tribunal, and the **circumstances in which the arbitral tribunal can refuse to appoint an expert**.

10. In case 4A_206/2017,[10] the **Supreme Court refused to hear a matter** brought by a national Olympic Committee against the governing body, United World Wrestling for alleged wrong refereeing at the Rio Olympics. The challenged **CAS decision was not an arbitral award**.

---

8 Swiss Federal Supreme Court, Decision 4A_12/2017 of 19 September 2017, ASA Bull. 1/2018, p. 173.

9 Swiss Federal Supreme Court, Decision 4A_277/2017 of 28 August 2017, ASA Bull. 1/2018, p. 186.

10 Swiss Federal Supreme Court, Decision 4A_206/2017 of 6 October 2017, ASA Bull. 1/2018, p. 193.

11. In Decision 4A_384/2017,[11] the Court confirmed that only arbitral awards – as opposed to procedural orders – can be challenged. However, a decision going by the name of an award or having the effect of an award does not need to have been issued by the arbitral tribunal. In the case at hand, the President of the CAS's Appeals Division **had issued a termination order following a late appeal. The Supreme Court found that the order was tantamount to an award and therefore subject to being** set aside.

The Court rejected the plaintiff's request for **legal aid** and all the grounds invoked by the plaintiff for annulment of the order. ***Infra petita*** could not be relied upon if the arbitral tribunal missed an important argument. In such circumstances, **only a failure to decide a prayer for relief can constitute a ground for a challenge**.

The plaintiff's reliance on the ECHR was also rejected both on the merits and because the **ECHR is not directly applicable to arbitral awards**.

12. In the arbitration leading to Supreme Court decision 4A_704/2015,[12] a sole arbitrator sitting under the aegis of the ICC had found that **a contract between the parties was null and void for fraud**. The claimant had sued the respondent and its director for payment of fees under an engagement letter governed by Swiss law. The defendant had indeed agreed to share with the claimant certain commissions it was set to receive under a pharmaceutical distribution contract that it thought the claimant had helped set up. However, it turned out that the claimant's representative had fraudulently let the defendant believe that he had a decisive bearing on whether the distribution agreement would be concluded or not. The defendant voided the engagement letter. **The arbitral tribunal found that it had no jurisdiction over the director of the defendant who was not a party to the engagement letter.** As to the merits, the tribunal found that there had indeed been fraud on claimant's part. All the claimant's claims were rejected.

Before the Supreme Court, the claimant argued that the arbitrator had not been impartial. This, it claimed, was shown by, for example, a lack of

---

[11] Swiss Federal Supreme Court, Decision 4A_384/2017 of 4 October 2017, ASA Bull. 1/2018, p. 197. See also Philippe HOVAGUIMIAN, *Non-reviewable Facts in Swiss Annulment Proceedings: Undermining the Safeguards of Art. 190 PILA*, ASA Bull. 1/2018, p. 89.

[12] Swiss Federal Supreme Court, Decision 4A_704/2015 of 16 February 2017, ASA Bull. 1/2018, p. 208. See also Philippe HOVAGUIMIAN, *Non-reviewable Facts in Swiss Annulment Proceedings: Undermining the Safeguards of Art. 190 PILA*, ASA Bull. 1/2018, p. 89.

responsiveness and how she treated document production requests. The Supreme Court found **no trace of procedural misconduct on the arbitrator's part**, but that the **procedural conduct of both parties had been wholly inadequate** and that they were ill placed to complain about the arbitrator's handling of the proceedings. In any event, it was not for one of the parties to dictate how the arbitral tribunal should run the proceedings.

The defendant had requested the Federal Supreme Court to issue a **disciplinary sanction** against the claimant for its procedural conduct. This is the Supreme Court's *sua sponte* prerogative and not an admissible prayer. In any event, the Court noted that the defendant was criticizing the claimant's conduct before the arbitral tribunal and not its conduct before the Supreme Court.

13. Supreme Court decision 4A_131/2017[13] of 21 September 2017 deals with a **pathological forum selection clause**. The court chosen by the parties subsequently became unavailable for hearing the parties' dispute («*Als Gerichtsstand für allfällige Streitigkeiten aus vorliegender Vereinbarung wird das Handelsgericht Zürich vereinbart*.»). The question arose whether jurisprudence regarding pathological arbitration clauses could be applied by analogy to defective forum selection clauses. The Supreme Court rejected this view. Arbitration agreements embody a waiver of the parties' constitutional right to bring the dispute before the municipal courts. Therefore a **full analogy between defective forum selection clauses and defective arbitration clauses is not warranted. Arbitration agreements have to be construed more restrictively**.

MATTHIAS SCHERER
EDITOR IN CHIEF

---

[13] Swiss Federal Supreme Court, Decision 4A_131/2017 of 21 September 2017, ASA Bull. 1/2018, p. 220.

Introduction to the Case Law Section 2/2018

1. In its decision 4A_7/2018[14], the Federal Supreme Court confirmed its practice regarding the **subject-matter arbitrability of domestic employment law disputes**. A dispute had arisen under an employment agreement between a coach and a Swiss football club providing for CAS arbitration. The coach had initiated conciliation proceedings before the Swiss Football Association but when they failed he seised the state court rather than the CAS. The club was unsuccessful at resisting the jurisdiction of the courts at first instance based on the arbitration clause. The club accordingly appealed to the Federal Supreme Court. The Supreme Court ruled that if a domestic employment law dispute involves mandatory provisions according to Articles 361 and 362 CO, it is not arbitrable and the arbitration agreement is void. Arbitration is, however, possible if the arbitration agreement is entered into after at least one month of the end of the employment. On the other hand, the Court also clarified that employment disputes are special and that **arbitration clauses are not void simply because the dispute involves mandatory provisions**, such as art. 404 CO.

2. The decision 4A_260/2017[15] originated from a sports arbitration and concerned a dispute between a football club affiliated to the Royal Belgian football Association (RBFA) and FIFA. The Swiss Federal Supreme Court analysed the **validity of Third Party Ownership Agreements** ("TPO") concluded between the football club and a third-party investor. In a previous case, the Supreme Court had upheld a TPO agreement (Sporting Lisbon/Marcos Rojo).[16] Today, these agreements are prohibited by FIFA's Regulations on the Status and Transfer of Players, in order to limit the influence that actors outside the football world can exert on football. Accordingly, the agreements at hand had been sanctioned by the Disciplinary Committee of FIFA.

Ultimately, the CAS upheld the decision rendered by the Disciplinary Committee. The football club seised the Supreme Court with a request to annul the decision, **arguing that the CAS was not an independent tribunal**. The Supreme Court considered declaring the **challenge**

---

14 Swiss Federal Supreme Court, Decision 4A_7/2018 of 18 April 2018, ASA Bull. 2/2018, p. 384. See also Angela CASEY, *Zur fehlenden Schiedsfähigkeit arbeitsrechtlicher Ansprüche,* ASA Bull. 2/2018, p. 399.

15 Swiss Federal Supreme Court, Decision 4A_260/2017 of 20 February 2018, ASA Bull. 2/2018, p. 406. See also Caroline DOS SANTOS, *Swiss Federal Supreme Court Confirms Independence of CAS. Note on Decision 4A_260/2017 of 20 February 2018,* ASA Bull. 2/2018, p. 429.

