

ABSTRACTS OF SWISS SUPREME COURT CASES ON ARBITRATION 2019

REPORTED IN ASA BULLETINS 1-4/2019

Introduction to the Case Law Section 1/2019

1. Decision 4A_550/2017¹ of 1 October 2017 concerns an arbitration in which the respondent had raised allegations of **contract simulation** as a defence to the claimant's request for payment. Although the arbitral tribunal acknowledged that the context in which the contract was entered into was rather strange, it ultimately rejected the allegation of simulation and found in favour of the claimant. The respondent sought to annul the award before the Swiss Federal Supreme Court. It asserted that the arbitral tribunal had violated its **right to be heard** by disregarding its allegations of simulation, refusing its requests for the taking of evidence and by **hearing witnesses on questions submitted to them in writing in advance** in a way contrary to the agreed procedural rules.

The Supreme Court rejected these arguments as it found that the arbitral tribunal had taken into account the respondent's theory on contract simulation and recalled that arbitral tribunals are not required to give detailed reasoning on every single argument. The Court also found that the arbitral tribunal was entitled to reject the request for the taking of evidence based on its **anticipatory assessment of the existing evidence**. The Court considered that the respondent had forfeited its **right to invoke violations of the procedural rules**. The respondent had not requested the right to ask questions to the witnesses at the hearing or objected to the way in which their examination had been conducted at the close of the hearing or in its post-hearing submissions.

2. In 2014, the **Supreme Court annulled an arbitral award that had been rendered out of time**. The sole arbitrator had delayed his award for years. He then offered to resign, in the event his award was not issued by a certain date. The parties accepted. The award was one day late. The Court found that the arbitrator was no longer competent (decision 4A_490/2013 of 28 January 2014 (140 III 75²)). The party who had successfully challenged the award, sued the arbitrator seeking to recover damages, including legal fees incurred in the Supreme Court (annulment) proceedings, beyond the fees

¹ Swiss Federal Supreme Court, Decision 4A_550/2017 of 1 October 2017, ASA Bull. 1/2019, p. 133, note KUNZ.

² ASA Bull. 3/2014, p. 617.

awarded by the Supreme Court under its tariff. The competent court in Geneva ruled that to the extent that the Supreme Court had awarded costs to the successful plaintiff by applying the Court's tariff and that no further fees could be claimed. The plaintiff challenged this decision before the Supreme Court. In decision 4A_76/2018³ the Court found **legal costs incurred by the party were damages**. The Supreme Court analysed the status of the arbitrator and the arbitrator's contract. **It found that the plaintiff was entitled to claim from the arbitrator** the difference between the costs awarded in the successful annulment proceedings and the actual costs.

3. The plaintiff (respondent in the arbitration) sought to annul an award rendered under the Swiss Rules on the ground of public policy. He had been ordered in the award to reimburse certain amounts to the heirs of a business partner under a contract entered into 15 years ago. He took issue with the fact that the arbitral tribunal had not drawn an adverse inference on the ground that the heirs had **deliberately destroyed documents which he had requested in a Redfern Schedule** and which disproved their case. The Supreme Court found that the arbitrators' allocation of the burden of proof was not open to challenge and that the award established that there was no proof of a malicious destruction of evidence on the heirs' part. The Court also rejected the argument that the arbitrators had violated *pacta sunt servanda* and ruled that **inconsistent reasons** in the award ("l'incohérence intrinsèque des considérants") was **not a ground to set aside an award**.⁴

4. A Canadian contractor undertook to build the new headquarters of an Algerian public entity (employer). A dispute arose over delays. The contract entitled the employer to terminate the contract when daily liquidated damages for delay had reached an aggregate amount of 10 percent of the contract sum. Considering that this cap was reached, the employer terminated the contract. The contractor refused to leave the site and occupied it for three years until an arbitral tribunal appointed under the ICC Rules (ICC case no. 19426) ordered the contractor to leave, threatening to apply penalties ("**astreintes**") in the amount of 5'000'000 DZD per day, if the contractor failed to evacuate the site. In the final award, the arbitral tribunal found that the cap was not met and the employer not entitled to terminate the contract for cause. The termination was nevertheless valid under Art 566 of the Algerian Civil Code, as a termination for convenience.

³ Swiss Federal Supreme Court, Decision 4A_76/2018 of 8 October 2018, ASA Bull. 1/2019, p. 146.

⁴ Swiss Federal Supreme Court, Decision 4A_522/2016 of 2 December 2016, ASA Bull. 1/2019, p. 158. An English translation is available on www.swissarbitrationdecisions.com.

The arbitral tribunal upheld the contractor's claim for lost profits, pursuant to Art 566 of the Algerian Civil Code, but reduced it in equity because of the damages incurred by the employer due to the contractor's refusal to leave the site. The arbitral tribunal determined that the contractual clause for liquidated damages due to the employer in the event of contractor's delay (2'000'000 DZD) was not directly applicable to a case where the contractor unlawfully occupied the site after termination. It found, however, that this clause was the only one in the entire contract that illustrated the value that the parties attached to the possession of the site. The tribunal concluded that the amount claimed by the employer (10'000'000 DZD per day) was exaggerated. An amount of 900'000 DZD per day was found to reflect equitably the value the building had for the employer.

The contractor sought to set aside the award arguing that its right to be heard had been violated on two accounts. According to the contractor, equity as a basis for a claim reduction had not been pleaded. The liquidated damages clause had been addressed by the parties, but it was wholly unforeseeable that the arbitral tribunal would rely on the contractual provision for the assessment of another head of damages that the employer had incurred, namely, damages due to the unlawful site occupation. The Federal Supreme Court rejected the challenge. Equity had been pleaded extensively. Moreover, this was **not a case where an arbitral tribunal had rendered an award in equity rather than in law. Equity was explicitly mentioned in Art 566 of the Algerian Civil Code as a factor to be taken into account**, when assessing the contractor's entitlement to lost profits.

With regard to the arbitral tribunal's reliance on Art 47 of the Contract as a basis for damages resulting from the unlawful site occupation, the Supreme Court was, in the beginning, somewhat more hesitant. Neither party had pleaded that this provision could be relied upon to reduce the damages due to the contractor. The Supreme Court found (para 3.3.3.) that the arbitrators were right in examining whether the contract, directly or indirectly, provided a means to assess the value of daily damages due to the late restitution of the construction site⁵. Art 47 had not been applied directly but gave guidance to the arbitral tribunal in equitably reducing the contractor's lost profit claim. According to the Court, the contractor could not reasonably assume that its occupation of the site would go unsanctioned

⁵ “la démarche consistant à rechercher dans le contrat et à le découvrir, faute de mieux, dans la même clause un élément concret apte à fournir un ordre de grandeur pour calculer la valeur d'un jour de retard dans la restitution du chantier et estimer, à l'aide de cet élément de comparaison, le montant dû au maître de l'ouvrage, relativement à sa conclusion reconventionnelle sur la créance de l'entrepreneur du chef du gain manqué.

nor that it could lead to an equitable reduction of its lost profits claim. The Court even rebuked the contractor for having simply challenged the amount claimed by the employer.⁶

