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New Developments in International Commercial Arbitration 2016

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Review of the Recent Case Law of the Swiss Federal Supreme Court

JONATAN BAIER¹

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I. Introduction

This paper reviews the decisions of the Swiss Federal Supreme Court (hereinafter "Supreme Court") relating to international arbitration which were published on the Supreme Court's website² between 25 August 2015 and 25 August 2016 (hereinafter "period under review" or "year under review").³ Decisions relating to domestic arbitration or purely procedural decisions – e.g. acknowledging the withdrawal of the application to set aside the arbitral award or declaring the challenge inadmissible for non-payment of the advance of costs – will not be examined.

During the period under review, the Supreme Court rendered 30 decisions relating to international arbitration (excluding the above-mentioned "purely procedural" decisions), 29 of which pertain to setting aside proceedings and 1 to enforcement proceedings.⁴ These figures are slightly lower than those of the previous period under review⁵ and lower than the average number of decisions rendered during the past five years.⁶ 4 of

² <http://www.bger.ch> (last visited: 26 August 2016).

³ Given that the publication on the Court's website generally takes place a few weeks after a decision has been issued, there may have been additional decisions issued in the period under review, which had not yet been published on the Court's website on 25 August 2016.

⁴ It is interesting to note that there was no decision on applications for revision of arbitral awards during the period under review.

⁵ See BEFFA, Review of the Recent Case Law of the Swiss Federal Supreme Court, in MÜLLER/RIGOZZI/BESSON (eds.), *New Developments in International Commercial Arbitration 2015*, p. 163 *et seq.*, reporting that, in the period between 25 August 2014 and 25 August 2015, the Supreme Court rendered 33 decisions, 29 of which pertained to setting aside proceedings, 2 to revision proceedings and 2 to enforcement proceedings.

⁶ See ROBERT-TISSOT, Review of the Recent Case Law of the Swiss Federal Supreme Court, in MÜLLER/RIGOZZI/BESSON (eds.), *New Developments in International Commercial Arbitration 2014*, p. 121 *et seq.*, recalling that, as reported by the previous authors of this review, the Supreme Court rendered 35 decisions in the period from 25 August 2010 to 25 August 2011; 34 decisions in the period from 25 August 2011 to 25 August 2012; 41 decisions in the period from 25 August

the decisions reviewed have been (or will be) published in the Supreme Court's reporter (hereinafter "ATF").⁷

The most frequently invoked ground in the setting aside decisions was the violation of the principle of equal treatment and the right to be heard (Article 190(2)(d) Swiss Private International Law Act (hereinafter "PILA")), followed quite closely by incorrect decisions on jurisdiction (Article 190(2)(b) PILA) and incompatibility with public policy (Article 190(2)(e) PILA). The grounds of irregular constitution of the arbitral tribunal (Article 190(2)(a) PILA) and decisions ruling beyond the claims submitted or failing to adjudicate claims (Article 190(2)(c) PILA) were less frequently invoked.

Only 1 of the 29 decisions rendered in setting aside proceedings during the period under review resulted in the award being set aside due to the lack of jurisdiction of the arbitral tribunal (Article 190(2)(b) PILA).⁸ This results in a success rate of approximately 3.4%, which is clearly lower than in the past few years.⁹ It is interesting to note that the only successful challenge was in a commercial arbitration case whereas all the challenges in the sports arbitration cases –

2012 to 25 August 2013; and 32 decisions in the period from 25 August 2013 to 25 August 2014.

⁷ Decision 4A_34/2015 of 6 October 2015, published in ATF 141 III 495; decision 4A_84/2015 of 18 February 2016, published in ATF 142 III 239; decision 4A_628/2015 of 16 March 2016, published in ATF 142 III 296; and decision 4A_342/2015 of 26 April 2016 which had not yet been published at the time of writing.

⁸ Decision 4A_628/2015 of 16 March 2016, published in ATF 142 III 296.

⁹ See BEFFA, *op. cit.*, p. 167, reporting the following success rates between 2011 and 2015: 6.45% for the period from 25 August 2011 to 25 August 2012; 5.26% for the period from 25 August 2012 to 25 August 2013; 13.8% for the period from 25 August 2013 to 25 August 2014; and 6.9% for the period from 25 August 2014 to 25 August 2015.

which tend to have slightly higher success rates than commercial arbitration cases – were unsuccessful.¹⁰

Following the tradition of this review, the decisions issued in setting aside proceedings pursuant to Article 190(2) PILA will be analyzed first in Section II. This section will address procedural issues arising in relation to applications to set aside an award as well as the substantive grounds for setting aside an award, following the order in which the grounds are set out in Article 190(2)(a)-(e) PILA. It concludes with an analysis of the consequences of a successful challenge. Section III will cover the recent case law on the enforcement of arbitral awards in Switzerland, while Section IV will briefly examine issues relating to the costs of federal proceedings. In each section, the decisions are addressed in chronological order. In Section V, we will conclude by highlighting the most interesting developments during the period under review. As in the past year's review, the main developments in the Supreme Court's decisions will be summarized in a table at the end of this paper (Section VI).

II. Decisions on applications to set aside arbitral awards (Article 190(2) PILA)

A. Admissibility of applications to set aside

1. Time limit to challenge the award

a) Decision No. 4A_214/2016 of 4 May 2016

Facts: A sole arbitrator rendered an arbitral award on 8 February 2016.

¹⁰ Regarding statistical data since 1989 see also DASSER/WOJTOWICZ, Challenges of Swiss Arbitral Awards – Updated and Extended Statistical Data as of 2015, in ASA Bull. 2/2016, p. 280 *et seq.*

By fax dated 9 March 2016, X filed a motion to set aside the award before the Supreme Court. In a letter dated 15 March 2016, the Supreme Court informed X that the challenge was inadmissible as it was sent by fax. The Supreme Court did not set a deadline for the submission of the motion by the correct means, given that the time limit to challenge the award had expired on 9 March 2016.

X claimed that it had sent the motion to the Supreme Court with a valid signature on 9 March 2016. However, the copy of the motion to set aside the award never reached the Supreme Court.

On 11 April 2016, X filed another submission in which it (i) challenged the decision by the Supreme Court as communicated in its letter dated 15 March 2016 and (ii) refiled the original motion including a photocopied signature.

Decision: The Supreme Court held that the motion to set aside the award was inadmissible.

First, the Supreme Court confirmed that the time limit to challenge the award had already expired. The Supreme Court also held that an application to set aside an award which is only sent by fax is inadmissible and that the Supreme Court does not give an appellant the opportunity to correct this mistake.¹¹ The Supreme Court held that it never received the hard copy of the original submission and that the resubmission of X did not change anything.

Second, the Supreme Court confirmed that its decision as communicated in the letter of 15 March 2016 could not be challenged.

Third, the Supreme Court held that the motion was inadmissible in any event given that an award may only be set

¹¹ See ATF 121 II 252.

aside based on the grounds set out in Article 190(2) PILA and that the application did not invoke any of these grounds.

Comment: This decision confirms that it is important to file an application for the setting aside of an award within the time limit and that the submission of the application by fax only is insufficient.

2. Limited grounds to set aside an award¹²

a) Decision No. 4A_342/2015 of 26 April 2016

As international arbitral awards can only be challenged on the basis of the limited grounds listed in Article 190(2) PILA, the Supreme Court held that a party cannot directly rely on a violation of the European Convention on Human Rights (hereinafter "ECHR") in order to have the award set aside.¹³ However, the principles in the ECHR may serve as a benchmark for the interpretation of the grounds listed in Article 190(2) PILA.

b) Decision No. 4A_206/2016 of 20 May 2016

In this decision, the Supreme Court reiterated that international arbitral awards can only be challenged based on the limited grounds listed in Article 190(2) PILA.¹⁴ In addition, the Supreme Court held that it only reviews the grounds which are duly raised and substantiated by the appellant according to Article 77(3) Swiss Supreme Court Act (hereinafter "SSCA"). Accordingly, A's application to have the award set aside based on grounds found in the Swiss Civil Procedure

¹² In this section, only a selection of the cases issued in the period under review is presented in which the Supreme Court confirmed its established case law regarding the limited grounds in the PILA for setting aside international arbitral awards.

¹³ As to the facts of the case see below, p. 175.

¹⁴ See also below, p. 115.

Code (hereinafter "CPC") rendered the application inadmissible.

3. No review of the facts in setting aside proceedings¹⁵

a) Decision No. 4A_136/2015 of 15 September 2015

The Supreme Court confirmed that it is bound by the facts as established by the arbitral tribunal. In this case, which will be discussed in more detail below,¹⁶ the sole arbitrator established in its award – through subjective interpretation – a common intent of the parties to resolve their dispute by arbitration. The Supreme Court confirmed that the common intent of the parties is a factual issue and that therefore, this factual conclusion is binding upon the Supreme Court, irrespective of its correctness.

b) Decision No. 4A_176/2015 of 9 November 2015

The Supreme Court once again confirmed that it is bound by the facts as established by the arbitral tribunal. In this case, which will be discussed in more detail below,¹⁷ the arbitrator of the Court of Arbitration for Sport (hereinafter "CAS") established in its award that the agent – who entered into an agreement with a FIFA-affiliated Ecuadorian football club – had demonstrated that the services he provided under the agreement were in his capacity as a players' agent within the scope of the FIFA Players' Agents Regulations of 2008 (hereinafter «PAR»). Accordingly, the Supreme Court held that the relevant findings by the arbitrator were of a factual nature, and as such, outside of the Supreme Court's scrutiny.

¹⁵ In the remainder of this section, only a selection of the cases issued in the period under review is presented in which the Supreme Court confirmed its established case law regarding the absence of the review of facts in setting aside proceedings.

¹⁶ See below, p. 128.

¹⁷ See below, p. 142 et seq.

c) ATF 142 III 239 (Decision No. 4A_84/2015 of 18 February 2016)

The sole arbitrator established through subjective interpretation that the parties had a common intent to submit the disputes relating to the Framework Contract to arbitration. This constituted a finding of fact which the Supreme Court again confirmed that it cannot review.¹⁸

d) Decision No. 4A_342/2015 of 26 April 2016

The Supreme Court reminded the parties that it issues its decision on the basis of the facts established by the arbitral tribunal. It cannot rectify or supplement such facts on its own even if they were manifestly inaccurate or in violation of the law. As an exception, the Supreme Court has the power to review the factual findings on which a challenged award is based, if one of the grounds in Article 190(2) PILA is raised with respect to such a factual finding, or if new facts or evidence are exceptionally taken into consideration in the proceedings.

Accordingly, the Supreme Court confirmed that a finding of fact by the tribunal, even a finding regarding a procedural fact, was not subject to review.¹⁹ The arbitral tribunal had established the subjective common intent of the parties to limit the first phase of the proceedings to one round of submissions, and the Supreme Court held that it was bound by that fact.

4. Application/Opting-out of Chapter 12 PILA

a) Decision No. 4A_568/2015 of 10 December 2015

In a rather helpless attempt, the appellant tried to argue that as the parties chose to "apply the FIFA regulations and the

¹⁸ As to the facts of the case see below, p. 149 et seq.

¹⁹ As to the facts of the case see below, p. 175 et seq.

Swiss Civil Code” in their agency contract, they had opted out of Chapter 12 PILA in favor of the provisions of the CPC.²⁰ The Supreme Court found that there was no explicit waiver of the applicability of the PILA in favor of Article 353 *et seqq.* CPC as required under Article 176(2) PILA. Accordingly, the appellant’s arguments based on Article 393 CPC were dismissed by the Supreme Court.

b) Decision No. 4A_206/2016 of 20 May 2016

Facts: In 2010, A and B signed an asset management contract. According to the contract, B was to manage the assets that A held in a Swiss bank. The agreement also contained a dispute resolution clause according to which all disputes were to be resolved by an arbitral tribunal seated in Lugano.

In 2015, A initiated arbitration proceedings against B claiming EUR 130’000.-- for breach of contract. The arbitral tribunal rejected A’s claim.

A then filed a motion to set aside the award, arguing a violation of Article 393(e) of the CPC. A stated that the award was arbitrary in its result because it was based on findings that were obviously contrary to the facts as stated in the case files and because it constituted an obvious violation of law and equity.

Decision: The Supreme Court held that the application was inadmissible.

Referring to Article 176(1) PILA, the Supreme Court stated that if at least one of the parties is domiciled or has its habitual residence in a foreign country when entering into the arbitration agreement, the arbitration is deemed international and is therefore in principle governed by Chapter 12 PILA. On the other hand, if both parties had their seats in Switzerland

²⁰ As to the facts of the case see below, p. 192 *et seq.*

at that time, then the rules governing domestic arbitration apply (Articles 353 *et seq.* CPC).

The Supreme Court pointed out that the appellant did not state where he was domiciled at the time the contract was signed. However, there were several indications that A was domiciled in Italy at that time. As he did not even assert that the parties had opted out of Chapter 12 PILA in accordance with Article 176(1) PILA, the Supreme Court held that the PILA provisions were applicable to the case at hand.

The Supreme Court confirmed that in international arbitration cases, awards can only be set aside based on the grounds set out in Article 190(2) PILA. Accordingly, A's application to have the award set aside based on the grounds of the CPC rendered the application inadmissible.

Comment: This decision serves as a reminder that in the context of international arbitration, arbitral awards can only be set aside based on the grounds listed in Article 190(2) PILA.

5. Challengeable awards

Decision No. 4A_222/2015 of 28 January 2016

Facts: The former manager (X) of a cycling team, a Belgian national domiciled in Spain, was a manager of several cycling teams, including in the United States. X was a member of the Belgian Cycling Federation and a holder of a license issued by the Union Cycliste Internationale (UCI). On the license application form he signed, there was a reference to UCI regulations *inter alia* regarding anti-doping and to the exclusive jurisdiction of the CAS.

On 28 June 2012, the United States Anti-Doping Agency (USADA) informed X that it had discovered sufficient evidence of repeated violations of anti-doping rules and that it was considering imposing sanctions in this respect. In addition, the

USADA told him that he had the choice of either accepting the finding, or challenging it in the framework of arbitral proceedings as provided for under the USADA Protocol. The USADA Protocol included a provision that stated that in the event the suggested sanctions were contested, the matter would be heard by a three-member panel of the American Arbitration Association (AAA).

In a letter of 12 July 2012, X replied to the USADA and challenged not only the proposed sanctions but moreover the very jurisdiction of this body to impose sanctions upon him. X stated in particular that his forced appearance in an AAA arbitration should not be interpreted as a waiver of his jurisdictional objection.

On 30 July 2012, the arbitral panel was constituted. Subsequently, it issued a procedural order which provisionally assumed jurisdiction as to X. On 21 April 2014, the AAA arbitral panel issued its final award. As to jurisdiction, it simply confirmed its provisional decision contained in the provisional order. As to the merits of the case, the arbitral panel found X guilty of involvement in a doping conspiracy and handed X a 10-year ban. X then appealed the final award of the AAA tribunal before the CAS.

Upon request by X, CAS agreed to first address the issue of jurisdiction as a preliminary issue. Subsequently, a CAS panel was constituted. On 11 March 2015, the CAS Secretariat sent a letter to the parties stating that the CAS panel had "*decided that USADA had results management jurisdiction and the AAA the disciplinary authority over Messrs. [X].*" The letter also stated that "*[t]he present decision is a partial decision on a substantive issue and not a preliminary decision on the jurisdiction of CAS within the meaning of Article 190 of the Swiss Private International [Law] Act*". The letter then stated that the reasons for the panel's decision would be included in its final award.

On 24 April 2015, X invoked Article 190(2)(b) PILA and filed a civil law appeal before the Supreme Court arguing that the CAS did not have jurisdiction over the dispute.

Decision: The Supreme Court held that the application was not admissible.

First, the Supreme Court emphasized that only certain types of decisions may be challenged in accordance with Article 190 PILA, i.e. (i) final awards putting an end to the arbitration on substantive or procedural grounds, (ii) partial awards putting an end to the arbitration with respect to a part of the dispute and (iii) preliminary or interim awards adjudicating one or several preliminary issues as to the merits or the procedure (e.g. an explicit or implicit decision on jurisdiction).

By contrast, procedural orders cannot be challenged before the Supreme Court. As a rule, arbitral tribunals decide on their jurisdiction in a preliminary award in accordance with Article 186(3) PILA. Nevertheless, arbitral tribunals often choose to decide on their jurisdiction in the final award given that Article 186(3) PILA is not a mandatory provision.

In order to determine whether the CAS panel's decision constituted an award, the Supreme Court analyzed it carefully. Firstly, it noted that a decision described as a "*partial decision on a substantive issue and not a preliminary decision on the jurisdiction of CAS*" was communicated to the parties in a simple letter from the CAS Secretariat. This letter was not signed by any member of the panel. Nevertheless, the Supreme Court maintained that neither the form of a decision, nor the title assigned to it is in itself decisive. The Supreme Court pointed out that all specific circumstances need to be taken into account in order to determine the nature of the decision.

The Supreme Court noted that it was fairly unusual for the CAS panel to be seized with an appeal against an arbitral award issued by an arbitral tribunal. As a rule, the CAS

constitutes an appeal authority for decisions taken by disciplinary boards of sports bodies. Further, X was not a cyclist subject to the authority of a national federation by delegation from the UCI, but rather a team director who was neither a U.S. citizen nor a U.S. resident. X was also a member of the Belgian Cycling Federation and consequently had a license from the UCI. Given that UCI indicated that it was opposed to the USADA action, the Supreme Court considered that it was not surprising that X challenged the authority of the USADA and the AAA panel.

However, X was the one who seized the CAS and thereby accepted its jurisdiction to decide on the matter of the USADA and AAA panels' authority. X did not argue that the CAS lacked jurisdiction prior to his application to the Supreme Court.

Following an examination of the wording, the Supreme Court held that the CAS panel had rendered a preliminary award on the authority of the USADA's and AAA's panel. Had the CAS panel considered that the authority was lacking, the case would have been dismissed. In the case at hand, the CAS panel, however, implicitly accepted jurisdiction over the dispute by stating that it had reached a decision on the issue of the authority of the USADA's and AAA's panel. At the same time, it maintained that the decision did not qualify as «a preliminary decision on the jurisdiction of CAS».

The Supreme Court held that the CAS panel accepted jurisdiction on a «provisional basis» only, and in doing so, reserved its reasoned decision for the final award. The Supreme Court noted that this conduct did not comply with the rule in Article 186(3) PILA, but that it was not prohibited either. The Supreme Court then ruled that there were no sanctions for breaches of Article 186(3) PILA except in case of clear abuse.

The Supreme Court stated that it was reasonable to wait for the notification of the final award, and any possible challenge

raised against it, in order to examine the grounds alleged by X. Accordingly, the application by X was declared inadmissible.

Comment: This is an unusual case based on a rather unusual set of circumstances.²¹ After a thorough analysis, the Supreme Court concluded that the decision did not definitively settle the issue of jurisdiction of the CAS and thus found that it was not an implicit award on jurisdiction.

Irrespective of whether one finds the Supreme Court's reasoning convincing or not, the problem for counsel with regard to «implicit» decisions on jurisdiction remains. It is difficult to tell whether a decision rendered by an arbitral tribunal will be considered to be an implicit decision on jurisdiction and therefore capable of being challenged. Thus, the case law of the Supreme Court urges practitioners not to take a risk and to submit an application to set aside before the Supreme Court if the decision may be an implicit one on jurisdiction.

6. No challenges in a foreign language

Decision No. 4A_596/2015 of 9 December 2015

Facts: A's challenge of an award of a CAS panel was submitted to the Supreme Court in a foreign language, i.e. English.

The Supreme Court gave the appellant the opportunity to correct this mistake and set a deadline to submit a translation in an official language of Switzerland (i.e. German, French or

²¹ For further analysis of this decision of the Supreme Court see PONCET, Provisional determination of jurisdiction not capable of appeal, available at: <http://www.swissarbitrationdecisions.com/provisional-determination-jurisdiction-not-capable-appeal> (last visited: 26 August 2016); VOSER/GEORGE, Doping charges against Lance Armstrong's former team director: Swiss Supreme Court examines ambiguous CAS decision, available at: http://www.swlegal.ch/getdoc/744c856d-1602-4fde-bb3f-9f34aee56df3/2016_Nathalie-Voser_Anya-George_Doping-charges-aga.aspx (last visited: 26 August 2016).

