ASA Bulletin

Contents Volume 36, No. 1/2018

President’s Message, Nobody Expects the Spanish Inquisition! (Of Soft Cushions and Comfy Chairs)
Christopher BOOG, Philip WIMALASENA, The 2018 DIS Rules: New Rules for a Renewed Institution
Anne-Marie LACOSTE, Corruption as a Bar to Award Enforcement in France
Leonid SHMATENKO, Svitlana BEVZ, The Arbitrability of Corporate Disputes in Ukraine
Philipp HABERBECK, The Recoverability of Lost Profits under Swiss Commercial Law
Philippe HOVAGUIMIAN, Non-reviewable Facts in Swiss Annulment Proceedings: Undermining the Safeguards of Art. 190 PILA

Swiss Federal Supreme Court Decisions
o 4A_150/2017 of 4.10.2017 [Award set aside for lack of jurisdiction]
o 4A_668/2016 of 24.7.2017 [FIFA rules violation not tantamount to public policy violation]
o 4A_672/2016 of 24.1.2017 ['International Chamber of Commerce of Geneva']
o 4A_302/2013 of 5.6.2014 [Defendant bound by arbitration clause despite “acting on behalf of” another company – Pre-arbitral negotiation duty]
o 4A_377/2013 of 11.2.2014 [SPA found to be void because of a fraud]
o 4A_316/2017 of 2.8.2017 [Supreme Court bound by description of the parties’ arguments, prayers, admissions in the award]
o 4A_40/2017 of 8.3.2017 [Ex aequo et bono (equity) award and jurisdiction]
o 4A_12/2017 of 19.9.2017 [Subject-matter arbitrability – Validation of freezing order]
o 4A_277/2017 of 28.8.2017 [When do arbitrators have to appoint an expert (and when not?)]
o 4A_206/2017 of 6.10.2017 [CAS decision not an arbitral award]
o 4A_704/2015 of 16.2.2017 [Arbitrator and party conduct – No disciplinary sanction before the Supreme Court]
o 4A_131/2017 of 21.9.2017 [Construction of arbitration clause more restrictive than that of forum selection clause]

ASA News/Bibliography
Aims & Scope

Switzerland is generally regarded as one of the World’s leading place for arbitration proceedings. The membership of the Swiss Arbitration Association (ASA) is graced by many of the world’s best-known arbitration practitioners. The Statistical Report of the International Chamber of Commerce (ICC) has repeatedly ranked Switzerland first for place of arbitration, origin of arbitrators and applicable law.

The ASA Bulletin is the official quarterly journal of this prestigious association. Since its inception in 1983 the Bulletin has carved a unique niche with its focus on arbitration case law and practice worldwide as well as its judicious selection of scholarly and practical writing in the field. Its regular contents include:

- Articles
- Leading cases of the Swiss Federal Supreme Court
- Leading cases of other Swiss Courts
- Selected landmark cases from foreign jurisdictions worldwide
- Arbitral awards and orders under various auspices including ICC, ICSID and the Swiss Chambers of Commerce (“Swiss Rules”)
- Notices of publications and reviews

Each case and article is usually published in its original language with a comprehensive head note in English, French and German.

Books and journals for Review

Books related to the topics discussed in the Bulletin may be sent for review to the Editor (Matthias Scherer, LALIVE, P.O. Box 6569, 1211 Geneva 6, Switzerland).
ASA Board
Association Suisse de l’Arbitrage/Schweizerische Vereinigung für Schiedsgerichtsbarkeit/Associazione Svizzera per l’Arbitrato/Swiss Arbitration Association

EXECUTIVE COMMITTEE
Elliott GEISINGER, President, Geneva
Dr Bernhard BERGER, Vice President, Bern
Dr Bernhard F. MEYER, Vice President, Zurich
Domitille BAIZEAU, Member, Geneva
Felix DASSER, Member, Zurich

MEMBERS OF THE ASA BOARD
Sébastien BESSON, Geneva – Harold FREY, Zurich –
Isabelle HAUTOT, Paris – Michael HWANG, Singapore –
Nadja JAISLI KULL, Zurich – François KAISER, Lausanne –
Pierre MAYER, Paris – Andrea MEIER, Zurich –
Andrea MENAKER, New York – Christoph MÜLLER, Neuchâtel –
Gabrielle NATER-BASS, Zurich – Christian OETIKER, Basel –
Yoshimi OHARA, Tokyo – Paolo Michele PATOCCHI, Geneva –
Henry PETER, Lugano – Wolfgang PETER, Geneva –
Franz T. SCHWARZ, London – Anke SESSLER, Frankfurt –
Frank SPOORENBERG, Geneva – Nathalie VOSER, Zurich

HONORARY PRESIDENTS
Dr Marc BLESSING, Zurich – Dr Pierre A. KARRER, Zurich –
Prof. Dr Gabrielle KAUFMANN-KOHLER, Geneva –
Michael E. SCHNEIDER, Geneva – Dr Markus WIRTH, Zurich

HONORARY VICE-PRESIDENT
Prof. François KNOEPFLER, Cortaillod

EXECUTIVE DIRECTOR
Alexander MCLIN, Geneva

ASA Secretariat
4, Boulevard du Théâtre, P.O.Box 5429, CH-1204 Geneva,
Tel.: ++41 22 310 74 30, Fax: ++41 22 310 37 31;
info@arbitration-ch.org, www.arbitration-ch.org
Submission of Manuscripts
Manuscripts and related correspondence should be sent to the Editor. At the time the manuscript is submitted, written assurance must be given that the article has not been published, submitted, or accepted elsewhere. The author will be notified of acceptance, rejection or need for revision within eight to twelve weeks. Manuscripts may be drafted in German, French, Italian or English. They should be submitted by e-mail to the Editor (mscherer@lalive.ch) and may range from 3,000 to 8,000 words, together with a summary of the contents in English language (max. ½ page). The author should submit biographical data, including his or her current affiliation.

Aims & Scope
Switzerland is generally regarded as one of the World’s leading place for arbitration proceedings. The membership of the Swiss Arbitration Association (ASA) is graced by many of the world’s best-known arbitration practitioners. The Statistical Report of the International Chamber of Commerce (ICC) has repeatedly ranked Switzerland first for place of arbitration, origin of arbitrators and applicable law.