16 Swiss Federal Supreme Court, Decision 4A_116/2016 of 13 December 2016, ASA Bull. 3/2017, p. 708.

inadmissible on grounds of estoppel (venire contra factum proprium) because the club had filed an appeal with the CAS while at the same time denying that the CAS was a proper arbitral tribunal.[17] The Court ultimately agreed to hear the case, but rejected the annulment request. It reaffirmed the independence of CAS, following its own findings in the leading case Lazutina.[18]

The Court rejected the argument that the award offended **competition law** rules and **public policy**. The Supreme Court also emphasized that not every violation of **Article 27 Civil Code** (economic freedom) would amount to a violation of public policy. In the case at hand, the decision could not be held contrary to public policy.

3. A telecom company terminated a Voice Over Internet Protocol ("**VoIP**") Interconnection Agreement with a service provider on the ground of alleged fraud. The service provider had allegedly created artificial calls on inoperative numbers to enhance revenues. The service provider succeeded in ICC arbitration proceedings in Geneva for the payment of damages for wrongful termination. The telecom company sought to set the award aside asserting the lack of impartiality of the sole arbitrator and a violation of its right to be heard. The telecom company took issue with the fact that the sole arbitrator had accepted certain **new exhibits filed** by the service provider **shortly before the hearing**. It also complained of unequal treatment in this regard on the basis that, a year later, documents which the telecom company sought to file were rejected as being too late.

As is often the case, the telecom company's version of events constituted a somewhat selective history of the proceedings. The Supreme Court found that the hearing had been cancelled and the telecom company had subsequently accepted the admission of the new documents to the record. No violation of the right to be heard was established. Nor was there, in the Court's view, any **unequal treatment** in 2016, because the arbitrator had in fact rejected late documents from both parties at that stage of the proceedings.

According to the telecom company the conduct of the arbitrator in the proceedings – including the arbitrator's procedural directions – revealed bias. The Court paid short shrift to this argument, recalling that, **without truly egregious conduct, an arbitrator's procedural directions, whether right or wrong, cannot raise the objective appearance of bias**.

---

17 4A_260/2017, para 1.2.2.

18 129 III 445, 27 March 2003 (Decision 4P.267/2002 of 27 May 2003, ASA Bull. 3/2003, p. 601.)

Finally, the telecom company alleged a violation of public policy and due process on the basis that the **decision of the ICC rejecting the challenge of the sole arbitrator could not be challenged and, moreover, had not been reasoned** despite the most recent set of ICC Rules allowing for reasoned decisions. The Court held that the fact that decisions of institutions cannot be challenged was not contrary to public policy. The same applied to decisions by the *juge d'appui* according to article 180(3) of the PIL Act. It also rejected the argument that the ICC Rules had been imposed as a package and that the operator could not opt out of the regime regarding arbitrator challenges.[19]

4. In case 4A_318/2017[20], the plaintiff (a football club) had been ordered by a CAS Tribunal to pay certain salary arrears to a player. Before the Swiss Federal Supreme Court, the club alleged that it had drawn the arbitral tribunal's attention repeatedly to **mandatory labor and tax law regulations** applicable in the plaintiff's country. The award did not mention these regulations at all. The plaintiff considered that its right to be heard had been violated. The **hearing had been recorded but no transcript had been prepared.** The Federal Supreme Court found that the club had not explained when exactly the regulations had been relied upon and it was not the task of the Court to listen into the recordings to try to identify the argument that the plaintiff had allegedly made. In any event, the argument would have been late under the CAS Code. Therefore, there was **no violation of the plaintiff's right to be heard.**

5. A Greek investor had won an ICC arbitration against Serbia. Serbia sought to set the award aside before the Supreme Court. Eventually the parties settled. Serbia withdrew its request. The **parties asked the Supreme Court not to charge any court fees**. The Court in its termination order found no reasons that would have justified such an exemption.[21]

6. An award in a **BIT arbitration under the PCA rules with its seat in Geneva** afforded the Swiss Federal Supreme Court an opportunity to clarify an important point. The State had filed a request to annul a jurisdictional award. The investor requested that the State pay security for the claimant's costs. The State refused to do so, arguing that under the Hague Convention on Civil Procedure of 1 March 1954 parties from member States

---

[19] Swiss Federal Supreme Court, Decision 4A_236/2017 of 24 November 2017, ASA Bull. 2/2018, p. 434.

[20] Swiss Federal Supreme Court, Decision 4A_318/2017 of 28 August 2017, ASA Bull. 2/2018, p. 451.

[21] Swiss Federal Supreme Court, Decision 4A_507/2017 of 15 February 2018, ASA Bull. 2/2018, p. 454.

do not have to pay security for costs when appearing in the courts of another member state. In a procedural order in case 4A_396/2017[22] the **Supreme Court rejected the investor's request for security**, finding that State parties could rely on the Convention too, and not only individuals.

7. Swiss law accepts that statutes of companies can refer disputes between members of the corporate entity and the company to arbitration. In Decision 142 III 220[23] the validity of **arbitration clauses** in such statutes was confirmed. Typically, such **statutory arbitration clauses** will not cover each and every dispute that relates to the company. For instance, shareholders might have entered into contracts among themselves or with third parties, which contain separate dispute resolution clauses. Delineating the scope of **conflicting dispute resolution clauses in a group of contracts** may be challenging. In case 4A_344/2017[24] three individuals had established a Swiss limited liability company (GmbH). The bylaws of the GmbH provided that all disputes in company matters concerning the GmbH between the latter and its members or management; between members; between the management and its members; and amongst the management were to be decided by an arbitral tribunal.[25] Some time after the GmbH had been established, one of the members (Mr A) bought parts from another member (Mr B), but kept them on a fiduciary basis. Mr B was to run GmbH and Mr A was entitled to a share of GmbH's profits. The fiduciary agreement between Mr A and Mr B contained a forum selection clause in favour of the courts of St. Gallen. A few years later Mr A sued Mr B for mismanagement of the GmbH. Mr B challenged the court's jurisdiction based on the arbitration agreement in the GmbH's bylaws. The first instance court rejected the defense but the appellate court upheld it considering that the dispute was closely linked to the affairs of the GmbH. Mr A sought to set the decision aside and was successful. **The Federal Supreme Court interpreted the statutory arbitration clause and found that it did not encompass private disputes between two members** under a fiduciary agreement. Even though it was closely linked to the company, the dispute did not concern a company matter, but Mr A

---

22 Swiss Federal Supreme Court, Decision 4A_396/2017 of 23 November 2017, ASA Bull. 2/2018, p. 456.

23 Swiss Federal Supreme Court, Decision 4A_492/2015 of 25 February 2016, ASA Bull. 3/2016, p. 687.

24 Swiss Federal Supreme Court, Decision 4A_344/2017 of 21 December 2017, ASA Bull. 2/2018, p. 464.

25 The clause reads as follows: «Alle Streitigkeiten in Gesellschaftsangelegenheiten zwischen der Gesellschaft und ihren Gesellschaftern oder Geschäftsführern, unter den Gesellschaftern und zwischen diesen und der Geschäftsführung oder Streitigkeiten unter den Geschäftsführern, werden, soweit nicht nach zwingenden gesetzlichen Bestimmungen der ordentliche Richter zuständig ist, von einem Schiedsgericht erledigt,..»

and Mr B's alleged obligations under the the fiduciary agreement. The Supreme Court left open the question whether as a matter of principle it is admissible that company statutes refer private disputes between two shareholders/members to arbitration. It remanded the matter to the appellate court to determine the scope of the forum selection clause.