Italian). It informed the appellant that the challenge would be refused otherwise. Subsequently, the appellant sent a German translation of the application by e-mail on the last day of the deadline. However, there was no electronic signature on the e-mail sent by the appellant.

Decision: The Supreme Court refused to allow the application to set aside the award.

The Supreme Court held that submissions to the Supreme Court must be made in an official language of Switzerland pursuant to Article 42(1) of the SSCA. Since the application was submitted in English, the Supreme Court declined to examine the application to set aside the award.

With respect to the e-mail with no electronic signature, the Supreme Court stated that the appellant had again failed to comply with the requirements of the SSCA according to which submissions to the Supreme Court must be made either in hard copy, with a handwritten signature, or electronically, with a certified electronic signature. As the appellant filed a hardcopy of the submission including a signature of its representative only after the deadline, the Supreme Court dismissed the submission as being out of time.

Comment: This case shows that, while the Supreme Court generally allows appellants – particularly in sport arbitration cases – to correct mistakes as to the formal requirement of the language of the appeal, it will not accept repeated failures to comply with formal requirements.²² There might be changes in the future, but as of today appellants are required to submit the challenge in an official language of Switzerland.

²² For further analysis of this decision of the Supreme Court see VOSER/GEORGE, Swiss Supreme Court refuses to allow challenge to award filed in a foreign language, available at: http://www.swlegal.ch/getdoc/e5762dd6-c361-4934-87fe-c7a90d64a0bd/2016_Nathalie-Voser_Anya-George_Swiss-Supreme-Cour.aspx (last visited: 26 August 2016).

7. Current legitimate interest to challenge the award

Decision No. 4A_620/2015 of 1 April 2016

Facts: A professional football player (X) signed a contract with Club B (B) in 2010. After having played only one match for B in the U21 league, X was transferred to Club C (C) for whom he played several games. X and B then jointly terminated their contract in January 2015. On the following day, X signed with Club D (D) for the season 2014/2015. Subsequently, the French Professional Football League (FPFL) seized the FIFA Players' Status Committee (PSC) before approving the contract in order to find out whether U21 matches were "official games" under the applicable FIFA Regulations on the Status and Transfer of Players. According to these regulations, a player may be registered with a maximum of three clubs during a season but may only play official games for two clubs. The PSC confirmed that the U21 matches were official games (PSC Decision). Subsequently, the FPFL approved the new contract with X, but decided that X could only participate in the official matches as of 1 July 2015, i.e. after the end of the season 2014/2015 (FPFL Decision).

Thereafter, X challenged the PSC Decision before the CAS but not the FPFL Decision. The CAS rejected X's appeal on the basis that X had no legitimate interest considering that the PSC Decision provided for a general interpretation of a statutory provision. Thus, it did not adjudicate his particular case.

Subsequently, X filed an application before the Supreme Court to set aside the CAS award.

Decision: The Supreme Court rejected the motion to set aside the award.

The Supreme Court confirmed its case law on the requirement of a “legitimate interest” worthy of protection when seeking the setting aside of an award according to Article 76(1)(b) SSCA. The Supreme Court held that a legitimate interest requires a party to show that the challenged decision would be economically, morally or materially detrimental to him or her. Furthermore, the party’s interest must be a current one; i.e. it must exist when the award is challenged before the Supreme Court as well as when the Supreme Court renders its decision.

In the present case, the Supreme Court confirmed the reasoning of the CAS. The Supreme Court restated that it was the FPFL Decision that temporarily prevented X from playing for D, and not the PSC Decision which was a general interpretation of the FIFA Regulations on the Status and Transfer of Players.

In addition, the Supreme Court held that when the CAS rendered its award in September 2015, X was already permitted to play for D. Therefore, it decided that X lacked a legitimate interest when it challenged the CAS award in November 2015 before the Supreme Court.

Comment: The case at hand underlines the importance of having a current legitimate interest when filing a motion to set aside the award.²³ It must be noted, that, in particular in sports-related cases, the Supreme Court often finds that the appellant lacks a current interest.

²³ For further analysis of this decision of the Supreme Court see VOSER/GEORGE, Swiss Supreme Court refuses to allow challenge to award filed in a foreign language, available at: http://www.swlegal.ch/getdoc/e5762dd6-c361-4934-87fe-c7a90d64a0bd/2016_Nathalie-Voser_Anya-George_Swiss-Supreme-Cour.aspx (last visited: 26 August 2016).

B. Substantive grounds for setting aside

1. Irregular constitution of the arbitral tribunal (Article 190(2)(a) PILA)

a) Decision No. 4A_510/2015 of 8 March 2016

Facts: The case involved a football player (A) who was transferred from one football club (Y) to another football club (X). According to the agreement that Y, X and A signed, X *inter alia* had to pay to Y a certain amount and promised not to lend or transfer A to a third club without Y's written consent. In case of a violation by X, the contract contained a penalty clause of USD 2 million. It further provided that X would owe Y USD 1.5 million if an anticipated breach of the player's employment contract was caused by X. Later on, X asked for Y's consent to prematurely terminate the player's employment contract or temporarily transfer him to another club (Z) for personal reasons. Y did not consent. Subsequently, X lent the player to Z, and Y filed a complaint before the FIFA Players' Status Committee. In December 2013, the Committee rejected Y's complaint. Thereupon, Y appealed this decision to the CAS.

On 13 August 2015, an online newspaper article was published reporting that the CAS tribunal had ordered X to pay USD 2 million to Y. X immediately contacted the CAS asking it to ensure that any decision was first communicated to the parties and not the press.

On 24 August 2015, the CAS tribunal rendered its award and faxed it to the parties. In its decision, the tribunal overturned the FIFA Committee decision. It held that the penalty clause in the contract was applicable, but reduced the amount due by 25 % from USD 2 million to USD 1.5 million.

X then filed an application before the Supreme Court to set aside the award *inter alia* due to a violation of Article

190(2)(a) PILA. X alleged that the rules regarding impartiality and independence of the arbitrators were violated due to a breach of confidentiality which resulted in an arbitral tribunal that was not properly constituted. According to X, an arbitrator must have been the source of the leak and this was a violation of S 19(1) of the CAS Statutes which provides that *"CAS arbitrators and mediators are bound by the duty of confidentiality, which is provided for in the Code and in particular shall not disclose to any third party any facts or other information relating to proceedings conducted before CAS."* X further alleged that the outcome reported in the press might have influenced the tribunal or that the tribunal even tried to protect one of the arbitrators by ensuring that the sum in the final award was not identical to that in the report.

Decision: The Supreme Court rejected the motion to set aside the award.

The Supreme Court first maintained that there was no evidence to support X's allegation that the tribunal had leaked information. It noted that the news report was wrong on several points. The Supreme Court further noted that the article did not mention any sources and that the CAS was not contacted by a journalist to verify it. In addition, the Supreme Court even pointed out that X might have leaked the information itself. In this regard, the Supreme Court noted that X's initial reaction after the leak was to ask that the award first be communicated to the parties, but not to question the arbitrator's impartiality.

The Supreme Court further held that even if there had been a breach of confidentiality attributable to the arbitral tribunal, this would in general not constitute a basis for challenging an award. However, it also pointed out that, according to some commentators, a breach of confidentiality might violate the principle of equal treatment pursuant to Article 190(2)(d) PILA in the event that one party is provided with more information than the other. The Supreme Court then held that this was not

the situation in the case at hand as the main allegation of X was that the arbitral tribunal changed its award based on the published newspaper report.

Comment: In this case, the Supreme Court confirmed the majority view of the doctrine stating that a breach of confidentiality will, in general, not result in the setting aside of an award.²⁴ However, if the breach of confidentiality results in an uneven distribution of information between the parties, there might be a possibility for a successful challenge based on a violation of Article 190(2)(d) PILA (violation of the principle of equal treatment). In any case, proving a breach of confidentiality and attributing it to one of the several actors in an arbitration will always be difficult.

b) Decision No. 4A_173/2016 of 20 June 2016

Facts: B and C each concluded an agreement with A. According to these agreements, A was engaged as a trustee in order to acquire shares of a fund D for B and C. The parties included a dispute resolution clause in their agreement that provided for arbitration in Basel.

Subsequently, a dispute arose regarding the repayment of the amounts that B and C paid to A. B and C filed a request for arbitration against A. A sole arbitrator was appointed who gave a preliminary assessment of the case before the evidentiary hearing. As the parties were not able to settle the case, the sole arbitrator issued its final award and obliged A to repay most of the amounts to B and C as A breached his duty of care according to Article 398(2) Swiss Code of

²⁴ For further analysis of this decision of the Supreme Court see BÄRTSCH/KOZMENKO, Suspected leak to the press does not lead to overturned award (Swiss Supreme Court), available at: http://www.swlegal.ch/getdoc/0a0b25c3-027f-4968-8153-367737c1e64b/2016_Philippe-Bartsch_Anna-Kozmenko_Suspected-leak.aspx (last visited: 26 August 2016).

Obligations (hereinafter "CO"). A then filed a motion to set aside the award *inter alia* based on Article 190(2)(a) PILA.

Decision: The Supreme Court rejected the motion to set aside the award.

The Supreme Court recalled that if an arbitrator is to be challenged pursuant to Article 190(2)(a) PILA, this challenge must be raised immediately during the arbitration proceedings. If there is a procedural error, this too must be raised immediately so that the tribunal has an opportunity to correct it. A party holding in reserve a procedural error or a challenge that it could have raised in the arbitration, acts in bad faith and forfeits the right to advance such issue before the Supreme Court.

A alleged that the sole arbitrator violated his duty of independence and impartiality by giving a clear cut and full assessment of the case in favor of B and C prior to having heard the witnesses. According to A, the sole arbitrator could not depart from that assessment later on in the proceedings. The appellant claimed that it was only agreed between the parties that the sole arbitrator would point out the risks and chances of each party and not that he would give a full assessment. The Supreme Court dismissed A's arguments. It pointed out that A should have raised the issue of impartiality right after the preliminary assessment by the sole arbitrator, which he did not. Rather, A waited until the final award was issued. Thus, A's respective objection was too late. In addition, the Supreme Court pointed out that A confirmed, prior to the assessment, that he would not challenge the arbitrator based on the preliminary assessment. The Supreme Court further held that the fact that the sole arbitrator confirmed his preliminary assessment in the final award did not prove a violation of his duty of independence and impartiality.

Comment: This case confirms that challenges of arbitrators must be raised immediately in the arbitral proceedings. To do otherwise is against good faith and results in a forfeiture of the right to challenge. This decision also serves as a reminder for arbitrators not to give a preliminary assessment of the case prior to having a confirmation by all parties on the record that they will not challenge him or her based on the preliminary assessment.

c) Decision No. 4A_132/2016 of 30 June 2016

In this case, the appellant asserted for the first time before the Supreme Court that the CAS tribunal violated its duty of independence and impartiality according to Article 190(2)(a) PILA.²⁵ The Supreme Court held that the appellant A acted in bad faith by not raising this issue in the arbitration proceedings. A party that holds in reserve a procedural error or a challenge that it could have raised in the arbitration forfeits the right to raise it before the Supreme Court. Accordingly, the respective objection was rejected.

2. Incorrect decision on jurisdiction (Article 190(2)(b) PILA)

a) Decision No. 4A_136/2015 of 15 September 2015

Facts: By a tripartite distribution agreement of 21 July 2009 (Distribution Agreement), a French laboratory (A) committed itself to sell pharmaceutical products to a UK buyer (B), which would then deliver the products to a Russian company (C). The Distribution Agreement – to which Swiss law was applicable and which was drafted in English and Russian – contained the following clause at Article 22:

"22 – ARBITRATION

²⁵ As to the facts of the case see below, p. 198 et seq.

Any disputes and disagreements that may arise out of or in connection with this Contract have to be settled between the Parties by negotiations. If no Contract can be reached, the Parties shall submit their dispute to the empowered jurisdiction of Geneva, Switzerland."

In this context, it must be noted that the preamble of the Distribution Agreement stated that "the headings to clauses are inserted for convenience only and shall not affect the construction of this Contract".

Moreover, Article 21 of the Distribution Agreement specified that the English language shall prevail.

The parties later agreed to amend the Distribution Agreement and signed a respective amendment on 1 April 2010 (Amendment). However, the Amendment did not affect Article 22 of the Distribution Agreement. Based on the Amendment A and C – but not B – then signed an agreement entitled "Quality and Safety Data Exchange Agreement", which was considered to be an annex to the Distribution Agreement. Article 7(1) of the Quality and Safety Data Exchange Agreement stated as follows:

"7-1) Governing law – Jurisdiction

This Agreement shall be governed by and construed in accordance with the laws of France.

The Parties shall do their utmost to reach an amicable settlement to any dispute arising hereunder. If no agreement can be reached, the Parties shall submit their dispute to the empowered jurisdiction of Lyon, France.

This Agreement constitutes the entire agreement of the Parties hereto with respect to its object and supersedes and cancels any prior representation, commitment, undertaking or agreement between

the parties, whether oral or written, with respect to or in connection with any of the matters of things to which such Agreement applies or refers.

The English version of this Agreement shall prevail."

By letter dated 26 May 2011, A notified C that it was terminating the Distribution Agreement with immediate effect.

On 22 May 2013, B filed a request for conciliatory proceedings at the court of first instance in the canton of Geneva according to Article 22 of the Distribution Agreement. As to jurisdiction, B selected the Geneva Court as the competent forum arguing that the heading of Article 22 "Arbitration" did not turn the provision into an agreement to arbitrate. B further argued that pursuant to the preamble of the Distribution Agreement, the heading was not decisive, but was rather meant as a reference only. Moreover, B noted that the term "arbitration" simply meant "jurisdiction" in the Russian language and that therefore, the provision could not be understood as an obligation to arbitrate. B also pointed out that C would initiate proceedings against A before the French courts in Lyon pursuant to Article 7 of the Quality and Safety Data Exchange Agreement.

Subsequently, A raised an objection to the jurisdiction of the court based on the existence of an arbitration agreement. A argued that Article 22 of the Distribution Agreement in fact provided first for settlement and then for arbitration before the Geneva Chamber of Commerce. In addition, A argued that English was the prevailing language of the contract and thus the heading "Arbitration" must be understood as a binding agreement to arbitrate. Nevertheless, the Geneva court granted B leave to commence court proceedings.

B and C accepted A's interpretation of Article 22 Distribution Agreement and decided to jointly file a notice of arbitration with the Geneva Chamber of Commerce on 23 May 2013.

Subsequently, A filed its answer in which it denied the existence of an arbitration agreement despite having previously raised an objection to court jurisdiction based on the existence of an arbitration clause. In its answer to the notice of arbitration, A *inter alia* argued that the necessary elements for a binding arbitration agreement, such as the designation of the institution, number of arbitrators, duration of the arbitration etc. were actually missing in Article 22 of the Distribution Agreement. In turn, A argued that this provision should be interpreted as a multi-tier amicable dispute settlement clause starting with negotiations between the parties followed by negotiations under the supervision of the Geneva authorities. A also argued that B had waived arbitration by accepting the jurisdiction of the Geneva court in the conciliatory proceedings.

The sole arbitrator bifurcated the proceedings and – after a second round of briefs – rendered an interim award affirming his jurisdiction. This interim award was challenged by A before the Supreme Court on 3 March 2015.

Decision: The Swiss Supreme Court rejected A's jurisdictional challenge.

The Supreme Court first concluded that the provision of Article 22 of the Distribution Agreement satisfied the validity requirements set out in Article 178(1) PILA as to the form of an agreement to arbitrate.

The Supreme Court then affirmed that according to Article 178(2) PILA an arbitration agreement is valid if it conforms to the particular law chosen by the parties to govern the arbitration agreement, the law governing the subject matter of the dispute or Swiss law (*in favorem validitatis*). In the case at hand, only Swiss law was applicable.

Further, the Supreme Court affirmed that arbitral tribunals must establish that the parties have a clear and common intent to exclude the jurisdiction of the state courts in favor of an arbitral tribunal. This must be done according to the general rules of contract interpretation. Even if an arbitration agreement is incomplete, unclear or contradictory (e.g. pathological) it may nevertheless be valid if the minimal requirement for a valid arbitration agreement – namely the intent to resolve a specific dispute by an arbitral tribunal and to exclude state courts – is fulfilled.

The sole arbitrator established in its award a common intent of the parties to resolve their disputes by arbitration (subjective interpretation). The Supreme Court confirmed that the common intent of the parties is a factual issue and that therefore, these factual conclusions were binding upon the Supreme Court, irrespective of their correctness.

However, the Supreme Court did not stop here. It proceeded to review the decision of the sole arbitrator and found that even based on an objective interpretation – *quod non* – the sole arbitrator's conclusions were correct in the present case for different reasons. Firstly, the heading of the jurisdiction clause "arbitration" written in caps carried particular weight, whereas the contractual preamble was of considerably less importance. Further, the double mechanism for amicable settlement argued by A did not convince the Supreme Court. The Supreme Court also found that the term "empowered" as stated in Article 22 of the Distribution Agreement did not establish state court jurisdiction. Moreover, the Supreme Court considered the international nature of the transaction and found that there was a general trend in international commerce that arbitration is the preferred dispute resolution mechanism. This favored a finding that the parties agreed to arbitration, in particular considering that Geneva is a well-known place for arbitration.

Lastly, the Swiss Supreme Court affirmed that despite Article 22 of the Distribution Agreement's short and summary nature, the sole arbitrator was in a position to establish the common intent of the parties to submit their disputes to arbitration and not to state courts. Therefore, the fact that the clause was so short on details was not decisive. Conversely, the Supreme Court pointed out A may have been acting in bad faith by first raising the defense that the dispute should go to arbitration and then taking the opposite view.

Comment: The case confirms the very arbitration-friendly position of the Supreme Court.²⁶ It demonstrates that while a poorly drafted dispute resolution clause can still constitute a valid arbitration agreement, this may entail a significant loss of time and costs. Practitioners must be aware of the risks of dual-language contracts, in particular the dual meaning of the term "arbitration" in the Russian language.

Furthermore, the decision confirms that factual findings are beyond the reach of an appeal. In particular, it demonstrates that the common intent of the parties as established by the arbitral tribunal is a factual issue and that it is therefore binding upon the Supreme Court. Consequently, it would not have been necessary for the Supreme Court to comment on the objective interpretation of Article 22 of the Distribution Agreement. These comments by the Supreme Court are not entirely convincing. Nevertheless, it is interesting to note that the Supreme Court may have departed from its long standing

²⁶ For further analysis of this decision of the Supreme Court see STUTZER/BÖSCH, Just write "ARBITRATION" - and you get it in Switzerland!, available at: http://thouvenin.com/wp-content/uploads/2015/10/Arbitration-Newsletter-Switzerland_Just-write-Arbitration-you-get-it-in-Switzerland.pdf (last visited: 26 August 2016); VOSER/KOZMENKO, Swiss Supreme Court considers meaning of "arbitration" in dual language contracts, available at: http://www.swlegal.ch/getdoc/a2189ada-92d7-44fb-a606-c9d4e2430966/2015_Nathalie-Voser_Anna-Kozmenko_Swiss-Supreme-Co.aspx (last visited: 26 August 2016); MENZ, Die bundesgerichtliche Rechtsprechung zur Schiedsgerichtsbarkeit 2014/2015, in: Jusletter 4 April 2016, N 27 *et seq.*

approach according to which the consent to conclude an agreement to arbitrate must be clear and unambiguous and that a restrictive approach applies when determining whether the parties concluded an obligation to arbitrate or not.²⁷ In this context, the Supreme Court seems to accept that arbitration has become the preferred means of dispute resolution in international contracts and that even a poorly drafted dispute resolution clause can result in an obligation to arbitrate in the context of international commerce.

Finally, the holding of the Supreme Court was also influenced by the appellant's contradictory statements claiming first that the dispute should go to arbitration and then taking the opposite view in the arbitration proceedings.

b) Decision No. 4A_172/2015 of 29 September 2015

Facts: By a cooperation agreement dated 27 March 2007 (Cooperation Agreement), a private investor (C) committed itself to transfer EUR 2 million to an attorney (A) and a securities trading company (B) for investment purposes. The Cooperation Agreement contained an arbitration clause stating that the seat of arbitration was Zurich and that the applicable law was Swiss law.