The ASA Bulletin is the official quarterly journal of this prestigious association. Since its inception in 1983 the Bulletin has carved a unique niche with its focus on arbitration case law and practice worldwide as well as its judicious selection of scholarly and practical writing in the field. Its regular contents include:

- Articles
- Leading cases of the Swiss Federal Supreme Court
- Leading cases of other Swiss Courts
- Selected landmark cases from foreign jurisdictions worldwide
- Arbitral awards and orders under various auspices including the ICC and the Swiss Chambers of Commerce (“Swiss Rules”)
- Notices of publications and reviews

Each case and article is usually published in its original language with a comprehensive head note in English, French and German.

Books and Journals for Review
Books related to the topics discussed in the Bulletin may be sent for review to the Editor in Chief (Matthias SCHERER, LALIVE, P.O.Box 6569, 1211 Geneva 6, Switzerland).
Non-reviewable Facts in Swiss Annulment Proceedings: Undermining the Safeguards of Art. 190 PILA

PHILIPPE HOVAGUIMIAN*

I. Introduction

To justify their integration into a given legal order, arbitral awards are expected to observe fundamental guarantees which courts typically reserve the right to review in annulment proceedings. In Switzerland, art. 190(2) of the 1987 Private International Law Act (PILA) enumerates the narrow grounds for annulment which parties may raise before the Federal Supreme Court against international awards rendered by Swiss-seated tribunals. In reviewing these grounds for annulment, the Federal Supreme Court is notoriously bound by the facts established by the arbitral tribunal and, with few exceptions, remains barred from correcting or completing these factual findings – a restriction intended to increase the efficiency of arbitration and reduce procedural delays.

Yet the grounds for annulment listed under art. 190(2) PILA occasionally hinge on the very existence of specific facts – e.g. regarding the pre-existing relationship between arbitrators and parties, the conduct of the arbitral proceedings, or whether the parties agreed to arbitration in the first place. The non-reviewability of such facts in annulment proceedings can lead to disconcerting results: as illustrated in a recent judgment, a challenge of arbitral jurisdiction under art. 190(2)(b) PILA will not, by itself, enable the Federal Supreme Court to review a tribunal’s finding of consent to arbitration as long as such consent was framed as a matter of fact.1

This article first recalls the legal basis and scope of this binding effect (II.1) as well as the rare exceptions thereto (II.2). The article then outlines cases where grounds for annulment hinge on factual questions (III.1) and shows how the current regime undermines the efficacy of art. 190(2) PILA (III.2) – notably by preventing the ultimate review of arbitral jurisdiction by a judicial instance (III.3). This restriction also creates an imbalance whereby

* MLaw (University of Zurich), LL.M. (King’s College London). The author is indebted to Professor Ulrich Haas, University of Zurich, for his insights and comments on a draft of this article.

1 Federal Supreme Court Decision (FSCD) 142 III 239, ASA Bull. 4/2016 pp. 967–987, c. 5.2.2 in fine.
Swiss courts exercise more limited supervisory powers over their own (international) awards than if the parties had chosen a non-Swiss seat (III.4). From a comparative perspective, Switzerland’s categorical deference to the factual findings of arbitral tribunals is also at odds with the approach of several other arbitration centres, including those with notoriously arbitration-friendly practices (III.5). The article then discusses a potential solution de lege lata (IV).

II. Non-reviewable facts in Swiss annulment proceedings

1. Legal basis and scope

The non-reviewability of an arbitral tribunal’s findings of fact was originally established under the case law of the Federal Supreme Court. In the landmark 1993 decision National Power Corporation v. Westinghouse, the Court held that the narrow grounds for annulment provided under art. 190(2) PILA reflected the legislator’s intent to increase efficiency in arbitration and reduce procedural delays. It held that empowering the Federal Supreme Court to challenge the factual findings of an arbitral tribunal when reviewing the PILA’s grounds for annulment would severely compromise these objectives.

The provisions governing annulment proceedings under the 2005 Federal Supreme Court Act (FSCA) appear entirely in line with this restrictive approach: under the FSCA, the Federal Supreme Court generally decides on the basis of the facts established by the previous instance; the Court’s discretion to correct or complete obviously inaccurate or unlawfully established findings of fact, as provided in other appellate proceedings before the Federal Supreme Court, is explicitly excluded in annulment matters. As discussed further below, however, the parliamentary history of the relevant provision suggests that its apparent alignment with the Federal Supreme Court’s approach in Westinghouse is more incidental than deliberate.

---

2 FSCD 119 II 380, ASA Bull. 2/1994 pp. 244–247, c. 3c; see also the legislative drafts and parliamentary debates pertaining to art. 190 PILA cited in FSCD 130 III 76 c. 4.2.
4 Art. 105(1) FSCA; the sole statutory exception is the admission of newly submitted facts whose allegation could only be prompted by the challenged decision (art. 99(1) FSCA).
5 Art. 77(2) FSCA, which excludes art. 105(2) FSCA.
6 See III.2.c below.
Case law has also specified that the factual findings which bind the Federal Supreme Court include not only the facts underlying the dispute between the parties (*Lebenssachverhalt*), but also those relating to the arbitral proceedings and their conduct (*Prozesssachverhalt*) – the latter being of paramount importance when examining whether procedural guarantees have been observed.

Furthermore, the non-reviewable findings of fact include not only those of the arbitral tribunal itself, but also the factual findings of any private institution chosen by the parties to rule on certain issues – e.g. on the independence of an arbitrator. References to the non-reviewability of a tribunal’s findings of fact should be understood to include those of such institutions as well.

2. **Exceptions**

   In annulment matters, the Federal Supreme Court has developed two exceptions to its general inability to correct or complete the factual findings of the challenged decision – though neither truly solves the issues addressed in this article.

   a. **Grounds for annulment raised against the factual finding itself**

      The first exception, which originates from the *Westinghouse* decision, enables a party to challenge a finding of fact by invoking a ground for annulment against the finding itself. The challenging party can show that the factual finding was established e.g. in violation of the procedural guarantees of art. 190(2)(d) – i.e. the principle of equal treatment and the parties’ right to be heard – or in violation of procedural public policy. The latter would

---

7 See e.g. FSCD 4A_542/2015 of 16 February 2016, ASA Bull. 1/2017 pp. 205–213, c. 1.3 (with further references).

8 FSCD 136 III 605, ASA Bull. 1/2011 pp. 80–106, unpubl. c. 2.2; FSCD 4A_386/2010 of 3 January 2011, ASA Bull. 3/2011 pp. 688–711, c. 3.2; decisions of such institutions are indirectly challenged before the Federal Supreme Court by seeking the annulment, pursuant to art. 190(2)(a) PILA, of the award subsequently rendered by the tribunal (FSCD 138 III 270, ASA Bull. 2/2013 pp. 322–343, c. 2.2.1).