8. Two former partners of a defunct Geneva law firm prompted decision 4A_407/417[26]. According to the applicable arbitration agreement the head of the Geneva bar ("Bâtonnier") was to act as sole arbitrator or to designate a member of the bar commission ("Conseil de l'ordre") to act. Moreover, **pre-arbitral mediation was required** under the agreement. The defendant resisted arbitration on the ground that the claimant had not conducted mediation proceedings. However, when the claimant proposed a mediator, the defendant did not reply. The arbitrator refused to order mediation, but was removed by the Geneva *juge d'appui* after three years' delay in the case. The defendant wrote to the new arbitrator inviting him to declare the arbitration inadmissible based on a new jurisprudence (Decision 142 III 296[27] where the Swiss Federal Supreme Court had enforced a pre-arbitral mediation agreement). The new arbitrator responded in a letter that, according to the said decision, the sanction of a violation of the pre-arbitral mediation requirement is merely a suspension of the arbitration. If the parties wished, he would grant them time for the mediation and stay the arbitration. The defendant challenged the letter before the Supreme Court considering that it was tantamount to an award on jurisdiction. While the matter was pending the arbitrator resigned.[28]

Since no member of the Bar commission was willing to act as arbitrator, the Geneva *juge d'appui* appointed a Geneva lawyer who was not a commission member. The new arbitrator found that he was bound by the first arbitrator's decision not to refer the parties to mediation and proceeded with the case. The **defendant objected that the decision of the *juge d'appui* was null and void and that the arbitrator had no jurisdiction as he did not meet selection criteria mentioned in the arbitration clause** (i.e., to be *Bâtonnier* or member of the Bar commission). Moreover, the parties had not yet engaged in the compulsory pre-arbitral mediation. The arbitrator rejected these arguments in a preliminary award which the defendant challenged on the same grounds.

---

[26] Swiss Federal Supreme Court, Decision 4A_407/2017 of 20 November 2017, ASA Bull. 2/2018, p. 474.

[27] Swiss Federal Supreme Court, 4A_628/2015 (ATF 142 III 296, ASA Bull. 4/2016, p. 988).

[28] Request rejected as the letter did not qualify as an arbitral award: Swiss Federal Supreme Court, Decision 4A_555/2016 of 10 October 2016, ASA Bull. 1/2017, p. 157.

The Supreme Court found that the arbitrator had construed the **pathological arbitration agreement** as establishing a common intention of the parties to arbitrate their dispute. There was a gap in the agreement to the extent that it did not address explicitly the nomination of an arbitrator if neither *Bâtonnier* or a Bar commission member was available. The *juge d'appui* **had filled the gap.** The decision of the juge d'appui was not null and void.

The Court confirmed that the decision of the first arbitrator rejecting the defendant's request for mediation was binding on subsequent arbitrators. In addition, the Court recalled that the defendant had not reacted to the plaintiff's proposal to appoint a mediator and could not object to the arbitration proceedings for **non-compliance with pre-arbitral mediation requirements**.

9. In case 4A_466/2017[29] the Supreme Court issued a termination order after the plaintiff withdrew its annulment request. **Defendant's counsel claimed and obtained costs for work performed prior to the withdrawal**.

10. According to article 42 of the Law on the Federal Supreme Court, **submissions that are not drafted in a Swiss national language can be returned** to the party for translation. In 4A_510/2017[30] the Court found that a plaintiff had been manifestly aware of that provision and had nevertheless filed its request to set aside a CAS award in English simply to obtain an extension. This amounted to an abuse of law. The Court did not allow the plaintiff to translate the request and rejected it outright. It further appears that the request was merely a notice of appeal rather than a full-fledged request, such as a plaintiff is required to file within 30 days from the receipt of the award. Even if the plaintiff had been granted time to translate this notice of appeal into a national language, it would not have gained much in practice. Plaintiffs have to file a fully reasoned request. Mere notices of appeal are inadmissible. Nor would it have been admissible to file a translation that added substance to a notice of appeal and thus went beyond the scope of a mere translation.

11. In July 2016, the CAS rendered two arbitral awards regarding sanctions issued against Russian athlets. **Only the operative part of the award was communicated to the parties.** Nevertheless the Russian athlets filed annulment requests forthwith, for the sole purpose of obtaining a stay of

---

[29] Swiss Federal Supreme Court, Decision 4A_466/2017 of 8 November 2017, ASA Bull. 2/2018, p. 496.

[30] Swiss Federal Supreme Court, Decision 4A_510/2017 of 9 November 2017, ASA Bull. 2/2018, p. 498.

the enforcement of the award. The full reasons of the award followed in October. Only this notification of the full award triggered **the 30-day time limit to file for annulment**. Indeed, prior to this moment the parties could not know the reasons for the award, and would therefore be unable to identify whether there are grounds for annulment. Upon receipt of the reasons, the plaintiffs should have expanded on their annulment request. They failed to do so, and the Supreme Court declared that the annulment requests were not admissible.[31]

12. Arbitrators are free to apply the law to the facts pleaded before them (**jura novit curia).** The only safeguard is the parties' right to be heard. If the arbitral tribunal intends to rely on a legal reasoning that the parties cannot reasonably anticipate in light of their pleadings, the tribunal must draw their attention to it. In case 4A_716/2016[32] the Swiss Federal Supreme Court found that the award did not contain an unexpected reasoning. Moreover, even the arbitrary application of the law is not a ground for annulment.

13. A body in Geneva dealing with employment law matters and trade unions (Chambre genevoise des relations collectives de travail (CRCT)) rendered a decision it labeled "arbitral award". The Federal Supreme Court declared that an annulment request against this decision was inadmissible. **It was not in fact an award, despite its name**. The CRCT had been established by law, as a public tribunal, rather than by the parties, as would be the case for a true arbitral tribunal.

As the CRCT had provided **wrong information about the remedies available** (Rechtsmittelbelehrung) the Supreme Court did not award costs against the plaintiff.[33]

14. By contrast to international arbitrations (art. 192 PIL Act), **parties to domestic arbitrations cannot waive their right to seek the annulment of the arbitral award**. In 4A_475/2016[34] the Federal Supreme Court found that while no advance waiver is possible, the **parties are free to waive their rights after an award has been rendered**. That had happened in the case at

---

31 Swiss Federal Supreme Court, Decision 4A_444/2016 of 17 February 2017, ASA Bull. 2/2018, p. 501.

32 Swiss Federal Supreme Court, Decision 4A_716/2016 of 26 January 2017, ASA Bull. 2/2018, p. 505. An English translation is available on www.swissarbitrationdecisions.com.