On 28 March 2007, A sent a letter to C, who countersigned it, stating *inter alia* that "I [A] undertake to reimburse the funds of EURO 2 Mio to any nominated account if the investment contract does not materialize as anticipated." This letter did not include an arbitration clause. The funds that C transferred were finally lost due to bad business decisions on investments made by a fraudulent third party that had been mandated by A. Given that A did not reimburse C the EUR 2 million as requested, C initiated arbitral proceedings against A and B

²⁷ See e.g. ATF 140 III 134, para. 3.2; ATF 129 III 675, para. 2.3.

before the International Chamber of Commerce (hereinafter "ICC").

The ICC-appointed sole arbitrator held that the Cooperation Agreement did not provide a basis for a claim among the three partners. However, he found that the letter from A dated 28 March 2007 constituted a promissory letter pursuant to Article 17 of the CO. As a result, the sole arbitrator ordered A alone to pay EUR 2 million to C. Subsequently, A filed an application with the Supreme Court to set aside the award. Among other grounds,²⁸ A argued that the sole-arbitrator had wrongfully accepted jurisdiction. A based his argument on the fact that the sole-arbitrator accepted jurisdiction based on the parties' agreement in the letter dated 28 March 2007 which, contrary to the Cooperation Agreement, did not contain an arbitration clause.

Decision: The Supreme Court rejected the application to set aside the award.

The Supreme Court relied on Article 186(2) PILA and recalled that a plea of lack of jurisdiction must be raised prior to any defense on the merits and that this provision reflects the principle of good faith found in Article 2(1) of the Swiss Civil Code (hereinafter "CC"). The Supreme Court held that if a party fails to raise a plea of lack of jurisdiction, the arbitral tribunal's jurisdiction is established based on acceptance by appearance, irrespective of the validity of an arbitration clause. Therefore, a party which comments on the merits of the case without raising a plea of lack of jurisdiction accepts the arbitral tribunal's jurisdiction and loses its right to raise a jurisdictional objection at a later stage.

The Supreme Court stated that A had admitted that he did not object to the sole arbitrator's jurisdiction in the arbitral

²⁸ As to the alleged violation of the right to be heard, see below p. 166 et seq.; as to the alleged violation of public policy see below, p. 191 et seq.

proceedings. A explained that in his view it was not foreseeable that the sole-arbitrator would base his decision on the letter dated 28 March 2007 as a document independent from the Cooperation Agreement. The Supreme Court disagreed in this respect, affirming that it was evident that the question of whether the letter of 28 March 2007 constituted a promissory note would arise and would therefore be a basis for C's claim.

During the arbitral proceedings, A had advanced the argument that the letter dated 28 March 2007 did not constitute an independent agreement, but rather formed an integral part of the Cooperation Agreement which included an arbitration clause. The Supreme Court maintained that if the letter dated 28 March 2007 was considered as an independent promissory declaration, any claims based on such declaration would be excluded from the material scope of the arbitration clause. However, the Supreme Court further explained that as A did not contest the jurisdiction of the tribunal during the arbitral proceedings, but instead was deemed to have accepted the jurisdiction of the sole-arbitrator by unreservedly commenting on the merits, A could not belatedly rely on such an argument as a ground for setting aside the award. As a result, the Supreme Court rejected the application to set aside the award.

Comment: The Supreme Court's decision is correct and the principle it is based on is well established. This decision therefore serves more as a reminder for counsel.²⁹ First, when an arbitration procedure has its seat in Switzerland and is subject to the ICC Rules, a plea of lack of jurisdiction must be

²⁹ This is correctly pointed out by VOSER/BELL, Swiss Supreme Court confirms requirement under Swiss law to timely file objection to jurisdiction, available at: [http://www.swlegal.ch/getdoc/86f868d0-875d-4856-bbad-30ddb8dab5b3/2015_Nathalie-Voser_Katherine-Bell_Swiss-Supre-\(1\).aspx](http://www.swlegal.ch/getdoc/86f868d0-875d-4856-bbad-30ddb8dab5b3/2015_Nathalie-Voser_Katherine-Bell_Swiss-Supre-(1).aspx) (last visited: 26 August 2016). See also SCHERER, Introduction to the case law section, in: ASA Bull. 2/2016, p. 387 *et seq.*

raised prior to any defense on the merits pursuant to Article 186(2) PILA. Second, counsel must bear in mind that the potential need to object to the jurisdiction of the arbitral tribunal may constitute an alternative line of argumentation in the event that the main argument on the merits is not successful.

c) ATF 141 III 495 (Decision No. 4A_34/2015 of 6 October 2015)

Facts: In 2000, the French company B became the majority shareholder of C, a Hungarian company active in the field of heat and electricity production. This majority stake qualified as a foreign investment under the Energy Charter Treaty (ECT). One major incentive for this investment was the fact that C could benefit from long-term power purchase agreements (PPAs) entered into with a state-owned company, which allowed it to sell power at a more attractive price than on the open market.

In 2008, four years after Hungary had joined the EU, the European Commission decided that the PPAs constituted state aids that were not compliant with EU competition law. As a result, the European Commission requested Hungary to terminate the PPAs and to seek reimbursement of the amounts unduly received by the electricity producers. However, the European Commission authorized the producers to be compensated by Hungary for the loss of investments caused by the early termination of the PPAs (so-called "stranded costs") within certain limits.

Hungary terminated the PPAs at the end of 2008. In 2010, it adopted a decree granting compensation for stranded costs to the producers but limiting the amount of such compensation to the amount of state aid they had to reimburse. Thus, Hungary sought to put in place a system whereby stranded costs were to be offset against the state aid that had to be reimbursed. As a consequence, producers who had stranded

costs above that ceiling would not be compensated for those additional costs. This was the case for B whose stranded costs were almost twice the amount of the reimbursable state aids. Moreover, in another decree of 2011, Hungary capped the maximum profit that producers such as C were allowed to make.

B then brought a claim against Hungary based on Article 26 ECT for breach of the protection awarded to investors according to the ECT.

An arbitral tribunal seated in Zurich was constituted pursuant to the UNCITRAL arbitral rules and under the aegis of the Permanent Court of Arbitration. In a final award rendered on 3 December 2014, the arbitral tribunal dismissed Hungary's jurisdictional objections and held that, although the termination of the PPAs did not constitute a breach of the ECT, Hungary's failure to adequately reimburse C's stranded costs within the limits allowed by EU law violated the ECT's fair and equitable treatment standard. Considering that the cap imposed by Hungary on the recovery of stranded costs was not mandated by EU law, B's legitimate expectation that no such cap would apply had been breached. In addition, the arbitral tribunal decided that the implementation of the 2011 decree constituted another breach of B's legitimate expectations under Article 10(1) of the ECT providing that each contracting party shall ensure fair and equitable treatment of investments of investors of other contracting parties (FET). The last sentence of Article 10(1) further provided that "*[e]ach Contracting Party shall observe any obligations it has entered into with an investor or an investment of an investor of any Contracting Party*". Accordingly, the arbitral tribunal ordered Hungary to pay damages to B.

Hungary filed an application to set aside the award before the Supreme Court.

Hungary's challenge *inter alia* relied on Article 190(2)(b) PILA. Hungary argued that the arbitral tribunal had wrongly accepted jurisdiction. According to Hungary, the arbitral tribunal incorrectly assessed the claim to be a "treaty claim" based on FET when it was actually a contract claim falling under the so-called "umbrella clause" to which Hungary made a reservation regarding arbitration. It stated that consent to arbitrate should not be admitted lightly, especially where a sovereign state has expressly withheld its consent for a specific category of disputes. In accordance with the principle of "*in dubio mitius*", one should prefer the interpretation of the treaty which is the less burdensome for the party undertaking the obligation, namely a meaning which limits as much as possible the scope of the state's consent to have investment disputes submitted to arbitration. According to Hungary, a failure to meet an investor's expectations that a contract with the host state will be concluded cannot alone be equated to a violation of the FET standard under the ECT.

Decision: The Supreme Court dismissed the application.

The main issue in the award was whether the claim brought by B was a so-called treaty claim benefiting from the protection of the FET pursuant to Article 10 ECT or whether it was a so-called contract claim governed by the "umbrella clause" to which Hungary had withheld its consent regarding arbitration.

The Supreme Court first clarified the difference between treaty and contract claims. Contract claims are claims which investors raise based on the contract they have concluded with the host state. They do not fall within the scope of investment treaty protection and its related jurisdictional clauses. Given that this represents a greater risk for investors, investment protection treaties regularly contain a so-called "umbrella clause" whereby the contract is placed under the "umbrella" of the treaty in order to benefit from its protection, including the possibility to submit a claim to the adjudicatory

bodies foreseen in that treaty. In the case at hand, the Supreme Court agreed with Hungary that the last sentence of Article 10(1) ECT represents an umbrella clause.

In contrast, treaty claims concern treaties between the national state of the investors and the host state and aim to provide for reciprocal protection of their investors. Treaty claims incorporate substantive undertakings such as the necessity to provide a FET to the investors and include a jurisdiction clause submitting investment disputes *inter alia* to an independent arbitral tribunal, such as Article 26(2)(c) ECT which allows the investor to choose between several types of arbitration.

Referring to the Vienna Convention on the Law of Treaties, the Supreme Court stated that the ECT must be interpreted in good faith according to the ordinary meaning of the words of the treaty, in their context, and in the light of the treaty's object and purpose.

The Supreme Court held that Hungary's excessively broad reading of the last sentence of Article 10(1) ECT did not hold to the extent that it would assimilate any treaty claim to a contract claim falling under the umbrella clause, thus depriving the parties of the possibility of arbitration due to Hungary's reservation. As a consequence, this would defeat the ECT's FET standard of its effect. Such an interpretation would prevent an investor from alleging a violation of the FET standard for the sole reason that it had concluded a contract with the host state or a state-owned entity or invested in a company which had entered into such a contract.

The Supreme Court decided that the arbitral tribunal had assessed and rightly accepted B's qualification of its claims and held that what was the main issue was not the premature termination of the PPAs, but rather Hungary's failure to implement an adequate system of compensation for C's stranded costs within the limits allowed by EU law. This

constituted a violation of the duty to provide a FET and gave rise to a treaty claim. Moreover, the Supreme Court agreed with the tribunal's conclusion that this type of claim acknowledged the general duties of the host state, under the first sentences of Article 10(1) of the ECT, to give investors of other contracting parties a fair and equitable treatment with respect to their investments.

Comment: This interesting case raised various issues regarding jurisdiction and was the Supreme Court's first fully-fledged decision on investment treaty arbitration.³⁰ Thus, this decision was rightfully published in the Supreme Court's reporter.

The Supreme Court adopted a narrow approach towards the interpretation of the umbrella clause for which Hungary had withheld its consent to arbitration, and conversely, a rather broad interpretation of the host state's general obligation to accord fair and equitable treatment to all investments made under the ECT for which Hungary had consented to arbitration. In the present case, the Supreme Court clearly decided that states could not "shut the umbrella" by withholding consent to arbitration.

The Supreme Court's decision is fully consistent with Switzerland's established tradition as a place where the judicial review of international arbitral awards is limited and arbitration-friendly. Thus, the Supreme Court made clear that it also intends to apply this arbitration-friendly approach with

³⁰ For further analysis of this decision of the Supreme Court see also CREMADES, Swiss Supreme Court rejects Hungary's application to set aside award under Energy Charter Treat, available at: http://www.swlegal.ch/getdoc/fe447a43-cabd-4e97-8ff3-b38c0e9f6652/2015_Nathalie-Voser_Anne-Carole-Cremades_Swiss-Sup.aspx (last visited: 26 August 2016); PONCET, The Swiss Supreme Court addresses the difference between treaty claims and contract claims, available at: <http://www.swissarbitrationdecisions.com/swiss-supreme-court-addresses-difference-between-treaty-claims-and-contract-claims> (last visited: 26 August 2016); MENZ, Die bundesgerichtliche Rechtsprechung zur Schiedsgerichtsbarkeit 2014/2015, in: Jusletter 4 April 2016, N 52 *et seq.*

respect to investment treaty arbitrations. In addition, the Supreme Court's reasons demonstrate that the court was very reluctant to second-guess the arbitrators' findings and approach taken during the arbitration proceedings.

d) Decision No. 4A_176/2015 of 9 November 2015

Facts: By agreement of July 2011, a FIFA-affiliated Ecuadorian football club (A) issued a document on its own letterhead, in which A undertook to pay to the players' agent (B) an amount in twelve identical instalments (Agreement). These payments were for B's intermediary services and sports advice. Subsequently, only the first two instalments were paid to the agent.

In May 2012, B filed a claim for payment with FIFA's Player's Status Committee (PSC) pursuant to the agreement and requested from A the payment of the outstanding balance plus interest. In a decision dated 25 February 2014, the PSC decided that the claim was inadmissible on the ground that B had not sufficiently established that his activities fell under the scope of FIFA's Players Agents Regulations of 2008 (PAR) which "*govern the occupation of players' agents who introduce players to clubs with a view to negotiating or renegotiating an employment contract or introduce two clubs to one another with a view to concluding a transfer agreement within one association or from association to another*".

In May 2014, B appealed the decision to a CAS-appointed sole arbitrator. A did not formally respond to the appeal and added a hand-written objection to a procedural order, signed by both parties, that it contested the CAS' subject matter jurisdiction. In January 2015, the arbitrator decided on the appeal and rendered his award deciding that B's appeal was admissible. The arbitrator maintained that he was competent to decide on his jurisdiction pursuant to Article 186 PILA, Article 67 FIFA Statutes, R27 CAS Code and that A's PAR-based objection, as a matter of substantive law, did not affect his jurisdiction in

any way. Moreover, the arbitrator decided that B had demonstrated that the services due under the Agreement were provided in his capacity as a players' agent within the scope of the PAR and that in this context, A had failed to discharge its burden to prove otherwise. According to the arbitrator, the PSC decision of February 2014 was to be set aside and as a result, B was to be awarded the amount plus interest from A.

In March 2015, A filed a motion with the Supreme Court to set aside the CAS award. In its motion, A argued that the arbitrator had wrongly accepted jurisdiction to hear the case. A alleged that B had not succeeded in showing that his services were being provided in his capacity as a players' agent and in fact, fell within the scope of the PAR. According to A, the arbitrator had unduly shifted the burden of proof. On the other side, B requested that A's claim be dismissed.

Decision: The Supreme Court rejected the application to set aside the award.

The Supreme Court confirmed that the CAS arbitrator had correctly established jurisdiction. In this respect, the Supreme Court approved the arbitrator's legal reasoning with respect to his jurisdiction and ability to substitute the earlier PSC decision. The Supreme Court further decided that the arbitrator's conclusions based on the relevant factual evidence presented to him were binding on the Supreme Court.

Ultimately, the Supreme Court pointed out that the CAS award was not decided based on a shifting of the burden of proof as alleged by A. According to the Supreme Court, the arbitrator had simply stated that in his view, B's services fell within the scope of the PAR. As a consequence, the party challenging this finding (here A) bore the burden of establishing the correct legal basis, or in absence thereof, the obligation that A had assumed.

Comment: This decision confirms the well-known difficulty of successfully challenging an arbitrator's jurisdiction under the Swiss *lex arbitri*, particularly in the event that the arbitrator has declared that he has jurisdiction based on questions of fact.³¹

e) Decision No. 4A_562/2015 of 9 December 2015

Facts: According to a loan agreement, the sons of FA (CA, EA, DA and AA) had the right to freely use determined buildings located in Rome, owned by company B (Loan Agreement). Pursuant to the agreement, ownership of the determined buildings could be transferred to FA's sons in the event that B was put into liquidation, on the condition that three of the sons signed a request for transfer. In addition, the Loan Agreement included a provision stating that the parties were to submit disputes with respect to its effect or interpretation to a sole arbitrator.

Subsequently, CA and DA started arbitration proceedings with the objective of giving effect to the provision concerning the transfer of ownership. AA and company B objected to the arbitrator's jurisdiction. On 28 April 2015, the arbitrator confirmed his jurisdiction in an interim award. On 9 October 2015, AA and B challenged the arbitrator's interim award *inter alia* based on the ground that the arbitrator lacked jurisdiction pursuant to Article 190(b) PILA.

According to AA and B, the arbitrator wrongly accepted jurisdiction considering that the arbitral proceedings did not include all of FA's heirs, in particular his widow. Further, AA and B argued that the issue was not covered by the

³¹ For further analysis of this decision of the Supreme Court see VOSER/ESCHMENT, Swiss Supreme Court confirms CAS jurisdiction in dispute over activities of players' agent, available at: http://www.swlegal.ch/getdoc/37c76276-8b4a-4da1-95bf-db1559fefaef/2015_Nathalie-Voser_Jorn-Eschment_Swiss-Supreme-Co.aspx (last visited: 26 August 2016).

agreement. Lastly, AA and B argued that the three necessary signatures were missing.

Decision: The Supreme Court rejected the motion to set aside the interim award.

The Supreme Court confirmed that a party's standing to sue or to be sued is a matter of substantive law which does not concern the jurisdiction of the arbitral tribunal. It held that disputes arising from the interpretation and execution of an agreement concern the merits of the case and not the arbitrator's jurisdiction.

As a result, the Supreme Court found no grounds to set aside the award on jurisdiction.

Comment: The present case shows that Supreme Court clearly separates issues of substantive law from those pertaining to jurisdiction.³² Accordingly, the matter of standing is a question of substantive law and must be distinguished from the question of whether there is a valid arbitration agreement which establishes jurisdiction.

f) Decision No. 4A_392/2015 of 10 December 2015

Facts: An Israeli national (A) and a Swiss national (B) agreed to submit a dispute regarding a common business to arbitration. A and B each signed a power of attorney mandating a Geneva lawyer to act as the sole arbitrator. The appointed sole arbitrator drafted a summary of the facts presented to him by the parties. Subsequently, the Parties signed an arbitration agreement explicitly referring to that summary of facts.

³² For further analysis of this decision of the Supreme Court see VOSER/PETTI, Swiss Supreme Court distinguishes between being a party to an arbitration agreement and having standing to sue, available at: http://www.swlegal.ch/getdoc/8d9666b0-facd-47c2-83cb-8f4d014cab3d/2016_Nathalie-Voser_Angelina-M-Petti_Distinction-m.aspx (last visited: 26 August 2016).

A then commenced proceedings before the sole arbitrator and filed a request to order B to pay an amount in excess of a certain sum. B filed a brief submission, but failed to take part in the proceedings thereafter. On 10 June 2015, the arbitrator rendered an award in favor of A. B then filed a motion to the Supreme Court to set aside the award.

B argued *inter alia* that the arbitration agreement was invalid and that the sole arbitrator lacked jurisdiction to hear the case according to Article 190(2)(b) PILA, as the subject-matter of the dispute was not sufficiently determined according to the powers of attorney and the arbitration agreement signed by the parties.

Decision: The Supreme Court rejected the challenge based on Article 190(2)(b) PILA referring to its long-standing practice that according to Article 186(2) PILA, a jurisdictional challenge must be raised before any argument is entered on the merits. In the case at hand, the appellant B filed a brief submission at the beginning of the arbitral proceedings, but failed to take part in the proceedings until the final award was issued.

In this respect, the Supreme Court stated that B failed to sufficiently raise his challenge in the arbitration proceedings. As a consequence, the Supreme Court held that he was barred from invoking this argument in support of a motion to set aside the award.

Comment: This decision serves as a reminder that a party who does not raise procedural or jurisdictional objections during the arbitration proceedings is generally precluded from raising those arguments before the Supreme Court.³³

³³ For further analysis of this decision of the Supreme Court see VOSER/GEORGE, Swiss Supreme Court examines jurisdictional and public policy challenge, available at: http://www.swlegal.ch/getdoc/482fb47d-1003-4372-835b-52c986024926/2016_Nathalie-Voser_Anya-George_Swiss-Supreme.aspx (last

g) Decision No. 4A_428/2015 of 1 February 2016

Facts: Seller (A) and purchaser (B) concluded a share purchase agreement (SPA) providing for ICC arbitration in Zurich. As to the purchase price, the SPA contained a clause providing for a price adjustment mechanism setting out a framework according to which the buyer had to prepare certain documents and hand them over to the seller. According to this mechanism, the seller was then required to submit a "Notice of Objection" within a certain period of time in the event that it wished to object to the documents prepared by the buyer. If such Notice of Objection was submitted, the price had to be assessed by a neutral auditor whose determination would be binding.