The rebuke is somewhat harsh. If a party raises a claim without particularizing its legal basis or demonstrating a damage, let alone its qualification, then it is a judgment call for counsel to decide whether to ask for the claim to be dismissed for lack of substantiation and evidence, or to challenge it on the merits. It may, however, be borne in mind that engaging with an entirely unsubstantiated damage claim carries the attendant risk that the arbitral tribunal might end up finding substantiation for such damage claim in the defendant's defense and use it to award the claim. This might have been a driver for the contractor's counsel's decision not to engage with the damages claim. The question is: was it really as predictable as the Supreme Court considered the arbitral tribunal to use this admittedly unsubstantiated counterclaim to reduce the contractor's claim? Ultimately, the Federal Supreme Court seemed to have given much weight to Art 566 of the Algerian Civil Code, which specifically mentions that the contractor's claims can be reduced equitably. Parties facing a similar situation may be well advised to consider building a fallback position and against engaging with inflated counterclaims, rather than hoping that the arbitral tribunal may throw it out for lack of evidence.⁷

5. On 30 November 2017, the Swiss Federal Supreme Court issued a decision in a **post M&A dispute**. In 1987, the German media group Westdeutsche Allgemeine Zeitung (WAZ), now Funke Mediengruppe, acquired a stake in Austria's largest journal (**Kronen Zeitung**) from its founder Hans Dichand. The contract provided that it could not be terminated before 31 December 2017 and that WAZ had to compensate profit shortfalls. Hans Dichand died in 2010. In 2014 the Funke Group tried to prematurely terminate the contract, arguing inter alia that its unlimited obligation to cover losses was immoral. An arbitral tribunal applying the Swiss Rules decided that neither the ordinary termination nor the immediate termination were valid. The arbitrators also found that there was no evidence that the loss guarantee was ever activated.

⁶ « ... Il va de soi que la plus élémentaire prudence commandait à la recourante de ne pas se borner à contester le montant journalier de 10'000'000 DZD réclamé par l'intimée, voire tout simplement son obligation de quitter le chantier, comme elle l'a fait, mais d'envisager, ce qu'elle n'a pas fait, tous les cas de figure ne revêtant pas un caractère extraordinaire ou insensé. Or, sous cet angle, **l'éventualité que le Tribunal arbitral fit référence, par analogie, à la seule clause du contrat qui fournissait une valeur chiffrée pour sanctionner un retard de l'entrepreneur, eût-il une autre origine, n'excédait pas objectivement les limites du possible.** »

⁷ Swiss Federal Supreme Court, Decision 4A_525/2017 of 9 August 2018, ASA Bull. 1/2019, p. 163. An English translation is available on www.swissarbitrationdecisions.com.

Funke sought to annul the award before the Supreme Court, alleging that the arbitral tribunal's finding was contrary to the available evidence. The Supreme Court dismissed the request.⁸ Funke had failed to show that it had argued in the arbitration that the loss guarantee was more than a theoretical threat.

6. In a decision dated 22 January 2018⁹, the Swiss Supreme Court **annulled an award rendered by the Court of Arbitration for Sports (CAS) for lack of jurisdiction** of the CAS Panel. The arbitration had been conducted under a player's agent contract, which embodied a potentially **pathological dispute resolution clause referring to two football bodies** (FIFA and an Argentine football association) **and also to the jurisdiction of the courts in Buenos Aires**. The Supreme Court found that there was no discussion in the award about the parties' real intentions and the role the two professional bodies were meant to play. The CAS Panel had interpreted the clause according to the reliance principle ("Vertrauensprinzip") but had come to a wrong conclusion. **The dispute resolution clause was manifestly not an arbitration agreement.**

7. **Lifting of the corporate veil** is a recurrent topic when assessing the scope of an arbitration agreement and its extension to third parties. In decision 5A_1056/2017,¹⁰ the issue arose under a different angle. A shipyard had performed works on a yacht owned by a company. An arbitral tribunal sitting in Italy ordered the company to pay around EUR 800'000 to the shipyard. As the company did not comply with the award, the shipyard sued the individual who controlled the company directly before the Italian courts. It requested that the **effect of the award be extended to the individual behind the award debtor**. The Italian court found that the company was a shell and its legal identity was amalgamated with that of the owner. The shipyard sought to enforce the court judgement in Switzerland against the owner under the Lugano Convention. The owner objected that the **Lugano Convention did not apply as arbitration was excluded from its scope**. He also raised arguments under the New York Convention. The Swiss Federal Supreme Court found that the proceedings were based on a foreign court

⁸ Swiss Federal Supreme Court, Decision 4A_430/2017 of 30 November 2017, ASA Bull. 1/2019, p. 179. An English translation is available on www.swissarbitrationdecisions.com.

⁹ Swiss Federal Supreme Court, Decision 4A_432/2017 of 22 January 2018, ASA Bull. 1/2019, p. 189. An English translation is available on www.swissarbitrationdecisions.com.

¹⁰ Swiss Federal Supreme Court, Decision 5A_1056/2017 of 11 April 2018, ASA Bull. 1/2019, p. 197.

On 11 April 2018 the Supreme Court also rejected the plaintiff's request to set aside the decision ordering the attachment of the plaintiff's funds based on the Italian judgment (5A_953/2017).

judgement and not on the arbitral award, and that the judgment analysed a question that was different from the one submitted to the arbitral tribunal and involved different parties. Enforcement of the judgement was granted.

8. An Austrian company undertook to supply to a Russian customer five machines for the maintenance of rail heads. The contract provided that it could be terminated in case of delay, and that Swiss law applied, to the exclusion of the Vienna Sales Convention (CISG). After the first machine had been delivered, the Russian customer cancelled the contract for delay and initiated arbitration under the contract (UNCITRAL, seat Zurich). The arbitral tribunal found that the **termination for delay was unlawful** and that there had been no proper notice of delay. It characterized the contract as a contract for work, rather than a sales agreement (arguably the exclusion of the CISG was not a factor proving that the parties meant to conclude a sales agreement), and found that the customer who terminated a contract without cause (for convenience) had to indemnify the supplier. The quantification of the indemnification was left to a future award. The partial award ordered as follows.

« 1. The Arbitral Tribunal's decision on Respondent's claim for an indemnity of EUR 10'982'507 plus the Swiss legal interest at 5% from July 17, 2015, and damages of EUR 187'420 plus the Swiss legal interest at 5% from the respective payment date as indicated in recital 26 of the Respondent's Reply on the Counterclaim is deferred until a future arbitral award;

2. The fees and expenses of the arbitrators for time period beginning with their appointment and the date of the present Partial Award are fixed at CHF 474'812,25.

3. The Arbitral Tribunal's decision on the parties' requests that costs be awarded is deferred until a future arbitral award.

4. All other prayers for relief are denied. »

The customer sought to set this partial award aside alleging due process violations. However, the customer was unable to show that its right to be heard had been violated. The Supreme court rejected the challenge in its decision 4A_491/2017.