33 Swiss Federal Supreme Court, Decision 4A_53/2016 of 13 July 2016, ASA Bull. 2/2018, p. 509.

34 Swiss Federal Supreme Court, Decision 4A_475/2016 of 28 March 2017 (143 III 157), ASA Bull. 2/2018, p. 513. An English translation is available on www.swissarbitrationdecisions.com.

hand, a dispute between a bank and the Swiss stock exchange regulator SIX Swiss Exchange AG. Counsel to the bank had informed his opposing counsel that his client, the bank, would not seek to annul the award, provided that SIX would not do so either, which SIX's counsel confirmed. The bank filed a request to set aside the award nevertheless. The Supreme Court considered that the request was inadmissible given the irrevocable waiver.

15. The grounds for challenging awards are slightly broader in domestic arbitration than in international arbitration. Domestic awards can be set aside if they are arbitrary. This is a lower standard than that set by article 190 PIL Act for international arbitrations. In 4A_206/2016[35] the plaintiff had entered into an asset management contract with a Swiss bank. The contract provided for arbitration under the Swiss Rules, in Lugano. A dispute arose, and an award was rendered. The plaintiff's residence at the time he entered into the arbitration agreement was not mentioned in the award. The plaintiff challenged the award on the ground of arbitrariness (art 393 Code of Civil Procedure, governing domestic arbitration proceedings). The **Supreme Court on its own motion established that the plaintiff's residence at the relevant time had been outside Switzerland**. Therefore, **the PIL Act applied rather than the CCP**. Consequently, the plaintiff could not challenge an award for arbitrariness as this ground is only available in respect of domestic arbitrations.

MATTHIAS SCHERER
EDITOR IN CHIEF

---

[35] Swiss Federal Supreme Court, Decision 4A_206/2016 of 20 May 2016, ASA Bull. 2/2018, p. 520.

Introduction to the Case Law Section 3/2018

In this issue of the Bulletin, we have compiled extracts of a number of rulings by arbitral tribunals upon applications for a stay of arbitral proceedings. They are summarised by Luka GROSELJ in his paper, *Stay of arbitration proceedings – Some examples from arbitral practice*, ASA Bull. 3/2018, p. 560 (see also the Arbitral Decisions from p. 633 onwards).

1. Dissenting opinions do not form part of the arbitral award, as the Swiss Federal Supreme Court recalled in decision 4A_322/2015,[36] one of many decisions rendered in an epic dispute between Israeli and Iranian actors about **secret oil supplies from Iran to Israel**. It is not permissible for a request to set aside an award to refer merely to a dissenting opinion as this opinion will be disregarded by the Court.[37]

The Court also disregarded **comments filed by the presiding arbitrator in his own name** in the setting aside proceedings. The plaintiff requested that these comments be removed from the court file on the basis that the comments had not been issued by all of the members of the arbitral tribunal jointly or at least by their majority. The Court held that, where a member of an arbitral tribunal has issued a dissenting opinion, it could hardly be expected that the arbitral tribunal would file comments in the set aside proceedings jointly. However, it was not even established in the case at hand that the presiding arbitrator's comments also reflected the views of the third (concurring) arbitrator and hence, the views of the majority of the arbitral tribunal. Accordingly, the Court disregarded the presiding arbitrator's comments and, correspondingly, any remarks by the plaintiff on these comments in its reply pleadings.

The plaintiff argued that the arbitral tribunal had adopted an entirely **surprising argument** and thus, violated the parties' **right to be heard**. This argument was successful in other cases, but not this one. The Court held that the prohibition on taking parties by surprise was limited to the way in which an arbitral tribunal applied the law and not how it established the facts of the case. An arbitral tribunal is free to apply the law (jura novit curia); however, if an arbitral tribunal intends to rely on a legal principle that the parties have not pleaded and could not reasonably anticipate, the arbitral tribunal must

---

[36] Swiss Federal Supreme Court, Decision 4A_322/2015 of 27 June 2016, ASA Bull. 3/2018, p. 686. An English translation is available on www.swissarbitrationdecisions.com.

[37] See also Swiss Federal Supreme Court, Decision 4A_356/2017 of 3 January 2018, ASA Bull. 3/2018, p. 756. An English translation is available on www.swissarbitrationdecisions.com.

hear the parties first. No such rule applies in relation to an arbitral tribunal's assessment of the parties' evidence.

This should not be misunderstood by arbitral tribunals as a carte blanche when assessing the evidence before them. The Court appears to have assumed that an arbitral tribunal follows either a claimant or a defendant when assessing the evidence on record. It would be more delicate for an arbitral tribunal to draw conclusions from evidence that none of the parties have drawn, or conclusions that they have even jointly excluded. This was found to be the case, for instance, in decision 4A_214/2013[38]: The Court set aside the award on the basis of arbitrariness (a ground on which domestic awards can be annulled). The arbitral tribunal had relied on a contract to establish the market price of certain commodities, although both parties had stated that that contract could not serve that purpose.

The plaintiff bolstered its surprise argument by pointing to regular factual questioning of the parties by the former chairman of the arbitral tribunal, who regrettably passed away during the course of the proceedings. The plaintiff submitted that the new chairman had not entertained such discussions with the parties. The Court held that there was no **established practice of arbitral tribunals questioning parties** beyond what is common in complex arbitrations, and even if there had been such practice or usage, departure therefrom was not a ground for a due process challenge. The arbitral tribunal was not obliged to question the parties on the factual issues at hand.

As the award ordered the payment of certain amounts to an Iranian state entity, which fell potentially under the **sanctions regime against Iran** in place at the time, the Court communicated its decision not only to the parties, but also, to the Swiss State Secretariat for Economic Affairs (SECO) in charge of supervising the application of the sanctions in Switzerland.

2. Decision 4A_250/2013[39] was also notified to the Swiss State Secretariat for Economic Affairs. X Ltd, a company with its seat in Geneva, resisted enforcement of an **arbitral award rendered in Teheran** in 2001. The dispute arose under a contract concluded in 1977 whereby Z, an Iranian company, sold petroleum to X Ltd for delivery to three Israeli companies. In 1985, Z commenced arbitration against X, subsequently joining the three Israeli companies. The award ordered the four co-defendants to jointly and

---

[38] Swiss Federal Supreme Court, Decision 4A_214/2013 of 5 August 2013, ASA Bull. 1/2014, p. 118.

[39] Swiss Federal Supreme Court, Decision 4A_250/2013 of 21 January 2014, ASA Bull. 3/2018, p. 697. An English translation is available on www.swissarbitrationdecisions.com.

severally pay USD 97 million for petroleum delivered by Z in 1978. When (in 2011) the Iranian company sought to enforce the award against X Ltd in Switzerland under the New York Convention, X Ltd resisted. The enforcement judge ("juge de la mainlevée"/"Rechtsöffnungsrichter") dismissed all objections but one: since **the award did not allocate post-award interest**, the amount claimed by Z was reduced accordingly. X Ltd appealed and the case came before the Swiss Federal Supreme Court.

X Ltd argued that the **sanctions against Iran** prevented payment pursuant to the award. Further, X Ltd submitted that it could not be forced to pay any money to a state which had vowed to destroy Israel. X Ltd was controlled by the three Israeli companies. Under Israeli law, all four companies faced criminal sanctions in Israel in the event of payment to the Iranian company. Even though the award was enforceable under Swiss law, it was not enforceable under public international law and the latter law trumped the former. Therefore, payment had become impossible as a matter of international law and the award debt was extinguished. The Court found that it was not for the Swiss enforcement judge to decide the existence of the debt as a question of substantive law. The Court also rejected X Ltd's arguments as to the alleged impossibility of payment. It found that the political environment described by X Ltd in general terms was insufficient to establish why the award should not be enforced in Switzerland and why X Ltd (a Swiss company) should not pay for goods it had received more than 30 years ago. A public policy violation had not been established.

