

# SWISS PRIVATE INTERNATIONAL LAW ACT (CHAPTER 12: INTERNATIONAL ARBITRATION), 1989

(In force as from 1 January 1989)

## [Introductory remarks]

**1. Legislative history.** Chapter 12 of the PILA entered into force on 1 January 1989; and has been amended only in a few respects since then. By creating chapter 12 PILA, the Swiss legislator produced a short and concise arbitration act that confined itself to rules of prime importance. The main characteristics of this law on international arbitration are its liberality and its wide scope for party autonomy. Where the parties do not make use of this autonomy, the discretion of the arbitral tribunal for structuring and organising the arbitral proceedings is equally far reaching. The law stipulates only a few mandatory general rules which are necessary in order to keep the arbitral process in balance and in accordance with the basic rules of due process. The intervention of the state courts is kept to a minimum; while assistance and cooperation is provided if so required, setting aside proceedings before the Federal Supreme Court are possible on only very limited grounds. While drafted more or less at the same time as the UNCITRAL Model Law, chapter 12 PILA stands alone and is independent from the UNCITRAL Model Law. There are, however, no fundamental differences between the two.

**2. Chapter 12 PILA and the Intercantonal Concordat.** Until 1 January 1989, all domestic and international arbitration proceedings were governed by the Intercantonal Concordat on Arbitration of 1969 that was concluded between the Swiss cantons. Compared to chapter 12 PILA, the Concordat is not quite as liberal, and contains a number of mandatory rules that restrict the powers of the arbitral tribunal and the freedom of the parties. Nowadays, chapter 12 PILA constitutes the *lex arbitri* for all international arbitrations, provided that the requirements of art. 176 are fulfilled. Where they are not fulfilled, the Concordat applies. When the Federal Code of Civil Procedure enters into force in 2011, and replaces the cantonal Codes of Civil Procedure, it will also contain a chapter on arbitration that will replace the Concordat.

**3. Case law and academic sources.** Arbitration and, in particular, international arbitration have a long-standing tradition in Switzerland. With simple, pragmatic and flexible statutes, a large body of case law has emerged that provides guidance on the interpretation and application of the relevant rules of law and confirms the Swiss judiciary's restraint in interfering with international arbitration. The broad spectrum of precedents by the Federal Supreme Court and a large number of academic sources, which are frequently consulted by arbitrators, counsel and the judiciary, provide for reliability and predictability; this, together with Switzerland's political stability and the nation's historical neutrality, has made Switzerland one of the preferred centres for international arbitration.

[Scope of application; seat of the arbitral tribunal]

Article 176

(1) The provisions of this chapter shall apply to arbitral tribunals which have their seat in Switzerland, provided that, at the time of the conclusion of the arbitration agreement, at least one of the parties had neither its domicile nor its habitual residence in Switzerland.

(2) The provisions in this chapter shall not apply where the parties have excluded their application in writing and agreed that the cantonal provisions on arbitration shall apply exclusively. [*New version of paragraph 2 entering into force in 2011: The parties can exclude the application of this chapter and agree on the application of the third part of the Federal Code of Civil Procedure by making an explicit declaration in the arbitration agreement or in a later agreement.*]

(3) The seat of the arbitral tribunal shall be determined by the parties, or by the arbitration institution designated by them, or, failing both, by the arbitrators.

**1. Requirements of the applicability of chapter 12.** Art. 176 determines that the provisions of chapter 12 PILA apply to arbitral tribunals (see note 2) with their seat in Switzerland (see note 3) if, at the time of the conclusion of the arbitration agreement, at least one of the parties was not domiciled or resident in Switzerland (see note 4) and provided that the parties did not validly exclude chapter 12 PILA (see note 5).

**2. Applicability to arbitral tribunals.** Chapter 12 PILA applies only to arbitral tribunals and not to expert determinations, valuations and audits. The concept of arbitration is not defined in the PILA but is taken to mean private jurisdiction sanctioned by the state, based on the parties' agreement to have their dispute adjudicated by a private tribunal, and resulting in decisions comparable to those of state courts (see ATF 4P.299/2006 reason 3; ATF 5P.427/2000 reason 1b). Arbitration must be distinguished from expert determinations (on this distinction, see in particular ATF 4A\_438/2008 reason 3.2), valuations, audits and decisions of other institutions which are not directly enforceable and have no *res judicata* effect. The intention of the parties (see ATF 107 Ia 318 reason 5a), the independence and impartiality of the tribunal (see ATF 5P.427/2000 reason 1b) and the tribunal's powers (see ATF 4P.299/2006 reason 3), as well as the purpose of the proceedings (final decision on claims, as opposed to the mere examination of single preliminary questions, see ATF 126 III 529 reason 3), are decisive for this distinction. Chapter 12 PILA applies to institutional and *ad hoc* arbitral tribunals.

**3. Seat of the arbitration.** An arbitral tribunal is subject to chapter 12 PILA only if the seat of the arbitration is in Switzerland (for the determination of the seat see note 6). The seat of the arbitration determines the nationality of an arbitral award, as per art. I New York Convention. It is

also relevant for the determination of the court that provides assistance if so required (see, e.g., arts. 179(2), 180(3), 183(2)), and for setting aside proceedings in Switzerland. Hearings and deliberations can be held elsewhere, in which case the law of that state will have to be consulted, since some states apply their law to any arbitration proceedings that are physically held there.

**4. Domicile or habitual residence outside Switzerland.** Chapter 12 PILA only applies if at least one of the parties to the arbitration does not have its domicile, seat or habitual residence in Switzerland at the time the arbitration agreement is concluded. A business establishment outside Switzerland is not sufficient to fulfil this requirement (Berti-Ehrat, n 35 ad art. 176). The domicile of a company is the statutory seat or, failing such designation, the place of actual management (art. 21(1) and (2) PILA). The domicile of a person is the place where he resides with the intent of permanently settling there (art. 20(1)(a) PILA), whereas the habitual residence is the place where he lives for an extended period (e.g. a couple of months) even if this period was limited from the outset (art. 20(1)(b) PILA). The Swiss legislator uses these purely formal criteria for reasons of clarity and simplicity (Botschaft, at 459). The international nature of the subject-matter is irrelevant (see ATF 4P.115/2003 reason 2.1). Changes of domicile, seat or habitual residence after the conclusion of the arbitration agreement are also irrelevant (see ATF 4P.113/2001 reason 3; ATF, 27 October 1995, reason 2a). The Federal Supreme Court has held, in an often criticised decision, that in cases where the foreign party to an arbitration agreement does not participate in the proceedings, i.e. when only those parties with their domicile or seat in Switzerland appear in the arbitration, chapter 12 PILA does not apply (see ATF 4P.54/2002 reason 3). Furthermore, parties that are all domiciled in Switzerland at present are not allowed to choose to submit their dispute to chapter 12 PILA (see ATF 4P.54/2002 reason 2). This, however, will change when the new Swiss Federal Code of Civil Procedure (FCCP) enters into force 2011, as art. 353(2) FCCP explicitly allows parties to agree on the applicability of chapter 12 PILA.

**5. Exclusion of chapter 12 PILA.** Art. 176(2) states that the parties may exclude the application of chapter 12 PILA and may elect instead to use the Intercantonal Concordat or, as of 2011, the third part of the FCCP that will replace the Concordat. It is not enough for the parties to explicitly agree in writing that they wish to exclusively apply the Concordat/the third part of the FCCP; it must also be clear from the wording of the agreement that they wish to exclude chapter 12 PILA (see ATF 4P.243/2000 reason 2b; ATF 116 II 721 reason 4). If the parties only agree on the applicability of the Concordat/the third part of the FCCP, this constitutes an agreement on the applicable arbitration rules, as provided for by art. 182(1) (see ATF 4P.140/2000 reason 2b). If the parties exclude chapter 12 PILA, they exclude all procedural provisions contained therein, but not the substantive provisions and conflict

of laws rules, such as art. 178(2) and art. 187 (Basel Commentary-Ehrat/Pfiffner, n 48-49 ad art. 176 with further examples). In practice, parties rarely exclude chapter 12 PILA.

**6. Determination of the seat of arbitration.** According to art. 176(3), the parties can determine the seat of arbitration. This determination actually implies a fundamental choice of law, as it simultaneously determines the applicable *lex arbitri*, i.e. the PILA or the Intercantonal Concordat/the third part of the FCCP (see Introductory Remarks, note 2). If the parties fail to establish the seat of arbitration but do choose a set of arbitration rules, these rules may directly determine the seat of the arbitration (e.g. art. 31 CIETAC Rules, art. 2 Vienna Rules) or, more commonly, provide for the determination of the seat by the arbitral institution (e.g. art. 14(1) ICC Rules, art. 16(1) Swiss Rules). If the parties have failed to agree on either the seat or on a set of arbitration rules, the arbitrators may establish the seat. However, constitution of the arbitral tribunal may be difficult if the parties have not determined the seat beforehand (see art. 179, note 4).

## [Arbitrability]

### Article 177

**(1) Any dispute involving an economic interest may be the subject of an arbitration.**

**(2) A party which is a state, a state-dominated enterprise, or a state-controlled organisation cannot invoke its own law in order to contest its capacity to arbitrate or the arbitrability of a dispute covered by the arbitration agreement.**

**1. General.** Art. 177 provides broad access to international arbitration by liberally defining the arbitrability of the subject matter of the dispute ('objective arbitrability') as well as addressing the capacity of a state-controlled party to arbitrate ('subjective arbitrability'). Both aspects are preconditions for a valid arbitration agreement.

**2. Arbitrability of the dispute.** Unlike art. II(1) New York Convention, art. 177(1) establishes a substantive rule with a definition of the requirements for arbitrability. Any disputes involving an economic interest are arbitrable, i.e. all claims that have an economic value for at least one party, be it an asset or a liability (see ATF 1P.113/2000 reason 1b; ATF 118 II 353 reason 3b). It does not matter whether the applicable law allows the parties to dispose of the claim in dispute (Berti-Briner, n 8 ad art. 177). Art. 74 of the new Federal Supreme Court Act, as well as art. 44 of the former Federal Law on Judicial Organization, provide a similar test for the admissibility of appeals to the Federal Supreme Court, and precedents in this context may give valuable guidance with regard to defining the notion of economic interest. Even where the claim is related to a non-arbitrable right, such as a

personal right of a party, the dispute can still be subject to arbitration if the party seeks protection from economic consequences and if the economic aspect is predominant, for example if an athlete is suspended because of doping (see *Gerichtspräsident Thun*, 1 December 2005, at 56 et seq.; see also ATF 4P.230/2000 reason 1).

**3. Restrictions.** As a principle, Swiss or foreign provisions stipulating the compulsory jurisdiction of a state court (mandatory fora) are not taken into account. Under this liberal approach, the only restriction to the arbitrability of economic interests is the principle of public policy (see ATF 118 II 353 reason 3c; *Basel Commentary-Briner*, n 12, 18 ad art. 177), as developed by the Federal Supreme Court in the application of art. 190(2)(e) (see art. 190, note 10 et seq.). The abuse of Switzerland as a ‘safe haven’ for international arbitration is restricted by the general rule prohibiting the abuse of law and by possible difficulties to be encountered in the recognition and enforcement of the ensuing award in a foreign country (see ATF 118 II 353 reason 3d). This is because art. V(2)(a) New York Convention allows any state to deny enforcement of an arbitral award if the matter was not arbitrable under the law of the enforcement state.

**4. Non-arbitrable preliminary questions.** If the dispute is subject to arbitration, the arbitral tribunal is both entitled and obliged to decide upon preliminary questions which would, as such, not be arbitrable. For example, if a party brings a contractual claim, the arbitral tribunal must decide upon the (in)validity of the contract under antitrust law, regardless of the state authorities’ exclusive competence (see ATF 118 II 193 reason 5), or upon the invalidity of the contract due to the violation of criminal law provisions (see ATF 133 III 139 reason 5). The arbitral tribunal’s decision does not bind the competent authorities.

**5. Examination ex officio.** It is controversial whether the arbitral tribunal must examine ex officio the arbitrability of the dispute or whether the parties must raise an objection in this respect (see *Basel Commentary-Briner*, n 20 ad art. 177; *Berger/Kellerhals, Schiedsgerichtsbarkeit*, n 247; *Kaufmann-Kohler/Rigozzi, LDIP*, n 193). The Federal Supreme Court once ruled that the parties had to challenge the arbitrability of the dispute before pleading on the merits (see ATF, 15 March 1993, reason 5). Respondents are therefore advised to make such a challenge before the arbitral tribunal at the earliest possible opportunity (see ATF 130 III 66 reason 4.3).

**6. Consequences of non-arbitrability.** If the dispute is not arbitrable, the arbitral tribunal in Switzerland must declare itself not legally competent to arbitrate, as otherwise its award will be set aside under art. 190(2)(b). Furthermore, if an arbitral tribunal with its seat abroad renders an award in a matter that is not arbitrable under art. 177, Swiss courts will deny recognition of the award in Switzerland under art. V(2)(a) New York Convention (*Berti-Patocchi/Jermini*, n 122 ad art. 194).