On a formal level, the Court noted that the **request for annulment of the entire partial award was not admissible since, only the last point of the dispositive part was final**. Points 1 and 3 referred claims to a future award. These points could not be challenged even though the arbitral tribunal had in the body of the partial award decided certain factual and legal points that were relevant for these deferred claims (such as the classification of the

contract). The cost award was final but could not be challenged as an international award (contrary to domestic arbitral awards).¹¹

9. Under Swiss law, it is possible to extend an arbitration clause to a party who has not signed the contract embodying the clause. A real estate broker (X) had the knowledge of a plot of land that was for sale. He contacted A, the brother of an acquaintance (B). 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. X subsequently signed a brokerage agreement with B, according to 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 for a representation that would call for an extension to the arbitration agreement. X appealed to the Swiss Federal Supreme Court. The Court upheld the award in the absence of proven representation. It left open the question 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 the **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 that in certain narrow circumstances, an extension was possible including 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 to reach out to Z S.A. X could not challenge the award on the ground that the arbitrator had wrongly failed to lift the corporate veil. As to the interference, the Court distinguished between merits and jurisdiction. Even if the plot was bought by a partner of B, only B could be bound by the arbitration clause. It did not matter whether the two brothers, A and B, 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 have come to a different conclusion. If bad faith on the part of the original and the allegedly interfering party were established,

¹¹ Swiss Federal Supreme Court, Decision 4A_491/2017 of 24 May 2018, ASA Bull. 1/2019, p. 205. An English translation is available on www.swissarbitrationdecisions.com.

this would have impacted not only the merits but also the jurisdiction. Good faith is regularly an important criterion for the Supreme Court when examining the extension of arbitration agreements to non-signatories.¹²

10. 4A_18/2019 concerns a domestic arbitration between an insurance company and a policy holder based on Art 169 of the Ordinance of supervision of insurance companies («Verordnung über die Beaufsichtigung von privaten Versicherungsunternehmen», SR 961.011). The plaintiff's request for **legal aid** in the Supreme Court annulment proceedings was rejected for lack of chance of success of the annulment request.¹³ The latter was dismissed with the Court finding that a **party cannot challenge an arbitral award on the ground that the right to be heard of the other party has been violated.**

MATTHIAS SCHERER
EDITOR IN CHIEF

Introduction to the Case Law Section 2/2019

1. In 4A_508/2017¹⁴, Swiss Federal Supreme Court accepted that the (CAS) arbitral tribunal rewrote the interest calculation on a claim on its own motion without exceeding its mandate (**ultra petita**). It also rejected football club's argument that public policy commanded to reduce allegedly **excessive penalties** which it had to pay to a coach whose employment was terminated.

2. After their contract was terminated by the employer, two architects sued successfully for damages under SIA Norm 102¹⁵ and Article 404 of Swiss Code of Obligations. The employer challenged the award on a number of accounts.¹⁶ The Supreme Court found that it was not arbitrary to award a lump sum of 10 percent compensation even in the absence of proof of actual damage, since certain legal authorities indeed militate for this solution. The Court also rejected an argument that the arbitral tribunal had acted in excess

¹² Swiss Federal Supreme Court, Decision 4A_473/2016 of 16 February 2017, ASA Bull. 1/2019, p. 218. An English translation is available on www.swissarbitrationdecisions.com.

¹³ Swiss Federal Supreme Court, Decision 4A_18/2019 of 7 February 2019, ASA Bull. 1/2019, p. 231.

¹⁴ Swiss Federal Supreme Court, Decision 4A_508/2017 of 29 January 2018, based on a CAS decision, ASA Bull. 2/2019, p. 375.

¹⁵ The SIA (the Swiss Federation of Architects and Engineers) also issues arbitration rules. For a presentation of the (new) rules see Bernd EHLE, *SIA 150:2018 – Modern Swiss arbitration rules for construction disputes*, ASA Bull. 4/2018, p. 895.

¹⁶ Swiss Federal Supreme Court, Decision 4A_642/2017 of 12 November 2018, based on a domestic ad hoc award ASA Bull. 2/2019, p. 384.

of its powers. The arbitral tribunal had operated a set-off. However, the Supreme Court ruled that **set-off is not ultra petita**.

The arbitral tribunal was found at fault on another point: the tribunal had violated the employer's right to be heard by making **findings that were contrary to the records in the arbitration**. The arbitrators found that the architects had established provisional drawings, but it flowed from the records that the architects admitted that they had been unable to prepare the drawings in the absence of required technical information from the employer. The award was partially annulled.

3. Dr Gustaf Rau, who died in 2002, sold his family business for several hundred million Deutsch Mark, and established himself as a medical doctor in Africa. He also amassed an immensely valuable collection of paintings, and established several philanthropic foundations¹⁷. His estate spawned many protracted law suits, including the arbitration that led to Supreme Court decision 4A_583/2017¹⁸. A foundation sued a lawyer whose mandate/power of attorney regarding a BVI company was allegedly revoked by Dr Rau. The foundation requested that the lawyer hand over shares of the BVI company. The lawyer objected, claiming that as long as his fees were not paid, he had a retention right (Art. 895 Swiss Civil Code). He also challenged the arbitral tribunal's jurisdiction to decide his claims against the foundation that were not connected to the shares and the right to retain them. The arbitral tribunal issued an award deciding, generically, that it had jurisdiction over the lawyer's retention claims. The lawyer sought to set the award aside. The Swiss Federal Supreme Court interpreted the **arbitration clause in the mandate/power of attorney** broadly. It held that the arbitral tribunal was competent to decide claims under the mandate as well as any rights that hinder such claims, like **rights of retention under Article 895 of the Swiss Civil Code**. Since the arbitral tribunal's decision appeared to admit jurisdiction over *any* claims that the attorney raised to bolster the retention right, the **Court gave clear guidance on how the award had to be interpreted** (this is quite unique). The retention right and the underlying retention claim have to be distinguished. The Court noted that the arbitral tribunal properly accepted jurisdiction over any retention right and underlying claims, i.e., claims that related to the retained shares. However, had the arbitral tribunal decided on the claims that were not connected to the mandate and the shares, it would not have had jurisdiction to do so.

¹⁷ [https://de.wikipedia.org/wiki/Gustav_Rau_\(Kunstsammler\)](https://de.wikipedia.org/wiki/Gustav_Rau_(Kunstsammler))

¹⁸ Swiss Federal Supreme Court, Decision 4A_583/2017 of 1 May 2018, based on a domestic ad hoc arbitration ASA Bull. 2/2019, p. 395.

4. In 4A_490/2017¹⁹ the Supreme Court rejected a challenge to a CAS award (CAS case 2016/O/4469 and CAS 2017/A/4949). A Russian athlete was banned for doping by a CAS sole arbitrator. The ban was confirmed by the CAS acting as an appellate body upon request of the International Association of Athletics Federations (IAAF). The athlete challenged both decisions before the Supreme Court. She argued that the CAS lacked **jurisdiction ratione temporis**, because the Russian Federation had yet to conduct disciplinary proceedings. The Supreme Court found that the challenge was inadmissible insofar as it was directed against the sole arbitrator's award. **Only last instance decisions can be challenged.** All remedies must first be exhausted. Regarding the appellate decision, the Court analysed and interpreted the arbitration agreement in the IAAF statutes and IAAF Rules. It found that an international sport **federation was entitled to bring an arbitration claim directly if the national federation was unable or unwilling** to proceed with a doping investigation.