3. A party who had won several **arbitrations in England** against a Swiss company sought to enforce the relevant awards in Switzerland under the New York Convention. The Swiss company (respondent) resisted **enforcement**, arguing that it had not been properly notified of the arbitration and that a third company which had seemingly received the claimant's emails was not its agent. The Swiss enforcement court found that the third company was an agent of the respondent and that **emails notified to the agent were deemed to be notified to the respondent**. The respondent also argued that the awards were null and void because they violated **US sanctions**.[40] The enforcement court ruled that the respondent had not shown that the executive order was in any way applicable. Enforcement was granted.

The respondent appealed to the Swiss Federal Supreme Court. It raised the same defenses and added that an award contrary to the US sanctions was

[40] Executive Order 13685 of December 19, 2014 by President Obama, Blocking Property of Certain Persons and Prohibiting Certain Transactions with Respect to the Crimea Region of Ukraine.

incompatible with Swiss public policy. In decision 5A_862/2017,[41] the Court rejected the appeal and confirmed the enforcement decision.

As to the US sanctions, the Court noted that the public policy defense was new and should have been raised before the first court, and that, **even if it was mandatory US law, it would not necessarily reach the threshold of a public policy norm in Switzerland**. Moreover, the respondent had not established why the sanctions would apply to a Swiss company and an award labelled in Swiss francs.

With regard to the **emails allegedly not received** by the respondent, the Court considered that emails are akin to letters sent to P.O. boxes which are not picked up by the addressee: they are deemed to have been received if not collected after seven days. It is not necessary either that the addressee acknowledges receipt.

4. In 4A_50/2017,[42] the Swiss Federal Supreme Court upheld an award in favour of a consultant who had successfully pursued his principal for unpaid fees. The principal had refused to pay, allegedly due to a lack of proof of actual services and **suspected acts of bribery**. The principal argued that paying the fees would expose him to **regulatory sanctions** and was **contrary to compliance rules**. The Court dismissed this argument on the basis that there was no supporting evidence, and because the same principal had raised the same argument in previous cases in which he had been sued by other consultants.[43]

The principal challenged the award on the ground of **ultra petita**, i.e., excess of an arbitrator's mandate. The principal took issue with a declaratory finding in the operative part of the award, declaring that the principal was in breach of contract. According to the principal, the agent had only requested compensation in monetary terms. The Court found this point to be inadmissible ("irrecevable"). The principal lacked any interest in having the award corrected on that account.

---

41 Swiss Federal Supreme Court, Decision 5A_862/2017 of 9 April 2018, ASA Bull. 3/2018, p. 709.

42 Swiss Federal Supreme Court, Decision 4A_50/2017 of 11 July 2017, ASA Bull. 3/2018, p. 714.

43 According to para 4.3.1 of the decision: Swiss Federal Court Decisions 4A_69/2009 of 8 April 2009, ASA Bull. 1/2010, p. 124, 4A_213/2014 of 23 September 2014, 4A_247/2014 of 23 September 2014, 4A_532,534/2014 of 29 January 2015 and 4A_136/2016 of 3 November 2016, ASA Bull. 1/2017, p. 129.)

5. A CAS case that came before the Swiss Federal Supreme Court[44] raised an interesting evidentiary issue: **Whether an arbitral tribunal can rely on evidence obtained illegally**. The CAS confirmed a 5-year ban issued by the **Football Federation of Ukraine** against a Ukrainian football player of **FC Karpaty** for corruption and match fixing. A significant piece of evidence was a compromising video featuring the player, recorded without his permission, during which he admitted to having been bribed by the sports director of an opposing football team, FC Metalist.[45] The Court recognised that the arbitral tribunal took the video into account. It added that the video was not the only evidence considered; witness testimony was also relevant.

The CAS panel concluded that match fixing was established "to its comfortable satisfaction". The player complained that, in making this finding, the Court relaxed the applicable standard of proof and on this basis, the award was contrary to public policy. The Court upheld the CAS award, ruling that the **standard of proof and presumption of innocence (in dubio pro reo) in criminal law and ECHR jurisprudence were not applicable to the arbitration proceedings at hand**.

6. Switzerland is home to most international sport federations, including the **Fédération Internationale de Motocyclisme** / International Motorcycling Federation (ci-après: "**FIM**"). Only one national federation may be member of FIM. Two Kuwaiti federations disputed the right to become the affiliated member for Kuwait: One federation was the current affiliate member for Kuwait; the other was a newcomer federation. FIM dragged out its decision on the applications for membership. The newcomer association seized the CAS to, in effect, force its way into FIM and exclude the current member. It argued that FIM's excessive delay in deciding its membership status was tantamount to a denial of justice and could therefore be brought before the CAS. According to FIM, as long as there was no decision, there was nothing to challenge. The CAS admitted that it had jurisdiction and ordered FIM to take a decision within nine months. FIM challenged the award before the Swiss Federal Supreme Court. In its decision 4A_314/2017,[46] the Court analysed in depth the **arbitration clause in the FIM bylaws**. It found that, contrary to the statutes of other sport associations

---

44 Swiss Federal Supreme Court, Decision 4A_448/2013 of 27 March 2014, ASA Bull. 3/2018, p. 727. An English translation is available on www.swissarbitrationdecisions.com.

45 The sport director of FC Metalist had also been sanctioned and challenged the CAS award on the same grounds as the football player: Swiss Federal Supreme Court, Decision 4A_362/2013 of 27 March 2014.

46 Swiss Federal Supreme Court, Decision 4A_314/2017 of 28 May 2018, ASA Bull. 3/2018, p. 738.

(such as FIFA) and the non-mandatory Swiss law of associations ("Vereinsrecht"), FIM statutes allowed non-members to challenge decisions of FIM bodies before the CAS. The Court confirmed that CAS had **ratione personae jurisdiction**. The Court also confirmed CAS's rejection of FIM's challenge to the CAS's **subject-matter jurisdiction**.

FIM also argued that CAS had exceeded its mission (**ultra petita**). The newcomer Kuwaiti federation had asked to be admitted as an affiliated member to the exclusion of the current Kuwaiti affiliated member. The CAS ordered FIM to take a decision within nine months from the final award. This had not been requested by the newcomer federation in its prayers. Yet, the Court rejected FIM's argument. The arbitral tribunal was entitled to grant less than what had been requested by a party.

7. In decision 4A_356/2017,[47] the plaintiff took issue with a decision of the arbitral tribunal to **reject a belatedly tendered expert report**. The arbitrators did not accept the plaintiff's argument that it had been unable to file the report any earlier in the proceedings. The Swiss Federal Supreme Court found no violation of the plaintiff's right to be heard and recalled that there is **no absolute right to a double exchange of submissions**.

8. A party to a DIS arbitration seated in Zurich challenged two arbitrators. Under the then applicable DIS arbitration rules, **challenges were decided by the arbitral tribunal itself**. The arbitral tribunal rejected the challenge and issued a final arbitral award a few months later. The party who had unsuccessfully challenged the arbitrators sought to annul the award on the basis of arbitrator bias.