**7. State-controlled party.** Art. 177(2) bars a state from using its legislative power to prevent an arbitration in disputes with an individual (see ATF, 13 October 1992, reason 7b). Art. 177(2) provides that a state cannot invoke its own law in order to challenge either the arbitrability of the dispute or its own capacity to enter into an arbitration agreement or to be a party to the arbitration. This also applies to companies and organisations that are owned or controlled (legally or de facto) by a state. Art. 177(2) constitutes a substantive rule of Swiss international arbitration law. It is not permissible to take foreign law into consideration here, except in clear cases of bad faith (see Basel Commentary-Briner, n 27 ad art. 177).

**8. Subjective arbitrability of parties that are not state-controlled.** Art. 177 does not address the capacity of a non-state party to be a party to the arbitration. Subjective arbitrability becomes an issue particularly in case of insolvency of a party. The Swiss Federal Supreme Court had to decide a case where one of the respondents in the arbitration became insolvent after the commencement of the arbitration. The arbitral tribunal had denied in an interim award subjective arbitrability with respect to this party based on the domestic insolvency law at the place of incorporation, which was at the same time the place of insolvency. Under this law, the arbitration clause lost its effects as of the date when insolvency was declared. The Swiss Federal Supreme Court upheld the interim award. It held that subjective arbitrability depends on the preliminary question of legal capacity under the applicable substantive law. The substantive law applicable to a company's legal capacity is the law under which it is organised (i.e. the law of its incorporation) or, if the company has not been validly organised under this law, the law of the state in which the company is effectively managed (art. 155(c) PILA; ATF 4A\_428/2008 reason 3.2). According to this decision, the law governing the insolvency of a company (*lex concursus*) will have an impact on subjective arbitrability only if it is also the law under which the company is incorporated. That being said, one should not overestimate the decision, which the Federal Supreme Court did not include in its official collection of precedents, but should await future developments. Instead of applying the law of incorporation, one could consider that the problem concerns in fact the validity of the arbitration agreement and apply the law designated by Art. 178(2), which favours the validity of the arbitration agreement. Another possible alternative would be to hold that the effect of an insolvency on pending arbitration proceedings is subject to the *lex arbitri*, in line with Article 15 of the EC Insolvency Regulation No. 1346/2000

## [Arbitration agreement]

### Article 178

**(1) As regards its form, an arbitration agreement is valid if made in writing, by telegram, telex, fax or any other means of communication which permits it to be evidenced by a text.**

**(2) As regards its substance, an arbitration agreement is valid if it conforms either to the law chosen by the parties, the law governing the subject matter of the dispute, in particular the principal contract, or Swiss law.**

**(3) The arbitration agreement cannot be contested on the grounds that the principal contract is not valid or that the arbitration agreement concerns a dispute which has not yet arisen.**

**1. Requirements for a valid arbitration agreement.** The PILA explicitly and implicitly contains the following mandatory requirements for a valid arbitration agreement: mutual consent on the necessary content (see note 4), written form (see notes 2 and 3), arbitrability of the subject matter and subjective arbitrability (art. 177) and determinability of the arbitral tribunal (see note 5). Art. 178(2) contains a conflict of laws rule for all other substantive requirements and issues (see note 7). If the arbitration agreement does not fulfil all of the requirements, it is invalid and the arbitral tribunal must decline its jurisdiction. Otherwise its award can be set aside under art. 190(2) (b).

**2. Form requirement.** Art. 178(1) requires the arbitration agreement to be in writing and allows the parties to use any means of communication which permits the arbitration agreement to be evidenced by a text. It must be proved that the parties exchanged declarations which are attributable to each party and which form a binding agreement. The text does not need to bear a signature in order to comply with the requirement of written form (e.g. ZCC Award, 7 August 2006, para. 53; Berger/Kellerhals, *Schiedsgerichtsbarkeit*, n 396 with references; but see ATF 121 III 38 reason 3 on art. II New York Convention, which states that, strictly speaking, arbitration agreements contained in the agreement itself require a signature, whereas those concluded by exchange of documents do not. However, the Federal Supreme Court held in this specific case that the arbitration agreement contained in the bill of lading itself was valid despite the lack of one signature). Under the current standards of technology, the requirement of visual perceptibility and physical reproducibility is fulfilled in an exchange of e-mails (Basel Commentary-Wenger/Müller, n 13 ad art. 178). With regard to the issue of form, the parties cannot choose to apply any law other than that of the Swiss seat of arbitration (Besson, *Arbitration in Switzerland* at 773 with further references; Kaufmann-Kohler/Rigozzi, *LDIP*, n 208).

**3. Art. 178(1) and art. II(2) New York Convention.** As a general rule, form is governed by art. 178(1) when arbitral tribunals with their seat in Switzerland are called to rule upon their jurisdiction, or when the Federal Supreme Court reviews the arbitration agreement in the context of an application to set aside the arbitral award pursuant to art. 190(2)(b). However, form is governed by art. II New York Convention when Swiss courts are required to rule upon the recognition and enforcement of a foreign arbitral

award or when a Swiss court is seized of an action in spite of the existence of an arbitration agreement providing for arbitration seated abroad. The Federal Supreme Court has ruled that there are no differences between the formal requirements of the New York Convention and art. 178 (see ATF 121 III 38 reason 2c; see also Commercial Court St. Gallen, ASA Bulletin 2007, 393 reason II.1).

**4. Necessary content of the arbitration agreement and pathological agreements.** A valid arbitration agreement requires the parties to agree that existing or future disputes arising in respect of a defined contractual or non-contractual legal relationship will be resolved by a private tribunal instead of a state court (see ATF 130 III 66 reason 3.1; art. 176, note 2). The general principles of contract interpretation, in particular art. 18 Swiss Code of Obligations, also apply to arbitration agreements (see ATF 4P.226/2004 reason 4.2; ATF 116 Ia 56 reason 3a). The Federal Supreme Court consistently takes a rather restrictive approach in making sure that the parties' true intention was to waive their right to proceedings before a state court (see ATF 129 III 675 reason 2.3). However, once the consent to arbitrate has been established, the scope of the arbitration agreement will be broadly construed and it will be assumed that the parties want an all-embracing jurisdiction (see ATF 116 Ia 56 reason 3b, see also note 8). If an arbitration agreement complies with the above-mentioned requirements and allows the determination of the arbitral tribunal (see note 5), but is otherwise incomplete, unclear or contradictory (pathological arbitration agreement), it must be construed in a way that respects the parties' will to submit their dispute to arbitration (see ATF 130 III 66 reason 3.1). Thus, the arbitration agreement is to be construed pursuant to the principle of favor validitatis, and not in a manner that renders it invalid or ineffective (see ATF 4P.226/2004 reason 4.2).

**5. Determinability of the arbitral tribunal.** For an arbitration agreement to be valid, the Federal Supreme Court requires that it be possible to determine upon which arbitral tribunal the parties agreed (see ATF 130 III 66 reason 3.1; ATF 129 III 675 reason 2.3; for an example, see CCIG case no. 193, 21 October 2002). Should the parties have failed to designate an authority that would be of assistance in the constitution process, they must have determined a seat of arbitration in order to obtain state court assistance under art. 179(2) (see ATF 130 III 66 reason 3.2). The wording 'arbitration in Zurich' is sufficient to enable a constitution of the arbitral tribunal, whereas problems arise if the parties only agreed on 'arbitration in Switzerland' (see art. 179, note 4; see also ZCC Award, 7 August 2006, paras. 71-72). In any event, the parties should strive to express their consent in an unequivocal manner, beyond the bare minimum of the essentialia of an arbitration agreement, and to restrict room for interpretation.

**6. Arbitration agreement by reference.** An arbitration agreement can be concluded by reference to another document containing an arbitration clause (for example earlier agreements, general business conditions, standard

contractual terms and conditions or by-laws of companies and professional associations). The arbitration agreement by reference is formally valid if the parties exchange written declarations that refer to the other document and if this document, which contains the arbitration clause, is also in the written form required by art. 178(1) (see ATF 4P.126/2001 reason 2c; ATF 4P.230/2000 reason 2a). Furthermore, the prerequisites for the substantive validity of the arbitration agreement according to art. 178(2) must be met, i.e. the declarations must also constitute an effective agreement on the arbitration clause. A global reference to a text containing an arbitration agreement constitutes a valid agreement under Swiss law if it can be shown in good faith that, in the specific circumstances at hand, an arbitration agreement is not an unusual provision and would not be something that the party would not and could not have expected at the time of the conclusion of the agreement.

**7. Substantive validity.** Art. 178(2) constitutes a conflict of laws rule providing that it is sufficient for an arbitration agreement to be valid under the substantive rules of any of the three laws listed in art. 178(2). The purpose of this provision is to ensure, as far as possible, the validity of an arbitration agreement. Art. 178(2) does not indicate which specific issues come under the concept of ‘substantive validity’ of the arbitration agreement. The scope of application generally includes, inter alia, the conclusion of the arbitration agreement (offer, acceptance, consent in cases where arbitration clauses are incorporated by reference, deficiencies of intent and possible deficiencies of consent, such as error, duress, misrepresentation), possible preconditions to arbitration (e.g. preceding mediation, see art. 186, note 4), performance issues (e.g. delay, impossibility, *exceptio non adimpleti contractus*), and the scope of the arbitration agreement (e.g. the binding force on non-signatories or assignees). All validity aspects must be covered by the application of one sole law and not by applying any of the three possible laws selectively to individual issues. It is controversial whether it is only national legal systems or also non-national rules of law (e.g. *lex mercatoria*) that can be applied under art. 178(2) (see Basel Commentary-Wenger/Müller, n 26 ad art. 178).

**8. The scope of the arbitration agreement.** The common arbitration clause (‘all disputes arising from the contract’ or ‘in connection with the contract’) is to be understood broadly. It covers disputes regarding the conclusion and binding effect of the contract, its performance and its interpretation, and claims resulting from its termination, as well as tort claims if they are related to claims arising from an alleged breach of the contract or are otherwise linked to the contract (see ATF 4A\_452/2007 reason 2.5.1; ATF 116 Ia 56 reason 3b; ICC case no. 12363/ACS, 23 December 2003, at 467). However, such a clause does not automatically cover claims arising from another contract, even where there are elements connecting the two contracts (see ATF 4A\_452/2007 reason 2.5.2). Unless the parties have agreed otherwise, an arbitral tribunal also has jurisdiction to adjudicate counterclaims, provided that the principal claim and the counterclaim stem from the same legal rela-

tionship. With regard to set-off defences, the situation may be more complex; where both claims stem from the same legal relationship, the jurisdiction of the arbitral tribunal is not an issue (see art. 186, note 3).

**9. Non-signatories.** As a general rule, the arbitration agreement binds only those parties that originally agreed to it (see ATF 129 III 727 reason 5.3). Under specific circumstances there are exceptions to this rule, and the arbitration agreement may be extended to third parties pursuant to one of the laws applicable under art. 178(2) (see ATF 4C.40/2003 reason 4.1; for an overview over the Swiss case law see Zuberbühler, *Non-Signatories*, at 19 et seq.). Successors in title are bound by the agreement if the succession is valid under the applicable law and covers the arbitration clause. Under Swiss law, for example, the arbitration clause is automatically transferred with the assignment of the principal claim (see ATF 128 III 50 reason 2b). Furthermore, where a guarantor assumes a contractual debt (either in replacement of the original debtor or as jointly and severally liable co-debtor), the arbitration clause covering the contractual debt also binds the guarantor, unless he explicitly excludes to be bound when assuming the debt (ATF 134 III 565 reason 3.2). The surety or guarantor is not automatically bound in case of other forms of securities, such as surety bonds or bank guarantees. A non-signatory may be bound by the agreement if he has close connections to one of the contracting parties, for example by legal or actual domination of the contracting party, by participating in the contract negotiations or by interfering in the performance of the contract in a manner that demonstrates his intent to be bound by the arbitration clause (see ATF 4A\_376/2008 reason 8, setting aside an award that had refused a joinder of several non-signatories; ATF 4P.48/2005 reason 3.4.1; ATF 129 III 727 reason 5.3.2). An arbitration agreement can also be considered binding upon a non-signatory party if circumventing the arbitration agreement would constitute an abuse of law (justifying, e.g., the piercing of the corporate veil, see ATF 4A\_160/2009 reason 4.3). Unilateral arbitration provisions can be valid, for example, in a will, in a foundation, in prize contests and for competitions, but restrictions may apply in specific cases (Basel Commentary-Wenger/Müller, n 63 et seq. ad art. 178).

**10. Art. 178(2) and art. V(1)(a) New York Convention.** For the question of recognition and enforcement of an arbitral award, art. V(1)(a) New York Convention contains a different choice of law clause for the substantive validity of the arbitration agreement than that of art. 178. Art. V(1)(a) New York Convention refers to the law chosen by the parties or, failing such a choice, the law of the country where the award was made. If an arbitration agreement is valid only under the law applicable to the dispute, but not under the other two possible laws referred to in art. 178(2), there are different possible outcomes with regard to the recognition and enforcement of the award. These differences can be resolved by interpreting the term ‘the law of the country where the award was made’ (art. V(1)(a) New York Convention) to

include the conflict rules of that country, so that, for an award rendered in Switzerland, all alternatives under art. 178(2) would be taken into consideration (Basel Commentary-Wenger/Müller, n 24 ad art. 178).