Since the parties could not agree on the price adjustment, an auditor was appointed. In his expert opinion, he assessed the adjustment amount to be paid by the purchaser to the seller at EUR 2'473'613.--. However, B rejected this assessment.

In February 2014, A initiated arbitration proceedings. B argued that A had failed to submit a "Notice of Objection" meeting the requirements set out in the SPA and that the previously set purchase price had become binding regardless of the expert opinion. It opposed the purchase price claim and submitted a counterclaim requesting A to pay EUR 1'354'000.- - plus interest.

The arbitral tribunal held that A did not submit a "Notice of Objection" corresponding to the requirements of the SPA and that the documents prepared by B – including the "Adjusted Purchase Price Determination Certificate" – were final and binding upon the parties. As a consequence, it upheld the counterclaim and ordered A to pay a certain amount.

visited: 26 August 2016); SCHERER, Introduction to the case law section, in: ASA Bull. 2/2016, p. 389.

A challenged the award before the Supreme Court arguing that the arbitral tribunal had violated the provisions concerning jurisdiction pursuant to Article 190(2)(b) PILA. A asserted that the arbitral tribunal did not have jurisdiction according to the SPA to disregard the expert opinion because the requirements for a "Notice of Objection" were not fulfilled.

Decision: The Supreme Court dismissed the motion to set aside the award.

According to the Supreme Court, a party wishing to challenge an arbitrator, or object to the jurisdiction of an arbitral tribunal, forfeits its claims if it does not raise them in a timely manner in the arbitration and if it does not undertake all reasonable efforts to remedy the error to the extent possible. The Supreme Court also underlined that it is contrary to good faith to raise a procedural error only in the framework of an appeal when it would have been possible to do so in the arbitration, thus giving the arbitral tribunal the possibility to correct the alleged error. In the same way, a party acts contrary to good faith and in an abusive manner when it holds the grievance in reserve only to raise it in case the arbitration takes an unfavorable turn and a loss appears foreseeable. The Supreme Court maintained that when a party participates in an arbitration without challenging the jurisdiction of the arbitral tribunal or the arbitrator, even though it has the opportunity of resolving the matter before the award is issued, it cannot raise the corresponding argument in the appeal proceedings because they were forfeited.

As to the arbitral tribunal's jurisdiction, the Supreme Court held that A's opinion cannot be followed when it claims to have already raised the alleged lack of jurisdiction in the arbitral proceedings. The Supreme Court stated that A itself appeared before the arbitral tribunal in order to claim the amount against B determined by the auditor. In doing so, the Supreme Court underlined that A stated that, in its view, the expert opinion was not an enforceable legal title having *res judicata*

effect, but that a decision of the arbitral tribunal was needed in this respect. Accordingly, A did not challenge the jurisdiction of the arbitral tribunal to assess the validity of the expert opinion issued or the contractual requirements regarding the “Notice of Objection” according to the SPA. In contrast, during the arbitration proceedings, A signed the Terms of Reference which specified that whether the “Notice of Objection” met the requirements of the SPA was an issue to be determined by the arbitral tribunal.

Comment: The Supreme Court reiterated its case law, according to which in the event that an arbitral tribunal is challenged or if its jurisdiction is disputed, an objection must be raised immediately in the arbitration proceedings.³⁴ If there is a procedural error, it too must be raised at once so that the arbitral tribunal has an opportunity to correct it. A party that does not challenge the jurisdiction of the tribunal in the arbitration proceedings but instead brings a claim itself and addresses the merits without any reservation, forfeits the right to argue a lack of jurisdiction of the arbitral tribunal before the Supreme Court. This is well-established case law and nothing new.

h) ATF 142 III 239 (Decision No. 4A_84/2015 of 18 February 2016)

Facts: The case at hand involved the relationship between an Iranian company (X) and a Cypriot company (Z) with regard to the sale of steel products by Z to X. In spring 2012, a couple of transactions were concluded, including a sales contract,

³⁴ For further analysis of this decision of the Supreme Court see PONCET, Objections not raised in the arbitration are forfeited, available at: <http://www.swissarbitrationdecisions.com/objections-not-raised-arbitration-are-forfeited> (last visited: 26 August 2016); VEIT, 4A_428/2015: Beteiligt sich eine Partei an einem Schiedsverfahren, ohne die Zuständigkeit des Schiedsgerichts in Frage zu stellen, ist sie mit der entsprechenden Rüge vor Bundesgericht wegen Verwirkung ausgeschlossen, available at: <http://www.swissblawg.ch/2016/02/4a4282015-beteiligt-sich-eine-partei.html> (last visited: 26 August 2016).

whereupon Z sent X pro forma invoices. With the exception of an advance payment, X did not pay the invoices.

Along with the sales contract, a draft Framework Contract was sent to X containing provisions regarding the implementation of the sale of steel products in the framework of a long-term commercial relationship. It contained an arbitration clause providing for arbitration in Lugano according to the Swiss Rules. Starting in May 2012, a chain of correspondence began between the representatives of X and Z. In addition, various drafts of the Framework Contract were exchanged between them. During this process, the Framework Contract was never signed, no goods were delivered and no payments were made. However, it must be noted that the wording of the arbitration clause remained undisputed in the later exchanges of the various drafts.

In August 2013, a dispute arose between X and Z. Z initiated arbitration proceedings in Lugano pursuant to the unsigned Framework Contract. Z claimed payment of the outstanding invoices. X replied by claiming lack of jurisdiction. The appointed sole arbitrator finally issued an award on jurisdiction rejecting the defenses raised and upholding his jurisdiction. He held that despite the fact that the Framework Contract containing the arbitration clause was never signed by the parties, they had nevertheless agreed on the arbitration clause. Relying primarily on Article 178(3) PILA, the sole arbitrator concluded that the arbitration clause was binding. During the arbitration proceedings, X also alleged that the representatives involved in 2012 actually lacked the necessary authority to bind it. The sole arbitrator found that – based on the principles of good faith representation and subsequent ratification – the acts of the representative were authorized.

In February 2015, an appeal was made to the Supreme Court on the basis of Article 190(2)(b) PILA.

First, X argued that the principle of the autonomy of the arbitration clause was not applicable because the lack of agreement of the parties regarding the Framework Contract also had an impact on the arbitration clause. Second, X argued that the arbitration agreement was not valid as it was not signed and therefore was not in conformity with Article 16 of the CO. Third, X alleged that the representatives acting for X were in fact not properly authorized. Furthermore, X claimed that the dispute arising under the sales contract did not fall within the scope of the arbitration clause of the Framework Contract.

Decision: The Supreme Court rejected the motion to set aside the award.

The Supreme Court confirmed its long-held view that the arbitration agreement is independent from the main contract. According to the Supreme Court, the doctrine of separability of the arbitration clause *“means that the mere allegation of the non-existence of the main contract is not sufficient to put an end to the arbitrator’s jurisdiction. However, if he finds that the main contract does not exist and that the cause for such non-existence also impacts the arbitration agreement, he must deny jurisdiction”*. The Supreme Court confirmed the basic principle that when a party does not consent to the main contract, the lack of consent will in principle also extend to the arbitration agreement contained therein. Nevertheless, the Supreme Court maintained that exceptions to this general rule are possible under particular circumstances. For instance, if the parties have concluded previous contracts including the same arbitration clause; or if the parties have an objective interest in choosing arbitration, such as the neutrality of the forum, the choice of an international language, confidentiality etc.; or if the draft contracts exchanged show that the parties agreed to conclude an arbitration agreement irrespective of the outcome of the main agreement. In this respect, the Supreme Court pointed out that in the present case the

parties, after they had discussed the arbitration clause during the first exchange of the draft Framework Agreement, left the apparently agreed clause unchanged in later drafts.

As to the requirements of form, the Supreme Court considered that the Framework Contract was in writing pursuant to Article 178(1) PILA. In this respect, it pointed out that Article 178(1) PILA is mandatory in the sense that the parties cannot agree to a less stringent requirement as to form. It did not finally decide the questions of whether the parties may agree on more stringent requirements or whether a clause containing stricter requirements as to form in the main contract also extends to the arbitration agreement. However, the Supreme Court indicated that it would support the principle of freedom of contract and thus the parties' liberty to agree on stricter form requirements, because any such agreement would serve the aim of Article 178(1) PILA to ascertain the clear will of the parties to submit to arbitration. In the case at hand, the Supreme Court stated that the sole arbitrator did not find in his award that the parties waived the simple written form foreseen in Article 178(1) PILA in favor of a stricter form requiring the signatures of all parties for a valid arbitration agreement. Based on these facts the Supreme Court rejected the argument of X of an alleged violation of Article 16 CO. The Supreme Court held that pursuant to Article 178(1) PILA a simplified written form is sufficient for an arbitration agreement. It must be in writing, but it does not need to be signed.

With respect to the authorization of the party representatives, the Supreme Court held that the challenge was inadmissible given that the sole arbitrator had relied on good faith representation and ratification to find that X's representatives were authorized.

The Supreme Court further confirmed that the substantive validity of the arbitration agreement had to be assessed under Swiss law (Article 178(2) PILA). According to the sole

arbitrator, there was a common subjective intent of the parties to submit their disputes to arbitration. As this constituted a finding of fact, the Supreme Court was bound by it.

Moreover, the Supreme Court rejected the argument that the dispute did not fall within the scope of the arbitration clause as it was connected to the previously concluded sales contract. In this context, the Supreme Court referred to the group of contracts theory stating that it may be presumed that the parties agreed to arbitration where there is a material connection between a group of contracts, even though only one of them contains an arbitration clause. According to the Supreme Court, the Framework Contract and the sales contract were directly interconnected.

Comment: This is an interesting and important case.³⁵ It is yet another example of the Supreme Court confirming its traditionally liberal and arbitration-friendly approach when interpreting arbitration clauses and with respect to the requirements to submit to arbitration in general.

This decision also addresses the important issue of whether parties have agreed to arbitrate when exchanging drafts of a contract. The Supreme Court states that in general, parties do not conclude an arbitration agreement when exchanging drafts. However, this is possible under exceptional circumstances. In fact, it appears that the present case is not that exceptional, as parties often exchange draft contracts in

³⁵ For further analysis of this decision of the Supreme Court see PONCET, Unsigned arbitration clause upheld, available at: <http://www.swissarbitrationdecisions.com/unsigned-arbitration-clause-upheld> (last visited: 26 August 2016); VOSER/MENZ, Can parties be bound to arbitration before signing a contract?, available at: http://www.swlegal.ch/getdoc/e6d2cf14-4eec-4306-ab28-a61e3702a933/2016_Nathalie-Voser_James-Menz_Can-parties-be-boun.aspx (last visited: 26 August 2016); VEIT, 4A_84/2015: Zuständigkeit des Schiedsgerichts auf der Grundlage einer Schiedsklausel in einem nicht unterzeichneten Hauptvertrag (amtl. Publ.), available at: <http://www.swissblawg.ch/2016/03/4a842015-zustandigkeit-des.html> (last visited: 26 August 2016).

which they reach consensus on some elements but not on the final deal. In this respect, the Supreme Court states that international parties are often in the position in which they would objectively favor arbitration due to its neutral form, choice of international language and confidentiality. It is interesting to note that the Supreme Court has held twice within a short period of time that international arbitration has become the default dispute resolution mechanism for international commercial transactions.³⁶

This decision further confirms that Article 178(1) PILA constitutes a mandatory provision setting out minimum requirements from which the parties cannot derogate. The question of whether parties can agree on stricter requirements was officially left open. However, it appears that the Supreme Court favors allowing parties to agree on stricter form requirements based on the principle of party autonomy.

In general, the Supreme Court notes that it will be in the interest of parties to international contracts to have pre-contractual claims adjudicated by an arbitral tribunal if a dispute arises and the main contract has not yet been finalized. Therefore, if the parties do not want to refer their pre-contractual or related disputes to arbitration, it is advisable to insert an explicit reservation in the draft contracts.

i) ATF 142 III 296 (Decision No. 4A_628/2015 of 16 March 2016)

Facts: X and Y signed a total of four contracts relating to the search and exploitation of oil deposits. All four contracts included or referred to the same dispute resolution clause providing for arbitration in Geneva according to the UNCITRAL Arbitration Rules. However, this clause also contained a mandatory requirement that conciliation pursuant to the ICC

³⁶ See decision no. 4A_136/2015 of 15 September 2015 above at p. 128 et seq.

ADR Rules in force as from 1 July 2001 should be attempted first.

After differences arose between the parties, Y started conciliation proceedings with the ICC International Centre for ADR by submitting a demand for conciliation. The parties agreed that the ICC ADR Rules in force as of 1 July 2001 would apply to the conciliation and that a first meeting should take place by way of a conference call. However, this first meeting never took place as it appeared impossible to organize a conference call or a meeting with the parties, their representatives and the conciliator in a setting that both parties could agree on.

Y then initiated arbitration proceedings against X and informed the conciliator that the conciliation had failed due to the behavior of the other party. X contested the initiation of the arbitration proceedings by informing the conciliator that there was no reason to declare the conciliation proceedings closed. Thereupon, the conciliator informed the parties that she could not close the proceedings without having held a meeting as foreseen in Article 5(1) ADR Rules. Accordingly, she proposed new dates for a meeting. As Y continued to argue that the conciliation had ended, the conciliator then informed the parties and the ADR Centre that Y had withdrawn from the proceedings. Later on, the ADR Centre declared the proceedings as terminated due to Y having failed to pay its share of the advance payment.

Y pursued the initiated arbitration proceedings under the UNCITRAL Arbitration Rules. X participated in the composition of the arbitral tribunal but objected that the arbitral tribunal lacked jurisdiction *ratione temporis* since the mandatory pre-arbitration conciliation proceedings had not taken place. After a double exchange of briefs on the question of the tribunal's jurisdiction, the arbitral tribunal bifurcated the arbitration proceedings and rendered a preliminary award accepting jurisdiction.

X filed a motion to set aside the award arguing that the arbitral tribunal had wrongly accepted jurisdiction pursuant to Article 190(2)(b) PILA. X alleged that conciliation proceedings in accordance with the agreement did not take place. As a consequence, the arbitral tribunal should have declined its jurisdiction *ratione temporis* or stayed the arbitration proceedings in order to allow the holding of a meeting between the parties and the conciliator.

In contrast, Y argued that relying on the pre-arbitral dispute resolution mechanism constituted an abuse of rights, as Y itself had commenced the conciliation proceedings. According to Y, X had neither sought a suspension of the arbitration to attempt conciliation, nor otherwise acted in accordance with its alleged desire to seek an amicable solution. Furthermore, Y argued that the parties' contract merely required an attempt at conciliation, but no strict compliance with the ADR Rules. Moreover, Y maintained that the arbitral tribunal was not bound by the statements of the conciliator and the ICC ADR Center with regard to the termination of the ADR proceedings. It argued that an attempt at conciliation had been made and that the tribunal had properly held that the discussions according to Article 5(1) ADR Rules had taken place.

Decision: The Supreme Court granted X's application and set aside the jurisdictional award.

First, the Supreme Court analyzed the alternative dispute resolution mechanism that the parties had agreed on by applying the general principles of contract interpretation (subjective interpretation followed by objective interpretation). It found – in particular based on the clear wording of the clause – that the parties had wanted the recourse to arbitration to be conditional on the conduct of conciliation proceedings in compliance with the agreed ADR Rules.

Second, the Supreme Court assessed whether the parties conducted such a conciliation and held that such a conciliation had not been conducted. As to the procedure, the Supreme Court pointed out that Article 5(1) of the ADR Rules required a meeting, which does not have to be a physical one, before either party could unilaterally terminate the conciliation. The Supreme Court held that such a meeting never took place.

Consequently, the Supreme Court had to examine whether X's objection to the arbitral tribunal's jurisdiction was an abuse of right. It distinguished this case from its earlier case law on this subject³⁷ where the court held that a challenge to an award based on an alleged failure to have complied with the requirements of the pre-arbitration conciliation was an abuse of right. The Supreme Court stated that the present case was very different from the earlier one because the party challenging the award (X) had actively taken part in the conciliation and had immediately raised an objection to the jurisdiction of the arbitral tribunal after Y had initiated arbitration proceedings. The Supreme Court further rejected the allegation that a new conciliation would not have been successful and noted that X had not abused its rights by objecting to the jurisdiction of the arbitral tribunal.

In a next and final step, the Supreme Court had to decide on the consequences of a breach of a compulsory pre-arbitral ADR procedure.

First, the Supreme Court underlined that a breach had to be sanctioned. It then pointed out that such a breach should not entail a claim for damages for breach of contract as this would not be a satisfactory solution. Rather, such breach should entail procedural consequences. However, the Supreme Court maintained that it should not result in a declaration of inadmissibility or even a dismissal of the claim on the merits. In line with the majority view of Swiss scholars, the Supreme

³⁷ See Decision No. 4A_18/2007 of 6 June 2007, para. 4.3.3.1.

Court held that the appropriate sanction in such cases is to suspend the arbitration proceedings combined with the fixing of a deadline for the parties to conduct a conciliation.

As a result, the Supreme Court upheld the challenge, annulled the award and ordered the suspension of the arbitration proceedings until the pre-arbitral ADR procedure had been conducted. The Supreme Court left the further modalities of the suspension – namely the fixing of a time limit for the suspension – to the arbitral tribunal.

Comment: This published case is important and led to the annulment of the award, which only happens on rare occasions.³⁸

The decision clarifies the issue of what the sanction should be in the event a party fails to comply with its obligation to mediate first before initiating arbitration proceedings. First, the Supreme Court rejected the possibility of awarding damages because it would be almost impossible to substantiate such damages. In addition, it rejected the option of dismissing the claim as the arbitral tribunal would then become *functus officio* and a new arbitral tribunal would have to be constituted in order to hear the case once the conciliation had been conducted. In the meantime, the claim might face the risk of being time-barred. As a result, the Supreme Court pragmatically concluded that when a party

³⁸ For further analysis of this decision of the Supreme Court see STUTZER/BÖSCH/HOHLER, Don't jump to the gun! Lack of jurisdiction in case of failure to comply with pre-arbitration dispute resolution provisions, available at <http://thouvenin.com/wp-content/uploads/2016/04/Arbitration-Newsletter-Switzerland.pdf> (last visited: 26 August 2016); BOOG/MENZ, Failure to comply with mandatory pre-arbitral tier can result in stay of arbitration, available at: http://www.swlegal.ch/getdoc/db59faff-ea24-4a57-a530-07ebd1305801/2016_Christopher-Boog_James-Menz_Failure-to-comply.aspx (last visited: 26 August 2016); PONCET, Mandatory pre-arbitration procedure not complied with results in annulment of the award, available at: http://www.swissarbitrationdecisions.com/mandatory-pre-arbitration-procedure-not-complied-results-annulment-award?search=4A_628%2F2015 (last visited: 26 August 2016).

disregards a mandatory contractual pre-arbitration tier without a valid excuse, the arbitral tribunal must stay the arbitration until the pre-arbitral dispute resolution mechanism has been complied with. The Supreme Court found that this is the appropriate solution as it balances the interests of the parties appropriately.

Accordingly, this decision clarifies the necessary steps to be taken when dealing with multi-tiered dispute resolution clauses.

- 1) Decide whether the pre-arbitral clause is mandatory.
- 2) If it is mandatory, analyze whether the party seeking to rely on the non-compliance of the pre-arbitral clause acted in good faith.
- 3) If the party acted in bad faith, such party cannot rely on the non-compliance of the pre-arbitral clause, even if the latter is indeed mandatory.
- 4) If the party acted in good faith and the pre-arbitral clause is mandatory, the arbitral tribunal must stay the arbitral proceedings until the conciliation proceedings have been conducted.

j) Decision No. 4A_173/2016 of 20 June 2016

The Supreme Court confirmed that if the jurisdiction of the arbitral tribunal is disputed pursuant to Article 190(2)(b) PILA, a challenge must be immediately raised in the arbitration proceedings. A party holding back a procedural error or a challenge which it could have raised during the arbitration, acts in bad faith and forfeits the right to raise the argument before the Supreme Court.