5. The award underlying decision 4A_394/2017²⁰ is remarkable in two respects. First, it was issued by an arbitral tribunal of four arbitrators; second, it denied the claimant the right to withdraw its claim without prejudice. The dispute arose under a railway **concession** granted by Spain and France to a concession company for the construction and operation of a high-speed railway through the Pyrenees, linking the cities of Perpignan in France and Figueras in Spain. The treaty between the two countries (**The Madrid Treaty**) provided for an ad hoc arbitration before an even-numbered arbitral tribunal composed of **four arbitrators**, the fourth arbitrator having decisive vote in case of a deadlock. Disputes with the concession holder under the concession contract were also subject to the same dispute resolution clause. In 2015, the concession holder sued the States. The seat of the arbitration, originally in Brussels, was moved to Geneva. In 2016 insolvency proceedings were initiated against the concession holder. The concession was terminated. After the termination and while the arbitration was ongoing, the concession holder attempted to withdraw the claim. The holder wanted to bring claims arising from the termination before a new arbitral tribunal. The States objected. The concession holder argued that in the absence of an **arbitrator**

¹⁹ Swiss Federal Supreme Court, Decision 4A_490/2017 of 2 February 2018, based on CAS award. ASA Bull. 2/2019, p. 408. An English translation is available on www.swissarbitrationdecisions.com.

²⁰ Swiss Federal Supreme Court, Decision 4A_394/2017 of 19 December 2018, ASA Bull. 2/2019, p. 421.

Ad hoc arbitration based on a treaty between Spain and France. Summarized in GAR, Sebastian PERRY, *France-Spain rail saga resumes before four-man panel*, 12 February 2019.

contract (receptum arbitri), the arbitral tribunal had no jurisdiction to decide on the consequences of the withdrawal. These would have to be established by the new arbitral tribunal. The arbitral tribunal ruled in a decision labelled “partial award” that the concession holder was wrong, that the tribunal had jurisdiction and that the concession holder was **not entitled to withdraw from the arbitration proceedings without prejudice**. The arbitrators mostly relied on the Treaty/concession and on Art. 182 of the Swiss PIL Act, but also on Art. 32.2 of the UNCITRAL Model Law and Art. 65 of the Swiss Code of Civil Procedure. They also noted that the then future claims relating to future termination had already been announced in the arbitration. They were not entirely new.

The concession holder challenged the award before the Swiss Supreme Court. The Court granted a request for **stay of enforcement**. It also ordered the concession holder to pay **security for costs**. As to admissibility, the Court found that the decision was mislabelled but the challenge was nevertheless possible. It was not a partial award but an intermediary decision (“**sentence incidente**”) as it did not decide on any issue pertaining to the merits. Yet, the challenge was admissible in principle because the award dealt with the arbitral tribunal’s jurisdiction. Therefore, it could and indeed **had to be challenged immediately**. After a detailed examination of the concept of **lis pendens** (“litispendance”) the Supreme Court upheld the award and decided that the arbitral tribunal had jurisdiction. The argument that the arbitral tribunal exceeded its mission (**Ultra petita**) was also rejected. Whether the arbitral tribunal was right or wrong in relying on a provision of Swiss domestic civil procedural law was irrelevant, because this was merely a secondary argument in the award. This being said, it should be noted that **the Code of Civil Procedure is not applicable in international arbitration at all**.

6. In 4A_424/2018²¹, the Supreme Court **found a violation of the right to be heard but did not set aside the (CAS) award**. The plaintiff, a tennis player, had objected to the fact that the arbitral tribunal had taken into account events that occurred after the hearing when issuing a retroactive doping ban. Moreover, the arbitral tribunal had promised to issue the award shortly but took several months. The Supreme Court found that it was not established that the tribunal had promised to issue the award by a certain date, and that the athlete had not complained when the alleged target date had passed (a circumstance that could have had an impact on the validity *ratione temporis* of the arbitration agreement). On substance, the Court recognized that the **arbitral tribunal did not hear the parties about**

²¹ Swiss Federal Supreme Court, Decision 4A_424/2018 of 29 January 2019, based on a CAS award, ASA Bull. 2/2019, p. 451.

the post-hearing events on which it had relied in the award. This was a due process violation. However, the athlete failed to show, that this due process violation had an impact on the outcome of the dispute.

7. Only arbitral awards can be challenged. Arbitral awards must by definition be issued by an arbitral tribunal. In decision 4A_556/2018²² the Supreme Court confirmed previous decisions where it had found exceptions to these two premises. A football player's appeal against a CAS decision was dismissed for formality reasons. His counsel failed to file the original hard copies required by article 51 of the CAS Code (2017 version). The Vice President of the CAS Appeals Arbitration Division issued a **termination order. Although this was not on its face an award**, and the Vice President not an arbitral tribunal, the Supreme Court considered the effect of such order to be tantamount to an award and the challenge procedurally admissible. This is **questionable** as we have written elsewhere²³. The Court amalgamates two distinct criteria, the required content of the decision and the body that issues it. The termination order may by its nature resemble an award, but it was issued by an administrative body, not an arbitral tribunal.

Whilst the player's challenge was procedurally admissible, it was found to be misguided. The player pointed out that the appeal had been filed by fax, and that terminating the arbitration in these circumstances offended both substantive and procedural public policy. The Court found that even assuming that the prohibition of excessive formalism was part of public policy, **it was not excessively formalistic to apply procedural rules strictly**. The Court also rejected the player's argument that his right to be heard had been violated because the Vice President had not taken into account his explanations on why communications by fax should suffice. The Court found that the termination order indeed did not elaborate on this, but merely mentioned the player's letter in which the arguments were made. These arguments were therefore deemed to have been seen, and implicitly rejected.

8. 4A_324/2018²⁴ is a rare example of parallel jurisdiction between state court and arbitral tribunals. An athlete suspected of doping obtained an **injunction from the local court** at the seat of the arbitration (Lausanne) prohibiting the analysis of her urine samples. In the parallel CAS arbitration, an award was rendered ordering further tests of the samples. Based on the

²² Swiss Federal Supreme Court, Decision 4A_556/2018 of 5 March 2019, based on a CAS award, ASA Bull. 2/2019, p. 462.

²³ See also Matthias SCHERER, *Decisions of private bodies and institutions cannot be challenged under Art. 190 PIL Act – Really?*, ASA Bull. 1/2014, p. 102

²⁴ Swiss Federal Supreme Court, Decision 4A_324/2018 of 17 July 2018, ASA Bull. 2/2019, p. 476.

award, the court in Lausanne lifted the injunction. The athlete challenged the lifting order unsuccessfully arguing that the order should remain in place until the CAS' decision on the merits was reached.