**11. The principle of autonomy/separability of the arbitration agreement.** Art. 178(3) contains two rules. First, it contains the principle of autonomy/separability, according to which the arbitral tribunal must examine the validity of the arbitration clause separately from the main contract in which the arbitration clause is found. The validity or invalidity of the contract does not necessarily affect the validity or invalidity of the arbitration agreement and vice versa. Thus, a party cannot object to an arbitration clause based on the assertion that the underlying contract is null and void, unless the reason for nullity also affects the arbitration agreement (see ATF 119 II 380 reason 4a). Secondly, art. 178(3) provides that arbitration agreements can be concluded for future disputes and do not have to be re-confirmed once the dispute has arisen.

#### [Arbitral tribunal: constitution]

#### Article 179

**(1) The arbitrators shall be appointed, dismissed or replaced in accordance with the agreement of the parties.**

**(2) In the absence of such an agreement, the matter may be referred to the court where the arbitral tribunal has its seat; the court shall apply, by analogy, the provisions of cantonal law concerning the appointment, dismissal or replacement of arbitrators. [New version of the last part of this sentence entering into force in 2011: the court shall apply, by analogy, the provisions of the Federal Code of Civil Procedure concerning the appointment, dismissal or replacement of arbitrators.]**

**(3) Where a court is called upon to appoint an arbitrator, it must comply with such request, unless a summary examination shows that no arbitration agreement exists between the parties.**

**1. Constitution of the arbitral tribunal.** Art. 179 applies to the constitution of the arbitral tribunal, i.e. to questions such as the number of arbitrators, the requirements and the procedure for their appointment, dismissal or replacement. The resignation of an arbitrator is not governed by art. 179, but by the arbitral contract between the parties and the arbitrator (see notes 8 and 9). Art. 179(1) leaves the constitution of the arbitral tribunal to the parties. If the parties do not agree or if the constitution fails for other reasons, such as the inability to agree on a sole arbitrator or the chairperson, art. 179(2) offers assistance from the state courts. Furthermore, prevailing legal opinion suggests that the expression ‘in the absence of such an agreement’ as used in art. 179(2) should be broadly interpreted so that the state court can also be invoked, for example, when the private

appointing authority chosen by the parties refuses to make a decision on the appointment of arbitrators, or where the appointing authority no longer exists (Basel Commentary-Peter/Legler, n 20/21 ad art. 179; Berger/Kellerhals, *Schiedsgerichtsbarkeit*, n 754; for the Intercantonal Concordat, see ATF 110 Ia 59 reason 3b). Art. 179(3) provides for the parties' possibility of choosing a Swiss court as appointing authority.

**2. Party autonomy.** Art. 179(1) establishes the priority of the parties' agreement. The parties can agree on the constitution of the arbitral tribunal either individually or by reference to a set of arbitration rules that normally contain detailed provisions on the tribunal's constitution. If a group of claimants or respondents in multi-party arbitration proceedings cannot agree on the nomination of 'their' arbitrator, some arbitration rules provide for the institution appointing all the arbitrators (see, e.g., art. 8(4) and (5) Swiss Rules, art. 10(2) ICC Rules). If the arbitration rules are silent on this point, it is unclear whether the principle of equal treatment of the parties would require that all arbitrators be appointed by the competent authority (see Berger/Kellerhals, *Schiedsgerichtsbarkeit*, n 773; Basel Commentary-Peter/Legler, n 13 ad art. 179; Kaufmann-Kohler/Rigozzi, *LDIP*, n 330 et seq.). The Federal Supreme Court has, in the past, implicitly denied such a requirement (see ATF, 16 May 1983).

**3. State court assistance.** For cases where state court assistance is provided (see note 1), art. 179(2) requires the cantonal procedural rules to apply by analogy to the procedure. The Cantons are free to set up their own rules or to declare applicable arts. 12, 22, 23 and 45 of the Intercantonal Concordat (see Introductory Remarks, note 2). When the Federal Code of Civil Procedure (FCCP) enters into force in 2011, the court has to apply, by analogy, the provisions of the FCCP. In referring to an application 'by analogy', art. 179(2) indicates that the particular nature of international arbitration must be observed when applying the cantonal rules or the FCCP. In international arbitration, the competent court is under an obligation to act (Berti-Peter/Legler, n 34 ad art. 179), unless a summary assessment (i.e. prima facie examination) of the case reveals that there is no arbitration agreement between the parties (Obergericht Zürich, 19 November 2004, reason 5). However, the competent court must conduct a full examination of whether the requirements for state court assistance have been met or whether the parties have validly agreed on another mechanism for the constitution of the arbitral tribunal (Obergericht Zürich, 19 November 2004, reason 5). In cases where the defaulting respondent appoints an arbitrator after the claimant has filed a request for state court assistance, Swiss courts will usually give preference to the respondent's choice, but order the respondent to bear the costs for the state proceedings (e.g. Tribunal de première instance Genève, 21 March 2007; Kantonsgericht Wallis, 27 April 2006, reason 2c and 3b; see for an overview Ehle, *Belated Nomination* at 392 et seq.).

**4. Competent court.** Art. 179(2) vests the authority to appoint the arbitrators in the court at the seat of the arbitration. Because of Switzerland's federal structure, each Canton determines which of its courts has jurisdiction if the seat is located in this Canton. For example, the Obergericht is competent in the Canton of Zurich (§ 239(2) Zurich Code of Civil Procedure) and the Tribunal de première instance in the Canton of Geneva (art. 461B(1)(a) Geneva Code of Civil Procedure). Problems may arise if the seat has not been clearly determined. If the parties have used a clause such as 'arbitration in Switzerland', art. 179 applies, but the identity of the competent court within Switzerland is not clear and the consequences are uncertain. Some courts, tribunals and legal commentators take the view that arbitration proceedings in Switzerland must be ruled out in such cases (e.g. Tribunal de première instance Genève, 18 June 2008, with critical comment by Hirsch at 168-169; ZCC Award, 7 August 2006, paras. 73-75; Basel Commentary-Ehrt/Pfiffner, n 29-32 ad art. 176). In order to uphold the arbitration agreement, three possible solutions should be favoured: art. 2(2) of the Intercantonal Concordat (as of 2011: art. 355(2) FCCP) applies by analogy, with the result that a Swiss court could only constitute the arbitral tribunal if it had jurisdiction in the absence of the arbitration agreement (Lalive/Poudret/Reymond, *L'Arbitrage*, n 9 ad art. 179); or the competent court of the Canton with which the dispute has sufficient connections can constitute the arbitral tribunal (Kaufmann-Kohler/Rigozzi, *LDIP*, n 311); or any competent cantonal court that is so requested can constitute the arbitral tribunal (at least if the respondent refused an invitation by the claimant to specify the Canton in which the seat should be located), thus construing art. 179(3) as vesting this authority in the competent court of any Swiss Canton (e.g. Berger/Kellerhals, *Schiedsgerichtsbarkeit*, n 704; Berti-Peter/Legler, n 3 ad art. 179; Besson, *Arbitration in Switzerland* at 774-775).

**5. State court as appointing authority.** If the parties agreed that a Swiss court should appoint the arbitrators, art. 179(3) obliges the court to do so. The court's power to examine whether an arbitration agreement exists between the parties is restricted (see note 3; ATF 118 Ia 20 reason 2a). The court should not examine the scope of the arbitration agreement (Basel Commentary-Peter/Legler, n 41 ad art. 179; however, ATF 118 Ia 20 reason 5b upheld a lower court's refusal to appoint an arbitrator where there was no doubt that the arbitration agreement did not cover the alleged claims).

**6. Remedies to set aside decisions of the appointing authority.** A direct challenge is admissible against court decisions based on art. 179(3) refusing an appointment (see ATF 118 Ia 20 reason 2): until 2011, there are first the cantonal rights of appeal, if any (for instance, no appeal is possible in the canton of Geneva, see ATF 4A\_215/2008). As of 2011, there will be no appeal before another cantonal court (see art. 356(2) FCCP). In the last instance, the parties can bring an appeal in civil matters before the Federal Supreme Court (ATF 4A\_215/2008 reason 1.1). This also applies to the case of art. 179(2) (see ATF 121 I 81 reason 1; Berti-Peter/Legler, n 33 ad

art. 179). On the other hand, court decisions appointing arbitrators are not subject to appeal to the Federal Supreme Court and can only be re-examined on a motion to set aside a subsequent interim award on jurisdiction or to set aside the final award (see ATF 115 II 294 reason 3). The decision of an appointing institutional body cannot directly be challenged (see ATF, 16 May 1983) and can only become the subject of a challenge in setting aside proceedings directed against a subsequent interim award on jurisdiction or against the final award (art. 190(3) and (2)(a); see art. 190, note 4).

**7. Repetition of the proceedings in case of a replacement.** If an arbitrator is replaced, the PILA does not address the issue of whether procedural steps in which the replaced arbitrator participated remain valid or need to be repeated. In the absence of a specific agreement by the parties or of a provision in institutional rules with respect to this question (see art. 14 Swiss Rules and art. 12(4) ICC Rules), the appropriate solution seems to be to leave the decision to the newly composed arbitral tribunal after it has heard the parties (Berti-Peter/Legler, n 32 ad art. 179; Berti-Wirth, n 19 ad art. 189; Kaufmann-Kohler/Rigozzi, *LDIP*, n 412). In any event, the right to be heard requires that the procedural steps for establishing the facts be repeated if the documentation relating to these steps is inadequate, since the new arbitrator would otherwise have no opportunity to hear and examine the parties' case (Basel Commentary-Wirth, n 24 ad art. 189).

**8. The arbitral contract.** Under Swiss law, the legal relationship between the arbitrators and the parties is deemed to be contractual in nature. Arbitrators and parties are bound by an arbitral contract, the so-called *receptum arbitri*, a *sui generis* contract, with elements of a mandate agreement as per art. 394 et seq. of the Swiss Code of Obligations. However, this is not a pure type of mandate and cannot, for example, be terminated by simple notice at any time. The arbitral contract is normally terminated with the rendering of the arbitral award, unless other specific grounds apply, for instance, a successful challenge of the arbitrator. In the absence of a choice of law, the arbitral contract should be governed by the law of the seat of the arbitral tribunal, as this establishes the closest connection and provides a uniform framework for all arbitrators.

**9. Resignation of an arbitrator.** The arbitral contract governs the conditions under which an arbitrator can voluntarily resign. Under Swiss law, an arbitrator can only resign for important reasons (see ATF 117 Ia 166 reason 6c). After an arbitrator has resigned, the remaining arbitrators cannot continue the proceedings until a new arbitrator has been appointed, unless the parties explicitly empower them to do so. For the question of repetition of the proceedings, see note 7. If one arbitrator refuses to participate in the deliberations or refuses to vote without sufficient justification and without having formally resigned, the other arbitrators can continue the deliberations and render an award, provided that the refusing arbitrator has the opportunity to participate at all times (see ATF 128 III 234 reason 3b).

[Arbital tribunal: challenge to an arbitrator]

**Article 180**

**(1) An arbitrator may be challenged:**

- (a) if he does not meet the qualifications agreed upon by the parties;**
- (b) if there exists a ground for challenge provided by the rules of arbitration agreed upon by the parties;**
- (c) if circumstances exist that give rise to justifiable doubts as to his independence.**

**(2) A party may challenge an arbitrator whom it has appointed, or in whose appointment it participated, only on grounds which come to that party's attention after the appointment. The ground for challenge must be communicated without delay to the arbitral tribunal and the other party.**

**(3) To the extent that the parties have not made provisions for the challenge procedure, the court at the seat of the arbitral tribunal shall make the final decision.**

**1. Scope of application and system of the provision.** Art. 180(1) comprehensively lists the grounds for challenge. It applies to challenges against all arbitrators (sole arbitrator, chairperson and co-arbitrators), irrespective of whether the appointment was made by the parties, by party-appointed arbitrators, by an arbitration institution or by a court. In formulating the grounds for a challenge, the provision gives priority to party autonomy. It is primarily the responsibility of the parties to establish the grounds for challenge (art. 180(1) (a) and (b)) and the challenge procedure (art. 180(3)) by agreeing individually on these issues, e.g., in the arbitration agreement, by reference to the rules of an arbitration institution or otherwise (e.g. by reference to a national law such as the Intercantonal Concordat or the third part of the FCCP). The only exception to the broad freedom granted to the parties is contained in art. 180(1)(c), namely the requirement of independence of an arbitrator, which the parties cannot waive.