9 FSCD 119 II 380, ASA Bull. 2/1994 pp. 244–247, c. 3c; for a more recent reiteration in published case law, see e.g. FSCD 142 III 239, ASA Bull. 4/2016 pp. 967–987, c. 3.1.


include factual findings based on the testimony of a tribunal-appointed expert lacking independence or impartiality.\(^\text{12}\)

However, where a ground for annulment is precluded by the merely *incorrect* factual findings of the tribunal or arbitral institution – no matter how obvious their inaccuracy – rather than by findings established in violation of art. 190(2) PILA, this exception will be of no use to the aggrieved party.

**b. Insufficient findings of fact in the challenged decision**

The second exception, which is less concerned with the reviewability of factual findings than with their supplementation, can be inferred from very few precedents and seems confined to cases where the challenged decision contains *insufficient findings of fact.* In such cases, the Federal Supreme Court has not only drawn from the case’s record to determine the relevant facts,\(^\text{13}\) but it has also occasionally allowed parties to (re-)submit evidence: when an athlete challenged an unreasoned award by alleging that the arbitrator had ignored her response to the request for arbitration, the Federal Supreme Court examined the contrary evidence submitted by the tribunal and noted that the appellant failed to present any;\(^\text{14}\) in another case, a party (indirectly\(^\text{15}\)) challenged an unreasoned decision of the ICC’s International Court of Arbitration which had refused to remove an arbitrator: when the appellant reiterated before the Federal Supreme Court the alleged circumstances suggesting a lack of independence and impartiality, the Federal Supreme Court merely noted that the appellant failed to provide any proof thereof\(^\text{16}\) – rather than refusing to contemplate a fact not contained in the challenged decision.\(^\text{17}\)


\(^{14}\) FSCD 4A_198/2012 of 14 December 2012, ASA Bull. 3/2014 pp. 580–585, c. 3.2.2; on the other hand, where the annulment action relied not on procedural facts but on facts underlying the dispute between the parties, the Federal Supreme Court held that it was prevented from verifying, due to the award’s lack of reasons, whether the appellant’s account corresponded to reality (*ibid.*, c. 3.1).

\(^{15}\) See fn. 8 *in fine*.

\(^{16}\) FSCD 4A_704/2015 of 16 February 2017, ASA Bull. 1/2018 pp. 208-219, c. 3.3.2; see also Matthias Leemann, "Challenging international arbitration awards in Switzerland on the ground of a lack of independence and impartiality of an arbitrator," ASA Bull. 1/2011
However, these cases are outliers and contrast with a large body of decisions where the Federal Supreme Court repeatedly refused to generalise its power to complete factual findings and declined to consider facts not contained in the award, even where such facts could be established by the evidence on record. In doing so, the Federal Supreme Court effectively rejects the doctrinal view that parties should be able to present evidence from the case’s record so as to complete the facts of the case where the award remains silent, e.g. to show that a party had duly protested a procedural violation during the arbitral proceedings.

Commentators rightly point out the difficulty in distinguishing between cases where the Federal Supreme Court exceptionally considered facts not contained in the award and cases where it refused to do so. It would seem that in the former cases, the award’s silence was less likely to be understood as an implicit rejection of the appellant’s factual assertions – e.g. because the award was not meant to make factual findings in that regard, or because it deliberately lacked reasons altogether. Thus barring such cases, the exception outlined in this section will not allow the aggrieved party to complete the award with facts justifying the existence of a ground for annulment.

---

17 This contrasts notably with FSCD 136 III 605, ASA Bull. 1/2011 pp. 80–106, c. 3.4.1.
18 Ibid., unpubl. c. 2.2; FSCD 4A_386/2010 of 3 January 2011, ASA Bull. 3/2011 pp. 688–711, c. 3.2; FSCD 4A_682/2012 of 20 June 2013, ASA Bull. 2/2014 pp. 305–318, c. 3.2.
19 See e.g. FSCD 4A_136/2016 of 3 November 2016, ASA Bull. 1/2017 pp. 129–137, c. 3.1 and 3.2 (the factual allegations of the appellants “refer only to evidence on the record and not to specific factual findings in the challenged award”); FSCD 4A_438/2008 of 17 November 2008, ASA Bull. 2/2011 pp. 379–390, c. 3.2.2.2; FSCD 136 III 605, ASA Bull. 1/2011 pp. 80–106, unpubl. c. 3.4.1 (although parts of the appellant’s assertions also relied on evidence absent from the record).
20 Sébastien Besson, Le recours contre la sentence arbitrale internationale selon la nouvelle LTF (aspects procéduraux), ASA Bull. 1/2007 pp. 2–35, n. 59; supported by Andreas Bucher, in: Bucher/Bonomi (eds.), Droit international privé, 3rd edn., Basel 2013, n. 45 ad art. 191 PILA, and Jean-François Poudret, Les recours au Tribunal fédéral suisse en matière d’arbitrage international (Commentaire de l’art. 77 LTF), ASA Bull. 4/2007 pp. 669–703, 681, although both authors seem to confine this possibility to cases where the award’s silence also constitutes a violation of the right to be heard (cf. II.2.a above).
21 Besson (fn. 20), ibid.
23 See the judgments cited in fn. 13.
24 See the judgments cited in fn. 14 and 16.
III. Inadequacies of the current regime

1. Relevance of factual questions under art. 190(2) PILA

Under art. 190(2) PILA, international arbitral awards may only be annulled in cases of irregular composition of the arbitral tribunal (lit. a), wrongly accepted or declined jurisdiction (lit. b), decisions infra petita or ultra petita (lit. c), unequal treatment of the parties or violations of the right to be heard (lit. d), and incompatibility with public policy (lit. e).

It is undisputed that factual errors do not (and should not) constitute by themselves a ground for annulment pursuant to art. 190(2) PILA. Quite distinct from the right to annul an award due to factual errors, however, is the right to invoke the aforementioned grounds for annulment unfettered by any factual error in the award. Indeed, the existence of the PILA’s grounds for annulment occasionally hinges not merely on questions of law but on whether specific allegations are factually true.