9. 4A_60/2018²⁵ involved a **corporate dispute** leading to an ad hoc (domestic) arbitration, seated in Lucerne, with parties being members of a limited liability company (GmbH/Sàrl). Four members exercised a **call option** for the parts of the fifth member. The valuation of the parts was contentious. The arbitral tribunal set a higher price than that calculated by the buying members. Three buying members challenged the award. The Supreme Court found that the challenge was procedurally admissible even if not made by all buyers jointly. There was **no obligation to act jointly** (“**consorité nécessaire**”, “**notwendige Streitgenossenschaft**”). The buyers argued that the arbitral tribunal had decided on employment law and corporate law issues that were not arbitrable. The Supreme Court found that the subject-matter was in fact arbitrable. The arbitral tribunal did not determine employment or corporate law matters but rather applied the partnership agreement. The buyers also argued that the tribunal had not verified **whether the company had approved the call**. It simply stated that the formalities were a matter for the buyers to deal with. The Court considered that the buyers were **estopped** from claiming that authority was missing as they exercised the call and controlled the company.

10. An ICC arbitration (No. 20994) between an Iraqi state entity attached to the Iraqi Oil Ministry (employer) and a supplier of an oil production plant (contractor) led to an award in favour of the contractor. The arbitral tribunal awarded the contractor the balance between the contract price and the amounts already paid. It rejected the employer's view that the proper basis for the calculation of the balance were bills of quantities, which the contractor had failed to deliver. The arbitral tribunal rejected this argument since the employer had made interim payments without requesting the bills of quantities. The employer had further claimed savings for omitted material. The arbitral tribunal relied on certificates of receipt on site signed by both parties. It did not consider that lists, prepared unilaterally by the employer many years later, were persuasive. Given that the contractor accepted certain omissions, although they were not reflected in the certificates, the tribunal credited them to the employer.

The employer sought to set aside the award before the Swiss Supreme Court on the ground of violation of its right to be heard. It

²⁵ Swiss Federal Supreme Court, Decision 4A_60/2018 of 27 June 2018, based on domestic ad hoc award, ASA Bull. 2/2019, p. 483.

complained that the arbitral tribunal had misconstrued the certificates. They only demonstrated receipt of a given individual shipment but not receipt of the material necessary for the operation of the plant as a whole. However, the employer was unable to establish the violation of his right to be heard. Moreover, the employer took issue with a **document filed late (in the oral reply closing)**, a list from the employer of allegedly missing material, annotated by the contractor. The employer argued that the arbitral tribunal confirmed at the hearing that this document was incompatible with the relevant procedural order which prohibited new documents and new arguments. For this reason, the employer did not deal with it exhaustively in the post hearing submission. The relevant procedural order stated as follows: “*However, the demonstratives shall not contain new evidence or new arguments with respect to the matters which have already been pleaded by the Parties in the proceedings to date*”. The arbitral tribunal stated in the award that the document was not new and in its award relied on the annotations to discredit the evidentiary value of the list: “*...the corrections made by Claimant of Mr D.’s list of alleged missing deliveries raise serious doubts on the accuracy of the same list, a fact to which the Tribunal must give the necessary weight*”. The Supreme Court found that the document was not new since it had already been put on record by the employer previously. The contractor merely submitted a version containing handwritten annotations made by the employer. While the *document* was not new, the *argument* was, and the arbitral tribunal did not explain in the award why this new argument was admissible in spite of the clear language of the procedural order. This was potentially a violation of the applicable procedural rules but, as the Supreme Court recalled, the **mere violation of a procedural rule is not tantamount to a violation of the right to be heard as defined in Art. 190(2)(d) PIL Act, that could be sanctioned by the annulment of the award.**

The Supreme Court also considered that the employer could not, and did not, rely on any assurances given by the arbitral tribunal at the hearing that it would not consider the annotated document. In fact, the employer addressed the annotations in its post hearing brief and stated that it should be rejected on the basis of the procedural order. The employer had therefore manifestly not been of the view that the arbitral tribunal had, in a final and binding manner, rejected the document with its annotations at the hearing already.²⁶

²⁶ Swiss Federal Supreme Court, Decision 4A_308/2018 of 23 November 2018, based on an ICC award, ASA Bull. 2/2019, p. 494.

11. As a matter of Swiss public policy, courts must on their own motion reduce **excessive commissions** of agents and contractual penalties (Art 163 and 417 of the Code of Obligations). In 4A_312/2017²⁷, a football club challenged a CAS award on the ground that it had implemented an excessive fee due to an intermediary. The intermediary had arranged for the transfer of a player to the club for a negotiated fee of EUR 3.1 million, which was ten times the player’s annual salary. The Supreme Court acknowledged that the amount of the fee was “impressive” (para. 3.3.4.2.). Ultimately, it found that, in light of all circumstances, the player’s salary was not the sole yardstick to assess the agent’s fee, overall the fee was not excessive, and the club’s belated complaint bordered on bad faith. The Court also recalled that a **violation of Swiss public policy is not automatically also a violation of international public policy** (para. 3.3.3).

12. In certain cases, it is possible for a party defending an arbitral award against an annulment request to ask the plaintiff to provide **security for legal costs** likely to be incurred in the Supreme Court proceedings. In an order issued in annulment proceedings 4A_66/2019²⁸, the defendant made such a request. The Supreme Court rejected it based on the Hague Convention on International Access to Justice of 25 October 1980. The plaintiff’s home state (Bulgaria) had ratified the Convention. The defendant had failed to show that the defendant was insolvent. It is testimony to the Supreme Court’s swift handling of arbitral matters that the request was decided by a presidential order in a (very) short lapse of time: The request was filed on 14 March, and rejected by an order the next day by Supreme Court Judge Kiss.

Judge Kiss had already issued an order in matter 4A_396/2017²⁹ deciding that **States that are members to the Hague Convention on Civil Procedure of 1 March 1954 cannot be requested to provide security** if they act as plaintiffs seeking to set aside an arbitral award.

13. Post scriptum to Decision 4A_356/2017. This case was published in ASA Bulletin 4/2018 with a short summary. On a closer review, it deserves more than that as it raises issues of great practical importance for arbitration counsel: two Swiss corporations became entangled in a dispute over pension fund payments. An arbitral tribunal applying the Swiss Rules

²⁷ Swiss Federal Supreme Court, Decision 4A_312/2017 of 27 November 2017, based on a CAS award, ASA Bull. 2/2019, p. 503. An English translation is available on www.swissarbitrationdecisions.com.

²⁸ Swiss Federal Supreme Court, Decision 4A_66/2019 of 15 March 2019, based on an ICC award, ASA Bull. 2/2019, p. 517.