**2. Independence.** Art. 30(1) of the Swiss Federal Constitution expressly guarantees that all legal disputes will be adjudicated by an independent and impartial court. Both objective independence and subjective impartiality are required, as both concepts are intrinsically linked. The standards that were developed under art. 30(1) Federal Constitution and under art. 6(1) of the European Convention on Human Rights also apply under art. 180(1)(c) (see ATF 4P.208/2004 reason 4.1). However, one must take into account the characteristics of international arbitration (see ATF 4P.4/2007 reason 3.1), for example the fact that contact between arbitrators and counsel is frequent in international arbitration due to the economic and professional background and the private nature of arbitration (see ATF 129 III 445 reason 4.2.2.2). The

wording in art. 180(1)(c), ‘if circumstances exist that give rise to justifiable doubts as to [the arbitrator’s] independence’, requires that each case must be considered individually and that an examination must address the question of whether concrete facts objectively justify an assumption of a lack of independence (see ATF 129 III 445 reason 4.2.2.2; ATF 118 II 359 reason 3c). Circumstances must exist that objectively corroborate mistrust. The parties’ subjective perception is not relevant; the perception of a reasonable observer is decisive. However, since the standard is based on objective circumstances creating mistrust, it is not necessary for the arbitrator to actually be biased, only to be objectively and possibly perceived as such (see ATF 4P.4/2007 reason 3.1; ATF 117 Ia 182 reason 3b). The arbitrator must remain independent throughout the arbitration proceedings. The requirement of independence also applies to experts appointed by the tribunal (see ATF 126 III 249 reason 3c). The Federal Supreme Court has once held that stricter standards apply to the chairperson and the sole arbitrator than to co-arbitrators (see ATF, 30 June 1994, reason 4; left open in ATF 4P.188/2001 reason 2b; see Basel Commentary-Peter/Besson, n 14 ad art. 180; Kaufmann-Kohler/Rigozzi, *LDIP*, n 362/3). Nowadays, in international arbitrations, such a differentiation is considered irrelevant.

**3. Independence: significant factors constituting lack of independence.** The following significant factors, drawn from legal commentaries and case law, illustrate some cases in which an arbitrator is not considered to be independent or impartial: a relationship of subordination with a party (e.g. executive position with one of the parties, an official in a government/administration which is a party, a member of the law firm representing a party); a significant economic affiliation (e.g. a member of the board of a company being in the same group as one of the parties. Mandates for a party in the past are only deemed to constitute a substantial economic affiliation if economic ties are ongoing, because of, e.g., the promise or concrete prospect of additional remuneration or subsequent mandates, see ATF 4P.188/2001 reason 2d); ongoing professional connections (e.g. if an arbitrator or one of his partners in a law firm is a regular advisor to a party); the representation of one party’s counterparty in another matter that is still ongoing or that ended recently (ATF 135 I 14 reason 4.3); strong positive or negative emotional ties between the arbitrator and one party or its counsel (see ATF 1P.99/2000 reason 3); publication of remarks on a prior award by a subsequently designated arbitrator if the remarks show that he has already formed an opinion on the concrete case and is unlikely to change his mind (see ATF 133 I 89 reason 3.3). The IBA Guidelines on Conflicts of Interest in International Arbitration may provide further guidance as they reflect an internationally recognised practice (see ATF 4A\_506/2007 reason 3.3.2.2).

**4. Independence: insufficient circumstances.** According to the Federal Supreme Court, the following circumstances are not sufficient to raise justifiable doubts regarding the arbitrator’s independence or impartiality:

where an arbitrator and a counsel have been or are simultaneously working together as arbitrators in another arbitration (see ATF 4P.105/2006 reason 4; ATF 129 III 445 reason 4.2.2.2); where an arbitrator and a counsel are simultaneously and jointly representing a third party in criminal proceedings completely unrelated to the arbitration (ATF 4A\_586/2008 reason 3.2); where an arbitrator and a counsel are members of the same professional or social association (see ATF 4A\_506/2007 reason 3.3.2.2); where the arbitrator gives both parties his preliminary view on the case (see ATF 4P.196/2003 reason 3.2.1); where the arbitrator makes legal mistakes, as long as these are not flagrant or repeated (see ATF 4P.129/2002 reason 5.2); where a party has the arbitrator shadowed (see ATF 4P.208/2004 reason 4); or where a party challenges the scale of the arbitrator's fees with the consequence that they are then significantly reduced (see ATF 4P.263/2002 reason 5). The Federal Supreme Court has, furthermore, held that the Court of Arbitration for Sport is independent even in cases where the International Olympic Committee is a party (see ATF 129 III 445 reason 3.3). In a case where the arbitral tribunal stigmatised, in a partial award, the behaviour of one of the parties in a personalised and metaphoric way, the Federal Supreme Court rejected doubts made regarding the tribunal's impartiality. It held that despite the inappropriate language in the partial award, the conduct of the arbitral proceedings showed that the arbitrators would continue the proceedings properly and with care (see ATF 4P.4/2007 reason 3.3).

**5. Duty to disclose.** The arbitral contract with the parties (see art. 179, note 8) imposes on arbitrators the duty to disclose to the arbitral tribunal and the parties, without delay, any circumstances that could justify a challenge (see ATF 111 Ia 72 reason 2c). However, non-disclosure in and of itself does not provide grounds for a challenge; the undisclosed facts themselves must justify the challenge (see ATF 4P.188/2001 reason 2f). If the arbitrator has disclosed circumstances that could justify a challenge and the concerned party does not challenge the arbitrator within reasonable time, it waives this right as it is precluded from challenging the arbitrator at a later stage (see note 8).

**6. Arbitrator appointed by a party.** Art. 180(2) deals with situations where a party challenges an arbitrator whom it has appointed or in whose appointment it has participated. Because of the principle of 'venire contra factum proprium', the party may base its challenge only on grounds which it became aware of after the appointment. The party has the duty to inform the arbitral tribunal and the other party of the ground for challenge without delay (see note 8).

**7. Challenge procedure.** According to art. 180(3), the challenge procedure is to be derived directly or indirectly from the parties' agreement, depending on whether they have reached an individual agreement or chosen to submit the arbitral proceedings to institutional arbitration rules. The state court at the seat of the arbitration only has jurisdiction to decide on the challenge if and

insofar as the parties have not agreed on the procedure. The competent courts are the Obergericht in the Canton of Zurich (§ 239(2) Zurich Code of Civil Procedure) and the Tribunal de première instance in the Canton of Geneva (art. 461B(1)(b) Geneva Code of Civil Procedure). The state court must apply the rules and grounds for challenge provided for by art. 180 (Basel Commentary-Peter/Besson, n 32 ad art. 180). If the tribunal as a whole is challenged and the challenge is clearly inadmissible or unfounded, the arbitral tribunal itself is competent to reject the challenge (see ATF 129 III 445 reason 4.2.2). A challenge procedure does not per se hinder the continuation of the arbitration proceedings (see ATF 128 III 234 reason 3b/bb).

**8. Duty to challenge.** A party must challenge the arbitrator as soon as it becomes aware of grounds for challenge, otherwise it is precluded from invoking such grounds at a later stage of the proceedings or in a motion to set aside the award under art. 190(2)(a). There is some debate as to whether information that is easily available (e.g. on the internet) should be considered as having been available to the parties. The Federal Supreme Court held that a party must verify the arbitrators' independence when the arbitral tribunal is constituted and that a party is precluded from basing its claim on information that was easily available at that time (see ATF 4A\_506/2007 reason 3.2; see also the obiter dicta in ATF 4P.105/2006 reason 4, ATF 4P.188/2001 reason 2c). This is true even if the arbitrator has violated his duty to disclose this information. The more advanced the arbitral proceedings, the stricter the requirements that must be applied to a party's duty to challenge the arbitrator; a challenge may have to be made on grounds of which the party has not yet gained full and certain knowledge (see ATF 126 III 249 reason 3c with further references).

**9. Appeal against a challenge decision.** Decisions by an arbitration institution on the challenge to an arbitrator cannot be appealed directly and can only be challenged indirectly by a motion to set aside the arbitral award under art. 190(2)(a) (see ATF 128 III 330 reason 2.2; ATF 118 II 359 reason 3b). If a state court decides on the challenge, art. 180(3) explicitly provides that the decision is final. This not only excludes any direct appeal but also any appeal against the arbitral award on these grounds (see ATF 128 III 330 reason 2.2; this decision is criticised, e.g., by Poudret, *Tribunal fédéral*, at 698 with further references).

## [Lis pendens]

### Article 181

**The arbitral proceedings are pending as soon as one of the parties submits a claim to the arbitrator or arbitrators designated in the arbitration agreement, or, in the absence of any such designation in the arbitration agreement, as soon as one of the parties initiates the procedure for the constitution of the arbitral tribunal.**

**1. Purpose of the provision.** Art. 181 determines the point in time at which the arbitration proceedings become pending. The main procedural effect of pendency is to render other proceedings in the same matter inadmissible, depending on the procedural law applied by the court or arbitral tribunal seized of the matter (for Switzerland, see note 4). Other possible procedural effects of the pendency, depending on the rules applicable under arts. 182 and 183, include restrictions on amending the claim and on adding or substituting parties, an obligation to continue the proceedings or a transfer to the arbitral tribunal of the authority to issue interim measures. With respect to the substance of the dispute, possible effects of the pendency of the proceedings are the interruption of the running of the statute of limitations and the compliance with any time limits for bringing actions, depending on the law applicable under art. 187 (see note 5).

**2. Time of *lis pendens*.** In the rare event that the parties have already designated the arbitrator(s) in their arbitration agreement, the proceedings are deemed pending as soon as the claimant files its request with all of the designated arbitrators. If the parties have agreed on institutional arbitration without designating the arbitrator(s), *lis pendens* occurs once the claimant takes the first step that is necessary under the chosen arbitration rules for the constitution of the arbitral tribunal (art. 179(1)). If the parties have agreed on ad hoc arbitration without designating the arbitrator(s), the proceedings are deemed pending as soon as one party requests the constitution of the arbitral tribunal in accordance with the parties' agreement (for example by sending the other party a request for arbitration, including the appointment of its arbitrator or a proposal for a sole arbitrator, see ATF 4P.129/2002 reason 3.3) or, in the absence of such an agreement, as soon as one party requests the court to constitute an arbitral tribunal under art. 179(2).

**3. Contents of the request for arbitration.** Art. 181 does not stipulate what requirements the request for arbitration must meet in order to cause *lis pendens*. This issue is primarily governed by the parties' agreement or by the arbitration rules they chose. In the absence of any such agreement or rules, a request that identifies the subject of the party's claims is considered sufficient to trigger *lis pendens* (Lalive/Poudret/Reymond, *L'Arbitrage*, n 2 and 3 ad art. 181; see also Basel Commentary-Vogt, n 9 ad art. 181). With regard to the requirements an application must meet in order to be effective under the applicable substantive law, see note 5.

**4. Procedural effects of pendency in Switzerland.** Art. 181 does not address the effects of pendency before an arbitral tribunal with its seat in Switzerland on subsequent proceedings before a state court or another arbitral tribunal. According to an obiter dictum of the Federal Supreme Court, and according to the majority of legal commentators, the rules applicable to pendency before state courts must be applied by analogy (see ATF 121 III 495 reason 6c; Basel Commentary-Wenger/Schott, n 16 ad art. 186; Berger/Kellerhals, *Schiedsgerichtsbarkeit*, n 638, 948/949, 952/953). A Swiss state

court thus has to stay the proceedings until the arbitral tribunal first seized of the dispute has decided on its jurisdiction, and it must renounce its jurisdiction if the arbitral tribunal ultimately asserts jurisdiction (see Basel Commentary-Berti, n 9-10 ad art. 7; Berger/Kellerhals, *Schiedsgerichtsbarkeit*, n 638, 949, 952). Until recently, this also applied to arbitral tribunals with their seat in Switzerland. However, with the entry into force of art. 186(1bis) on 1 March 2007, arbitral tribunals with their seat in Switzerland may continue proceedings even if the same dispute is pending before another arbitral tribunal (see art. 186, note 5). Although pendency before an arbitral tribunal with its seat in Switzerland might not preclude subsequent proceedings before a foreign state court, recognition and enforcement of the foreign state court's decision in Switzerland may be refused (see Liatowitsch/Bernet in *Zivilprozess*, at 161-162). For the converse situation, i.e. the effects of pendency before a state court for arbitral tribunals with their seat in Switzerland, see art. 186, note 5.

**5. Substantive effects of pendency under Swiss law.** As art. 181 does not contain a conflict of laws rule, the substantive law applicable under art. 187 determines whether bringing a claim before an arbitral tribunal with its seat in Switzerland interrupts the running of the statute of limitations, or is in compliance with a given deadline. Under Swiss substantive law, the standard referred to in note 3 would, in most instances, not be sufficient to interrupt the running of the statute of limitations, since the application for commencing arbitration proceedings would have to incorporate a specific statement of claim noting the amounts claimed (see Basel Commentary-Vogt, n 18 ad art. 181). If a claim is brought before an arbitral tribunal that lacks jurisdiction and if the period of limitation has in the meantime expired, the claimant can still file the claim with the competent court or arbitral tribunal within sixty days of the arbitral tribunal declining jurisdiction (art. 139 Swiss Code of Obligations). Where arbitration proceedings serve a validation purpose, such as validating a freezing order rendered under the Swiss Debt Enforcement and Bankruptcy Law, specific requirements and deadlines must be observed.