Taking examples from the Federal Supreme Court’s case law, a party may need to assert:

- that the common intent of the parties as to the existence or scope of an arbitration agreement differs from the intent determined by the tribunal25 (to invoke a lack of jurisdiction – further discussed under III.3 below);
- that an arbitrator previously acted as a party’s representative26 or had social ties with key people involved in the case27 (both to invoke the irregular composition of the tribunal);
- that it was not duly summoned to a hearing,28 that it did not waive the right to cross-examine a witness,29 that the delivery of a document – which marked the start of a filing deadline – occurred later than the tribunal determined,30 that the tribunal had allowed the parties to postpone their submissions on certain issues until after the tribunal had ruled on a preliminary point,31 or that the parties

27 Cf. FSCD 4A_704/2015 of 16 February 2017, ASA Bull. 1/2018 pp. 208-219, c. 3.3.2.
31 Cf. FSCD 4A_42/2016 of 3 May 2016, ASA Bull. 4/2016 pp. 958–966, c. 4.2.2.2.
never agreed to waive a second exchange of briefs\(^\text{32}\) (all to invoke a violation of the right to be heard);
– that it duly protested an irregularity during the arbitral proceedings\(^\text{33}\) (without which the corresponding grounds for annulment are deemed irrevocably waived); or
– that the award enforces an obligation to pay bribes\(^\text{34}\) or that an athlete’s occupational ban applied without any temporal or geographical limitations\(^\text{35}\) (both to invoke a violation of substantive public policy).

In these cases, the current regime prevents the aggrieved party from relying on any such facts whenever they depart from the award’s findings.\(^\text{36}\)

2. **Inefficacy of art. 190(2) PILA**

a. **Art. 190(2) PILA as a safeguard ensuring the observance of minimal guarantees**

The preclusion resulting in the cases outlined above strikes as incongruous. Art. 190(2) PILA sets the threshold for the integration of arbitral awards in the Swiss legal order.\(^\text{37}\) The PILA’s grounds for annulment ensure the observance of minimal guarantees\(^\text{38}\) justifying the assimilation of an arbitral award to a fully-fledged judgment.\(^\text{39}\) This includes guarantees which the Federal Supreme Court has deemed so fundamental that the final

\(^{32}\) Cf. FSCD 142 III 360, ASA Bull. 1/2017 pp. 178–198, unpubl. c. 4.2.2.1.


\(^{34}\) Cf. FSCD 4A_136/2016 of 3 November 2016, ASA Bull. 1/2017 pp. 129–137, c. 4.2.1; FSCD 4A_532 and 534/2014 of 29 January 2015, c. 5.2; FSCD 4A_231/2014 of 23 September 2014, c. 5.1.

\(^{35}\) Cf. FSCD 138 III 322, ASA Bull. 3/2012 pp. 591–602, c. 4.3.2 (on the incompatibility of such ban with public policy) and FSCD 4A_304/2013 of 3 March 2014, ASA Bull. 2/2014 pp. 384–396, c. 5.2.2 (“[in arguing a public policy violation], the appellant is once again forced to depart from the factual findings of the award and allege, in particular, that the player’s deregistration was unlimited in time”).

\(^{36}\) Barring the rare exceptions outlined under II.2 above.


\(^{38}\) See e.g. FSCD 133 III 235, ASA Bull. 3/2007 pp. 592–609, c. 4.3.2.2 (“fundamental principles and essential procedural guarantees”; similarly FSCD 138 III 270, ASA Bull. 2/2013 pp. 322–343, c. 2.2.2 (any legal order must “reserve the right to review arbitral awards and procedures for their conformity with fundamental legal principles”).

\(^{39}\) Tarkan Göksu, Schiedsgerichtsbarkeit, Zurich 2014, n. 2031.
answer must necessarily be left to a judicial instance, such as the existence of arbitral jurisdiction (discussed further under III.3 below) or the tribunal’s independence and impartiality.\textsuperscript{40} Thus while the legislator undoubtedly aimed to curtail dilatory tactics by confining the grounds for annulment of art. 190(2) PILA to a strict minimum,\textsuperscript{41} it seems sensible that the review of these strictly minimal guarantees should not, in addition, become precluded by the very decision subject to annulment.\textsuperscript{42}

Indeed, the current regime seems to rely on the notion that the guarantees protected by art. 190(2) PILA only pertain to legal conclusions (on jurisdiction, on arbitral independence, on compatibility with public policy), and thus cannot be pre-empted by factual findings. This prompts the question: is it the purpose of annulment proceedings to sanction arbitral tribunals and institutions for having drawn incorrect legal conclusions from the factual premises they established, or is it to ensure the observance of these guarantees in effect – i.e. that the tribunal actually had jurisdiction, was independent, and did not compel an obligation violating public policy? It is submitted that a teleological interpretation of art. 190(2) PILA supports the latter purpose.

One could object that, in ordinary appellate proceedings, the Federal Supreme Court readily defers to the factual findings of the previous instance and does not inquire, beyond the limited factual review accorded by art. 105(2) or 118(2) FSCA, whether the rights under review are infringed in effect. However, this merely reflects the role of the Federal Supreme Court as the ultimate appellate instance within the Swiss judiciary, with the examination of the facts already delegated to lower courts having full powers of review.\textsuperscript{43} By contrast, in reviewing grounds for annulment against arbitral awards, the Federal Supreme Court officiates as the first and only judicial

\textsuperscript{40} FSCD 138 III 270, ASA Bull. 2/2013 pp. 322–343, c. 2.2.2: ensuring the observance of the fundamental right to an impartial and independent arbitrator “cannot be surrendered” to private institutions.

\textsuperscript{41} See the legislative drafts and parliamentary material discussed in FSCD 130 III 76 c. 4.2; cf., however, Pierre Lalive, L’Article 190 al. 2 LDIP a-t-il une utilité ?, ASA Bull 4/2010 pp. 726-734, 732, emphasising that the driving intent behind art. 190(2) PILA was not merely to increase the attractiveness of Switzerland as an efficient arbitral seat, but to ensure legal security against the excesses of arbitral tribunals.

\textsuperscript{42} See the judgments of the German Federal Court of Justice (fn. 86 below), holding that the supervisory powers granted to ordinary courts in reviewing grounds of annulment would be “undermined” and “largely ineffective” if such courts were bound by the factual findings of the tribunal.

\textsuperscript{43} Cf. art. 110 FSCA.
instance empowered to rule on the integration of such awards into the Swiss legal order.