The Swiss Federal Supreme Court declared the annulment request inadmissible.[48] The Court recalled that **any decision by the arbitral tribunal on its composition or jurisdiction must be challenged immediately like an award**. The procedural order rejecting the challenge to the two arbitral tribunal members was tantamount to an interim award: It should have been brought immediately before the Court.

The decision is consistent with the Court's case law on the characterization of procedural orders as awards and the related duty to immediately challenge such orders. Yet, it is questionable as to why a decision on an arbitrator challenge by an arbitral tribunal itself is treated differently from a decision rendered by an arbitral institution administrating

---

47 Swiss Federal Supreme Court, Decision 4A_356/2017 of 3 January 2018, ASA Bull. 3/2018, p. 756.

48 Swiss Federal Supreme Court, Decision 4A_136/2018 of 30 April 2018, ASA Bull. 3/2018, p. 760.

the arbitration, such as the ICC Court (Art. 14 ICC Rules), or the SCAI (Art. 11 Swiss Rules). These decisions need not, and indeed cannot, be challenged before the Supreme Court. Given also that the new DIS Rules (2018) no longer leave it in an arbitral tribunal's discretion to decide challenges to its members, the decision appears harsh, although consistent.

MATTHIAS SCHERER
EDITOR IN CHIEF

Introduction to the Case Law Section 4/2018

1. A CAS arbitrator[49] found that a football player had **terminated his employment contract in bad faith**. The Swiss Federal Supreme Court upheld the award.[50] The player's employer, an Israeli football team, had offered to pay his salary arrears by cheque. The player had refused to pick up the cheque and insisted on payment to his bank account by a certain day. The payment arrived two days late. By then, the player had already terminated for "just cause" under the article 14 of the FIFA Regulations on the Status and Transfer of Players. In the arbitration, he sought damages equivalent to his salary for the ordinary term of the contract. The arbitrator equated "just cause" to "justes motifs" mentioned in article 337 of the Swiss Code of Obligations. He acknowledged that the club's late payment was in breach of the contract and that under Swiss law, payment per cheque does not discharge the debtor unless this payment method is accepted by the creditor. He nevertheless concluded that player was not entitled to terminate: The arbitrator noted that payment by cheque was not unusual for the parties, that the player knew that the club wanted to continue his employment and that he left Israel as soon as he received the outstanding payment in his account. The arbitrator emphasised the duty to act in good faith in all circumstances: "[**t]here is an element of good faith in any contractual relationship which brings with it the duty to bear in mind the interests of the other party and to weigh those interests against the interests of the first party**". In the case at hand, such weighing of interests would have required the player, in the arbitrator's opinion, to take the cheque and verify whether the cheque was covered before terminating the contract.

---

49 CAS 2016/O/4870.

50 Swiss Federal Supreme Court, Decision 4A_578/2017 of 20 July 2018, ASA Bull. 4/2018, p. 936.

The player sought to annul the award before the Supreme Court, complaining about a violation of his right to be heard. The arbitrator had allegedly missed crucial evidence and arguments. In particular, he had wrongly assumed that the amount of the cheque was higher than the amount actually due to the player. The arbitrator admitted that the award contained certain typographical errors, but that they were not decisive for his findings.

The Court recalled its restrictive case law regarding allegations of due process violations. It is not admissible for a party to rely on facts that are not established in the award itself, unless it can show that they are wrong precisely because the arbitral tribunal violated due process. **The Court provided guidelines on the applicable test for demonstration of a due process violation**.[51] Specifically, the player should have shown when and how he had raised, in compliance with the applicable procedural rules, the relevant fact (amount of the cheque). Further, he ought to have established that his allegations on this point were proven or had not been challenged, and lastly, that they had nevertheless escaped the arbitral tribunal's attention. The player had not made such demonstration. The annulment request was rejected.

From the facts reported in the decision, it follows that the CAS arbitrator had dealt with an interesing issue which was no longer in dispute before the Supreme Court: First he had rejected a request of the Israeli club, which had gone **bankrupt**, to end or stay the arbitration.[52] Second, in his award, he rejected the club's **objections to his jurisdiction based on the insolvency proceedings**.

2. In a Swiss Rules arbitration, a Cayman company sued a Panamean company for payment of the purchase price for 500,48 grammes of Selenium 74. The Panamean company counterclaimed, seeking reimbursement of partial payments already made. Having heard the parties, the arbitral tribunal found that the sales agreement was part of a **group of contracts** and could not be considered in isolation. The parties had contemplated three consecutive contracts, the sales agreement being the second one. The overall goal of the transactions was the transfer of funds from Hong Kong to

---

51 4A_578/2017, para. 3.3.1.2.

52 See ASA Bull. 3.2018 for extracts of arbitral decisions on request for stay and the article by Luka GROSELJ, *Stay of arbitration proceedings – Some examples from arbitral practice*, ASA Bull. 3/2018, p. 560. On the impact of insolvency on arbitration agreements see Karin GRAF, Brigitte UMBACH-SPAHN, *Berücksichtigung ausländischer Schiedsurteile in der Insolvenz – Lehren aus den Bundesgerichtsentscheiden in Sachen Swissair*, ASA Bull. 4/2018, p .822, and Bernhard BERGER, *Insolvenz und Schiedsvereinbarung in der Schweiz*, ASA Bull. 4/2018, p. 834.

Switzerland. It was not possible to bring a claim under a contract unless the third and last contract had been performed.

The Cayman company sought to annul the award. It asserted that the arbitral tribunal had **taken the parties by surprise with its argument of a chain of interdependent contracts.** The Swiss Federal Supreme Court ruled that the parties' right to be heard had been respected. There had been no surprise. The parties had elaborated extensively on the three contracts and their objective.[53]

3. In case 4A_518/2017,[54] the Swiss Federal Supreme Court had engaged in multiple electronic **communications with a plaintiff through the Swiss consulate** in the party's country. The plaintiff then appointed its country's consul as its party representative with a power of attorney expiring on 31 December 2017. The Supreme Court ordered the plaintiff to pay an advance on costs and renew the power of attorney. It further stated that, in the absence of a valid power of attorney, the Supreme Court could publish future orders in the official Swiss publication Swiss government ("Feuille fédérale") or not communicate them at all. This order was notified to the consul. The **cost advance requested by the Court was neither paid nor was the power of attorney renewed**. The Supreme Court granted a grace period to the plaintiff for the payment of the advance. This final **order was made available to the plaintiff at the Court's chancellery**. After the expiry of the grace period, the annulment request was struck from the court's docket.

4. In a Swiss Rules arbitration, a party (A) claimed CHF 50'000 from its opponent (B). A had appointed B as its sales agents for a hospitality package for the FIFA World Cup in Brazil. The relevant arbitration agreement called for **pre-arbitral negotiations** and provided that disputes shall be "finally resolved by an arbitral tribunal in accordance with the Swiss Rules of Arbitration". B insisted that the (domestic) arbitration should be suspended until the negotiations had taken place and requested that a three-member arbitral tribunal be appointed (relying on the term "arbitral tribunal").