²⁹ Order in case 4A_396/2017, 23 November 2017, ASA Bull. 2/2018, p. 456.

issued an award, with one member dissenting. The award was challenged. The Supreme Court³⁰ found that the plaintiff could not merely refer to the **dissenting opinion** in its annulment request. Dissenting opinions do not form part of the award. The plaintiff argued that the arbitral tribunal had admitted a counterclaim despite the fact that the **amount claimed had never been substantiated or particularised**. The Supreme Court found that the award established that the plaintiff's objections were heard and rejected. There was no violation of the right to be heard. Neither did the Court sanction the **arbitral tribunal's refusal to admit to the record an expert report filed (late) with the rejoinder to counterclaim**. The report could and should have been filed earlier. The **counterclaim merely mirrored a principal claim**. According to the procedural order and timetable in place, the parties had five submissions, i.e., statement of claim, statement of defense, reply, rejoinder, and rejoinder on counterclaim. All arguments and evidence were to be filed as early as possible. Rebuttal arguments and evidence were to be filed in the next possible submission. Given the nature of the counterclaim (it was mirroring the claim), the plaintiff should have filed its expert report on the counterclaim with its reply (on the main claim), rather than delaying and filing it only with the rejoinder to the counterclaim. The plaintiff objected that the rebuttal expert report was precisely meant to rebut an expert report which the defendant had filed with its rejoinder only. The rebuttal could not possibly be made before the main report was filed. The arbitral tribunal did not accept this as an excuse. The Supreme Court upheld the award. It confirmed that **there is no absolute right to a double exchange of submissions and the right to submit evidence is not unrestricted, both as to content and time**.

This is a **troubling decision for arbitration counsel**. What yardstick should be used to determine the degree of connexity of claim and counterclaim? Does it mean that, if a counterclaim mirrors a claim, the claimant must (even if considered unnecessary to support the main claim) retain its own expert to address a counterclaim even before the other party has filed its own expert report? And if the claimant does not appoint an expert but the other party then does, the claimant would not be allowed to react with a rebuttal expert report? That seems to be the unsatisfactory conclusion from this decision. Practically it means that **out of precaution the claimant facing a counterclaim reflecting its own claims may have to incur the cost of**

³⁰ Swiss Federal Supreme Court, Decision 4A_356/2017 of 3 January 2018, based on a domestic Swiss Rules award. This case was published in ASA Bulletin 4/2018, p. 756 with a short summary. An English translation is available on www.swissarbitrationdecisions.com.

appointing an expert, just in case the other party does so as well: in the present case, the circumstances of the case may have militated in favour of rejecting the expert report. It transpires from the Supreme Court judgment (para. 2.4.2) that the arbitral tribunal considered rightly or wrongly that the timing of the claimant's expert report was the fruit of a litigation tactic, rather than a necessity, and that the timing was inconsistent with the agreed procedure. This would explain the harsh sanction of rejecting the party's expert evidence. While front-loading the proceedings is a distinctive feature of modern arbitration, where neither argument nor proof must be held back, a good faith claimant and counter-respondent should not be compelled to escalate means of evidence just out of precaution.

MATTHIAS SCHERER
EDITOR IN CHIEF

Introduction to the Case Law Section 3/2019

1. Awards are rarely annulled by the Swiss Federal Supreme Court. Even more **rarely awards are annulled twice in a row**. This happened in matter 4A_462/2018³¹. The Court had previously annulled a Swiss Rules award (dispute between Palestine and casino/hotel investors over withdrawal of gaming and hotel licenses). Said decision (4A_532/2016³²) provides a highly interesting analysis of expropriation measures, a state's right to modify its law (gambling laws in casu), estoppel, and force majeure. The award was set aside because arbitral tribunal had failed to deal with the investors' claim that their hotel license had been cancelled too, not only the gambling license (as a result of a new gambling law). The award was annulled and remanded to the arbitral tribunal which rendered a new award. This new award has now been set aside too. In its decision 4A_462/2018 the Supreme Court found that the **arbitral tribunal had failed to follow the Supreme Court's reasoning** that led to the annulment of the first award (Bindungswirkung des Bundesgerichtsentscheids).

2. 4A_663/2018³³ arose from an attempt to enforce two ICC awards rendered in the USA in a post M&A dispute in Switzerland. The names of the

³¹ Swiss Federal Supreme Court, Decision 4A_462/2018 of 4 July 2019, based on a Swiss Rules/SCAI award, ASA Bull. 3/2019, p. 649.

³² ASA Bull. 4/2018, p. 972.

³³ Swiss Federal Supreme Court, Decision 4A_663/2018 of 27 May 2019, based on an ICC award, ASA Bull. 3/2019, p. 666.

parties are not disclosed but it appears to be the matter opposing Brazilian businessman Adriano Ometto and Abengoa over alleged breaches of reps and warranties³⁴. Ometto challenged the awards on the ground of undisclosed conflicts of the presiding arbitrator David Rivkin. The awards had been confirmed in the USA. The Brazilian Supreme Court on the other hand had refused to enforce the awards. In the Swiss proceedings, Ometto argued that there were numerous **undisclosed ties between the claimant's group and the chairman's law firm**. The Supreme Court acknowledged the growing size and international operations of large groups, and of modern law firms. Relying also on the **IBA Guidelines on Conflicts of Interest**, the Court found that services rendered to a party in the arbitration did not automatically create a conflict. Rather a case by case analysis of the interests concerned was warranted³⁵.

First, during the arbitration, a client of the chairman's firm had acquired an affiliate of the claimant. The chairman's firm represented the buyer. This was not considered to be a conflict.

Second, at the very end of the arbitration (on the day the arbitral tribunal sent the award to the ICC) a client of the chairman's firm bought a significant stake of the claimant's parent company. The Supreme Court found that at the time of the tribunal's deliberations, there was no relationship yet between the chairman's firm and the party in the arbitration. Hence, Rule 2.3.6 of the red list of the IBA Guidelines was not applicable ("The arbitrator's law firm currently has a significant commercial relationship with one of the parties, or an affiliate of one of the parties"). The Court did not explain why the IBA Guidelines would be a relevant standard.

The Court rejected Ometto's view that because of the due diligence preceding the sale there had already been relevant ties between representatives of the claimant's group and lawyers of the chairman's firm well before the completion of the transaction.

During the arbitration, the chairman's firm had received USD 6.5 million from the US Department of Energy (DOE) for advice in relation to credit facilities granted by DOE to the claimant's parent company. That company paid the DOE for these legal services and was thus ultimately the source of the law firm's revenue. The Supreme Court found that the firm's client was the DOE, not the affiliate who had no power to instruct the law firm but simply reimbursed the firm's client (DOE) for legal services provided to DOE.

³⁴ GAR News, 13 January 2014 – Abengoa Awards Survive Second Challenge.

³⁵ Decision 4A_663/2018 para 3.5. Enforcement of ICC award.

Ometto had drawn the Court's attention to the fact that Brazilian courts had refused to enforce the awards, considering them to offend public policy. The Supreme Court recalled that under Art. V(2)(b) NYC it was only concerned with Swiss public policy notwithstanding any foreign court's decision based on its own public policy³⁶.

Abengoa further argued that only USD 18 out of 100 million awarded were actual damages, the remainder being punitive damages. This was not a hopeless argument as punitives can indeed clash with Swiss public policy³⁷. However, according to the lower court's decision the arbitral award did not say that the actual damages were only USD 18 million. This finding was binding for the Court³⁸.

3. In 4A_62/2019³⁹ the Supreme Court analysed whether the **relationship between counsel and arbitrators**, and alleged ties of a party and the brother (also a lawyer) of the arbitrator were relevant when assessing independence and impartiality of the arbitral tribunal.