The unique purpose of annulment proceedings under the PILA, i.e. providing a safeguard which justifies the assimilation of Swiss awards to fully-fledged Swiss judgments, arguably militates against delegating any part of such review, whether legal or factual, to the arbitral tribunal.\textsuperscript{44} Deciding otherwise entails already assimilating arbitral awards to Swiss judgments with regard to their factual findings, even though such findings may preempt the very review which must confirm whether this assimilation is warranted in the first place.

b. Overstated similarities between an unfettered review and an appellate review

By contrast, the justifications expressed in favour of the current regime are not entirely self-evident. In \textit{Westinghouse}, the Federal Supreme Court held that the objectives of increased efficiency and reduced procedural delays would be severely compromised if the Court was able to review the factual findings of the tribunal “like an appellate court”.\textsuperscript{45} Later decisions similarly emphasised that such power of review would be incompatible with the Federal Supreme Court’s mission, which does not consist “in retrying the case” but only in determining whether the grounds for annulment invoked are founded or not.\textsuperscript{46} A doctrinal view suggests that the Federal Supreme Court would otherwise be empowered to exercise a substantive review of the award (révision au fond).\textsuperscript{47}

This rationale seems to blur the line between a substantive review of the award, akin to a retrial or an appellate court’s review, and the ability to examine the specific grounds for annulments unfettered by the tribunal’s conclusions, whether legal or factual. Being able to disregard factual findings in matters of e.g. jurisdiction or independence constitutes no more of a révision au fond than the Federal Supreme Court’s existing power to disregard all legal findings of the tribunal in these matters. The justifications

\ \textsuperscript{44} See also Emmanuel Gaillard/Philippe Fouchard/Berthold Goldman, in: Gaillard/Savage (eds.), \textit{Fouchard, Gaillard, Goldman on international commercial arbitration}, The Hague 1999, p. 925, on the need for a judicial review “which prevents the arbitrators from avoiding censure by the courts through careful reasoning based on the facts alone”.

\textsuperscript{45} FSCD 119 II 380, ASA Bull. 2/1994 pp. 244–247, c. 3c.


expressed above become all the less compelling where the findings precluding the annulment pertain to purely procedural facts – e.g. whether a party was duly summoned to a hearing, whether it protested a lack of jurisdiction, etc. – and are thus entirely removed from the case’s merits. Having the Federal Supreme Court review whether such procedural facts correspond to reality can hardly be considered a retrial of the case. The same applies to facts relating to the independence and impartiality of an arbitrator.

The narrow exception suggested under IV. below, which would allow the Federal Supreme Court to review factual assertions whenever the existence of an alleged ground for annulment hinges on a factual question, would arguably not jeopardise the aforementioned objective of efficiency pursued by the legislator – not least given the relative scarcity of cases where such exception would actually come into play.

c. No legislative intent for the FSCA to preclude grounds for annulment through predetermined facts

At first glance, a reading of the FSCA might suggest a deliberate endorsement of the Westinghouse approach by the legislator. Indeed, art. 77 FSCA leaves untouched the general principle that the Federal Supreme Court must rule on the basis of the facts established by the previous instance (art. 105(1) FSCA) while declaring inapplicable the exception allowing the Court to correct or complete obviously inaccurate or unlawfully established findings of fact (art. 77(2) FSCA, which excludes art. 105(2) FSCA).

Yet the exclusion of art. 105(2) FSCA should be read together with the equally excluded art. 97 FSCA, which provides that any obviously inaccurate or unlawfully established finding of fact can be invoked, by itself, as a ground for appeal. Whenever such factual findings are successfully challenged, art. 105(2) FSCA allows the Federal Supreme Court to correct or complete the challenged finding (namely where the necessary correction is manifest beyond any doubt) instead of remanding the case to the previous instance to reassess the evidence. 48 Since art. 105(2) FSCA is accordingly seen as the pendant provision to art. 97 FSCA, 49 it plainly makes sense to exclude its applicability once factual errors are excluded as a ground for annulment. 50 Yet it remains questionable that the drafters of the FSCA, in so

49 Ibid., n. 11 ad art. 105 FSCA.
50 Poudret (fn. 20), pp. 683–684; Corboz (fn. 48), n. 64b ad art. 77 FSCA, similarly views the exclusion of art. 105(2) FSCA as a mean to confine the annulment grounds to those of art. 190(2) PILA.
doing, also intended for the explicit grounds for annulment of art. 190(2) PILA to become precluded by the tribunal’s findings whenever such grounds hinge on factual questions.

Indeed, the parliamentary process by which art. 77 FSCA was adopted does not suggest that this consequence was deliberately taken into account by the legislator. Art. 77 FSCA, including its exclusion of art. 105(2) FSCA, was inserted by the Federal Office of Justice in a proposal to the Council of State’s Legal Affairs Committee dated 3 April 2003. The Federal Office of Justice laconically introduced art. 77 FSCA (then art. 72a draft FSCA) as a provision tailored to the particularities of annulment proceedings in arbitration, without any further remarks as to the rationale or consequences of the exclusions listed therein. The provision was immediately approved by the Committee without any discussion and, in turn, the Council of State followed the Committee’s approval without parliamentary debate or comment. Likewise, the National Council’s Legal Affairs Committee approved the new article without any debate or comment, as did the National Council when endorsing the Committee's approval.

It seems therefore fair to say that the history of art. 77 FSCA does not reflect much parliamentary consideration of the interplay between art. 105 FSCA and the grounds for annulment of art. 190(2) PILA, let alone its potential bearing on cases where annulment grounds hinge on decisive questions of fact. Given the aforementioned purpose of art. 190(2) PILA, it is submitted that art. 77(2) FSCA must ultimately be understood as a provision aiming to prevent factual errors from being invoked as a ground for annulment. By contrast, the impeded factual review precluding grounds for

---

51 Minutes of the Council of State’s Legal Affairs Committee, sessions of 8 July 2003 and 9 July 2003, agenda item 01.023 s, annexed proposal of the Federal Office of Justice dated 3 April 2003, p. 2 (art. 72a draft FSCA).
52 Minutes of the Council of State’s Legal Affairs Committee, sessions of 8 July 2003 and 9 July 2003, agenda item 01.023 s, p. 69.
53 Ibid.
55 Minutes of the National Council’s Legal Affairs Committee, sessions of 1 July 2004 and 2 July 2004, agenda item 01.023 s, p. 40.
annulment in the cases outlined under III.1 above was likely not intended by
the legislator.57

3. Inefficacy of art. 190(2)(b) PILA in particular

A sceptical reader might dismiss the above concerns as the natural
consequence of choosing arbitration in Switzerland – a deliberate waiver of
judicial review over arbitral findings of fact, whether or not such findings end
up precluding grounds for annulment. This section examines the situation
where a party contests this very premise, i.e. consent to arbitration.