## [Procedure: principle]

### Article 182

**(1) The parties may, directly or by reference to existing rules of arbitration, determine the arbitral procedure; they may also submit the arbitral procedure to a procedural law of their choice.**

**(2) If the parties have not determined the procedure, it shall, to the extent necessary, be determined by the arbitral tribunal, either directly or by reference to a statute or to existing rules of arbitration.**

**(3) Regardless of the procedure chosen, the arbitral tribunal shall ensure equal treatment of the parties and their right to be heard in adversarial proceedings.**

**1. Scope of application.** Art. 182 addresses procedural rules, which must be clearly distinguished from the general provisions of the law governing the arbitration (*lex arbitri*). If a procedural issue arises before an arbitral tribunal seated in Switzerland, art. 182 applies as part of the *lex arbitri* and determines the procedural rule to be applied. ‘Arbitral procedure’ under art. 182 encompasses all procedural aspects, such as exchanges of memoranda, time limits, communication between the arbitral tribunal and the parties, the language of the proceedings, the costs and advances on costs (see also note 2 and art. 189, note 8), the involvement of third parties (subject to jurisdiction), interim measures (see art. 183), the taking of evidence (see also art. 184), the production of documents, the confidentiality of the proceedings, the staying of the proceedings (see ATF 133 III 139 reason 6), the admissibility of counterclaims and set-offs (art. 186, note 3) and other issues.

**2. Priority of party autonomy.** Art. 182(1) stipulates the priority of party autonomy. The parties may stipulate how the arbitration shall be conducted according to their needs and wishes. They can either agree on individual rules tailored to their specific case, on institutional arbitration rules, on independent arbitration rules (e.g. UNCITRAL Arbitration Rules) or on national procedural law. There is, however, some controversy regarding whether the chosen national procedural law only applies to procedural questions in a strict sense, excluding, for example, the question of costs (see ATF 4P.280/2005 reason 2.2.1). Neither art. 182(1) nor the New York Convention prescribe a particular form for a procedural agreement, which can become effective tacitly or implicitly. While it may be difficult to establish with certainty an implicit agreement, the tribunal should, in any case, consider in its own ruling any indications of the parties’ tacit understanding (Basel Commentary-Schneider, n 5 ad art. 182). Usually, the agreement on the procedure reflects the parties’ intent that it should also bind the arbitral tribunal. If the chosen institutional rules change before the arbitration starts and if the old version does not cover the effects of such a change, the new version of the rules will only become applicable if tacitly or implicitly agreed upon by the parties. Thus, the parties’ intent has to be established. In this respect it can be assumed that parties that agree to arbitration under the rules of an association they both belong to (such as FIFA), agree to be bound by the rules in force at the time the arbitration starts, including possible amendments (see ATF 4P.253/2003 reason 5.4). The violation of procedural rules agreed upon by the parties does not per se constitute a reason to set aside the award (see art. 190, note 14), but can be pleaded as a defence in recognition and enforcement proceedings pursuant to art. V(1)(d) New York Convention.

**3. Discretion of the arbitral tribunal.** The arbitral tribunal’s authority to determine the procedure is subsidiary to the parties’ agreement. According to art. 182(2), the arbitral tribunal can either establish its own rules, or apply a set of arbitration rules or of procedural law, or a combination thereof. With regard to the calculation of time limits, the arbitral tribunal can refer

to the European Convention on the Calculation of Time-Limits of 16 May 1972, which has been ratified by Switzerland and which, according to its art. 1(1)(b), applies to the calculation of time limits ‘by an arbitral body, where such body has not determined the method of calculating the time-limit’. The arbitral tribunal is not under any obligation to follow any national procedural laws. It can set the procedural rules either in advance or once an individual matter arises. Although formal deliberations are not necessary, decisions on procedural issues, with the exception of those which concern solely the practical course of the proceedings and do not have any impact on the rights of the parties, must be taken with the participation of all the members of the tribunal (Basel Commentary-Schneider, n 43 ad art. 182). The arbitral tribunal’s discretion is limited in two main respects: first, the arbitral tribunal must guarantee the equal treatment of the parties, and second, it must respect the parties’ right to be heard in an adversarial procedure (art. 182(3); see note 5 et seq.). Furthermore, the arbitral tribunal must respect the requirements set out by the New York Convention, which limit, for example, the arbitral tribunal’s discretion to accept counterclaims that do not fall under the arbitration agreement (see art. 186, note 3).

**4. Procedural orders by the arbitral tribunal.** If the arbitral tribunal decides on a procedural question, it often issues a procedural order. To the extent that such a decision does not concern questions of jurisdiction, art. 188 et seq. do not apply in principle (but see art. 189, note 1) and there is no direct appeal against the decision. The arbitral tribunal can reverse procedural orders, as they do not constitute *res judicata* (Basel Commentary-Schneider, n 41 et seq. ad art. 182).

**5. Procedural public policy.** Art. 182(3) is mandatory in nature and forms a central part of procedural public policy in Switzerland. It lays down the principles of equal treatment of the parties and the right to be heard in adversarial proceedings. The arbitral tribunal must guarantee these principles at all times. In cases of violation, the arbitral award can be set aside under art. 190(2)(d), provided that the aggrieved party raised a sufficiently specific objection during the arbitration proceedings (see, e.g., ATF 4P.129/2002 reason 7.1 with further references). In addition, recognition and enforcement of the award abroad can be refused pursuant to art. V(1)(b) and (2)(b) New York Convention.

**6. Equal treatment of the parties.** The arbitral tribunal must determine and conduct the proceedings in a way which grants the parties the same opportunity to present their case (see, e.g., ATF 4P.117/2004 reason 2.1). It must treat the parties equally in procedural situations which are comparable (see ATF 4P.207/2002 reason 3), for example regarding time limits or the examination of witnesses. The question of whether the factual situations are similar or dissimilar requires careful examination (see ATF 4P.207/2002 reason 3 regarding the parties’ requests to produce documents). The arbitral tribunal must not grant to one party something that it has refused the other and vice

versa (Berti-Schneider, n 65 ad art. 182). A party may not argue a violation of equal treatment when, in reality, it is merely criticising the weighing of evidence by the arbitral tribunal (see ATF 4P.140/2004 reason 2.1). It does not violate the equal treatment of the parties if the arbitral tribunal accepts a belated submission by one party if this does not violate the terms of reference and if the arbitral tribunal did not reject a belated submission by the other party (see ATF 4A\_244/2007 reason 6.3; ATF 134 III 186 unpublished reason 7.1). The situation might be different if the submissions had to be filed simultaneously and the late filing allowed one party to review the other party's submission.

**7. Right to be heard.** The right to be heard broadly corresponds with the right guaranteed by art. 29(2) of the Swiss Federal Constitution. It is not congruent with the procedural guarantees under art. 6(1) ECHR, which is not directly applicable in voluntary arbitrations (see ATF 4P.105/2006 reason 7.3). The right to be heard under art. 182(3) encompasses the parties' right to examine the files that will constitute the basis of the arbitral award, to present legal arguments, to express their opinion on any facts that are essential for the decision, to participate in the hearings personally or via a representative, to offer relevant evidence and to comment on the results of the taking of evidence (see ATF 4P.235/2001 reason 3e; ATF 127 III 576 reason 2c). The right to be heard also encompasses the arbitral tribunal's obligation to examine and to address the relevant problems: The right to be heard is violated if the arbitral tribunal does not take into consideration a party's arguments that are relevant for the outcome of the decision, i.e. if the award is completely silent on these arguments and does not even implicitly address them (see ATF 133 III 235 reason 5.2). However, the right to be heard does not impose on the arbitral tribunal the duty to discuss all arguments invoked by the parties. For example, the arbitral tribunal may implicitly reject arguments that are objectively irrelevant (see ATF 133 III 235 reason 5.2). If a mistake by the arbitral tribunal (for example overlooking or misunderstanding part of the file) leads to a wrong decision, the right to be heard is violated if the mistake makes it impossible for a party to present and prove its case regarding this specific issue and if the party is thus in the same position as it would have been in if it had not been heard at all (see ATF 127 III 576 reason 2d-f). For the right to be heard related to the taking of evidence, see art. 184, note 4.

**8. Right to be heard: counter-examples.** The right to be heard does not include a party's right to make an oral statement (see ATF 4A\_160/2007 reason 4.1; ATF 117 II 346 reason 1b/aa, but see Basel Commentary-Schneider, n 90 ad art. 182), to a decision which contains the reasons for the decision (see ATF 128 III 234 reason 4b; under the Federal Supreme Court Act (FSCA) ATF 134 III 186 reason 6.1; see art. 189, note 6), or to a substantively correct decision (see ATF 127 III 576 reason 2d). The right to be heard does not oblige the arbitral tribunal to explicitly deal in its award with a party's differing view (see ATF 4P.140/2004 reason 2.2.4) or to address facts and arguments that

the parties did not previously duly submit (see ATF 4P.26/2005 reason 3.3). The arbitral tribunal does not have to consult the parties regarding its legal evaluation of the facts unless the evaluation is surprising in the sense that the parties did not invoke the legal grounds on which the arbitral tribunal based its decision, and cannot reasonably have been expected to foresee them (see ATF 4A\_400/2008 reason 3; ATF 130 III 35 reason 5 – both decisions set aside the award). The Federal Supreme Court exercises restraint in examining whether a legal evaluation was surprising (see, e.g., ATF 4P.134/2006 reason 6 with further references). The arbitral tribunal neither has to draw the parties' attention to the facts that it considers decisive for its decision, nor has to inform a party that it considers the evidence produced by this party insufficient for proving a relevant fact (see ATF 4A\_450/2007 reason 4.2.2). The right to be heard does not preclude default proceedings, provided that the defaulting party had an opportunity to present its case, was duly notified of the consequences of the default and did not present a valid excuse for its default (see Berger/Kellerhals, *Schiedsgerichtsbarkeit*, n 1067; Kaufmann-Kohler/Rigozzi, *LDIP*, n 483/4). The right to be heard is, in principle, not affected by a decision to stay or not to stay the proceedings (see ATF 133 III 139 reason 6.1). In summary, the right to be heard is not violated if it has been established that the procedural conditions allowed the parties to present their arguments and that the arbitral tribunal took note of them (see ATF 4P.318/2001 reason 2.1).

**9. Adversarial proceedings.** Key requirements for adversary proceedings are that every party must have the right to comment on its opponent's submissions, to examine and evaluate the opponent's evidence and to offer evidence in rebuttal (see ATF 130 III 35 reason 5). This right is not unlimited and does not include the right to rebut ad infinitum the other party's arguments (see ATF 4P.104/2004 reason 5.3.1). The arbitral tribunal may request the parties to file post-hearing briefs simultaneously if the briefs are only meant to include the parties' evaluation of the results of the hearing and legal aspects of the case discussed during the proceedings without new allegations or evidence (see ATF 4P.104/2004 reason 5.3.1). According to legal commentators, the principle of adversarial proceedings not only includes a right, but also leads to the parties' obligation, to substantiate their counter-submissions and contestations of factual assertions (Berti-Schneider, n 61 ad art. 182).

## [Procedure: provisional and protective measures]

### Article 183

**(1) Unless the parties have agreed otherwise, the arbitral tribunal may, at the request of one party, order provisional or protective measures.**

**(2) If the party concerned does not voluntarily comply with these measures, the arbitral tribunal may request the assistance of the state court; the court shall apply its own law.**

**(3) The arbitral tribunal or the state court may make the granting of provisional or protective measures conditional upon the provision of appropriate security.**

**1. Authority of the arbitral tribunal.** The *lex arbitri* decides whether the arbitral tribunal is competent to issue provisional and protective measures. Art. 183 vests arbitral tribunals to which chapter 12 PILA applies (see art. 176, note 1 et seq.) with the authority to grant such measures, provided that the parties have not previously agreed on procedural rules which would exclude such authority. The arbitral tribunal's competence is not exclusive (see note 2). As art. 183 does not give the arbitral tribunal the power to enforce its orders, it provides for collaboration with the Swiss courts.

**2. Authority of the state courts.** Before the arbitral tribunal is constituted, the state courts have exclusive authority to order interim relief. Once the arbitral tribunal has been constituted, and unless there is an agreement by the parties to the contrary, the majority view in Switzerland is that both the arbitral tribunal and the state courts are competent to issue provisional and protective measures (Berti-Berti, n 5 ad art. 183). A request for interim relief submitted to a state court does not jeopardise the jurisdiction of the arbitral tribunal. Unlike an arbitral tribunal's order, the order of a state court can be directly enforced and may therefore be more effective, especially if enforcement abroad is necessary (see note 7). Although orders for provisional and protective measures do not have the effect of *lis pendens* or *res judicata*, arbitral tribunals and state courts will not order the requested interim relief for reasons of efficiency and procedural economy if the same request is already pending before another court or tribunal or if the other court or tribunal has already granted or denied the interim relief, unless a change in circumstances and/or facts justifies doing so (see Berger/Kellerhals, *Schiedsgerichtsbarkeit*, n 1170; Kaufmann-Kohler/Rigozzi, *LDIP*, n 571 et seq.).