The Arbitration Court of the Swiss Chambers' Arbitration Institution (SCAI) appointed a sole arbitrator who subsequently invited the parties to pay the advance on costs. B challenged the decision of the SCAI Arbitration Court, and the arbitrator's letter inviting the parties to pay the advance,

---

53 Swiss Federal Supreme Court, Decision 4A_220/2017 of 8 January 2018, ASA Bull. 4/2018, p. 956.

54 Swiss Federal Supreme Court, Decision 4A_518/2017 of 21 February 2018, ASA Bull. 4/2018, p. 962.

before the Swiss Federal Supreme Court. B requested that the Supreme Court set aside the decision of the SCAI and declared that the sole arbitrator had no jurisdiction. Alternatively, B requested that the matter be remanded to the SCAI for appointment of a three-member tribunal, or that the arbitration be stayed until the negotiations had taken place.

The Court[55] recalled that **decisions of private bodies such as the SCAI on the nomination, challenge and replacement of arbitrators cannot be challenged**. As to the arbitrator's letter, the Court admitted that **simple letters can embody a decision which can, and sometimes must, be challenged immediately**. However, the letter at hand was merely a call for cost advances and addressed organisational matters; it did not amount to a decision on the arbitrator's jurisdiction.

Consequently, the request to set aside the SCAI decision and the arbitrator's letter was inadmissible.

5. A Liechtensteinian company (contractor) entered into a contract with the Palestinian Authority and a Palestinian company (the employer) for the construction of a tourist resort including a hotel-cum-casino in West Jordan, Palestine. The employer was indirectly controlled by the Palestinian Authority. The contract was governed by Swiss law and provided for arbitration in Switzerland. The contract and the casino concession contained various **stabilisation clauses**, including that "this Concession Decree shall not be revoked or altered by any authority by law or decree or similar measures bearing the same effect, in whole or in parts thereof".

The contract also contained a ***force majeure*** **clause.** It was agreed that the contractor could invoke significant changes to the political or security status of the area which would affect the economic situation of the project by preventing potential guests and patrons from visiting the facilities as a case of *force majeure*.

The hotel was built and remained in operation for a number of years until travel restrictions and damage inflicted by the Israeli army resulted in its closure. In 2000, the parties entered into new agreements for the further development of the resort. However, the casino licence was not subsequently renewed due to the gambling prohibition in the Palestine Criminal Code. The contractor initiated arbitration against the Palestinian Authority and the Palestinian company. The arbitral tribunal found that the **contractor could not force the Palestinian Authority to issue a licence in violation of its own law**. The contractor sought to annul the award

[55] Swiss Federal Supreme Court, Decision 4A_546/2016 of 27 January 2017, ASA Bull. 4/2018, p. 965.

before the Swiss Federal Supreme Court.[56] It is unclear from the published decision whether the employer relied on the non-renewal of the casino licence as a case of *force majeure*, but it did argue that the contract was void for being illegal or impossible to perform. The contractor, on the other hand, argued that the contract was not void and that the Palestinian Authority was estopped from relying on the gambling prohibition as it had signed the contract when the law was already in force, allowing the casino to remain in operation (*venire contra factum proprium; fait du prince*). The contractor also relied on the stabilisation clause which should have prevented the Palestinian Authority from altering the casino licence. The Court did not consider that the finding that the Palestinian Authority had belatedly enforced its own law was contrary to public policy (which is the threshold in an annulment case). It also considered that, to assess whether a contract was impossible to perform, not only the governing Swiss law but also Palestinian law had to be considered. The stabilisation clauses were of no help. The contractor's second ground for annulment was, however, successful. The contractor had also requested a licence to operate the hotel without the casino, a prayer which the arbitral tribunal had rejected without having examined it. The **Supreme Court set the award aside for violation of due process. However, it remanded only the one prayer to the arbitral tribunal for reconsideration** and ordered nine tenth of the costs of the proceedings against the contractor.

6. Decision 4A_34/2016[57] was prompted by an ICC award involving disputes under a complex **group of contracts** regarding the **Arab Gas Pipeline**. Egyptian state companies A and B had undertaken to deliver gas to an Egyptian private company (X) for on-sale to a state-owned Israeli company (Y). B and X had entered into a **gas supply agreement ("GSA")** which provided for arbitration in Cairo under the Rules of the Cairo Regional Centre for International Commercial Arbitration ("CRCICA"). If the dispute involved the same facts as an ongoing dispute under an on-sale agreement between X and Y, the buyer (X) had the option to refer the dispute to the dispute resolution method foreseen in the on-sale agreement. B and Y entered into an on-sale agreement providing for ICC arbitration in Geneva. B, X and Y concluded a tri-partite agreement ("**TPA**") according to which B and X undertook to supply gas to Y. Disputes were also referred to ICC arbitration in Geneva. During the unrests in 2011 (Arab spring), terrorists sabotaged the pipeline. X was unable to supply gas to Y and pay B. X considered that B had repudiated the GSA and that, consequently, both the GSA and the TPA had

[56] Swiss Federal Supreme Court, 4A_532/2016 of 30 May 2017, ASA Bull. 4/2018, p. 972.
[57] Swiss Federal Supreme Court, 4A_34/2016 of 25 April 2017, ASA Bull. 4/2018, p. 996.

been terminated. X initiated ICC arbitration in Geneva against B and Y asserting claims under both contracts. The arbitral tribunal accepted jurisdiction over the TPA, but not over the GSA. Regarding the TPA, the tribunal found that not only Y, but also X, were beneficiaries of B's promise to deliver gas. X had therefore standing to claim against B under the GSA.

B sought to annul the award before the Swiss Federal Supreme Court. X argued that, for the purpose of determining jurisdiction, it was irrelevant whether its claims were founded. The Supreme Court found that, while this is ordinarily the case, the existence of a valid claim was not only a question pertaining to the merits, but also, a prerequisite for the arbitral tribunal's jurisdiction over the TPA ("**fait doublement pertinent", "doppelrelevante Tatsache"**). As the TPA was governed by English law, this law was controlling, and not the law governing the validity of arbitration agreements pursuant to article of the 178 PIL Act. The Supreme Court noted that, in order to determine whether the arbitral tribunal had rightly or wrongly accepted its jurisdiction, it would **apply freely (iura novit curia) any applicable foreign law**, relying on the decisions of the highest court in the relevant country. It is for the parties to prove the content of that law.[58]

Ultimately, the Court confirmed the arbitral tribunal's finding that X was a beneficiary of B's obligations under the TPA and could bring claims against it.

In a second prong of the annulment request, B stated that the arbitral tribunal had violated its **right to be heard** by ignoring a relevant argument. According to B, the terrorist attack on the pipeline was a *force majeure* event. The arbitral tribunal had found that X was not estopped from denying B's *force majeure* defence by the fact that X had relied on *force majeure* as a defense against its own buyer (Y).[59] Further, the arbitrators considered that B had not acted as a reasonable and prudent pipeline operator and could not rely on *force majeure*. B alleged that the arbitral tribunal had missed the fact that X and Y had subsequently concluded an agreement in which they considered that there was *force majeure*. The Supreme Court found that it was insufficient for a party to simply assert a fact (X and Y's alleged agreement as to a *force majeure* event). Even if proven, it is for that party to properly explain to the arbitral tribunal how this fact was relevant. This, B had not done. **The arbitrators could not be blamed for not considering a virtual argument. It is for the parties to explain their case in full in their pleadings**.