Under Swiss law,58 consent to arbitration can consist in a purely factual
question. General principles of Swiss contract law establish consent between
the parties primarily through their inner and common intent – a factual
conclusion inferred from all the circumstances of the case (subjective
interpretation);59 if no common intent can be established, consent will be
determined by the objective meaning which the parties could and should have
ascrbed in good faith to their mutual declarations, which is a matter of law
(objective interpretation).60 Thus whenever arbitral tribunals establish factual
consent based on the subjective interpretation, the Federal Supreme Court has
considered itself bound by this finding.61

It should first be noted that this categorical deference to a tribunal’s
factual finding of consent sits uncomfortably with the Federal Supreme
Court’s otherwise cautious approach when determining consent under the
objective interpretation62 – i.e. that consent to arbitration should be
unequivocal63 and not readily assumed.64

57 As suggested by Bernhard Berger, Die Rechtsprechung des Bundesgerichts zum
300, 296–297, with regard to the preclusion of art. 190(2)(b) PILA due to a tribunal’s
factual finding of consent; see also III.3 below.
58 Which applies in favorem validitatis pursuant to art. 178(2) PILA.
59 See e.g. FSCD 142 III 239, ASA Bull. 4/2016 pp. 967–987, c. 5.2.1, with further
references.
60 Ibid.
61 Ibid; FSCD 4A_305/2013 of 2 October 2013, ASA Bull. 3/2015 pp. 558–564, c. 3.4; see
c. 5b, and FSCD 4P.126/2001 of 18 December 2001, c. 4e/aa.
62 Mladen Stojiljkovic, Arbitral Jurisdiction and Court Review: Three Swiss Federal
63 FSCD 140 III 367, ASA Bull. 3/2014 pp. 539–542, c. 2.2.2.
64 FSCD 140 III 134, ASA Bull. 4/2014 pp. 813–825, c. 3.2.
More importantly, this deference is hardly reconcilable with the purpose of art. 190(2)(b) PILA as a backstop reserving the ultimate review of arbitral jurisdiction to the Federal Supreme Court. Indeed, since arbitration deprives a party from the fundamental right to argue its case before a court established by law, the Federal Supreme Court has emphasised the need to prevent such waiver from being forced upon an unwilling party. Thus while arbitrators are empowered to rule on their own jurisdiction pursuant to art. 186(1)–(1bis) PILA (competence-competence), the Federal Supreme Court explicitly leaves the ultimate decision on arbitral jurisdiction to a judicial instance, provided it was invited to do so. For this very reason, whenever a court must decide whether to refer parties to a Swiss-seated tribunal, the Federal Supreme Court has limited the reviewing power of said court to the prima facie validity of the arbitration agreement. In the words of the Federal Supreme Court, “the limited reviewing power of the court at this stage is justified by the fact that the [Federal Supreme Court] can later examine with full powers of review whether the tribunal correctly accepted or declined jurisdiction”.

Yet if this “full power of review” excludes factual questions, postponing the review of arbitral jurisdiction leads to aberrant results: prior to the tribunal’s ruling on jurisdiction, an ordinary court will satisfy itself with the prima facie existence of the arbitration agreement and decline a more in-depth investigation of factual consent, under the promise of ultimate review by the Federal Supreme Court; after the tribunal’s ruling on jurisdiction, however, factual consent will be deemed an unreviewable finding which binds the Federal Supreme Court under art. 105(1) FSCA.

On a fundamental level, the current regime unduly allocates unchecked competence-competence to the arbitral tribunal whenever jurisdiction hinges on factual questions. It is a blatant truism that the existence of an arbitration

---

65 See Stojiljkovic (fn. 62), 899–901, and Christian Luczak, Beschwerde gegen Schiedsgerichtsentscheide, in: Geiser et al (eds.), Prozessieren vor Bundesgericht, 4th edn., Basel 2014, pp. 305–355, para. 6.45; similarly Berger/Kellerhals (fn. 12), n. 1725 (deeming the result “awkward”) and Berger (fn. 57), pp. 296–297 (suggesting that the result was likely not intended by the legislator).
66 FSCD 128 III 50 c. 2c/aa, referring to art. 30(1) of the Swiss Constitution and art. 6(1) of the European Convention on Human Rights.
67 FSCD 117 II 94, c. 5a in fine.
68 FSCD 121 III 38 c. 2b.
69 FSCD 138 III 681 c. 3.2, with further references.
70 Ibid.
71 See similarly Stefan Kröll/Peter Kraft, in: Böckstiegel et al. (eds.), Arbitration in Germany: the model law in practice, 2nd edn., Alphen aan den Rijn 2015, n. 54 ad s. 1059
agreement constitutes the most elementary requirement for any arbitration proceedings. If this very premise is contested, the restrictive approach of the Federal Supreme Court arguably loses much of its justification. By itself, an arbitral finding of consent cannot be the basis for its own non-reviewability. It should not matter whether such consent was framed as a matter of law or as a matter of fact.

For all these reasons, it seems highly unlikely that the legislator intended to preclude parties from raising a challenge under art. 190(2)(b) whenever the tribunal’s finding of consent relied on a subjective rather than an objective interpretation.

4. Differing powers of review between Swiss and foreign arbitral awards

A further incongruity of the current regime consists in the greater powers of review exercised by the Swiss judiciary over foreign arbitral awards compared to the review carried out as seat jurisdiction over its own (international) awards.

Swiss courts review the recognition and enforcement of foreign arbitral awards by directly applying the 1958 New York Convention. When the party resisting enforcement invokes a ground for refusal under art. V of the Convention, the admissible evidence and allegations extend to anything necessary to verify the conditions for recognition. Where such evidence...
conflicts with arbitral findings, commentators of the New York Convention support a review of the Convention’s grounds for refusal unbound by any finding of the tribunal, at least when examining arbitral jurisdiction under art. V(1)(a)79 – though there is limited guidance on this point under Swiss law.80 Thus whenever a lack of arbitral jurisdiction (and possibly other overlapping grounds between art. 190(2) PILA and art. V of the Convention) hinges on factual questions, the reviewing powers of Swiss enforcement courts will likely be greater than that of the Federal Supreme Court in annulment proceedings.

In such cases, even though parties may legitimately expect that choosing Switzerland as the arbitral seat will allow Swiss courts to exercise supervision over the arbitration,81 parties will be more constrained in inviting Swiss courts to review (and prevent the enforcement of) the award than if they had chosen a non-Swiss seat.

5. **Comparative analysis**

Finally, one should note that the categorical deference of the Federal Supreme Court to the factual findings of the arbitral tribunal in annulment proceedings is at odds with the approach adopted by several other arbitration centres, either generally or at least with regard to an alleged lack of arbitral jurisdiction.