**3. Requirements for an order of provisional and protective measures.** Art. 183 does not contain any requirements for interim relief. Such requirements are subject to art. 182, which leaves the parties free to agree on them. In the absence of any such agreement, the arbitral tribunal may exercise broad discretion in determining these requirements (art. 182(2)). According to international best practice, the following requirements must usually be met (see, e.g., Kaufmann-Kohler/Rigozzi, *LDIP*, n 582 et seq.): prima facie jurisdiction of the arbitral tribunal; plausible proof that without the interim relief, substantial harm may be caused which cannot be adequately compensated by damages; plausible proof that such possible harm would substantially outweigh the harm the interim measure may cause the other party against whom the order is directed; a reasonable possibility that the requesting party will succeed on the merits; and provision of a security by the requesting party, if so ordered by the arbitral tribunal (see note 8). While many national laws require urgency for interim measures issued by state courts, urgency is,

in general, not required in international arbitration (see, e.g., art. 17A of the revised UNCITRAL Model Law on International Commercial Arbitration; but see note 4). For orders to preserve evidence, the above requirements may not be relevant. If a Swiss court is requested to grant interim relief, it applies its cantonal code of civil procedure (as of 2011: the Federal Code of Civil Procedure, FCCP). Cantonal procedural law normally requires the applicant to make a plausible case that it is in imminent danger of suffering harm that would be difficult to remedy, and that the main claim is well founded on a prima facie basis. This is in line with the requirements of art. 261(1) FCCP.

**4. Ex parte orders.** If urgency so demands, the arbitral tribunal may grant interim relief *ex parte*, i.e. upon request by one party and without hearing the other party. Because of art. 182(3), the arbitral tribunal must grant the other party the right to be heard immediately thereafter, and must lift or modify the order where necessary (Basel Commentary-Berti, n 12 ad art. 183; Berger/Kellerhals, *Schiedsgerichtsbarkeit*, n 1153; Kaufmann-Kohler/Rigozzi, *LDIP*, n 584).

**5. Subject matter of the order.** It is subject to controversy whether the determination of the substance of the interim relief by the arbitral tribunal is governed by art. 182, i.e. subject to the parties' agreement or to the rules set by the arbitral tribunal, whether the arbitral tribunal must apply the law applicable to the main claim (art. 187), or whether it can choose another law with the aim of enhancing the enforcement of the interim measure (see Kaufmann-Kohler/Rigozzi, *LDIP*, n 579; Poudret/Besson, *Comparative Law*, n 624). Possible orders may, for example, incorporate measures which address the parties' behaviour during the proceedings, such as anti-suit injunctions, orders to continue with a contractual performance, orders which prohibit the drawing of a bank guarantee, orders that prohibit behaviour likely to cause personal injury or orders for security for costs (see ICC case no. 12542/EC, 19 December 2003; Ad hoc Arbitration, 27 November 2002). Orders may also have the purpose of securing the enforcement of an award, such as freezing orders, orders to deposit goods that are in the parties' custody or to provide a bank guarantee. As a rule, only state courts can issue orders directed against third parties, e.g., orders for the seizure of assets which are in the third party's custody and which are under dispute in the arbitral proceedings. The prevailing view in Switzerland is that the arbitral tribunal does not have the competence to combine its orders with constraints or punitive sanctions (see Berger/Kellerhals, *Schiedsgerichtsbarkeit*, n 1156; Berti-Berti, n 11 ad art. 183; Kaufmann-Kohler/Rigozzi, *LDIP*, n 587).

**6. Enforcement of interim measures in Switzerland.** Parties often comply voluntarily with orders for interim relief issued by arbitral tribunals. Where they do not comply, a Swiss court may enforce the order, provided that the arbitral tribunal so requests, and provided that a prima facie examination shows that a valid arbitration agreement exists and that the arbitral tribunal was validly constituted (Basel Commentary-Berti, n 18 ad art. 183; more

liberal apparently Kaufmann-Kohler/Rigozzi, *LDIP*, n 594). Whether the parties themselves may also request the enforcement by the state court, or whether the clear wording of art. 183(2) excludes this possibility is a matter of controversy (see Basel Commentary-Berti, n 16 ad art. 183; Berger/Kellerhals, *Schiedsgerichtsbarkeit*, n 1160). The Bezirksgericht in the Canton of Zurich is competent for ordering the enforcement of interim measures rendered by an arbitral tribunal (§ 239(1) Zurich Code of Civil Procedure), as are the ordinary courts in the Canton of Geneva (art. 461E Geneva Code of Civil Procedure), i.e. in most cases, the Tribunal de première instance (art. 27 Loi sur l'organisation judiciaire). The enforcement judge may not examine the substance of the order except in terms of its public policy aspects (Berti-Berti, n 18 ad art. 183). If the measure that the arbitral tribunal has ordered is foreign to the cantonal code of civil procedure (as of 2011: the Federal Code of Civil Procedure), the state court must transform it into an order of its own procedural law that reflects, as closely as possible, the purpose of the original order (Berger/Kellerhals, *Schiedsgerichtsbarkeit*, n 1164; Kaufmann-Kohler/Rigozzi, *LDIP*, n 594).

**7. Enforcement of interim measures abroad.** If the interim measure rendered by an arbitral tribunal must be enforced abroad, direct enforcement under the New York Convention is problematic. The revised art. 17 of the UNCITRAL Model Law and its adoption into the body of national laws may improve the chances of successful international enforcements. Alternatively, if enforcement of the order abroad is likely to be an issue, the party concerned should request the state court to order an interim measure and have it enforced abroad, for example under the Lugano Convention which provides for the possibility of enforcing interim measures, provided that they have not been ordered *ex parte* (art. 25 et seq. Lugano Convention; see Berger/Kellerhals, *Schiedsgerichtsbarkeit*, n 1188). Regarding orders issued by the state court under art. 183(2), the prevailing view is that such orders do not fall within the scope of the Lugano Convention (e.g. Poudret/Besson, *Comparative Law*, n 641; but see Kaufmann-Kohler/Rigozzi, *LDIP*, n 592 FN 261).

**8. Appropriate security.** The arbitral tribunal or the state court may require the applicant to provide security intended to facilitate the enforcement of a possible claim for damages if the interim measure later turns out to be unjustified. The amount of security ordered should be determined in light of the aforementioned purpose. If the interim measure turns out to be unjustified and if the other party has suffered damages, the arbitral tribunal is presumed to have jurisdiction to adjudicate the claim for damages (ICC case no. 12363/ACS, 23 December 2003).

**9. Setting aside proceedings.** Setting aside proceedings before the Swiss Federal Supreme Court against an interim measure ordered by an arbitral tribunal are inadmissible, regardless of whether the arbitral tribunal orders it in the form of a procedural order or of an award (Berger/Kellerhals, *Schiedsgerichtsbarkeit*, n 1539; Poudret, *Tribunal fédéral*, at 681; Kaufmann-Kohler/Rigozzi,

*LDIP*, n 721; for a different view see Berger/Kellerhals, *Schiedsgerichtsbarkeit*, n 1540 if the arbitral tribunal wrongly declines or accepts its competence to order interim measures). An appeal in civil matters to the Federal Supreme Court is admissible, in last instance, against the decision of a state court under art. 183(2) (Poudret, *Tribunal fédéral*, at 682). However, the Federal Supreme Court will only examine the violation of constitutional rights (art. 98 FSCA).

## [Procedure: taking of evidence]

### Article 184

**(1) The arbitral tribunal shall itself conduct the taking of evidence.**

**(2) If the assistance of state authorities is necessary for the taking of evidence, the arbitral tribunal, or a party with the consent of the arbitral tribunal, may request the assistance of the state court at the seat of the arbitral tribunal; the court shall apply its own law.**

#### **1. General principle and the subject matter of taking evidence.**

Based on art. 184(1), the arbitral tribunal has control over the evidentiary proceedings and has broad discretion within the framework constituted by the applicable procedural rules (see note 2 et seq.). The subject matter of evidentiary proceedings is essentially derived from the parties' submissions and requires their substantiated factual allegations and contestations (see ATF, 17 August 1994, reason 3c). The burden of proof is considered a question of substantive law and is thus subject to the law applicable under art. 187 if the parties have not agreed otherwise (Basel Commentary-Schneider, n 11 ad art. 184; Berger/Kellerhals, *Schiedsgerichtsbarkeit*, n 1203 with further references). In most cases, each party shall bear the burden of proof for the facts on which it is basing its case (*actori incumbit probatio*). The arbitral tribunal must take evidence itself and may not delegate this task to a third person or to individual members of the arbitral tribunal, unless the parties have so agreed.

**2. Applicable procedural rules.** The procedure of taking evidence is subject to art. 182 (see art. 182, note 2 et seq.). Procedural issues that fall under art. 182 include, for example, the admissibility of evidence, the production of documents, the required form and time limits for offers to introduce evidence, the appointment of experts and the question of written witness statements and oral examination of the witnesses. In international arbitrations, the parties frequently come from different legal systems and traditions regarding the taking of evidence (see, e.g., for the wide differences regarding the concepts of confidentiality and privilege with respect to document production, Heitzmann, *Confidentiality* at 207 et seq.). It is therefore important either that they agree on procedural rules for the evidentiary part of the proceedings or that the arbitral tribunal, after consultation with the parties, issue procedural directions. This can be achieved by reference to institutional rules or to the IBA Rules on the Taking of Evidence in International Commercial Arbitration.

As a rule, international arbitral tribunals in Switzerland do not follow any standard form of evidentiary proceedings, but tend to adopt a broad range of different approaches, depending, *inter alia*, on the nature of the dispute, the familiarity of the parties and their representatives with procedural issues and the composition of the tribunal (see Roney/Müller in *Handbook*, at 60).

**3. Methods of presenting evidence.** Evidence can be presented via documents, through the testimony of witnesses of fact (written or oral), via opinions of expert witnesses (written or oral) and by means of inspecting the objects in dispute. The arbitral tribunal has the authority to order the parties to produce documents, unless the parties have agreed otherwise. Where a party refuses to produce documents without justified cause, the arbitral tribunal may infer that such document would be adverse to the interests of that party or it may seek the assistance of a court in order to enforce its order (Basel Commentary-Schneider, n 21 ad art. 184; for the latter possibility see note 5). Third persons and parties can appear as witnesses, and it is up to the tribunal to evaluate the evidentiary weight of their testimony. It is admissible for the parties' counsel to discuss with a witness his testimony prior to his examination, provided that the counsel does not influence the content of the witness's testimony (Basel Commentary-Schneider, n 25 ad art. 184). The examination of witnesses can either follow the Anglo-American pattern, with direct examination, cross-examination and re-examination, or the continental European pattern with an examination by the tribunal, or, alternatively, it can embody a hybrid form of both patterns. Experts can be appointed either by the parties or the tribunal. The Federal Supreme Court has ruled that under certain conditions an arbitral tribunal must appoint an expert (see note 4). The arbitral tribunal may order the inspection of the item that is the object of the dispute (Basel Commentary-Schneider, n 48 ad art. 184).

**4. Procedural guarantees.** When taking evidence, the arbitral tribunal must respect the parties' right to be treated equally and to be heard in adversarial proceedings (art. 182(3), see art. 182, note 6 et seq.). With regard to the taking of evidence, the right to be heard in adversarial proceedings encompasses the parties' right to offer relevant evidence, to participate in the evidentiary proceedings, to examine and challenge evidence adduced by the adverse party, to present rebuttal evidence of their own and to comment on the results of the taking of evidence, but not the right to comment on the results of the arbitral tribunal's evaluation of the evidence (see, e.g., ATF 130 III 35 reason 5; ATF 4P.114/2003 reason 2.2; ATF 4P.235/2001 reason 3e). The right to be heard includes the right to an opinion by a tribunal-appointed expert if one party makes a timely and formally valid request and advances the costs, provided that the expert opinion is capable of proving the facts and appears necessary because the arbitral tribunal does not have sufficient (technical) knowledge to solve the relevant questions (ATF 4A\_2/2007 reason 3; ATF 129 III 727 unpublished reason 4.2). The right to be heard in adversarial proceedings has limitations; it is not violated if

a motion to take evidence is dismissed because the fact has already been proven or if the arbitral tribunal has already concluded that the piece of evidence in question would not lead to the tribunal changing its mind (so-called anticipated evaluation of the evidence; see ATF 4A\_220/2007 reason 8.1; ATF 4P.23/2006 reason 3.1; see also art. 190, note 14). The right to be heard is also not violated if the taking of evidence (and the legal evaluation thereof) is restricted to issues which are relevant for the decision, if motions to take evidence are refused because they do not follow the applicable formal rules, have been filed after the applicable time limit expired or are deemed inappropriate to the purpose of proving the facts (see, e.g., ATF 4P.23/2006 reason 3.1; see also Geisinger/Frossard, *Challenge and Revision* at 147). Art. 182(3) does not encompass the parties' right to orally examine a witness who has provided a written witness statement (see ATF 4P.196/2003 reason 4.2.2). If the arbitral tribunal overlooks a piece of evidence and thus comes to the wrong conclusion, the right to be heard is deemed to have been violated if the mistake makes it impossible for a party to present and prove its case regarding this specific issue, and if the party is thus in the same position it would have been in had it never been heard in the first place (see ATF 4P.74/2006 reason 4). Consequently, the right to be heard is violated if the arbitral tribunal does not take into consideration a piece of evidence or an offer to produce evidence if this evidence is important for the outcome of the decision (see ATF 133 III 235 reason 5.2).