---

[58] 4A_34/2016, Arrêt du 25 avril 2017, para 3.1.

[59] 4A_34/2016, Arrêt du 25 avril 2017, para 4.2.1.

B had applied to the arbitral tribunal for a correction of the award. In the annulment proceedings, B relied on the arbitral tribunal's decision on the correction request. The Supreme Court noted that the decision was new evidence and therefore inadmissible in annulment proceedings.[60]

7. Decision 5A_701/2017[61] relates to a challenge of a judge, not of an arbitrator. However, the circumstance that gave rise to the challenge, a **Facebook friendship between a judge** and a party, might also arise in arbitration. The Supreme Court also refers to case law in arbitral matters. It found that a friendship or dislike between decision-makers and parties must reach a certain intensity in order to be considered as a sufficient ground for a challenge. Absent other elements, a Facebook friendship is no proof of such a relationship.[62]

8. Under Swiss law, it is possible **to extend an arbitation clause to a party who has not signed the contract** embodying the clause. A real estate broker (X) had knowledge of a plot of land that was for sale. He contacted the brother (A) of an acquaintance (B) regarding the plot. X submitted a draft brokerage agreement to A to be signed by A and Z S.A., a company of which A was a director. The draft was not signed and A denied that he had ever received it. The draft did not identify the plot of land. X subsequently signed a brokerage agreement with B by which X was to receive a commission of 4% of the price of the plot. A few months later, the plot of land was bought by Z S.A. X sued Z S.A. for his commission, arguing that B had acted as a representative of Z S.A. The arbitral tribunal declined jurisdiction, finding that Z S.A. had not signed the brokerage agreement and that there was no evidence of a representation that would call for an extension of the arbitration clause to Z S.A. X applied to the Swiss Federal Supreme Court. The Court upheld the award in the absence of proven represention. It left open the question as to **whether there would have to be a written power of attorney between the principal and his agent vesting the agent with the right to enter into an arbitration agreement (in addition to the right to represent in the framework of the contract in general)**.

In addition to extension based on agency, X posited that Z S.A. had interfered with the performance of the brokerage contract and should be bound by the arbitration clause it contained. The Supreme Court admitted

---

60 4A_34/2016, Arrêt du 25 avril 2017, para 3.5.1.

61 Swiss Federal Supreme Court, Decision 5A_701/2017 of 14 May 2018, ASA Bull. 4/2018, p. 1023.

62 See also 4A_672/2011 of 31 January 2012, ASA Bull. 1/2013, p. 66.

that, in certain narrow circumstances, an **extension was possible,** including for **interference, agency/representation, lifting of the corporate veil, and assignment.** However, X had not raised in the arbitration the argument that there was an identity between B and Z S.A. that would justify extending the arbitration clause to Z S.A. X could not challenge the award on the ground that the arbitrator had wrongly failed to pierce the corporate veil. As to the interference, the Court distinguished between merits and jurisdiction. Even if the plot of land was bought by a partner of B, only B was bound by the arbitration clause. It did not matter whether the two brothers had communicated and Z S.A. (through its director, A) had obtained the information from B.

It is safe to assume that, in presence of a more egregious factual matrix, the Supreme Court would come to a different conclusion. If bad faith on the part of the original, allegedly interfering party is established, this should impact not only on the merits of a claim, but also on jurisdiction. Good faith is regularly an important criterion for the Supreme Court when examing the extension of arbitration clauses to non-signatories.[63]

9. In 4A_30/2018,[64] the Swiss Federal Supreme Court recalled that procedural decisions which do not bind an arbitral tribunal and which can be subsequently modified are not tantamount to arbitral awards. This includes **directions on the taking of evidence**. They **cannot be challenged** before the Court.

10. In 2016, the Swiss Federal Supreme Court had ruled that the question whether a default decision of the **Court of First Instance of the Dubai International Financial Centre (DIFC)** was an arbitral award or not had to be decided as a preliminary issue before a decision on its enforcement in Switzerland could be taken. The matter was remanded to the lower court.[65] The lower court found[66] that the DIFC was not an independent arbitral tribunal, but rather, part of the local judicial system. Consequently, the decision was not an arbitral award and the New York

---

63 Swiss Federal Supreme Court, Decision 4A_473/2016 of 16 February 2017, ASA Bull. 4/2018, p. 1027.

64 Swiss Federal Supreme Court, Decision 4A_30/2018 of 8 February 2018, ASA Bull. 4/2018, p. 1040.

65 Swiss Federal Supreme Court, Decision 5A_672/2015 of 2 September 2016, ASA Bull. 4/2016, p. 1030. See also Catherine A. KUNZ, *Enforcement of Arbitral Awards under the New York Convention in Switzerland*, ASA Bull. 4/2016, p. 836.

66 Swiss Federal Supreme Court, Decision 5A_889/2016 of 30 March 2017, ASA Bull. 4/2018, p. 1041. For a summary of Dubai's new arbitration law see Sami TANNOUS, Matei PURICE, Mohamed KHANATY, *The New UAE Federal Arbitration Law: Was it Worth the Wait?*, ASA Bull. 4/2018, p. 866.

Convention did not apply. Absent any enforcement treaty, the PIL Act applied. The lower court found that the Swiss defendant had not been properly notified of the proceedings and that enforcement could not be granted as a matter of public policy (art. 27(2)(a) of the PIL Act). The Dubaian creditor again appealed to the Supreme Court. The Court annulled the lower court's ruling a second time. It found that the Swiss defendant had received a notice from the DIFC through the proper (official) channels with a German translation. The DIFC had requested the defendant to acknowledge receipt. The defendant had remained silent. The DIFC had not served any further notices on the Swiss defendant and eventually issued its ruling. The Supreme Court recalled that the requirement of proper notice merely meant to ensure that Swiss defendants receive all necessary information to organise their defence in the relevant foreign court. In the present case, the Swiss defendant had been informed of the existence of the court proceedings in Dubai. It had chosen to ignore the DIFC notice rather than seeking to defend itself or appoint local counsel. In the circumstances, the Swiss defendant could not expect that it would receive further invitations to file pleadings or attend hearings.

11. In its decisions 4A_298/2018[67] and 4A_300/2018,[68] the Swiss Federal Supreme Court found that under the applicable arbitration rules (those of the Basketball Arbitral Tribunal), the **decision of the arbitral tribunal could be validly notified without reasons**. Reasons were delivered only if a party requested them within 10 days after having been served with the rulings ("*Dispositif*"; "*Urteilsbegründung*"). As reasons are not a prerequisite for an annulment request, the (unreasoned) decision could be challenged. The challenge was dismissed ("*irrecevable*") on formal grounds, however. The plaintiff had not drawn the Court's attention to specific pleadings and exhibits that were relevant to the alleged ground for annulment. The plaintiff had asserted that it had raised a jurisdictional defense in its pleadings but had not provided any further reference.

MATTHIAS SCHERER
EDITOR IN CHIEF

---

67 Swiss Federal Supreme Court, Decision 4A_298/2018 of 22 August 2018, ASA Bull. 4/2018, p. 1042.

68 Swiss Federal Supreme Court, Decision 4A_300/2018 of 22 August 2018, ASA Bull. 4/2018, p. 1042. An English translation is available on www.swissarbitrationdecisions.com.