In France, the Supreme Court has held that the judge ruling on annulment actions must freely examine, both as a matter of law and as a matter of fact, all the elements pertaining to the grounds for annulment


80 Jean-François Poudret/Sébastien Besson, Comparative law of international arbitration, 2nd edn., London 2007, n. 939, doubt that the principle of art. 105(1) FSCA can be readily transposed to Swiss enforcement proceedings. The authors nonetheless suggest that an enforcement court cannot call the factual findings of the tribunal into question solely because the losing party invokes a public policy violation under art. V(2)(b) of the Convention.

81 See e.g. Daniel Girsberger/Nathalie Voser, International arbitration: comparative and Swiss perspectives, 3rd edn., Zurich 2016, p. 397, with further references.
invoked.82 This principle has been reiterated by the Supreme Court with regard to an alleged lack of jurisdiction,83 violations of public policy,84 and is said to apply to grounds of irregular composition of the tribunal as well as violations of the right to adversarial proceedings.85

In Germany, the Federal Court of Justice has similarly ruled that that the supervisory powers granted to ordinary courts in reviewing grounds of annulment would be “undermined” and “largely ineffective” if such courts were bound by the factual findings of an arbitral tribunal.86 This unfettered power of review is also supported by German commentators regarding all available grounds for annulment.87

Under English case law, it has been held that the court examining a lack of arbitral jurisdiction “should not be placed in a worse position than the arbitrator” and should accordingly remain free to review questions of fact.88 As a result, the court is neither bound by the tribunal’s findings nor reduced to the evidence presented before the arbitrator, but rather “makes its own

82 French Supreme Court, civ. 1re, judgment of 6 January 1987, Bull. 1987 I no. 2.
83 French Supreme Court, civ. 1re, judgment of 6 October 2010, Bull. 2010 I no. 185.
84 While the Supreme Court briefly endorsed a new trend of the Paris Court of Appeal supporting a more limited review of the award’s findings when public policy is at issue, the Paris Court of Appeal’s subsequent reversal of its approach and return to the original principle of unfettered review seems to have been now re-endorsed by the Supreme Court as well (see Louis Christophe Delanoy, Les allégations de corruption et le contrôle de la sentence au regard de l’ordre public : vers un revirement de la Cour de cassation?, note sous Cass civ 1re, 24 juin 2015, Revue de l’Arbitrage 1/2016 pp. 221–234, as well as the more recent French Supreme Court judgment of 25 May 2016, civ. 1re, pourvoi no. 14-29.264).
85 Delanoy (fn. 84), p. 223.
86 German Federal Court of Justice, judgment of 23 April 1959, VII ZR 2/58, c. 2a; judgment of 25 October 1966, KZR 7/65, c. 2; similarly: judgment of 29 September 1983, III ZR 213/82, c. 2e/aa; judgment of 31 May 1972, KZR 43/71, c. II. However, recent case law by the Higher Regional Courts appears more divided on this issue: see Zöller (ed.), Zivilprozessordnung, 31st edn., Köln 2016, n. 53 ad s. 1059 ZPO.
decision on the evidence before it”. This faculty, however, does not extend to the review of the award’s compatibility with public policy, in which case a tribunal’s finding of fact as to e.g. the payment of bribes remains binding on the court.

The Supreme Court of Singapore has similarly held that a tribunal’s own view of its jurisdiction has “no legal or evidential value” before a court examining that question in annulment proceedings, which is accordingly free to review the evidence presented before the arbitral tribunal and make its own findings of fact. With regard to public policy violations, on the other hand, the Supreme Court of Singapore follows the English approach and prevents courts from reviewing an arbitral finding of fact as to e.g. the intention of the parties to compel an illegal conduct.

IV. Concluding remarks and possible solution de lege lata

As outlined above, several considerations support the notion that the Swiss legislator did not intend to preclude the PILA’s grounds for annulment whenever their existence hinges on factual questions. The current deference given to the factual findings of an arbitral tribunal or institution undermines art. 190(2) PILA as a safeguard ensuring the effective observance of minimal guarantees. This approach proves all the more contradictory when the precluded grounds for annulment involve guarantees which even the Federal Supreme Court has deemed so fundamental that the final answer must necessarily be left to a judicial instance – such as the tribunal’s independence or a lack of arbitral jurisdiction. In the latter case, the current regime is at odds with the allocation of competence-competence within the Swiss legal order, including the prima facie review of arbitration agreements by ordinary courts under the promise of ultimate judicial review by the Federal Supreme Court. None of these considerations seem to find much reflection in the expedient, little-debated adoption of art. 77 FSCA by the parliamentary committees and chambers. As a further incongruity, the current regime

90 Westacre Investments Inc v Jugoinport-SDRP Holding Company Ltd & Ors [1999] EWCA Civ 1401 (enforcement of a foreign award), applied in the annulment case of R v V [2008] EWHC 1531 (Comm) para. 34.
91 PT First Media TBK v Astro Nusantara International BV & Ors [2013] SGCA 57 para. 163.
92 AQZ v ARA [2015] SGHC 49 para. 54.
93 AJU v AJT [2011] SGCA 41 para. 70.
subverts the parties’ expectation that Swiss courts would exercise greater supervisory powers over the award than if the parties had chosen a non-Swiss seat. Finally, a comparative analysis suggests that annulment courts in other arbitration centres are not ordinarily bound by the tribunal’s factual finding, at the very least when reviewing an alleged lack of arbitral jurisdiction.

Given that the Federal Supreme Court already departs from the strict wording of art. 77(2) and 105 FSCA in certain cases, similar exceptions de lege lata can be envisaged to address the shortcomings described above. Indeed, Stojiljkovic draws from the current exception allowing parties to invoke grounds for annulment against the factual finding itself and suggests that art. 190(2)(b) PILA could be raised against a factual finding of consent to arbitration so as to review the tribunal’s jurisdiction when based on a subjective interpretation. This solution appears somewhat circular, given that the faultiness of the tribunal’s finding of consent does not specifically result from a lack of jurisdiction in the same way such faultiness would specifically result from e.g. procedural violations or biased expert testimonies. It would also fail to address unduly predetermined questions of fact relating to other grounds for annulment.