4. The parties can agree that certain facts are established in a binding manner by an expert. For domestic arbitration, the Code of Civil Procedure explicitly mentions this possibility in art. 189 ("**Schiedsgutachten**", "**expertise arbitrale**"). In 4A_460 /2018⁴⁰, the Supreme Court held that even if the contract refers certain issues to an expert, the party that invokes this method has to substantiate its claim, and cannot simply refer to the expert determination. The dispute concerned claims among partners regarding the revenues from generated by a hotel and deduction of value of investments made by one of the partners. The contract did not contain an arbitration clause but provided that in case of disagreement the investment value had to be established by an independent auditor. The party seeking to enforce the expert determination proceedings had failed to substantiate the investments it had allegedly made. The lower court had refused to order the audit, which the Supreme Court upheld⁴¹.

³⁶ Decision 4A_663/2018, para 3.7. Enforcement of ICC award.

³⁷ Decisions 4A_536/2016 of 26 October 2016 E. 4.3.2; 4A_16/2012 of 2 May 2012 E. 4.3.

³⁸ Decision 4A_663/2018 Para 4.

³⁹ Swiss Federal Supreme Court, Decision 4A_62/2019 of 6 August 2019, based on a domestic award, ASA Bull. 3/2019, p. 684.

⁴⁰ Swiss Federal Supreme Court, Decision 4A_460/2018 of 13 June 2019, based on a domestic award, ASA Bull. 3/2019, p. 691.

⁴¹ "...nicht zu beanstanden, dass die Vorinstanz die Vorbringen des Beschwerdeführers als nicht hinreichend substantiiert erachtete, um ihn zum Beweis der behaupteten Tatsachen zuzulassen, zumal die Treuhandstelle nur bei Uneinigkeit der Parteien zum Zuge kommen soll, was voraussetzt, dass die Forderung so substantiiert behauptet wird, dass der Beschwerdegegner dazu Stellung nehmen kann."

5. A party in 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 challenged the arbitrators unsuccessfully now sought to annul the award for arbitrator bias.

The Swiss Federal Supreme Court declared the annulment request to be inadmissible⁴². 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 of two members of the arbitral tribunal was tantamount to an award. It should have been brought immediately before the Supreme Court.

The decision is consistent with the Court's case law on the characterization of procedural orders as awards, and the ensuing duty of immediate challenge. Yet, it is questionable why a decision on an arbitrator challenge by the arbitral tribunal itself is treated differently from a decision rendered by an arbitral institution administering 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 the arbitral tribunal's discretion to decide challenges to its members, the decision appears harsh, although consistent.

6. Case 4A_530/2013⁴³ deals with a contractual right to swap the shares of a company with the shares of another. The claimants in the arbitration (plaintiffs in the subsequent annulment proceedings before the Swiss Federal Supreme Court) commenced arbitration against the Bank C alleging that the bank had prevented them from exercising the swap and had discriminated them compared to other shareholders. The arbitrator rejected the claims. The claimants sought to set aside the award for a double violation of public policy. They accused the arbitrator to have relied on a document that did not prove the point for which it was relied upon in the award, and had been mentioned by mistake in the award, **as the arbitrator had specifically acknowledged in an email to counsel**. Moreover, the claimants took issue with the fact that they

⁴² Swiss Federal Supreme Court, Decision 4A_136/2018 of 30 April 2018, based on a DIS award, ASA Bull. 3/2019, p. 694.

⁴³ Swiss Federal Supreme Court, Decision 4A_530/2013 of 2 May 2014, based on Camera di commercio, dell'industria, dell'artigianato e dei servizi del Canton Ticino/SCAI/Swiss Rules award, ASA Bull. 3/2019, p. 697. An English translation is available on www.swissarbitrationdecisions.com.

had been requested to prove a negative fact (i.e. that they had not waived their rights to swap the shares).

The Supreme Court found that the document was not the basis of the arbitrator's decision. Therefore any violation of public policy was excluded.

As for the second argument, the Court stated that **the principle *negativa non sunt probanda* is not absolute, but it only imposes an obligation of cooperation upon the party that is able to provide positive proof of the contrary fact.**

The claimants also complained about an alleged violation of equal treatment. **In their view, the arbitrator had accepted an allegation of the defendant without requesting any proof.** Based on the award the Court found that this was not the case, and that in any event the claimants could not, in the annulment proceedings, challenge the arbitrator's assessment of the evidence before him.

7. In 2015 the South American Football Federation (**CONMEBOL**) became entangled in criminal investigations in a number of countries. A BVI company terminated a contract with CONMEBOL alleging contract frustration and that CONMEBOL was in breach of the anti-corruption provisions in the contract. The corruption had marred the public image of CONMEBOL. CONMEBOL filed for arbitration and was successful. A CAS panel found that the termination was invalid. The corruption probes were known when the parties signed the contract. The BVI company **had accepted the risk that the alleged corruption had an adverse impact on the venture's profitability.** This risk had materialized. Moreover the alleged corruption had not prevented CONMEBOL from performing the contract.

The BVI company sought to set aside the award before the Swiss Federal Supreme Court. It argued that the arbitral tribunal had failed to consider events of corruption that occurred after the conclusion of the contract. The Court found that the arbitral tribunal had not ignored this argument but had considered that these events were irrelevant for the *clausula rebus sic stantibus* argument. Both the BVI company's argument that contract frustration was part of Swiss public policy and that the arbitral tribunal had missed relevant facts failed⁴⁴.

8. FIFA and a Swiss-based hospitality company had an agreement that entitled the later to buy tickets for the World Cup from the former. In 2013 the parties restructured their relationship. The hospitality company entered into an agency agreement with a partner company of FIFA that was supposed

⁴⁴ Swiss Federal Supreme Court, Decision 4A_494/2018 of 25 June 2019, based on a CAS award, ASA Bull. 3/2019, p. 704.

to deliver the tickets. In 2016 the hospitality company initiated arbitration against FIFA under the first agreement requesting delivery of tickets to the 2018 World Cup at nominal value. FIFA argued that the agreement had been terminated. An arbitral tribunal applying the Swiss Rules found that FIFA had given assurances that the hospitality company would henceforth receive the tickets through FIFA's partner company. While these assurances had been given without authority this was cured by FIFA's subsequent conduct (Article 38 Code of Obligations).

FIFA challenged the (domestic) award, asserting that findings in the award were incompatible with the record. The Supreme Court held that the arbitral tribunal had not missed relevant facts but simply weighed the evidence. This is not open for challenge under the applicable Code of Civil Procedure.

FIFA took issue with the fact that the arbitral tribunal had applied Article 38 CO which had not been pleaded by the parties. The Court acknowledged that while arbitrators can apply the law on their own motion (**iura novit curia**) they **must not take the parties by surprise**. If an arbitral tribunal wishes to adopt a legal reasoning that would be unexpected for the parties, it has to hear them first. This the tribunal had not done. However, FIFA had not explained why the application of Article 38 came unexpected.

FIFA also **challenged the allocation of costs** in the award. The Court recalled that contrary to its past jurisprudence cost decisions could only be annulled on formal grounds, such as a violation of the right to be heard. The allegedly wrong allocation of costs in light of the parties' respective success was not an available ground⁴⁵.