In the case at hand³⁹, A did not raise the issue of lack of jurisdiction during the arbitration proceedings. The Supreme Court noted that A explicitly accepted the tribunal's jurisdiction regarding contractual claims in its statement of defense. Therefore, the Supreme Court dismissed the appellant's objection.

k) Decision No. 4A_132/2016 of 30 June 2016

In this case, the appellant asserted for the first time before the Supreme Court that the arbitration agreement was invalid and claimed a violation of Article 190(2)(b) PILA.⁴⁰ The Supreme Court held that the appellant A acted in bad faith by not raising this issue in the arbitration proceedings. Pursuant to Article 190(2)(b) PILA, a challenge must be immediately raised in the arbitration proceedings. A party holding in reserve a procedural error or a challenge that it could have raised in the arbitration proceedings forfeits the right to raise it before the Supreme Court. Accordingly, the respective objection was rejected.

3. Decision ruling beyond claims submitted or failing to adjudicate claims (Article 190(2)(c) PILA)

a) Decision No. 4A_218/2015 of 28 October 2015

Facts: Mr. Y died, leaving as heirs his wife (A), his daughter (X) and his three sons (B), (C) and (D). After Y's death, a dispute arose between X and the other heirs in relation to the estate. On 8 March 2011, the parties concluded a settlement agreement. The settlement agreement contained an arbitration clause providing for disputes to be submitted to an arbitral tribunal made up of three arbitrators and designated Geneva as the seat of arbitration. Pursuant to the settlement

³⁹ As to the facts of the case see above, p. 126 et seq.

⁴⁰ As to the facts of the case see below, p. 198 et seq.

agreement, a party who breached any of the provisions of the agreement or initiated arbitration proceedings against another party but was unsuccessful, was liable to pay contractual penalties to the other party.

In 2012, X partially voided the settlement agreement, whereupon A, B, C and D responded by declaring that the agreement was null and void. Subsequently, they initiated arbitration proceedings against X.

A, B, C and D *inter alia* demanded the arbitral tribunal to confirm the full, or alternatively, the partial invalidity of the settlement agreement, to order X to return certain assets to the estate and to make an individual payment of a specified amount to A, B, C and D each. X replied requesting the arbitral tribunal to confirm the partial voidance of the agreement and raised a counterclaim for contractual penalties.

The arbitral tribunal rejected A, B, C and D's claim in its entirety and ordered A, B, C and D to pay X contractual penalties in accordance with the settlement agreement.

A, B, C and D then challenged the award before the Supreme Court arguing first, that the arbitral tribunal had rendered an award *infra petita* within the meaning of Article 190(2)(c) PILA by not having addressed their alternative requests and second, that the arbitral tribunal had rendered an award *ultra petita* within the meaning of Article 190(2)(c) PILA by awarding X more than she had requested.

Decision: The Supreme Court rejected the application to set aside the award.

First, the Supreme Court dismissed the argument, that the arbitral tribunal had rendered an award *infra petita* within the meaning of Article 190(2)(c) PILA. As the arbitral tribunal had formally rejected all of the appellants' claims, it had also rejected their alternative requests. The Supreme Court pointed out that A, B, C and D were in fact criticizing the

arbitral tribunal for not having addressed an important argument of their claim when it rendered the award. According to the Supreme Court, this concerns the parties' right to be heard according to Article 190(2)(d) PILA and is not within the scope of Article 190(2)(c) PILA. Given that the arbitral tribunal had, in any case, addressed the relevant claim when reaching its decision and moreover, given that A, B, C and D had failed to invoke a violation of Article 190(2)(d) PILA, there was no reason for the Supreme Court to set the award aside.

Second, the Supreme Court rejected the argument that the arbitral tribunal had rendered an award *ultra or extra petita* within the meaning of Article 190(2)(c) PILA by awarding X more than she had requested. According to the Supreme Court, an award is only considered to be *ultra petita* in the event that the total amount awarded to a party is beyond the total amount claimed by that party. This also holds true if the arbitral tribunal construed certain claims differently or relied on different legal grounds. The principle of *iura novit curia* applies also in arbitration proceedings.

In the case at hand, the Supreme Court considered that the award was not *ultra petita*, given that the amount of contractual penalties awarded was not in excess of the total amount claimed by X.

Comment: The present case confirms that it is very difficult to successfully challenge an arbitral award based on Article 190(2)(c) PILA.⁴¹ The Supreme Court is only willing to set an award aside in clear-cut cases. This is not the case when the

⁴¹ For further analysis of this decision of the Supreme Court see SCHERER, Introduction to the case law section, in: ASA Bull. 1/2016, p. 128; PETER, Der Grundsatz ne eat iudex ultra petita patrium, ius.focus, 11/2015 Heft 12; VOSER/GEORGE, Swiss Supreme Court rejects infra/ultra petita challenge to an award in an inheritance dispute, available at: http://www.swlegal.ch/getdoc/8f20d392-3663-470b-a2a9-6b5f217cb1bc/2015_Nathalie-Voser_Anya-George_Swiss-Supreme-Cour.aspx (last visited: 26 August 2016).

arbitral tribunal decides within the framework of the parties' claims.

b) Decision No. 4A_678/2015 of 22 March 2016

Facts: A Brazilian football player (B) and a Portuguese football club (A) concluded an employment contract for the term of 1 August 2009 until 30 June 2014. The contract provided for a gross monthly salary of EUR 16'670.--. Subsequently, B was lent by A to another football club until 30 June 2010.

After the end of the Portuguese football championship, B went on holiday to Brazil, but failed to return to Portugal for the beginning of the next season starting on 1 July 2010. A then terminated the contract with immediate effect stating that B had not returned in due time.

B filed a claim against A with FIFA's Dispute Resolution Chamber claiming damages in an amount of EUR 800'160.- due to unjustified termination. The Dispute Resolution Chamber partly accepted the claim and ordered A to pay EUR 550'000.- to B in damages for breach of contract.

Subsequently, both parties appealed the decision to the CAS. In an award of 16 September 2015, the CAS tribunal rejected A's appeal and accepted B's appeal in part by ordering A to pay EUR 550'000.- plus interest. All other motions were rejected.

Subsequently, A filed a motion to set aside the CAS award before the Supreme Court alleging *inter alia* a violation of Article 190(2)(c) PILA. A argued that the CAS panel did not rule on some of its prayers for relief, in particular (i) the motion to set the compensation at a maximum of EUR 229'725.- as well as (ii) the motion to declare that any compensation payable under the employment agreement was net.

Decision: In its decision dated 22 March 2016, the Supreme Court rejected the motion to set aside the award. According to the Supreme Court, the CAS panel did not rule *infra petita* given that A's motion to set the compensation at a maximum of EUR 229'725.- had essentially been addressed when it set the compensation at EUR 550'000.-. In addition, the Supreme Court also rejected A's motion alleging that the award was ambiguous as to whether the compensation calculated by the CAS panel was a gross or a net salary. The Supreme Court held that the compensation could – in good faith – only be understood as a net amount.

Comment: This case confirms the Supreme Court's prior case law as regards this ground for appeal. A motion to set aside an award based on Article 190(2)(c) PILA will only be granted under exceptional circumstances.⁴²

c) **Decision No. 4A_173/2016 of 20 June 2016**

In this case, which was discussed in more detail above⁴³, the Supreme Court indicated that the appellant A was in fact criticizing the arbitral tribunal for not having taken into account an element of its claim pursuant to Article 190(2)(c) PILA when reaching its decision. According to the Supreme Court, an award may be set aside when the arbitral tribunal's decision goes beyond the claims submitted to it, or when it fails to decide one of the items of the claim. This requires the arbitral tribunal to not decide on a claim rendering the award

⁴² For further analysis of this decision of the Supreme Court see MONNIER, Swiss Federal Supreme Court rejects motion to set aside CAS award in dispute between Portuguese football club and Brazilian football player, available at: <http://www.lexology.com/library/detail.aspx?g=d9220781-f03a-4131-8b5b-01d60cd17d1d> (last visited: 26 August 2016); VOSER/ESCHMENT, Swiss Supreme Court confirms CAS award in dispute between Brazilian soccer player and Portuguese football club, available at: http://www.swlegal.ch/getdoc/048ecff0-9dc6-495f-bb8b-1053c7238129/2016-Nathalie-Voser_Jorn-Eschment_-Swiss-Supreme-C.aspx (last visited: 26 August 2016).

⁴³ See above, p. 126 et seq.

incomplete as it fails to answer a question relevant for the outcome of the case. The Supreme Court found that this was not the case at hand, as the sole arbitrator clearly specified in the final award that while some requests were granted, all other requests of the parties were dismissed. Accordingly, the respective ground for appeal was rejected.

4) Violations of the principle of equal treatment or the right to be heard (Article 190(2)(d) PILA)

a) Decision No. 4A_678/2015 of 22 March 2016

In this case, which was discussed in more detail above⁴⁴, the Supreme Court rejected the allegation that the CAS panel had violated the appellant's right to be heard. In particular, the Supreme Court rejected the allegation that the compensation had not been correctly calculated by the CAS tribunal by using B's gross salary instead of his net salary. The Supreme Court explained that the right to be heard does not include a right to a substantively correct decision.

b) Decision No. 4A_378/2015 of 22 September 2015

Facts: On 19 June 2015, the appointed arbitral tribunal rendered an award in favor of C and D.

A and B then filed a motion to set aside the award pursuant to Article 190(2)(d) PILA. According to A and B, their right to be heard was violated because the arbitral tribunal wrongly assessed the testimony of the expert witnesses E, F and G. A and B alleged that false witness statements can constitute a ground of appeal.

Decision: The Supreme Court held that this appeal was inadmissible.

⁴⁴ See above, p. 163 et seq.

According to the Supreme Court, A and B's allegations concerned the right to be heard. In any event, the Supreme Court stated that facts established by the arbitral tribunal are not subject to review by the Supreme Court.

In addition, the Supreme Court recalled that a party alleging a violation of the right to be heard must invoke it as soon as possible during the arbitration proceedings. If the party does not do so it forfeits its right. The Supreme Court further stated that it is contrary to good faith not to raise procedural objections in the course of the arbitration and to raise them only before the Supreme Court.

Comment: With this decision the Supreme Court reaffirms its established case law that a party may not challenge an award for an alleged violation of its right to be heard on the basis that the tribunal wrongly addressed an issue.

Furthermore, this decision also serves as a reminder that a party who fails to raise a violation of the right to be heard in the course of the arbitration is generally precluded from raising the argument before the Supreme Court.

c) Decision No. 4A_172/2015 of 29 September 2015

In this decision that was discussed in more detail above,⁴⁵ the appellant also claimed a violation of its right to be heard as the sole arbitrator disregarded two of its factual allegations. The Supreme Court dismissed the appellant's allegation as the sole arbitrator did address these issues in his award but did not consider them to be relevant.

In addition, the Supreme Court explained that the right to be heard according to Article 190(2)(d) PILA imposes on the arbitrator a minimal duty to examine and address all relevant issues that are material to the outcome of the case. This duty is only violated if, by inadvertence or misunderstanding, the

⁴⁵ See above, p. 134 et seq.

arbitrator does not take into consideration submissions, allegations, arguments or evidence that had been presented or offered by a party and that were of importance to the outcome of the decision to be rendered.

d) ATF 141 III 495 (Decision No. 4A_34/2015 of 6 October 2015)

In this decision discussed previously above,⁴⁶ Hungary as the appellant also asserted a violation of equal treatment and the right to be heard according to Article 190(2)(d) PILA.

In connection with the damages suffered by B, Hungary claimed that the calculations made by B's quantum experts were based on an indemnification system to which Hungary had not been given access. However, the Supreme Court maintained that B itself had not had access to the data either as this data was owned by a third party. Therefore, the principle of equal treatment was not violated.

With respect to the right to be heard, the Supreme Court held that Hungary did not sufficiently call into question the reliability of the expert evidence relied upon by B during the arbitration proceedings. As a consequence, Hungary could not in good faith complain of the impossibility of access to the underlying data in the setting aside proceedings. Nevertheless, the Supreme Court pointed out that the arbitral tribunal did in fact take into account Hungary's argument and gave a reduced weight to B's expert evidence. In addition, the Supreme Court confirmed that in setting aside proceedings, it will not review the weighing of the evidence conducted by the arbitral tribunal. The Supreme Court thus also found no violation of the right to be heard.

⁴⁶ See above, p. 137 et seq.

e) Decision No. 4A_69/2015 of 26 October 2015

Facts: By contract of 17 September 2008, an Austrian company (A) appointed a Singapore company (B) as its exclusive distributor of watches and jewelry products of brand X in Singapore and other Asian countries. The contract contained an arbitration clause providing for disputes to be resolved by a sole arbitrator seated in Geneva in accordance with the rules of the ICC.

In 2012, A sold 100 special edition watches of X to another Singapore company (C), a company owned by D. Later in 2012, A terminated the contract with B and concluded a similar distribution agreement with the company Y, represented by D.

In 2013, B initiated arbitration proceedings against A for breach of contract. Thereupon, A requested the rejection of B's claim and formulated a counterclaim for payment of open invoices.

The sole arbitrator decided in its award that A violated the exclusivity clause by selling 100 special edition watches to C. The sole arbitrator condemned A to pay an amount for unjustified termination of the contract, to pay damages for A's initiation of court proceedings in Singapore in violation of the arbitration agreement and also admitted A's counterclaim.

In 2015, A filed a motion before the Supreme Court to set aside the award. A argued a violation of the right to be heard according to Article 190(2)(d) PILA. In particular, A alleged that the sole arbitrator had omitted to address the argument that B's claim as regards the violation of the exclusivity clause constituted an abuse of right. In addition, A argued that the sole arbitrator should have calculated B's losses in a different way.

Decision: The Swiss Supreme Court rejected the application to set aside the award.

The Supreme Court stated that the sole arbitrator took into consideration A's explanations but did not agree with them. Accordingly, the sole arbitrator – at least implicitly – rejected the argument of an abuse of right by B.

Moreover, the Supreme Court held that the sole arbitrator had considered A's arguments regarding the calculation of losses and damages, but either explicitly or implicitly rejected them.

Furthermore, the Supreme Court indicated that A was trying to have the merits of the case reassessed under the cover of a violation of its right to be heard. This is not permitted in setting aside proceedings in Switzerland.

Comment: This case demonstrates that according to established principles of the Supreme Court, a party cannot have the merits of the case reassessed by the Supreme Court, under the cover of a violation of its right to be heard and on the false pretense that the arbitral tribunal did not consider arguments duly raised in the arbitration proceedings.⁴⁷ As long as the arbitral tribunal addressed all relevant arguments invoked by the parties, the Supreme Court does not assess the merits of the arbitral tribunal's award.

f) Decision No. 4A_568/2015 of 10 December 2015

In this case, which will be discussed in detail below⁴⁸, the appellant A argued *inter alia* that the CAS panel had ignored several of its express requests for B and C to prove and substantiate certain allegations and asserted that the case file showed that certain allegations by B and C were clearly

⁴⁷ For further analysis of this decision of the Supreme Court see GROZ/TRABALDO-DE MESTRAL, Parties cannot have tribunal's assessment on merits reviewed through a challenge based on alleged violation of right to be heard (Swiss Supreme Court), available at: http://www.swlegal.ch/getdoc/6feb72a4-a190-4977-9fdf-96b2266092a5/2015_Philipp-Groz_Elena-Trabaldo-de-Mestral_Partie.aspx (last visited: 26 August 2016).

⁴⁸ See below, p. 192 et seq.

wrong. A also argued that the CAS panel had ignored its actual motives for terminating the contract.

The Supreme Court rejected the application to set aside the award based on a violation of Article 190(2)(d) PILA. It confirmed that it is not for the Supreme Court to review whether an arbitral tribunal properly considered all documents of the case file. According to the Supreme Court, A failed to demonstrate how the CAS panel violated his right to be heard, i.e. how it prevented him from pleading his case during the arbitration proceedings.

g) Decision No. 4A_520/2015 of 16 December 2015

Facts: Two banks (A) and (B) entered into a share purchase agreement (SPA) for the sale of the totality of the shares B held in one of its subsidiaries (X). As a condition of the overall transaction, the institutions (Y and Z) required a recapitalization of X by B in the amount of EUR 3 billion, which B eventually complied with. The SPA included an adjustment mechanism in favor of B in clause 4.4, in the event that prior to a specific date Y set the ratio between X's own capital and its risk-weighted assets below 10%.

Prior to that date, the banking institution Y lowered the requirement from the anticipated 10% to 9%, but A refused to pay B the amount resulting from the adjustment mechanism.

Based on the arbitration clause, B then initiated arbitration proceedings against A seeking payment of almost EUR 161 million plus interest. A opposed the claim based on two main arguments: first, that the clause was not applicable under the specific circumstances of the case as adjustment in favor of B was provided for only if Y reduced X's own capital requirements, which it did not; and second, that the clause in the SPA was not valid with respect to the applicable mandatory rules (*lois de police*) and the rules of public policy.

On 31 August 2015, the arbitral tribunal rendered an award granting in full B's claim. According to the arbitral tribunal, clause 4.4 of the SPA was clear and needed no interpretation. As to the question of the validity of the clause with respect to the *lois de police* and the rules of public policy, the arbitral tribunal ruled that the question was "irrelevant" insofar as Z and Y (as well as other institutions) had approved the transaction.

On 24 September 2015, A challenged the award before the Supreme Court for violation of its right to be heard pursuant to Article 190(2)(d) PILA. A argued that the tribunal did not address the issue of the validity of the applicable adjustment clause under the *lois de police* or public policy provisions. According to A, the tribunal "sidestepped" this issue by wrongly declaring it to be irrelevant.

Decision: The Supreme Court rejected the challenge of the award.

The Supreme Court restated that the right to be heard pursuant to Article 190(2)(d) PILA does not require the arbitral award to be reasoned. It however imposes on the arbitrators a minimal duty to examine and address all relevant issues that are material to the outcome of the case. According to the Supreme Court, this duty is violated if, by inadvertence or misunderstanding, the arbitrators do not take into consideration submissions, allegations, arguments or evidence that had been presented or offered by a party and that were of importance to the outcome of the decision to be rendered. In the event that material issues have been ignored in the award, it is up to the arbitral tribunal or the other party to evidence that these elements were not material to the outcome of the case, or that they were implicitly denied by the arbitral tribunal. However, the Supreme Court held that arbitral tribunals are under no obligation to respond to arguments which are inconclusive for the decision. The Supreme Court further stated that there is no violation of the

parties' right to be heard if the arbitral tribunal did not address, even implicitly, an issue invoked by the parties that is irrelevant. It moreover held that in accordance with Article 190(2)(d) PILA, the Supreme Court does not reassess the arbitral tribunal's ruling on the merits, as long as the tribunal addressed all relevant arguments.

In this context, the Supreme Court denied the appellant's contention that the court's recent case law was indicative of a willingness to extend the scope of review for alleged violation of the right to be heard based on a failure to address issues raised by the parties. The Supreme Court made it clear that this practice has not changed since the issuance of the Cañas decision in 2007.⁴⁹ It pointed out that a wider scope of review was not being considered, in particular because it regularly finds that the alleged violations of the party's right to be heard are just attempts to obtain a reassessment of the merits of the case. The Supreme Court underlined that it is not an appellate court and that the legislator consciously restrained its scope of review.

Comment: The Supreme Court made clear with this decision that it continues to rely on its long-standing practice regarding the right to be heard, which may be perceived as strict.⁵⁰ It is not willing to broaden its scope of review under Article 190(2)(d) PILA. Thus, a party's motion to set aside the award for a violation of its right to be heard based on the allegation that the tribunal did not address an issue will not be

⁴⁹ FTD 133 III 235.