Rather, it is submitted here that the Federal Supreme Court should allow parties to assert and substantiate facts – just as it occasionally does when the challenged awards lacks sufficient factual findings – whenever the existence of an alleged ground for annulment hinges on a factual question. In applying this exception, the Federal Supreme Court’s review would evidently be limited to facts which would support the existence of a ground for annulment under art. 190(2) PILA, and only consider facts which were

---

94 See II.2 above.
95 On this exception see II.2.a above.
96 Stojiljkovic (fn. 62), pp. 901–902.
97 See text to fn. 11–12 above.
98 Whether based on the same evidence as that contained in the case’s record (see text to fn. 13 above) or, where necessary, in accordance with art. 55 FSCA: see the first solution considered (but ultimately rejected) by Leemann (fn. 16), p. 21.
99 On this exception see II.2.b above.
100 Regarding public policy challenges under art. 190(2)(e) PILA, it should be emphasised that this solution would not allow parties to re-argue the existence of contractual obligations under the guise of a pacta sunt servanda violation; this particular aspect of substantial public policy is premised on a contradiction between the tribunal’s acknowledgement that a contractual obligation exists and its refusal to enforce it (FSCD 4A_319/2015 of 5 January 2016, ASA Bull. 3/2016 pp. 744–748, c. 4.1, with further references); just as the Federal Supreme Court currently refrains from verifying whether the obligation did exist as a matter of law, it would continue to do so as a matter of fact. By contrast, the Federal Supreme Court already examines as a matter of law whether the
duly alleged during the arbitral proceedings. Parties would be barred from submitting factual assertions regarding the background of the case or the conduct of the arbitral proceedings without rigorously demonstrating the necessity to depart from or complete the tribunal’s findings in order to substantiate the existence of a specific ground for annulment. The Federal Supreme Court could dismiss at the outset, just as it currently does, any factual assertions which have no bearing on a ground for annulment, or where parties do not sufficiently establish why the ground for annulment hinges on that particular fact. Even when reviewing a decisive factual question, the Federal Supreme Court would remain free to give substantial weight to the tribunal’s own findings of fact.

It is submitted that the scope of this exception remains appropriately narrow and would preserve the legislative aim of maintaining the efficiency of arbitration proceedings: scenarios where a ground for annulment hinges on decisive factual questions remain relatively infrequent, and the Federal Supreme Court can readily dismiss attempts to challenge the facts of the award outside of this exception. However, when such scenarios do occur, it is both fair and consistent with the purpose of art. 190(2) PILA that the Federal Supreme Court retain the power to review these factual questions – be it the existence of specific facts relating to arbitral independence, whether a party was duly summoned, whether an irregularity was protested, whether the award effectively compels an obligation violating public policy, or indeed whether the parties agreed to arbitration in the first place.

award e.g. enforces a serious violation of personality rights (FSCD 138 III 322, ASA Bull. 3/2012 pp. 591–602, c. 4.3.2) and, under the approach proposed in this article, would be able to verify the same as a matter of fact.

101 Cf. FSCD 4A_470/2016 of 03 April 2017, ASA Bull. 3/2017, p. 693, c. 2.4 (with further references).

102 See Born (fn. 79), p. 1236, suggesting that having such deference in cases involving issues of e.g. trade practice or industry custom is “both efficient and fair (in that it promotes accuracy in the annulment court’s decision-making)”.

Cf. FSCD 4A_470/2016 of 03 April 2017, ASA Bull. 3/2017, p. 693, c. 2.4 (with further references).

See Born (fn. 79), p. 1236, suggesting that having such deference in cases involving issues of e.g. trade practice or industry custom is “both efficient and fair (in that it promotes accuracy in the annulment court’s decision-making)”.
Ph. HOVAGUIMIAN, *Non-reviewable Facts in Swiss Annulment Proceedings: Undermining the Safeguards of Art. 190 PILA*

**Summary**

In annulment proceedings against international awards, the Swiss Federal Supreme Court is notoriously bound by the facts established by the arbitral tribunal. Yet the grounds for annulment provided under art. 190(2) PILA occasionally hinge on the very existence of specific facts – e.g. regarding the pre-existing relationship between arbitrators and parties, the conduct of the arbitral proceedings, or whether the parties agreed to arbitration in the first place.

This article submits that the non-reviewability of factual findings in such cases undermines the efficacy of art.190(2) PILA, notably by preventing the ultimate review of arbitral jurisdiction by a judicial instance. The article argues that this preclusion of the grounds for annulment was likely not intended by the legislator when adopting the relevant procedural rules, particularly in light of their parliamentary history. As a further incongruity, the current regime subverts the parties’ expectation that Swiss courts would exercise greater supervisory powers over their own (international) awards than if the parties had chosen a non-Swiss seat. Finally, a comparative analysis suggests that Switzerland’s categorical deference to the factual findings of arbitral tribunals is also at odds with the approach of several other arbitration centres, including those with notoriously arbitration-friendly practices.

To address these shortcomings, the article submits that, whenever the existence of a purported ground for annulment hinges on a factual question, the Federal Supreme Court should allow parties to assert and substantiate facts which were already alleged in the arbitral proceedings – rather than refusing to contemplate any fact which departs from the tribunal’s findings. Used restrictively, this exception would remain appropriately narrow in scope while also preserving the purpose of art.190(2) PILA as a safeguard ensuring the observance of minimal guarantees.
Submission of Manuscripts
Manuscripts and related correspondence should be sent to the Editor. At the time the manuscript is submitted, written assurance must be given that the article has not been published, submitted, or accepted elsewhere. The author will be notified of acceptance, rejection or need for revision within eight to twelve weeks. Manuscripts may be drafted in German, French, Italian or English. They should be submitted by e-mail to the Editor (mscherer@lalive.ch) and may range from 3,000 to 8,000 words, together with a summary of the contents in English language (max. ½ page). The author should submit biographical data, including his or her current affiliation.

Aims & Scope
Switzerland is generally regarded as one of the World’s leading place for arbitration proceedings. The membership of the Swiss Arbitration Association (ASA) is graced by many of the world’s best-known arbitration practitioners. The Statistical Report of the International Chamber of Commerce (ICC) has repeatedly ranked Switzerland first for place of arbitration, origin of arbitrators and applicable law.

The ASA Bulletin is the official quarterly journal of this prestigious association. Since its inception in 1983 the Bulletin has carved a unique niche with its focus on arbitration case law and practice worldwide as well as its judicious selection of scholarly and practical writing in the field. Its regular contents include:

- Articles
- Leading cases of the Swiss Federal Supreme Court
- Leading cases of other Swiss Courts
- Selected landmark cases from foreign jurisdictions worldwide
- Arbitral awards and orders under various auspices including the ICC and the Swiss Chambers of Commerce (“Swiss Rules”)
- Notices of publications and reviews

Each case and article is usually published in its original language with a comprehensive head note in English, French and German.

Books and Journals for Review
Books related to the topics discussed in the Bulletin may be sent for review to the Editor in Chief (Matthias SCHERER, LALIVE, P.O.Box 6569, 1211 Geneva 6, Switzerland).