**5. Assistance by Swiss state courts.** The arbitral tribunal can only take evidence insofar as the parties and third persons (for example, witnesses and holders of documents) voluntarily comply with its orders. If this is not the case, the arbitral tribunal, or a party with the consent of the arbitral tribunal, can require judicial assistance from the Swiss courts at the seat of the arbitration (art. 184(2)). In the Canton of Zurich, this is the *Bezirksgericht* (§ 239(1) Zurich Code of Civil Procedure), in the Canton of Geneva, it is the *Tribunal de première instance* (art. 461B(1)(c) Geneva Code of Civil Procedure). The form of judicial assistance and its requirements are subject to cantonal law, which will be replaced in 2011 by the Federal Code of Civil Procedure (FCCP). The court normally administers the evidence itself (*Tribunale di appello Ticino*, 12 March 1993) or orders the person concerned to appear before the arbitral tribunal, and to produce a document or the like (see *Tribunal de première instance Genève*, 9 May 1990). The court can use means of coercion that are available under the cantonal code of civil procedure (see Knoepfler, *Tribunale di appello Ticino*, at 600 et seq.; Basel Commentary-Schneider, n 62 ad art. 184). As of 2011, the FCCP will provide for means of coercion against third parties (for example fines or compulsion, see art. 167 FCCP), but not against the parties to the proceedings (art. 164 FCCP). In cases where assistance must be provided abroad, a request to the cantonal court will be the first step in obtaining international judicial assistance from a foreign court, pursuant to the Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters of 18 March 1970 or the Hague Convention on Civil

Procedure of 1 March 1954 (see Basel Commentary-Schneider, n 63/64 ad art. 184; Poudret/Besson, *Comparative Law*, n 673).

[Procedure: other judicial assistance]

**Article 185**

**For any further judicial assistance the court at the seat of the arbitral tribunal shall have jurisdiction.**

**1. Scope of application.** Art. 185 has a catch-all function for international arbitration proceedings subject to chapter 12 PILA (see art. 176(1)) and completes the other statutory provisions which provide for the assistance of the state courts (arts. 179(2) and (3), 180(3), 183(2), 184(2) and 193(2)). It obliges Swiss courts to cooperate with the arbitral tribunal and provides them with jurisdiction if the arbitral tribunal or the parties require assistance. Examples of cooperation by state courts include extending the arbitrators' term of office where this has not been agreed upon by the parties, intervening, upon request, to advance the proceedings, or decisions on whether the proceedings must be repeated if one arbitrator has been substituted.

**2. Jurisdiction.** The courts at the seat of arbitration have jurisdiction, i.e. the *Bezirksgericht* in the Canton of Zurich (§ 239(1) Zurich Code of Civil Procedure) and the *Tribunal de première instance* in the Canton of Geneva (art. 461B(1)(c) Geneva Code of Civil Procedure).

**3. Applicable law.** The court applies its own cantonal procedural law (as of 2011: the Federal Code of Civil Procedure).

**4. Appeal.** The means of appeal are governed by cantonal law (as of 2011: the Federal Code of Civil Procedure). A final cantonal decision can be appealed to the Federal Supreme Court, e.g., on grounds that the cantonal court wrongly agreed, or refused, to assist the arbitral tribunal.

[Jurisdiction]

**Article 186**

**(1) The arbitral tribunal shall decide on its own jurisdiction.**

**(1bis) It shall decide on its jurisdiction notwithstanding an action concerning the same matter between the same parties that is already pending before a state court or another arbitral tribunal, unless there are serious grounds for staying the proceedings.**

**(2) A plea of lack of jurisdiction must be raised prior to any defence on the merits.**

**(3) The arbitral tribunal shall, as a rule, decide on its jurisdiction by a preliminary award.**

**1. Kompetenz-Kompetenz.** Art. 186(1), as a mandatory provision of the *lex arbitri*, contains the principle of Kompetenz-Kompetenz, according to which arbitrators are the judges of their own jurisdiction. This authority of the arbitral tribunal is, however, subject to later examination by the Federal Supreme Court, which can set aside a decision on jurisdiction (see art. 190(2) (b)), or by state courts whose assistance is required in *exequatur* proceedings for the enforcement of the arbitral award (see art. V(1)(a) and (c) New York Convention). A request to a Swiss state court for a declaratory judgment on the jurisdiction of the arbitral tribunal will in most cases be deemed inadmissible for reasons of lack of a sufficient interest on the part of the requesting party in such a declaration (see Basel Commentary-Wenger/Schott, n 4 ad art. 186). When a party submits its claim to a Swiss state court despite the existence of an arbitration agreement providing for arbitration in Switzerland, the court will decline jurisdiction, unless the arbitration agreement is null and void, inoperative or incapable of being performed, or unless the defendant has made an appearance in the state court proceedings without reservation, or unless the arbitral tribunal cannot be constituted due to the defendant having obstructed its constitution (art. 7 PILA). When deciding whether to refer the parties to arbitration, the court will examine the validity of the arbitration agreement only on a *prima facie* basis (see ATF 122 III 139 reason 2b; confirmed in ATF 4P.114/2004 reason 7.3). In contrast, if the arbitration agreement provides for arbitration abroad, a Swiss state court seized of the dispute will thoroughly examine whether the arbitration agreement is ‘null and void, inoperative or incapable of being performed’ within the meaning of art. II(3) New York Convention (see ATF 121 III 38 reason 2b). A state court’s negative decision on its own jurisdiction does not prejudice the decision of an arbitral tribunal subsequently seized of the matter (Basel Commentary-Berti, n 10 ad art. 7; Basel Commentary-Wenger/Schott, n 8 ad art. 186). On the other hand, a Swiss state court’s decision admitting jurisdiction despite an arbitration clause is binding on an arbitral tribunal in Switzerland and has *res judicata* effect (see ATF 4P.114/2004 reason 7.3; ATF 120 II 155 reason 3b/bb). The Federal Supreme Court has based this ruling on the fact that it is the state court judge that decides the question of jurisdiction in last instance, as shown in art. 190(2)(b). As this line of reasoning does not seem to be affected by the new art. 186(1bis), it is most likely that the Federal Supreme Court will not change this jurisprudence (see also Basel Commentary-Berti, n 10 ad art. 7). In general, the principle of Kompetenz-Kompetenz precludes a Swiss state court from issuing an anti-arbitration injunction (Tribunal de première instance Genève, 2 May 2005). If proceedings are already pending before an arbitral tribunal, a Swiss state court subsequently seized of the dispute must stay its proceedings (see art. 181, note 4).

**2. Jurisdiction of the arbitral tribunal.** In its decision on its own jurisdiction, the arbitral tribunal will have to examine whether the arbitration agreement is valid according to art. 178 (see art. 178, notes 1-7), whether the arbitration agreement covers the subject matter of the dispute (see art. 178,

note 8), and whether it is binding on the parties to the arbitration (see art. 178, note 9). In multi-party arbitrations, all parties must have consented to arbitration (Basel Commentary-Wenger/Schott, n 32 ad art. 186). The parties' consent is required for the consolidation of two or more arbitral proceedings, unless the parties have agreed on a set of arbitration rules providing for such consolidation under certain circumstances (see, e.g., art. 4 Swiss Rules).

**3. Counterclaim and set-off.** Unless the parties have agreed otherwise, an arbitral tribunal has jurisdiction to adjudicate counterclaims, provided that the principal claim and the counterclaim are derived from the same legal relationship covered by the arbitration agreement. If the counterclaim arises from a different legal relationship, or is subject to a separate arbitration agreement, the arbitral tribunal only has jurisdiction to hear the counterclaim if the parties agree to this (Basel Commentary-Wenger/Schott, n 39 ad art. 186; see also art. V(1)(c) New York Convention; Karrer in *Festschrift Kellerhals* at 52-53, takes a different view). With regard to set-off defences, the arbitral tribunal has jurisdiction to adjudicate the set-off claim if both claims stem from the same legal relationship, if the set-off claim is undisputed or is already *res judicata* or if the claimant does not raise any objections to the arbitral tribunal's jurisdiction. In all other situations and in the absence of an agreement by the parties, it is controversial whether the arbitral tribunal has jurisdiction to adjudicate the set-off claim (see, e.g., Basel Commentary-Wenger/Schott, n 42 et seq. ad art. 186; Berger/Kellerhals, *Schiedsgerichtsbarkeit*, n 483 et seq.; Karrer in *Festschrift Kellerhals* at 49 et seq.). The Federal Supreme Court has not yet decided upon this issue. If the set-off is admissible from a procedural point of view, the arbitral tribunal must examine whether it is also substantively admissible. The issue of substantive admissibility and the further conditions of a set-off are governed by the law that is applicable to the principal claim against which the set-off is being declared (see art. 148(2) PILA), as this is the law that has the closest connection as per art. 187(1). However, where the set-off claim is subject to a different law, the admissibility of the set-off should be examined under both laws, as otherwise the admissibility may depend purely on which party files its claim first (Berger/Kellerhals, *Schiedsgerichtsbarkeit*, n 1109). Counter-claims and set-off defences should be submitted at the earliest possible opportunity in the proceedings. The arbitral tribunal may not admit them if they are submitted too late, for example, only with the rejoinder (Berger/Kellerhals, *Schiedsgerichtsbarkeit*, n 1108).

**4. Preliminary mediation or conciliation.** Often, arbitration clauses provide that the parties shall first try to settle their dispute by way of mediation, conciliation or other ADR methods before resorting to arbitration. When dealing with such clauses, the first step is to determine by way of interpretation whether the pre-arbitral ADR phase is mandatory or merely permissive (see ATF 4A\_18/2007 reason 4.3.2). The absence of any time limit for initiating and closing the pre-arbitral ADR phase and/or for initiating the subsequent arbitration is an indication of the non-mandatory character

of the ADR phase (see ATF 4A\_18/2007 reason 4.3.2; Boog, *Multi-tiered Dispute Resolution* at 106). If the pre-arbitral ADR phase is mandatory, it is controversial which sanctions shall be imposed upon a party that directly commences arbitration proceedings, in particular whether the consequences are procedural in nature (e.g. the arbitral tribunal has to stay the proceedings or lacks jurisdiction *ratione temporis*) or substantive (e.g. the other party can claim damages for breach of the mediation clause). For details on this controversy see, e.g., Boog, *Multi-tiered Dispute Resolution* at 106 et seq.; Voser, *Schlichtungsklausel*, at 376 et seq. The Federal Supreme Court left the question undecided because it interpreted the clause in question as not imposing a binding obligation upon the parties to first resort to ADR (see ATF 4A\_18/2007 reason 4.3.1-4.3.2). In addition, the Federal Supreme Court held that even in case of a mandatory pre-arbitral ADR phase, the respondent in the arbitration would be precluded from challenging the arbitral award for lack of jurisdiction *ratione temporis* if he actively participated in the arbitration (even if under reservation) and did not start the ADR process himself (see ATF 4A\_18/2007 reason 4.3.3; ATF 4P.67/2003 reason 4).

**5. Pending proceedings before a state court or another arbitral tribunal.** Art. 186(1bis) entered into force on 1 March 2007. In 2001, the Federal Supreme Court held in the *Fomento* decision that the *lis pendens* rule, which for state courts is stated in art. 9 PILA, also applied to arbitral tribunals with their seat in Switzerland. An arbitral tribunal would thus have to stay its proceedings if a dispute was already pending before a foreign state court, provided that a decision that would be recognisable in Switzerland could be expected within a reasonable period of time (see ATF 127 III 279 reason 2c). The new art. 186(1bis) was introduced as a response to this decision and expressly entitles an arbitral tribunal to declare itself competent and continue the arbitration despite pending actions before a Swiss or foreign state court or before another arbitral tribunal with its seat in or outside Switzerland (see Parliamentary Commission, *Feuille Fédérale* 2006, at 4684; Basel Commentary-Wenger/Schott, n 7b ad art. 186). As an exception, the arbitral tribunal may stay the proceedings if there are serious reasons to do so. Until now, there have been no precedents giving any indication of what is meant by ‘serious reasons’ that would justify a staying of the proceedings. Parliamentary discussions and legal writings suggest the following possible situations for staying the proceedings: if the arbitration was only initiated in order to abide by an agreed upon time limit, while proceedings before a foreign state court were already pending; if the defendant in the antecedent court proceedings has either not raised an objection or has raised it late, thus possibly making the arbitration agreement obsolete (as in the facts underlying ATF 127 III 279 where the defendant in the state proceedings did not invoke the arbitration agreement within the delay provided by the *lex fori*); if the arbitral tribunal considers that the arbitral tribunal first seized of the dispute is more likely to have jurisdiction (see Parliamentary Commission,

Feuille Fédérale 2006, at 4685; Basel Commentary-Wenger/Schott, n 15 ad art. 186).