9. In case 4A_54/2019⁴⁶ the Swiss Federal Supreme Court upheld a **termination order** issued by the Court of Arbitration for Sport (CAS). The CAS struck the appeal from the docket because the originals (hard copies) of the appeal brief had been filed timely by email only. The CAS Code requires that the original of the appeal is served by courier. R 31.3: "The filing is valid upon receipt of the facsimile or of the electronic mail by the CAS Court Office provided that the written submission and its copies are also filed by courier within the first subsequent business day of the relevant time limit". The Supreme Court found that the CAS was not excessively formalistic. The

⁴⁵ Swiss Federal Supreme Court, Decision 4A_338/2018 of 28 November 2018, based on a Swiss Rules/SCAI award, ASA Bull. 3/2019, p. 716.

⁴⁶ Swiss Federal Supreme Court, Decision 4A_54/2019 of 11 April 2019, ASA Bull. 3/2019, p. 732.

Court left open the more general question whether **excessive formalism** would reach the public policy threshold.

10. In 4A_40/2018⁴⁷ the Swiss Federal Supreme Court rejected a challenge to an ICC award for an alleged violation of the right to be heard. The plaintiff had not raised the alleged due process violations with sufficient clarity in the arbitration. The Court also ruled that the **30-day time limit to file a challenge an award commences** with the notification of the signed original arbitral award and **not with the advance courtesy electronic copy sent by the ICC** (art 34 ICC Rules). The Court applies the same rule to awards that are notified by fax. As an exception, fax or electronic notification triggers the time limit if the applicable rules do not provide for service of a hard copy.

MATTHIAS SCHERER
EDITOR IN CHIEF

Introduction to the Case Law Section 4/2019

1. A Swiss company (A) had sold food products imported from a Slovenian company (B) on the Swiss market under a distribution agreement. The distribution agreement had been signed by an affiliate of A. A was not a signatory. When the relation between A and B turned sour, B sued A before the court at A's place of business. A resisted jurisdiction of the court based on **Article II of the New York Convention** ("NYC"), relying on an arbitration clause in the distribution agreement which provided for arbitration in Ljubljana, Slovenia. B argued that A was not a signatory and hence not entitled to rely on the arbitration clause. B also argued that as the arbitration clause was not signed or otherwise in writing, it was not formally valid under the NYC. The lower court considered that B had accepted for many years that the contract was performed by A rather than its signatory affiliate. In the circumstances, B was estopped from arguing that the arbitration clause was not binding on A. B challenged the decision. The Supreme Court held that estoppel / *venire contra factum proprium* was a relevant argument in the framework of the NYC. However, **a party was not necessarily estopped from arguing that while a contract was materially valid, the arbitration clause was not**. This was a consequence of the principle of **autonomy of the arbitration agreement**. Also the lower court should have examined whether A and B had actually been the intended parties from the beginning, and if the

⁴⁷ Swiss Federal Supreme Court, Decision 4A_40/2018 of 26 September 2018, based on an ICC award, ASA Bull. 3/2019, p. 741.

name of A's affiliate on the contract was merely a mistake. The personal scope of application of an arbitration agreement is a question of interpretation. **An incomplete name or erroneous designation can be disregarded if it is merely a misnomer.**

Ultimately, the Supreme Court came to the same conclusion as the lower court. **A was not a signatory but had performed the contract with B's consent. A had therefore become a party to the contract.** Any formal requirements for the validity of the arbitration agreement only applied to the original parties, but not to any third party in case of transfer or extension of the arbitration agreement.⁴⁸

2.-7. In this Bulletin you will find a **survey** of decisions of the Swiss Federal Supreme Court, published since 2015, dealing with **investment treaty arbitrations**.⁴⁹ The decisions were made in context of annulment requests filed by States or investors against awards rendered under bilateral or multilateral investment protection treaties, notably the Energy Charter Treaty. The survey provides abstracts of the following decisions: *Russia v Yukos*⁵⁰ – *Hungary v EDF*⁵¹ – *Recofi v Vietnam*⁵² – *Poland v Hortel et al*⁵³ – *Serbia v Mytilineos*⁵⁴ – *India v Deutsche Telekom*⁵⁵ – *Russia v Ukrnafta & Stabi*⁵⁶.

⁴⁸ Swiss Federal Supreme Court, Decision 4A_646/2018 of 17 April 2019, ASA Bull. 4/2019, p. 918; see also Simon GABRIEL, *Congruence of the NYC and Swiss lex arbitri regarding extension of arbitral jurisdiction to non-signatories*, ASA Bull. 4/2019, p. 883.

⁴⁹ See Matthias SCHERER, Angela CASEY, *Domestic Review of Investment Treaty Arbitrations: the Swiss experience revisited*, ASA Bull. 4/2019, p. 805. Abstracts of earlier decisions are reported in Matthias SCHERER, Veijo HEISKANEN, Sam MOSS, *Domestic Review of Investment Treaty Arbitrations: The Swiss Experience*, ASA Bull. 2/2009, p. 256. See also (to be published in ASA Bull. 2020), Bernhard BERGER, *Die Schweiz als Schiedsort für Investitionsstreitigkeiten – Erkenntnisse aus der neueren Rechtsprechung des Bundesgerichts*.

⁵⁰ Swiss Federal Supreme Court, Decision 4A_98/2017 (143 III 462) of 20 July 2017, ASA Bull. 4/2019, p. 931.

⁵¹ Swiss Federal Supreme Court, Decision 4A_34/2015 (141 III 495) of 6 October 2015, ASA Bull. 4/2019, p. 941. An English translation is available on www.swissarbitrationdecisions.com.

⁵² Swiss Federal Supreme Court, Decision 4A_616/2015 of 20 September 2016, ASA Bull. 4/2019, p. 959. An English translation is available on www.swissarbitrationdecisions.com.

⁵³ Swiss Federal Supreme Court, Decision 4A_157/2017 of 14 December 2017, ASA Bull. 4/2019, p. 972. An English translation is available on www.swissarbitrationdecisions.com.

⁵⁴ Swiss Federal Supreme Court, Decision 4A_507/2017 of 15 February 2018, ASA Bull. 2/2018, p. 454.

⁵⁵ Swiss Federal Supreme Court, 4A_65/2018 of 11 December 2018, ASA Bull. 4/2019, p. 1000.

None of the annulment requests were successful. The Supreme Court analysed the jurisdiction of the arbitral tribunals freely, including their interpretation of the terms, investor and investment, umbrella clauses, the scope of reservations, and allegations of illegality.

MATTHIAS SCHERER
EDITOR IN CHIEF

⁵⁶ Swiss Federal Supreme Court, Decision 4A_396/2017/4A_398/2017 of 16 October 2018, ASA Bull. 4/2019, p. 983. In the matter 4A_396/2017, the Supreme Court had also issued a procedural order rejecting the investor's request for security for cost. The Court held that States were entitled to rely on the Hague Convention on Civil Procedure of 1 March 1954 (Decision 4A_396/2017 dated 23 November 2017 (ASA Bull. 2/2018, p. 456). An English translation is available on www.swissarbitrationdecisions.com.