⁵⁰ For further analysis of this decision of the Supreme Court see LEIMBACHER/VON SEGESSER, BGer – 4A_520/2015, Federal Supreme Court of Switzerland, 1st Civil Law Chamber, 4A_520/2015, 16 December 2015, available at: <http://www.kluwerarbitration.com/CommonUI/document.aspx?id=kli-ka-16-16-003> (last visited: 26 August 2016); VOSER, No violation of a party's right to be heard where a tribunal does not address arguments that it considers to be irrelevant (Swiss Supreme Court), available at: http://www.swlegal.ch/getdoc/82a51864-a69c-4495-9088-265a222787ed/2016_Nathalie-Voser_No-violation-of-a-party-s-righ.aspx, (last visited: 26 August 2016).

successful, if in fact the tribunal consciously disregarded this argument and limited itself to an analysis of the decisive arguments.

h) Decision No. 4A_572/2015 of 6 January 2016

Facts: In 2013, a Spanish company (X) and a French company (Y) concluded an investment agreement in order to create a joint company with an initial share capital of EUR 3 million. The parties agreed that each partner was to contribute half of the sum. The joint company was to purchase and operate a portfolio of parking spaces in Spain between 2013 and 2016 for a total amount of EUR 151 million. However, Y did not contribute its share of the capital and the investment could not be carried out.

X relied on the arbitration clause in the investment agreement and initiated arbitration proceedings in Geneva, claiming an amount of EUR 18 million for lost profits. For the calculation of the damages, X relied on the expert reports and expert testimony of E.

During the arbitration proceedings, Y did not deny that it had breached the investment agreement, but disagreed with the quantum of X's damages. Y filed a short expert report, which was then excluded from the arbitration file because the author of the report was not authorized by its employer to testify at the hearing.

The arbitral tribunal rendered an award in September 2015 ruling that Y had breached the investment agreement and had been grossly negligent. As a result, the arbitrators ordered Y to pay X around EUR 18 million for lost profits plus interest.

In the case at hand, the arbitral tribunal maintained that it could not disregard expert evidence simply because the other party asserts that the assessed lost profits are too optimistic. It held that the expert evidence provided by X was persuasive and the answers given by the experts E during their

examination at the hearing were convincing. The arbitrators noted that Y had chosen not to file any expert evidence to rebut the evidence given by X's experts and that thus its defense essentially relied on unsubstantiated allegations, hypotheses and other speculations. Further, the tribunal stated that none of Y's arguments was sufficiently convincing to contradict X's expert evidence on the quantum of damages sought and that Y's allegations did not serve to refute X's quantum valuation. A party challenging the expert's findings cannot merely make general objections but has to show in detail why it does not agree with the assessment of its opponent's expert. Based on these grounds, the arbitral tribunal ordered Y to pay the amount of lost profits calculated by X's expert.

Subsequently, Y filed a motion to set aside the award before the Supreme Court due to a violation of its right to be heard according to Article 190(2)(d) PILA. In particular, Y alleged that the arbitral tribunal ignored the arguments set forth in its written submissions on the sole ground that they were minor allegations and that they were insufficient to refute expert evidence. In this respect, Y argued that the arbitral tribunal had put Y in the same situation as if it had not been given the possibility of presenting its case. Y therefore concluded that the arbitral tribunal should have adopted a more critical view of the conclusions given by X's expert.

Decision: The Supreme Court rejected the application to set aside the award.

The Supreme Court questioned the admissibility of Y's challenge, because Y was simply referring to part of its written submissions during the arbitration proceedings, which was contrary to the requirement of substantiation.

In any event, the Supreme Court found *inter alia* that Y was only trying to call into question the assessment of evidence made by the arbitral tribunal under the cover of an alleged

violation of its right to be heard. The Supreme Court clearly pointed out that this is not admissible.

Comment: The Supreme Court confirmed that setting aside proceedings before the Supreme Court may not constitute an appeal on the merits.⁵¹ The case at hand also demonstrates that the Supreme Court will not second-guess the arbitrators' assessment of evidence. The Supreme Court only accepts a "formal denial of justice" in the event that an award completely fails to address allegations of fact or legal submissions that were relevant for the resolution of the dispute and that were not implicitly rejected by the arbitral tribunal.

i) Decision No. 4A_342/2015 of 26 April 2016

Facts: By share purchase agreement (SPA), a group of Turkish companies (X) sold the shares of the company (X6) to a German company (Z). The SPA contained an obligation on Z to ensure that X6 would conclude a distributorship agreement (DA) with company A, a company of group X. Subsequently, A and X6 concluded the DA in 2003. In 2008, X6 terminated the DA. In 2011, X initiated ICC arbitration proceedings against Z claiming that the illegal termination of the DA triggered the rescission of the SPA as they were compound contracts. X requested that the shares in X6 be returned and that the dividends received from X6 be transferred to X. Z countered that the termination of the DA had no effect on the SPA. Ahead of the case management conference, Z suggested that the proceedings should be bifurcated; i.e. that the initial phase of the proceedings should

⁵¹ For further analysis of this decision of the Supreme Court see BÄRTSCH, Arbitrators' assessment of the evidence cannot be questioned under cover of alleged violation of right to be heard (Swiss Supreme Court), available at: http://www.swlegal.ch/getdoc/40872693-d337-4030-b317-22dd5ab91f75/2016_Philippe-Bartsch_Arbitrators-assessment-of-th.aspx (last visited: 26 August 2016); SCHERER, Introduction to the case law section, in: ASA Bull. 1/2016, p. 129 *et seq.*

be limited to the question of whether the termination of the DA triggered the rescission of the SPA. In addition, Z suggested that the arbitral tribunal should decide this question after the exchange of the first round of submissions. X accepted Z's proposal for bifurcation of the proceedings.

The parties and the arbitral tribunal held a case management conference where they agreed on the terms of reference, the procedural rules and the procedural timetable. The procedural timetable indicated that the parties were to file their statement of claim as well as their statement of defense together with witness statements and expert reports and that the arbitral tribunal would determine the next steps in consultation with the parties. In a cover letter to the parties enclosing the supplemental procedural rules and the procedural timetable, the arbitral tribunal stated: "*The parties agreed during the conference call that the Arbitral Tribunal should limit the initial stage of the proceedings to the question of the rescission of the SPA 2003 and the compound contract issue. They further agreed that the Arbitral Tribunal should, if appropriate, render a binding award thereon after the submission of the Statement of Defence.*" In addition, the terms of reference stated that the arbitral tribunal was "*to decide, after the submission of the Statement of Defence, in an arbitral award whether the Claimants have succeeded in establishing a legal basis for their claims.*"

The parties then filed the statement of claim (including an expert report and two witness statements) and the statement of defense (including three expert reports and seven witness statements). Afterwards, the arbitral tribunal informed the parties that the first stage of the proceedings was closed. On the following day, X wrote to the arbitral tribunal indicating that it wished to file rebuttal witness statements and a rebuttal expert opinion based on the elements of fact and law that had emerged out of the documents filed by Z. X argued that this would justify a second exchange of submissions. Z

opposed this request. The arbitral tribunal rejected X's request relying on the clear agreement that a preliminary decision on the rescission of the SPA was to be made after the first statement of claim and statement of defense, respectively. X's request for reconsideration was also denied. Subsequently, the arbitral tribunal confirmed the closure of the first stage of the proceedings.

By partial award of 27 May 2015, the arbitral tribunal decided that the termination of the DA had not triggered the rescission of the SPA and rejected X's prayers for relief.

X filed a motion to set aside the award *inter alia* based on a violation of its right to be heard and the principle of equal treatment pursuant to Article 190(2)(d) PILA. X alleged that the arbitral tribunal violated this provision by failing to take into account relevant allegations that it had pleaded and by not allowing X to file a reply as well as rebuttal evidence.

Decision: The Supreme Court rejected the application to set aside the award.

In a first step, the Supreme Court outlined the content of the right to be heard, the right to equal treatment and the principle of adversarial proceedings in the context of international arbitration proceedings seated in Switzerland.

As to the right to be heard, the Supreme Court held that each party has the right to state its views on the essential facts, to submit its legal allegations, to introduce evidence on pertinent facts as well as to attend the hearings. However, the Supreme Court underlined that this does not include a right to an oral argument. In the same way, the right to be heard does not require an award to be reasoned but instead imposes upon the arbitral tribunal the duty to consider and discuss the pertinent issues. It further stated that the arbitral tribunal violates its duty in the event that it did not take into account, inadvertently or due to a misunderstanding, arguments,

allegations, evidence and offers of evidence submitted by one of the parties and important for the decision to be rendered.

With respect to evidence, the right to introduce evidence must be exercised timely and in accordance with the applicable procedural rules. The right to be heard is not violated when an arbitral tribunal refuses to examine evidence because the fact to be proven is already established, or because the evidence is insufficient to convince the tribunal to modify its finding.

With respect to the right to equal treatment, the Supreme Court stated that it requires that each party has the same chances of presenting its case during the proceedings. The principle of adversarial proceedings requires that each party has the possibility of examining the opponent's evidence, stating its views on the opposing party's arguments and refuting them with its own evidence.

However, in the field of international arbitration, the Supreme Court also underlined that the right to be heard is subject to important restrictions. For instance, an award is not required to include reasons. In the same way, a party is not entitled to be informed of the prospective legal basis on which the award is to be based unless that legal argument was not pleaded and could not reasonably have been anticipated by the parties. Furthermore, the arbitral tribunal is not required to inform a party of the decisive character of a factual element on which it intends to rely in the award. Finally, the Supreme Court also mentioned that in an action for annulment before the Supreme Court in the field of international arbitration, a party cannot directly rely on the ECHR.

Parties to arbitration agreements are free to agree on the rules of the procedure – in particular by reference to institutional rules – as long as their equal treatment and their right to be heard in an adversarial procedure is protected. The strict case law of the Supreme Court regarding the quasi-

absolute right of a party to respond to any substantive pleading submitted in state court proceedings does not apply in the field of international arbitration. It is generally recognized that there is no absolute right to a second round of submissions in international arbitration proceedings as long as a party has had the opportunity to express itself on the other party's conclusions. It must also be noted that a party can partially waive its right *ex ante* provided that the party is fully aware of the consequences and that the waiver does not affect the very core of the right to be heard. This must be assessed based on the circumstances of each case.

In a second step, the Supreme Court examined the parties' arguments in light of these principles.

First, the Supreme Court held that the arbitral tribunal established the common subjective intent of the parties with respect to the limitation to one round of submissions in the first phase of proceedings. The Supreme Court held that a finding of fact by the tribunal, even regarding a procedural fact like in this case, is not subject to review by the Supreme Court. Therefore, X's argument that there was no such agreement was inadmissible.

Second, the Supreme Court held that there was no reason not to respect the parties' and the tribunal's agreement to limit the first stage of an arbitration procedure to a single exchange of submissions. When they agreed to this limitation, the parties knew the positions of the opponent and understood the consequences of this agreement. Even if X could not have known the content of Z's witness statements and legal opinions, X could anticipate that Z would submit witness evidence regarding the negotiation history of the contracts. Accordingly, X should have submitted all relevant evidence in this regard. For X to complain about the consequences of an agreement that it consciously and freely concluded is incompatible with the principle of good faith. Accordingly, the

Supreme Court held that X had validly waived its right to reply in the case at hand.

Third, the Supreme Court also rejected the alleged violation of the principles of adversarial proceedings and equal treatment. It based its decision on the fact that both parties were given the same opportunity to present their case in full in one written submission.

Comment: This leading decision contains an extensive outline of the Supreme Court's position on the right to be heard in international arbitration proceedings seated in Switzerland.⁵² In fact, it is the first decision in which the Supreme Court confirmed that parties may waive certain aspects of their right to be heard as long as they are aware of the respective consequences and as long as the very core of that right remains untouched.

Furthermore, the Supreme Court quite rightly recognized the importance of party autonomy in the field of international arbitration. It pointed out that some of the strict due process principles developed for state court proceedings are not directly applicable in arbitration proceedings.

On the other hand, the Supreme Court also made clear that the arbitral tribunal and the parties are bound by any

⁵² For further analysis of this decision of the Supreme Court see BÄRTSCH, Enforcing parties' agreement to one round of written submissions does not violate right to be heard (Swiss Supreme Court), available at: http://www.swlegal.ch/getdoc/04114a6d-7c8f-446b-ac41-b89ecb977758/2016_Philippe-Bartsch_Enforcing-parties-agreement.aspx, (last visited: 26 August 2016); FEIT, 4A_342/2015: Schranken des Anspruchs auf rechtliches Gehör in der Schiedsgerichtsbarkeit: Kein zwingender Anspruch auf Durchführung eines zweiten Schriftenwechsels (amtl. Publ.), available at: <http://www.swissblawg.ch/2016/06/4a3422015-schranken-des-anspruchs-auf.html> (last visited: 26 August 2016); HIRSCH, Le droit à la réplique en arbitrage international (art. 182 al. 3 LDIP), available at: <http://www.lawinside.ch/248/> (last visited: 26 August 2016); STUTZER/BÖSCH/HOHLER, Limits to the right to be heard: No absolute right to a double exchange of briefs and no absolute right to reply ("droit de réplique"), available at: <http://thouvenin.com/wp-content/uploads/2016/06/Arbitration-Newsletter-of-8-June-2016.pdf> (last visited: 26 August 2016).

procedural agreements made. Accordingly, parties should carefully evaluate the risks of agreeing to any such limitation.

j) Decision No. 4A_42/2016 of 3 May 2016

Facts: In 2003, BX as a subsidiary of X, and Y concluded an Investor Referral Agreement (IRA) by which Y was obliged to canvass potential investors in return for payment of a corresponding commission. Later in 2003, Z joined the contractual relationship on Y's side. A dispute arose between the parties at the end of 2005. AX, another subsidiary of X, then terminated the IRA in 2006 and took over all financial obligations of BX with regard to the respective agreement.

In 2007, Y and Z initiated arbitration proceedings against AX based on the arbitration clause in the IRA. A first sole arbitrator was appointed and the parties filed a Statement of Claim and a Statement of Defense respectively. The second sole arbitrator – who took over due to a conflict of interest arising with respect to the first arbitrator – then set up a procedure with the following steps. AX was required to deliver specific data regarding the potential investments falling within the scope of the contract and Y and Z were required to demonstrate which commissions they thought they were entitled to. After that, AX was to indicate which commissions it contested.

Y and Z then filed their First Submission on Quantum and Related Issues providing a calculation of the commissions they deemed that they were entitled to. Thereupon, AX filed its First Statement of Reply on Quantum and Related Issues whereby it contested Y and Z's claims in their entirety. A second round of submissions were filed in which both parties maintained their respective positions.

By letter dated 18 May 2015, AX requested that the sole arbitrator should render a preliminary decision as to the number of relevant investments, so that AX could calculate

the commissions based on that preliminary decision. AX informed the arbitral tribunal that it would claim a violation of its right to be heard without such a preliminary decision. Y and Z objected to this request. Subsequently, the sole arbitrator informed the parties that he was "*in the process of completing the award on Claimant's fees on direct investments...*" and asked AX to comment on the following questions:

"If the Sole Arbitrator were to find, upon review and consideration of the Parties' respective positions on the disputed investments and other disputed issues, that he is in a position to compute the amount of fees owed to Claimants without the need to revert to parties in order to arrive at a determined amount, would the Respondent have any objections not already raised in its submission of 18 May 2015 with respect to the issuance of an award setting out a determined figure?"

If the answer to question (1) is "yes", what are those additional objections (if any)? Respondent is hereby directed to provide its answers, as succinctly as possible, by Friday, 11 December 2015, end of the day."

AX did not answer the questions and subsequently informed the sole arbitrator that it maintained its view expressed in the letter dated 18 May 2015.

On 21 January 2016, the sole arbitrator rendered a decision in favor of Y and Z.

A filed a motion to set aside the award alleging a violation of its right to be heard in adversarial proceedings pursuant to Article 190(2)(d) PILA.

Decision: The Supreme Court rejected the motion to set aside the award.

With regard to the right to be heard, the Supreme Court restated that each party has the right to state its views on the

essential facts, to submit its legal arguments, to introduce evidence on pertinent facts as well as to attend the hearings. The principle of adversarial proceedings requires that each party has the possibility of examining the opponent's evidence, to state its views on the opposing party's arguments and to refute it with its own evidence.

The Supreme Court made clear that a party is not entitled to unilaterally dictate to the arbitrator how to conduct the proceedings.

In this respect, the Supreme Court recalled that it is not its role to decide whether the tribunal should have found that the allegation, argument or evidence provided by the appellant was merited given its limited scope of review. The Supreme Court is bound by the arbitrator's finding of facts which also include procedural facts.

Regarding the right of equal treatment, the Supreme Court held that it was not violated given that both parties were given the same possibility of presenting their claims, i.e. the same number of submissions.

Comment: The Supreme Court restated its well-known case law regarding Article 190(2)(d) PILA and confirmed once again that setting aside proceedings before the Supreme Court may not constitute an appeal on the merits.⁵³ Furthermore, parties do not have a right to dictate the procedure. Rather, they must elaborate their case in full and are not entitled to insist that the arbitral tribunal relieve them of this burden e.g. by rendering preliminary awards which may narrow the scope of the dispute.

⁵³ For further analysis of this decision of the Supreme Court see VOSER/GEORGE, Swiss Supreme Court finds that party cannot unilaterally dictate procedure, available at: http://www.swlegal.ch/getdoc/91562536-1086-44ca-812e-572eadb5d80a/2016_Nathalie-Voser_Anya-George_Swiss-Supreme.aspx (last visited: 26 August 2016).

k) Decision No. 4A_173/2016 of 20 June 2016

In this case,⁵⁴ the appellant A asserted *inter alia* that the sole arbitrator had violated his right to be heard as he did not take into consideration one of the arguments A presented. The Supreme Court restated that the right to be heard according to Article 190(2)(d) PILA is violated if, inadvertently or due to a misunderstanding, the arbitral tribunal failed to take into consideration allegations, arguments or evidence that had been put on the record by a party and that were material to the outcome of the case. However, arbitral tribunals have no obligation to respond to each and every irrelevant argument raised by the parties. In this respect, the Supreme Court rejected A's objection reiterating that it is not its role to decide whether the tribunal assessed an allegation, argument or evidence correctly. The right to be heard does not comprise a right to a materially correct decision.

l) Decision No. 4A_322/2015 of 27 June 2016

Facts: This is a historically, as well as politically interesting, and sensitive case. In 1968, Iran – through its national oil company – and Israel entered into an agreement for the construction of a pipeline between the cities of Eilat and Ashkelon. The deal provided for Iranian oil to be shipped to Europe via Israel through this pipeline without having to go through the Suez Canal. The implementation of the deal was effected through several companies that were set up.

Before the Shah of Iran was overthrown in 1979, significant amounts of Iranian oil were sold to Europe via Israel through oil contracts. In January 1978, the last oil contract was signed between an Iranian and an Israeli company regarding the delivery of almost 15 million tons of oil based on which oil was delivered. The Islamic revolution in Iran subsequently resulted

⁵⁴ As to the facts of the case see above, p. 126 et seq.

in a freezing of the relations between the countries. This left some of the delivered oil unpaid for.

In 1989, the Lichtenstein subsidiary (Y) of an Iranian entity (Z) started arbitration proceedings against a company (X). X was a Panama entity jointly established and owned by Israel and Z through subsidiaries. X then filed a counterclaim not only against Y, but also against Z and against a third party. After long arbitral proceedings, the arbitral tribunal finally obliged X to pay more than USD 1 billion to Y and Z.

X then filed a motion to set aside the award arguing that the arbitral tribunal had violated its right to be heard pursuant to Article 190(2)(d) PILA as regards two specific issues concerning damages and delivery dates. X accused the arbitral tribunal of having rendered a decision based on an unexpected reasoning.

Decision: The Supreme Court rejected the motion to set aside the award.

First, the Supreme Court recalled its well-established case law according to which the arbitral tribunal is in general not obliged to hear the parties with respect to the legal provisions that it intends to apply. However, in the event that the arbitral tribunal intends to base its award on a legal argument which was not put forward during the proceedings and the relevance of which was not foreseeable, the tribunal is obliged to invite the parties to comment on that legal provision or consideration in order to avoid surprises.

Further, the Supreme Court held that this principle only applies with respect to the legal issues and not the factual issues. The right to be heard does not require the arbitral tribunal to hear the parties on each submitted argument. In addition, the parties cannot limit the tribunal's autonomy with respect to the assessment of the evidence. The principle of free assessment of evidence constitutes a key principle of international arbitration.

In the case at hand, the Supreme Court denied a violation of the right to be heard. The Supreme Court held that the reasoning of the arbitral tribunal was not a surprise to the parties and was also based on the arguments brought forward by the appellant and one of the appellant's witnesses respectively. According to the Supreme Court, X could have expected such a reasoning which is why the Supreme Court denied that an element of surprise was present.

In addition, the Supreme Court also addressed the issue of dissenting opinions in awards. X frequently relied on the dissenting opinion that its own arbitrator issued. The Supreme Court then explained that a dissenting opinion is not part of the award itself, irrespective of whether it is integrated in the award or not. A dissenting opinion is an autonomous view which does not have any legal effects. Therefore, a dissenting opinion is not considered by the Supreme Court.

Comment: This dispute has been subject to a long history of proceedings and earlier Supreme Court decisions.⁵⁵ In this case, the Supreme Court confirmed two well established principles: (i) parties are not entitled to be informed about the prospective legal basis of the award unless that legal basis was not pleaded and could not reasonably have been anticipated by the parties; and (ii) dissenting opinions – which bear the risk of weakening the authority of an award – have no legal value and will not be considered by the Supreme Court. Furthermore, the Supreme Court pointed out that the principle of free assessment of evidence constitutes a key principle of international arbitration.

⁵⁵ For further analysis of this decision of the Supreme Court see VOSER/GOTTLIEB, Right to be heard, change of procedural practices, dissenting opinions and tribunal submissions (Swiss Supreme Court), available at: http://www.swlegal.ch/getdoc/856be6b1-2375-4775-9929-302bd02a7221/2016-Nathalie-Voser_Benjamin-Gottlieb_Right-to-be.aspx (last visited: 26 August 2016).

m) Decision No. 4A_202/2016 of 3 August 2016

Facts: B was a professional cyclist. Company C which was held by B was the owner of B's image rights. Company A was a professional cycling team.

A and B concluded a contract named "Self-employed Agreement" (SEA) according to which B rendered services for A from 1 January 2011 to 31 December 2014 in exchange for remuneration.

On the same day, C and A concluded an "Agreement on Image Rights" (AIR) by which A was authorized to exploit B's image rights in exchange for remuneration for the same duration as the SEA.

On 14 July 2012, during the Tour de France, B tested positive for doping. Afterwards, B quit the Tour de France and did not participate in any other competitions for the rest of the season. However, B continued to practice with the professional cycle team of A.

On 30 January 2013, the disciplinary body of the Olympic Committee against doping suspended B for a period of one year as from 14 July 2012. Furthermore, it annulled B's individual results in the Tour de France 2012.

On 21 June 2013, A terminated the SEA and the AIR with retroactive effect as of 14 July 2012.

On 27 October 2014, B and C initiated arbitration proceedings before the CAS against A pursuant to the arbitration agreement signed by all the parties.

The CAS panel held *inter alia* based on equity that A had waived all rights allowing it to immediately terminate the agreements as it had waited too long after the positive doping test. Therefore, the CAS ordered A to make payments to B and C.

A then filed a motion to set aside the CAS award based on a violation of its right to be heard pursuant to Article 190(2)(d) PILA. A alleged that the arbitral tribunal wrongly applied Swiss law under the cover of the *ex aequo et bono*-clause even though all parties were domiciled in country X and chose to apply the law of X. Accordingly, the parties could not have foreseen the application of Swiss law. Furthermore, A argued that even if Swiss law were applicable, the tribunal wrongly applied the provisions regulating employment relationships to the AIR which is an agreement between two companies. In addition, A also claimed that the arbitral tribunal violated its right to be heard based on the fact that it did not address all relevant issues.

Decision: The Supreme Court rejected the motion to set aside the award.

The Supreme Court pointed out that the parties' right to be heard mainly relates to the finding of facts. The right of the parties to be heard on questions of law is very limited. According to the principle *iura novit curia*, which applies before state courts as well as before arbitral tribunals, the tribunal is free to assess the facts under the law and it may also apply different legal provisions than the ones invoked by the parties. As a consequence, if an arbitration clause does not limit the arbitral tribunal to deciding only on the legal basis pleaded by the parties, the tribunal is not obliged to hear the parties on the legal provisions it intends to apply. Only in the exceptional circumstance of an unforeseeable application of a legal provision or consideration is the tribunal required to hear the parties regarding such a legal provision or consideration. This is the case if the tribunal intends to base its decision on a legal provision which was not raised during the proceedings and of which the parties could not have anticipated the relevance.

The Supreme Court pointed out that the parties agreed to the following provision: "The parties authorise the Arbitral

Tribunal to assist them in reaching a settlement and, if it deems it appropriate, to decide *ex aequo et bono*. Applicable law should be X law; the Arbitral Tribunal can also apply any rule of law that it will consider appropriate." Accordingly, the Supreme Court held that the parties could not reasonably exclude that the arbitral tribunal would apply another law than the law of X. It also stated that the term "should" clearly allowed the application of another law.

Furthermore, the Supreme Court referred to clause 9 of the order of procedure which was signed by all parties and which stated the following: "*In view of the discretion granted to the Panel by the Parties of their written submissions and of the fact that they chose Swiss arbitrators, the Panel deems it appropriate to decide this case ex aequo et bono and to refer to Swiss law whenever it deems it appropriate.*" As A was clearly aware of the provision, A could not allege that it was a surprise that the arbitral tribunal applied Swiss law. Given the predictable nature of the application of Swiss law in the case at hand and given the interdependence of the two contracts, it was not inappropriate for the arbitral tribunal to apply the provisions governing employment law.

With regard to A's second allegation, i.e. that the arbitral tribunal did not address all relevant issues in its award, the Supreme Court restated that the right to be heard pursuant to Article 190(2)(d) PILA does not require the arbitral award to be reasoned. It however imposes on the arbitrators a minimal duty to examine and address all relevant issues that are material to the outcome of the case. According to the Supreme Court, this duty is violated if, by inadvertence or misunderstanding, the arbitrators do not take into consideration submissions, allegations, arguments or evidence that had been presented or offered by a party and that were of importance to the outcome of the decision to be rendered. In the event that material issues have been ignored in the award, it is up to the arbitral tribunal or the other party

to prove that these elements were not material to the outcome of the case, or that they were implicitly rejected by the arbitral tribunal. However, the Supreme Court held that arbitral tribunals are under no obligation to respond to arguments which are inconclusive for the decision. In the same way, the Supreme Court stated that there is no violation of the parties' right to be heard if the arbitral tribunal did not address, even implicitly, an issue invoked by the parties that is irrelevant. It further recalled that in accordance with Article 190(2)(d) PILA, the Supreme Court does not reassess the arbitral tribunal's ruling on the merits, as long as the tribunal addressed all relevant arguments.

Referring to its decision in No. 4A_520/2015 of 16 December 2015,⁵⁶ the Supreme Court confirmed that its scope of review in this regard remains very narrow. It pointed out that a wider scope of review was not being considered, in particular because it finds that the alleged violations of the party's right to be heard are frequently only attempts to obtain a reassessment of the merits of the case. The Supreme Court underlined that it is not an appellate court and that the legislator consciously restrained its scope of review. Based on this, the Supreme Court found no violation of the appellant's right to be heard.

Comment: This is another case showing an unsuccessful party's attempt to use the right to be heard as a vehicle for achieving a substantive review of the award. The Supreme Court confirmed its long-standing and strict case law regarding the right to be heard under Article 190(2) PILA.

⁵⁶ See above, p. 170 et seq.

5. Incompatibility with public policy (Article 190(2)(e) PILA)

a) Decision No. 4A_172/2015 of 29 September 2015

In this case – the facts of which were presented in more detail above⁵⁷ – the appellant also claimed a violation of public policy according to Article 190(2)(e) PILA. The Supreme Court stated that an award only violates public policy if it disregards fundamental principles and is therefore inconsistent with the essential, widely recognized values of the Swiss legal system. Such fundamental principles include *pacta sunt servanda*, the prohibition of an abuse of rights and the principle of good faith. However, the Supreme Court held that the appellant did not establish a violation of such fundamental principles. The appellant just criticized the reasoning of the award. In addition, the alleged violation of Articles 106/107 CPC as regards the distribution of costs did not constitute a violation of public policy. Accordingly, the application was also rejected on this ground.

b) ATF 141 III 495 (Decision No. 4A_34/2015 of 6 October 2015)

In this decision, which was discussed in detail above,⁵⁸ Hungary as the appellant also asserted an incompatibility of the arbitral award with public policy according to Article 190(2)(e) PILA. Hungary argued that the tribunal's awarding of damages to B was not in compliance with the requirements under EU law for state aid and compensation of stranded costs, including the need to obtain prior approval from the European Commission. Accordingly, Hungary argued that the award ordered Hungary to breach its international obligations, e.g. under the Treaty on the Functioning of the EU (TFEU).

⁵⁷ See above, p. 134 et seq.

⁵⁸ See above, p. 137 et seq.

This resulted in a violation of public policy pursuant to Article 190(2)(e) PILA.

With respect to the violation of public policy pursuant to Article 190(2)(e) PILA invoked by Hungary, the Supreme Court restated that an arbitral award is contrary to public policy if it disregards fundamental legal principles which, in accordance with the concepts prevailing in Switzerland, should constitute the basis of any legal system.

In the case at hand, the Supreme Court acknowledged that the principle of the supremacy of international law over domestic law is generally accepted. However, it does not follow that an award ordering a party to compensate the opponent fairly would necessarily violate the restrictive definition of substantive public policy, even though it might contradict an obligation under international law. In the end, the Supreme Court did not decide this issue as it found that there was no violation of public policy as the arbitral tribunal *inter alia* assessed and held that the awarding of damages to B did not violate EU law.

c) Decision No. 4A_568/2015 of 10 December 2015

Facts: An Argentinian football player (A) entered into a contract with two players' agents (B and C) in Argentina. According to the agreement, B and C brokered and negotiated contracts for A, in return for which A paid to B and C ten per cent of his annual income. In the event that A was to unilaterally terminate the contract, B and C would receive EUR 1 million in contractual penalty payments.

On 27 May 2014, A unilaterally terminated the contract.

B and C sued A before the CAS which had jurisdiction pursuant to the agreed arbitration clause. B and C requested a payment of EUR 3 million in contractual penalties. Subsequently, the CAS panel essentially upheld the claim, but ordered A to only

pay EUR 1 million instead of the EUR 3 million claimed by B and C.

A then filed a motion to set aside the award *inter alia* due to a violation of public policy. According to A, the award was incompatible with public policy for not taking into consideration A's legal reasoning regarding Article 404 CO, Articles 158 *et seq.* CO and Article 27 Swiss Constitution (SC).

Decision: The Supreme Court rejected the application to set aside the award.

With respect to A's allegation of the potential violation of public policy, the Supreme Court pointed out that A had merely criticized the legal reasoning of the CAS panel relating to Articles 158 *et seq.* and 404 CO. It held that criticizing the CAS panel's finding regarding the validity of the penalty clause as wrong, illegal and simply untenable shows no violation of public policy. As to the invoked constitutional guarantee of economic freedom found at Article 27 SC, the Supreme Court held that the appellant cannot deduce from such a right an entitlement to the termination of a contract at any time by claiming a violation of public policy. The Supreme Court pointed out that A had again failed to show that the payment of the penalty pursuant to the contract would qualify as a manifest and grave violation of his personal rights capable of rendering the award incompatible with public policy.

Comment: A's attempt to rely on Article 404 CO and/or Article 27 SC with the objective of establishing the right to terminate fixed-term contracts at will as part of public policy was not successful.⁵⁹ This was to be expected. The case at

⁵⁹ For further analysis of this decision of the Supreme Court see PONCET, Another hopeless sport-related appeal..., available at: http://www.swissarbitrationdecisions.com/another-hopeless-sport-related-appeal%E2%80%A6?search=4A_568%2F2015 (last visited: 26 August 2016); SCHERER, Introduction to the case law section, in: ASA Bull. 1/2016, p. 130; PETER, Art. 404 OR im Lichte des Ordre public nach Art. 190 Abs. 2 lit. e IPRG, *ius.focus*, 02/2016 Heft 2; VOSER/ESCHMENT, Swiss Supreme Court confirms CAS award in dispute over

hand may however bring some additional legal certainty with respect to the validity of penalty clauses sanctioning player's untimely or immediate termination of a fixed-term agency contract.

d) Decision No. 4A_392/2015 of 10 December 2015

The facts of this case have already been summarized above.⁶⁰ In addition to the jurisdictional objection, B also raised a public policy objection, alleging that the arbitral tribunal not only issued procedural rules that were not "usual for international arbitration" but also failed to apply these rules.

The Supreme Court maintained that the issuing of procedural rules or failing to comply with rules agreed on by the parties can only amount to a breach of procedural public policy in the event that the rules in question were essential for ensuring fair proceedings. The Supreme Court pointed out that B had failed to establish that this had occurred in the case at hand and thus confirmed that public policy objections are not accepted lightly.

e) Decision No. 4A_319/2015 of 5 January 2016

Facts: A and B concluded a contract regarding the construction of a highway. The contract contained an arbitration clause. B terminated the contract. Only two weeks later, A terminated the contract as well. Subsequently, a dispute arose as to the validity of the respective terminations.

B then filed a request for arbitration and claimed payment of a certain amount from A based on several grounds. A rejected B's claim and filed a counterclaim for penalty payments.

penalty payments for sports agents, available at: http://www.swlegal.ch/getdoc/43d35bb7-d0f7-4252-95b4-42556aa66d51/2016_Nathalie-Voser_Jorn-Eschment_Swiss-Supreme-Co.aspx (last visited: 26 August 2016).

⁶⁰ See above, p. 145 et seq.

In its award, a majority of the arbitral panel rejected A's counterclaim.

A filed a motion to set aside the award arguing that there had been a violation of *pacta sunt servanda* and a violation of public policy pursuant to Article 190(2)(e) PILA. A based its claim on mandatory provisions of public law which allegedly provided for a penalty payment against B. The majority of the arbitral tribunal held that the prerequisites of the public law provisions were basically met. However, the majority of the tribunal also stated that there were other provisions in the applicable law which justified a dismissal of the claim. Conversely, the dissenting opinion relied on the mandatory provisions of public law. A relied on the dissenting opinion and claimed before the Supreme Court that the majority of the arbitral tribunal had refused to apply mandatory provisions of public law.

Decision: The Supreme Court rejected the motion to set aside the award.

The Supreme Court restated that an award only violates public policy if it disregards fundamental principles and is therefore inconsistent with the essential, widely recognized values of the Swiss legal system. One of these fundamental principles is *pacta sunt servanda*. The Supreme Court explained that the principle of *pacta sunt servanda* is violated according to Article 190(2)(e) PILA in two situations: first, if the tribunal refuses to apply a contractual provision despite having recognized that the parties are bound by it; second, if the arbitral tribunal orders the parties to comply with a provision which the tribunal did not recognize as binding. Accordingly, the principle of *pacta sunt servanda* is breached whenever a tribunal applies a provision of a contract (or refuses to apply it) and, in doing so, contradicts its own interpretation of the respective clause. However, it must be noted that the principle does not encompass the tribunal's contract interpretation or

the legal conclusions that the tribunal drew from such interpretation.

In the case at hand, the Supreme Court did not find a violation of public policy or the principle of *pacta sunt servanda*. In particular, it clarified that A could not rely on the dissenting opinion. A dissenting opinion represents an autonomous opinion which does not produce any legal effects. The Supreme Court stated that a dissenting opinion is not part of the award, irrespective of whether it is integrated in the award or issued separately. Thus, A did not establish the mandatory character of the respective public law provision by simply referring to the analysis in the dissenting opinion. Even if A could establish the mandatory character of this provision it would not have been successful as Article 190(2)(e) PILA does not comprise the failure to apply or the incorrect application of the relevant foreign law.

Thus, the Supreme Court rejected the motion to set aside the award.

Comment: This case confirms the narrow scope of Article 190(2)(e) PILA.⁶¹ The Supreme Court confirmed that dissenting opinions – which bear the risk of weakening the authority of an award – have no legal value.

f) Decision No. 4A_510/2015 of 8 March 2016

In this case – the facts of which were presented in detail above⁶² – the appellant also claimed a violation of procedural and substantive public policy according to Article 190(2)(e) PILA due to a breach of confidentiality by the arbitral tribunal

⁶¹ For further analysis of this decision of the Supreme Court see PETER, Die Dissenting Opinion in internationalen Schiedsverfahren, *ius.focus*, 02/2016 Heft 2.

⁶² See above, p. 124 et seq.

and due to the failure to reduce the excessive contractual penalty.

The Supreme Court rejected X's alleged violation of procedural public policy as it was based on the same facts and arguments as the alleged, but rejected, violation of impartiality and independence of the arbitral tribunal (Article 190(2)(a) PILA).

As to the alleged failure to reduce the contractual penalty in violation of substantive public policy, the Supreme Court confirmed that Article 163(3) CO is a mandatory provision under Swiss law. However, the Supreme Court held that this provision (which permits a reduction of excessive penalties) does not necessarily fall within the narrow scope of substantive public policy pursuant to Article 190(2)(e) PILA. As the Supreme Court found that the CAS panel did in fact reduce the contractually agreed penalty by taking into account all the circumstances, it also rejected the allegation of a violation of substantive public policy.

g) Decision No. 4A_342/2015 of 26 April 2016

In the above-discussed case,⁶³ X alternatively argued that the arbitral tribunal had violated procedural public policy by refusing to allow the filing of a second round of submissions and rebuttal evidence.

The Supreme Court noted that the arbitral tribunal had found that there was no need for additional evidence given that it had already sufficient elements at its disposal in order to render an award (anticipated assessment of evidence). As this constitutes a finding of fact, it can only be reviewed by the Supreme Court to the extent that it violates procedural public policy. The Supreme Court then stated that X failed to establish such a violation of procedural public policy and

⁶³ See above, p. 175 et seq.

further held, that there was no violation of substantive public policy either.

h) Decision No. 4A_132/2016 of 30 June 2016

Facts: A was a French football player. Football club B was a member of the Cyprus Football Association which in turn was a member of the Fédération Internationale de Football Association (FIFA).

On 22 June 2011, A and B signed a fixed-term employment agreement. On 23 June 2011, the parties signed an addendum to the employment agreement with the same fixed-term which provided for additional remuneration for the football player.

After having played for B at the beginning of the season 2011/2012, A got injured. Subsequently, disputes arose between the parties with respect to the remuneration due under the said agreements. On 25 January 2013, A informed B that it was in default with regard to several payments due and terminated the contract with just cause based on Articles 14 and 17 of the FIFA Regulations on the Status and Transfer of Players.

On 25 January 2013, A filed a claim against B for a total payment of EUR 113'670.- with the FIFA Dispute Resolution Chamber. In its decision of 6 November 2014, the FIFA Dispute Resolution Chamber awarded A an amount of EUR 26'520.-. Subsequently, A appealed this decision to the CAS and the CAS finally awarded A an amount of EUR 53'753.-.

A then filed a motion to set aside the CAS award alleging *inter alia* a violation of substantive public policy pursuant to Article 190(2)(e) PILA. A argued *inter alia* that by failing to apply mandatory provisions of Swiss and French law regard the maturity of salary payments, the CAS violated substantive public policy.

Decision: The Supreme Court rejected the motion to set aside the award.

The Supreme Court confirmed that an award only violates public policy if it disregards those essential and broadly recognized values which, according to the prevailing values in Switzerland, should be the foundations of any legal order. Amongst such principles are contractual fidelity (*pacta sunt servanda*), the respect for the rules of good faith, the prohibition of an abuse of rights, the prohibition of discriminatory or confiscatory measures, the protection of incapable persons as well as the prohibition of excessive restrictions (Article 27 CC) which amount to an obvious and serious violation of personal rights.

The Supreme Court held that mandatory provisions as such do not necessarily fall within the narrow scope of substantive public policy pursuant to Article 190(2)(e) PILA and thus dismissed A's respective arguments. In addition, the Supreme Court held that A failed to establish a violation of such a fundamental principle. Furthermore, the fact that the CAS panel did not agree with the appellant's interpretation regarding an automatic right of termination in case of a delayed salary payment did in no way amount to an abuse of rights by the arbitral tribunal.

Comment: This case confirms that the scope of Article 190(2)(e) PILA is very narrow. It serves as a reminder that a violation of mandatory legal provisions does not automatically result in a violation of substantive public policy.

C. Consequences of a successful challenge

ATF 142 III 296 (Decision No. 4A_628/2015 of 16 March 2016)

In the above-discussed decision the Supreme Court annulled the jurisdictional award of the arbitral tribunal as claimant

failed to mediate first before initiating arbitration proceedings.⁶⁴ This case is interesting as the Supreme Court also addressed in detail the issue of the appropriate sanction. The Supreme Court very pragmatically found, based on a balancing of the interests involved, that when a party disregards a mandatory contractual pre-arbitral clause without a valid excuse, the arbitral tribunal must stay the arbitration until the pre-arbitral clause has been complied with.

It rejected other possible consequences such as (i) an award of damages (which are almost impossible to substantiate) and (ii) the rejection of the claim (which would mean that the appointed arbitral tribunal would become *functus officio*) as inappropriate in such a situation.

III. Decisions on the enforcement of arbitral awards

Decision No. 5A_441/2015 of 4 February 2016

Facts: A and B, a company domiciled in Switzerland, concluded a contract for the sale of wheat through a broker. The contract contained a clause providing for Grain and Feed Trade Association (GAFTA) arbitration in London, which provides for a two-tier arbitral procedure. Neither A nor B actually signed the contract; only the broker did.

After a dispute arose between the parties, A initiated arbitration proceedings against B. During the arbitration proceedings, B did not raise any objection to the jurisdiction of the arbitral tribunal on the ground that the arbitration agreement did not meet the requirements of Article II of the New York Convention.

⁶⁴ See above, p. 154 et seq.

Finally, the second-tier GAFTA appeal panel rendered an award in London ordering B to make a payment to A. Thereupon, A served B in Switzerland with a payment summons through the debt collection authorities to which B objected. B argued *inter alia* that the arbitration agreement did not comply with the requirements of Article II of the New York Convention. Subsequently, A commenced judicial proceedings in Switzerland requesting the Swiss courts to reject B's objection as well as to enforce the foreign arbitral award. The Swiss courts of first and second instance both decided in favor of A.

Consequently, B filed an appeal before the Supreme Court.

Decision: The Supreme Court rejected B's appeal *inter alia* on the following grounds.

The Swiss Supreme Court held regarding the formal requirements of Article IV(1)(b) of the New York Convention that these were not met, as the arbitration agreement provided by A was not duly certified. However, as B had admitted during the arbitration proceedings that it was bound by the arbitration clause contained in the contract and that the clause provided for GAFTA arbitration, it followed that, *prima facie*, the arbitration agreement was authentic and binding on the parties.

The Supreme Court also rejected the appellant's argument that A failed to produce a complete certified translation of the arbitral award, arbitration agreement, or the contract by pointing out that Article IV(2) of the New York Convention is not mandatory, especially if the relevant documents are in English.

Furthermore, the Supreme Court stated that the arbitration clause was neither signed by the parties, nor confirmed by letters exchanged at a later stage. As a result, the sales contract containing the arbitration clause was not in "writing" as required under Article II(2) of the New York Convention.

The substantive validity of the arbitration clause pursuant to Article V(1)(a) of the New York Convention was governed by English Law. According to Section 5(5) of the English Arbitration Act 1996, *“an exchange of written submissions in arbitral or legal proceedings in which the existence of an agreement otherwise than in writing is alleged by one party against another party and not denied by the other party in his response constitutes as between those parties an agreement in writing to the effect alleged”*. Based on the written submissions exchanged by the parties in the arbitration in which B actually referred to the arbitration agreement and confirmed that the contract was subject to GAFTA arbitration, the arbitration agreement constituted a written arbitration agreement between the parties within the meaning of Section 5(5) of the English Arbitration Act 1996. As a consequence, there was no ground for refusing the enforcement under Article V(1)(a) of the New York Convention.

The Supreme Court confirmed that B committed an abuse of right pursuant to Article 2 CC by claiming for the first time in the enforcement proceedings that the arbitration clause did not comply with the written requirement pursuant to Article II(2) of the New York Convention. In this respect, the Supreme Court highlighted that the duty to act in good faith and the prohibition regarding an abuse of rights also apply in recognition and enforcement proceedings. It pointed out that a party’s conduct can cure formal shortcomings of the arbitration agreement under Article II(2) of the New York Convention. As the formal validity of an arbitration clause is one of the conditions for the arbitral tribunal’s jurisdiction, it is contrary to good faith to challenge it for the first time during the enforcement of the final award.

Comment: This case confirms the arbitration-friendly position of the Swiss courts, in particular the Supreme Court.⁶⁵ One may take away at least two reminders from this decision: (i) the Supreme Court takes a lenient approach with respect to the requirements of Article IV of the New York Convention; (ii) based on the principle of good faith, a party may be precluded from relying on a ground for the refusal of the recognition and enforcement of an award if it failed to raise such a ground in the arbitration proceedings.

IV. Costs of federal proceedings

Decision No. 4A_572/2015 of 6 January 2016

The above-discussed decision also included an application for security for costs.⁶⁶ After the appellant Y filed an application with the Supreme Court requesting the setting-aside of the arbitral award to which X replied, Y informed the Supreme Court that it was now in liquidation. X then filed an application with the Supreme Court requesting security for the costs of the Supreme Court proceedings based on Article 62(2) SSCA.

As this application came after X filed its answer on the merits and as X was not allowed to file a rejoinder, the Supreme Court found that it was no longer entitled to security for costs. Security can only be claimed for costs that are not yet incurred. It stated that X should have followed the financial situation of Y more closely. If the financial status is unknown or if there are doubts as to the liquidity of the appellant, the

⁶⁵ For further analysis of this decision of the Supreme Court see SCHERER, Introduction to the case law section, in: ASA Bull. 2/2016, p. 391 *et seq.*; VOSER/CREMADES, Lack of valid arbitration agreement cannot be raised for first time in enforcement proceedings (Swiss Supreme Court), available at: http://www.swlegal.ch/getdoc/ce180cd5-316f-42d6-a647-00707bf7dadd/2016_Nathalie-Voser_Anne-Carole-Cremades_Lack-of-v.aspx (last visited: 26 August 2016).

⁶⁶ See above at p. 173 *et seq.*

defendant should formulate a request for security as a precaution before filing an answer. Thus, counsel must make sure that any application for security for costs with the Supreme Court is filed before addressing the merits.

V. Conclusion

While the period under review has not produced a “landmark decision” in international arbitration, this review of the case law has nevertheless shown that the Supreme Court has seized the opportunity to develop and clarify its case law, in particular regarding jurisdictional challenges (Article 190(2)(b) PILA) as well as regarding the principle of equal treatment and the right to be heard (Article 190(2)(d) PILA).

The following key decisions and developments are of interest with regard to jurisdictional challenges (Article 190(2)(b) PILA):

In 4A_136/2015 of 15 September 2015 and ATF 142 III 239 (4A_84/2015 of 18 February 2016) the Supreme Court held twice that arbitration has become the preferred means of dispute resolution in the context of international commerce. It stated that international parties are often in a position in which they objectively favor arbitration over state court proceedings due to its neutral forum, choice of an international language and confidentiality. Time will tell if, with these decisions, the Supreme Court has indeed departed from its long standing practice of taking a restrictive approach when determining whether or not the parties concluded an agreement to arbitrate.

ATF 142 III 239 (4A_84/2015 of 18 February 2016) also addressed the important question of whether parties have agreed to arbitration when exchanging drafts of a contract. The Supreme Court held that in general, parties do not conclude an arbitration agreement when exchanging drafts.

However, this is possible under exceptional circumstances which was the case here. In fact, the circumstances of the case were not that exceptional, as parties often exchange draft contracts in which they reach consensus on some elements – like the dispute resolution clause – but not on the final deal. Thus, it might be advisable to insert a respective reservation in the next draft contract.

With ATF 141 III 495 (4A_34/2015 of 6 October 2015), the Supreme Court issued its first fully-fledged decision on investment treaty arbitration. The Supreme Court made clear that it also intends to apply an arbitration-friendly approach, developed with regard to commercial arbitration, to investment treaty arbitration.

ATF 142 III 296 (4A_628/2015 of 16 March 2016) was the only decision in the period under review that resulted in the annulment of an arbitral tribunal's award. In this decision, the Supreme Court addressed the steps to be taken when dealing with multi-tiered dispute resolution clauses, in particular conciliation attempts prior to commencing an arbitration. The Supreme Court held that if the pre-arbitral clause is mandatory and the party seeking to enforce such clause did not act in bad faith, the conciliation must be conducted. More importantly, the Supreme Court also decided the open question of what sanction should apply if a party fails to adhere to its obligation to mediate. It pragmatically concluded that when a party disregards a mandatory contractual pre-arbitral clause without a valid excuse, the arbitral tribunal must stay the arbitration until the pre-arbitral clause has been complied with. The modalities of the stay should be decided on by the arbitral tribunal.

The following key decisions and developments are of interest with regard to the principle of equal treatment and the right to be heard (Article 190(2)(d) PILA):

In 4A_342/2015 of 26 April 2016, the Supreme Court confirmed for the first time that parties may waive certain aspects of their right to be heard as long as they are aware of the respective consequences and as long as the very core of that right remains untouched. In the case at hand, the parties agreed on just one round of written submissions. The Supreme Court recognized the importance of party autonomy in the field of international arbitration and pointed out that some of the strict principles developed by state courts with respect to due process are not necessarily applicable in arbitration. On the other hand, the Supreme Court correctly made it clear that the arbitral tribunal and the parties are bound by any procedural agreements made.

Furthermore, the Supreme Court confirmed in 4A_202/2016 of 3 August 2016 that its scope of review with regard to the right to be heard remains very narrow. It pointed out that a wider scope of review was not being considered, in particular because it often finds that the alleged violations of the party's right to be heard are actually attempts to obtain a reassessment of the merits of the case. The Supreme Court underlined that it is not an appellate level court and that the legislator consciously restrained its scope of review.

Otherwise, the case law shows that the Supreme Court continues to reject a large number of appeals, simply recalling and applying the well-established principles in its case law. The standard of review in international arbitration matters remains very strict and arbitration-friendly, which is confirmed by the fact that in the period of review only one award was annulled by the Supreme Court.

VI. Table of cases

A. Setting aside proceedings

1. Admissibility of applications to set aside

<p>4A_342/2015 of 26 April 2016</p>	<p>As international arbitral awards can only be challenged based on the limited grounds listed in Article 190(2) PILA, a party cannot directly rely on a violation of the European Convention on Human Rights (ECHR) in order to have the award set aside. However, the principles in the ECHR may serve as a benchmark for the interpretation of the grounds listed in Article 190(2) PILA.</p>
<p>4A_136/2015 of 15 September 2015 4A_342/2015 of 26 April 2016</p>	<p>A finding of fact by the arbitral tribunal is not subject to review by the Supreme Court. This includes procedural facts, such as the common intent of the parties to have only one round of submissions.</p>
<p>4A_568/2015 of 10 December 2015</p>	<p>A simple choice of law clause cannot result in a waiver of the applicability of the PILA in favor of Article 353 <i>et seq.</i> CPC according to Article 176(2) PILA.</p>

<p>4A_222/2015 of 28 January 2016</p>	<p>An arbitral tribunal may implicitly accept jurisdiction only on a provisional basis, reserving a reasoned decision on that point for the final award. While such conduct does not comply with the general rule in Article 186(3) PILA, it is not prohibited. There are no sanctions for breaches of Article 186(3) PILA, except in case of a clear abuse.</p>
<p>4A_596/2015 of 9 December 2015</p>	<p>Submissions to the Supreme Court must be made in an official language of Switzerland pursuant to Article 42(1) SSCA. If a submission is submitted in a foreign language, the Supreme Court generally allows a correction of this mistake. However, it will not accept repeated failures to comply with such a formal requirement.</p>

2. Irregular constitution of the arbitral tribunal (Article 190(2)(a) PILA)

4A_510/2015 of 8 March 2016	A breach of confidentiality by the arbitral tribunal will, in general, not result in the setting aside of the award. However, if the breach of confidentiality results in an uneven distribution of information between the parties, this might result in a violation of the principle of equal treatment (Article 190(2)(d) PILA).
4A_173/2016 of 20 June 2016	An irregular constitution of the arbitral tribunal must be challenged immediately during the proceedings. A party holding a challenge in reserve, which it could have raised during the arbitration, acts in bad faith and forfeits the right to raise the argument before the Supreme Court.

3. Incorrect decision on jurisdiction (Article 190(2)(b) PILA)

<p>4A_136/2015 of 15 September 2015 ATF 142 III 239 (4A_84/2015 of 18 February 2016)</p>	<p>A poorly drafted dispute resolution clause may still constitute a valid arbitration agreement. Arbitration has become the preferred means of dispute resolution in the context of international commerce. International parties are often in a position in which they would objectively favor arbitration over state courts due to its neutral forum, choice of international language and confidentiality.</p>
<p>4A_172/2015 of 29 September 2015 4A_392/2015 of 10 December 2015 4A_173/2016 of 20 June 2016 4A_132/2016 of 30 June 2016</p>	<p>A plea of lack of jurisdiction must be raised prior to any defense on the merits. If a party comments on the merits of the case without raising a plea of lack of jurisdiction, it accepts the tribunal's jurisdiction and loses its right to raise a jurisdictional objection at a later stage. This also holds true for jurisdictional objections which arise only in case an alternative line of arguments is pursued.</p>

<p>ATF 141 III 495 (4A_34/2015 of 6 October 2015)</p>	<p>A jurisdictional challenge raised in the context of an investment treaty arbitration is assessed according to the same restrictive and arbitration-friendly principles that the Supreme Court developed for challenges in commercial arbitrations.</p>
<p>4A_176/2015 of 9 November 2015</p>	<p>Where the arbitrator has declared that he has jurisdiction to hear the case based on questions of fact, it is very difficult to successfully challenge his jurisdiction under the Swiss <i>lex arbitri</i>.</p>
<p>4A_562/2015 of 9 December 2015</p>	<p>Issues of substantive law must be clearly separated from those pertaining to jurisdiction. A party's standing to sue or to be sued is a matter of substantive law which does not concern the jurisdiction of the arbitral tribunal.</p>

<p>ATF 142 III 239 (4A_84/2015 of 18 February 2016)</p>	<p>In principle, parties do not conclude an arbitration agreement when exchanging drafts of a contract. However, this is possible under exceptional circumstances such as (i) where there are previous contracts including the same arbitration clause, (ii) when the parties have an objective interest in choosing arbitration; and/or (iii) when the draft contracts show that parties agreed to conclude an arbitration agreement irrespective of the outcome of the main agreement.</p>
<p>ATF 142 III 296 (4A_628/2015 of 16 March 2016)</p>	<p>When a party disregards a mandatory contractual pre-arbitral clause and the opposing party has not acted in bad faith, the arbitral tribunal must stay the arbitration proceedings until the pre-arbitral clause has been complied with.</p>

4. Decision ruling beyond claims submitted or failing to adjudicate claims (Article 190(2)(c) PILA)

<p>4A_218/2015 of 28 October 2015</p>	<p>An award is only considered to be <i>ultra petita</i> in the event that the total amount awarded to a party is beyond the total amount claimed by that party. This also holds true if the arbitral tribunal construed certain claims differently or relied</p>
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	on different legal grounds. The principle of <i>iura novit curia</i> applies in arbitration proceedings.
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5. Violations of the principle of equal treatment or the right to be heard (Article 190(2)(d) PILA)

4A_378/2015 of 22 September 2015	<p>A party alleging a violation of the right to be heard must invoke it as soon as possible during the arbitration proceedings. If a party fails to do so, it forfeits its right. It is contrary to good faith not to raise procedural objections in the course of the arbitration and to only invoke them before the Supreme Court.</p> <p>A party may not challenge an award for an alleged violation of its right to be heard on the basis that the tribunal wrongly addressed an issue, when in reality the tribunal deliberately took into account and disregarded the issue.</p>
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<p>4A_172/2015 of 29 September 2015</p>	<p>An arbitrator has a minimal duty to examine and address all relevant issues that are material to the outcome of the case. This duty is only violated if, by inadvertence or misunderstanding, the arbitrator does not take into consideration submissions, allegations, arguments or evidence of importance to the outcome of the case that were presented by a party.</p>
<p>4A_69/2015 of 26 October 2015 4A_572/2015 of 6 January 2016</p>	<p>A party cannot have the merits of the case or evidence reassessed under the cover of a challenge based on Art. 190 (2)(d) PILA and on the false pretense that the sole arbitrator did not consider arguments duly raised in the arbitration proceedings.</p>
<p>4A_520/2015 of 16 December 2015 4A_202/2016 of 3 August 2016</p>	<p>The scope of review by the Supreme Court with regard to the right to be heard remains very narrow. A wider scope of review is not being considered, as the legislator consciously restrained the scope of review.</p>

4A_510/2015 of 8 March 2016	If a breach of confidentiality by the arbitral tribunal results in an uneven distribution of information between the parties, this might give rise to a violation of the principle of equal treatment.
4A_342/2015 of 26 April 2016	Parties may waive certain aspects of their right to be heard – e.g. by limiting the number of rounds of submissions – as long as they are aware of the respective consequences and as long as the very core of that right remains untouched. If these requirements are fulfilled, the arbitral tribunal and the parties are bound by such procedural agreements. Party autonomy is a cornerstone of international arbitration and some of the strict principles developed by state courts with regard to due process are not necessarily applicable in arbitration.
4A_42/2016 of 3 May 2016	A party is not entitled – neither based on the right to be heard nor on the principle of adversarial proceedings – to unilaterally dictate to the arbitrator how to conduct the proceedings.

<p>4A_173/2016 of 20 June 2016</p> <p>4A_202/2016 of 3 August 2016</p>	<p>A party may not challenge an award for an alleged violation of its right to be heard on the basis that the tribunal failed to address an issue, when the tribunal deliberately disregarded the issue. There is no violation of the parties' right to be heard if the arbitral tribunal did not address, even implicitly, an issue invoked by the parties that is irrelevant.</p>
<p>4A_322/2015 of 27 June 2016</p>	<p>Dissenting opinions are not part of the award itself, irrespective of whether they are integrated in the award or not. They have no legal value and will not be considered by the Supreme Court.</p> <p>The principle of free assessment of evidence constitutes a key principle of international arbitration.</p>
<p>4A_202/2016 of 3 August 2016</p>	<p>Parties are not entitled to be informed about the legal ground on which the award will be based unless such legal ground was not pleaded and could not reasonably have been anticipated by the parties.</p>

6. Incompatibility with public policy (Article 190(2)(e) PILA)

<p>ATF 141 III 495 4A_34/2015 of 6 October 2015</p>	<p>An arbitral award is contrary to public policy if it disregards fundamental legal principles which, in accordance with the concepts prevailing in Switzerland, should constitute the basis of any legal system. The Supreme Court left the question open of whether an award that obliges a party to violate obligations resulting from international law would be contrary to public policy.</p>
<p>4A_319/2015 of 5 January 2016</p>	<p>The principle of <i>pacta sunt servanda</i> – which forms part of public policy – is violated in two situations: first, if the tribunal refuses to apply a contractual provision despite having recognized that the parties are bound by it; second, if the arbitral tribunal orders the parties to comply with a provision which the tribunal did not recognize as binding.</p>
<p>4A_510/2015 of 8 March 2016 4A_132/2016 of 30 June 2016</p>	<p>A violation of a mandatory provision according to Swiss law does not necessarily mean that it falls within the narrow scope of substantive public policy pursuant to Article 190(2)(e) PILA.</p>

B. Enforcement of arbitral awards

5A_441/2015 of 4 February 2016	The duty to act in good faith also applies in recognition and enforcement proceedings. A party may be precluded from relying on a ground for the refusal of the recognition and enforcement of an award if it failed to raise such a ground in the arbitration proceedings.
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