**6. Plea of lack of jurisdiction.** In general, the arbitral tribunal must examine its jurisdiction only if the parties make any objections in this respect (art. 186(2)). Such objections must be raised at the earliest possible opportunity (see, e.g., ATF 4P.298/2005 reason 2.3), i.e. prior to or, at the latest, simultaneously with alternative pleadings of defence on the merits (see ATF 128 III 50 reason 2c/aa). Otherwise, the party forfeits its right to have the final award set aside or to avoid the enforcement of the award because of lack of jurisdiction. The Federal Supreme Court held that the same applies with regard to the challenge to arbitrability of the dispute (see ATF 4A\_370/2007 reason 5.2.1; ATF, 15 March 1993, reason 5; see also art. 177, note 5). If the parties do not raise any objections, the arbitral tribunal's jurisdiction is deemed to be established. However, paying an advance on costs, filing a power of attorney, requesting a longer time limit, cooperating in the constitution of the arbitral tribunal and participating in agreeing on the procedural rules do not constitute behaviours which are considered to imply acceptance of the jurisdiction of the arbitral tribunal. There is one exception to the general requirement of an objection by a party: the arbitral tribunal must examine its jurisdiction *ex officio* if one party does not participate in the proceedings (see ATF 120 II 155 reason 3b/bb). Once a party pleads lack of jurisdiction, the Obergericht Zürich has held that the arbitral tribunal must examine only those grounds for lack of jurisdiction that have been alleged by the parties, and that the parties are precluded from invoking other grounds at a later stage (Obergericht Zürich, 22 May 1990, reason 3.3). The Federal Supreme Court has left this question undecided (see ATF 128 III 50 reason 2c/bb/cc).

**7. Preliminary award.** In general, the arbitral tribunal decides on its jurisdiction and renders a preliminary award before entering into the substance of the dispute (art. 186(3)). It may delay the decision on jurisdiction until the final award if there are serious reasons to do so, for instance, if the relevant questions of fact or law are closely connected with the substance of the dispute (Basel Commentary-Wenger/Schott, n 63 ad art. 186).

**8. Motion to set aside the award on jurisdiction.** The parties may challenge the preliminary award on jurisdiction under art. 190(3) and (2)(b) within thirty days from its notification. If they do not, they are deemed to have waived their right to do so (see, e.g., ATF 4P.298/2005 reason 2.3). The Federal Supreme Court will thoroughly examine pleas of lack of jurisdiction, including any substantive preliminary questions that determine jurisdiction or lack thereof, such as a valid assignment of a contract that includes an arbitration agreement (see ATF 128 III 50 reason 2a), but excluding those aspects which go beyond jurisdiction issues and deal with substantive matters, such as the authority to adjudicate punitive or treble damages. The parties can only waive their right to have the jurisdiction award examined under the

conditions provided in art. 192(1). In cases of a party challenging a positive preliminary award on jurisdiction, the arbitral tribunal has the discretion to continue or to stay the proceedings until the decision of the Federal Supreme Court is rendered. If a challenge against a negative award on jurisdiction is successful, the decision of the Federal Supreme Court bindingly establishes the competence of the arbitral tribunal to decide on the merits (see ATF 127 III 279 reason 1b; ATF 117 II 94 reason 4).

## [Decision on the merits: applicable law]

### Article 187

**(1) The arbitral tribunal shall decide the dispute according to the rules of law chosen by the parties or, in the absence of such a choice, according to the rules of law with which the dispute has the closest connection.**

**(2) The parties may authorise the arbitral tribunal to decide ex aequo et bono.**

**1. Conflict of laws.** Art. 187 contains a conflict of laws rule that designates the law applicable to the merits of the case, i.e. to substantive legal issues including, for example, the statute of limitations, interest, the standing to sue and to be sued and the burden of proof. As a principle, this special conflict of laws rule for international arbitration is to be interpreted autonomously and excludes the applicability of the conflict of laws rules that are contained in the other chapters of the PILA and that are addressed to the state courts (Berti-Karrer, n 5 ad art. 187). Art. 187 provides for a choice of law by the parties (see note 2 et seq.) and allows parties to authorise the arbitral tribunal to render a decision ex aequo et bono (see notes 7 and 8). Art. 187 does not refer to trade usages, which are to be taken into account under certain arbitration rules (see, e.g., art. 17(2) ICC Rules, art. 33(3) Swiss Rules, art. 33(3) UNCITRAL Arbitration Rules). Trade usages may, however, form part of the substantive law, in which case they must be considered.

**2. Choice of law.** According to art. 187(1), the parties are, subject to the prohibition against abuse of law, free to choose the law that applies to the merits. The choice of law can be explicit or implicit, as long as it is clear from the circumstances that the parties are aware that by their conduct they are choosing specific rules of law (Berti-Karrer, n 88 ad art. 187; Kaufmann-Kohler/Rigozzi, *LDIP*, n 609). It is not in and of itself sufficient for both parties to simply plead under the same law; the circumstances must show that they are aware that another law might apply (see ATF 119 II 173 reason 1b on art. 116 PILA; the same principles apply to art. 187, Berti-Karrer, n 88 ad art. 187; Kaufmann-Kohler/Rigozzi, *LDIP*, n 609).

**3. Possible choices.** The parties have the following options. First, they can choose the applicability of a national law. If the parties do not agree otherwise, the chosen law applies regardless of the conflict of laws rules of the

country in question; the so-called *renvoi* is thus excluded (Kaufmann-Kohler/Rigozzi, *LDIP*, n 604). The parties' choice of a national law will generally also include any international conventions that form part of that national law, for instance, the Vienna Sales Convention (CISG) in the case of Switzerland (La Spada in *Handbook*, at 122). Secondly, art. 187(1) also allows the parties to choose a non-national law ('rules of law'), as do most sets of arbitration rules. The parties can choose, for example, international conventions, drafts of international conventions, unofficial codifications such as the UNIDROIT Principles of International Commercial Contracts, the rules and by-laws of private organisations (such as the Incoterms or rules of international sport organisations), general principles of law or the *lex mercatoria* (see Basel Commentary-Karrer, n 88-97 ad art. 187; Kaufmann-Kohler/Rigozzi, *LDIP*, n 636 et seq.). The *lex mercatoria* has the advantage that it may provide for appropriate and internationalised solutions, though at the risk of a certain unpredictability if it is unclear whether or not a certain rule is part of the *lex mercatoria*. Thirdly, the parties can choose another set of conflict of laws rules, notably by choosing a set of arbitration rules that contains conflict of laws rules (so-called 'indirect choice of law'; Berti-Karrer, n 92 ad art. 187). Fourthly, the parties can choose different laws for different questions (so-called 'dépeçage'; Berti-Karrer, n 75 ad art. 187). Finally, the parties can choose a law that is in force as of a specific date, which means that future amendments of this law are not to be considered (so-called 'freezing clause' or 'stabilisation clause'; La Spada in *Handbook*, at 122).

**4. Limits of the parties' choice of law.** When applying the law chosen by the parties, the arbitral tribunal must still respect international public policy as defined by art. 190(2)(e) (see art. 190, note 10 et seq.; Berger/Kellerhals, *Schiedsgerichtsbarkeit*, n 1597 et seq.; Berti-Karrer, n 176 ad art. 187), as otherwise its award can be set aside later. Furthermore, it must examine whether and to what extent it is obliged or authorised to respect interventionist provisions of law which have the character of 'lois d'application immédiate', i.e. mandatory rules that are imposed on the dispute irrespective of the applicable law and that form part of a country's public policy. The problem of the applicability of the 'lois d'application immédiate' is complex and the details are controversial (for details, see, e.g., Basel Commentary-Karrer, n 229 et seq. ad art. 187; Berti-Blessing, n 669 et seq. ad Introduction; Kaufmann-Kohler/Rigozzi, *LDIP*, n 658 et seq.; Voser, *Mandatory Rules*, at 319 et seq.). A distinction must be drawn between the mandatory provisions of the chosen law and the interventionist norms of another law. When applying the law chosen by the parties, the arbitral tribunal generally must respect the applicable mandatory provisions of that law (Berti-Karrer, n 133 ad art. 187). One prominent example is antitrust law; if the parties choose the law of a member state of the EU, the EU antitrust law must be applied (see ATF 118 II 193; the published part of this decision does not show that Belgian law was chosen). For interventionist provisions outside the *lex causae*, a further distinction must be drawn between the mandatory provisions of Swiss law and those of

a third state. As for Swiss mandatory provisions, they must be respected if they form part of the public policy as defined by art. 190(2)(e) (see art. 190, note 10 et seq.). Regarding the interventionist provisions of a third state, it is controversial whether and to what extent the arbitral tribunal may or must respect them. The Federal Supreme Court has held that the arbitral tribunal must apply EU antitrust law if, for example, the parties chose Swiss law but one party alleges the invalidity of the contract because it affects the EU market (see ATF 132 III 389 reason 3.3; see also the extract of an unpublished decision in Berger/Kellerhals, *Schiedsgerichtsbarkeit*, n 1304; the award is set aside if the arbitral tribunal refuses to apply the antitrust law, but not if it applies it incorrectly, see art. 190, notes 5 and 12). Other writers pose stricter requirements for the application of a third country's interventionist norms, for example, an abuse of law (Berti-Karrer, n 137 ad art. 187; for an overview on the different views, see Berti-Karrer, n 147 ad art. 187). In any event, the consideration of mandatory rules presupposes that these rules have a close connection to the dispute and that the arbitrators will consider their application appropriate for reaching a just decision that is recognised both generally and with regard to international public policy. In general, police laws, exchange control regulations and tax laws are not considered to be of such a nature that a direct application in international arbitrations is justified (Berti-Karrer, n 162 ad art. 187). If the arbitral tribunal does not apply the 'lois d'application immédiate', the parties face the risk of the award not being enforceable in the country that issued them.

**5. Closest connection test.** If the parties have not chosen a law, the arbitral tribunal applies the conflict of laws rule contained in the chosen arbitration rules. Arbitration rules often refer to the (rules of) law with the closest connection to the dispute (see, e.g., art. 23.2 DIS Rules, art. 33(1) Swiss Rules) or require the application of the rules of law that the arbitral tribunal determines to be appropriate (see, e.g., art. 17(1) ICC Rules, art. 22.3 LCIA Rules, art. 33(1) UNCITRAL Arbitration Rules). If no arbitration rules are chosen, art. 187(1) in fine designates the law that has the closest connection to the dispute. When applying the closest connection test, the arbitral tribunal should consider all the circumstances of the substantive dispute and weigh up all the aspects that have a connection to a specific law. It can (but is not obliged to) take guidance in national or international conflict of laws rules that specify the closest connection for certain disputes, especially if such conflict of laws rules are identical in all the states involved (Kaufmann-Kohler/Rigozzi, *LDIP*, n 630). The arbitral tribunal may take into account mandatory rules when certain requirements are fulfilled (see note 4). In order to ensure predictability within the arbitral process, the arbitral tribunal should always bear in mind whether the parties could have anticipated the applicability of the law it wants to apply. Art. 187(1) in fine does not allow for a 'better law approach'; the arbitral tribunal, in other words, may not consider which law it considers more appropriate in substance (Berti-Karrer, n 110 ad art. 187). Unlike some sets of arbitration rules

(see, e.g., art. 23.2 DIS Rules), art. 187(1) in fine allows the arbitral tribunal to apply non-national rules of law (Berti-Karrer, n 63 ad art. 187), as do, for instance, art. 17(1) ICC Rules, art. 22.3 LCIA Rules and art. 33(1) Swiss Rules. Preliminary questions, such as the question of whether a person had the capacity to act or to bind a legal entity, should be determined separately under the law with which that particular question has the closest connection (Berti-Karrer, n 58 ad art. 187).

**6. Application of the law by the arbitral tribunal.** The Federal Supreme Court has held that the arbitral tribunal must apply the designated law ex officio (see, e.g., ATF 4P.260/2000 reason 5b). It can impose on the parties the duty to contribute to the establishment of the law or can request expert opinions on its content (see ATF 4P.242/2004 reason 7.3; Basel Commentary-Karrer, n 169 et seq. ad art. 187). As in many other countries, however, the precise scope and limits of the arbitrators' right and obligation to apply the law ex officio are controversial (see, e.g., Kaufmann-Kohler in *Études Hirsch*, at 73 et seq.). The arbitral tribunal must hear the parties on its legal evaluation of the case only if this evaluation is based on legal grounds not previously invoked by the parties and whose application they could not reasonably have foreseen (ATF 4A\_400/2008 reason 3; ATF 130 III 35 reason 5).

**7. Decision ex aequo et bono.** According to art. 187(2), the parties may authorise (and thus oblige) the arbitral tribunal to decide ex aequo et bono. This authorisation can be explicit or even implicit, provided that it results unequivocally from the circumstances (which is rare). Rendering a decision ex aequo et bono means that the arbitral tribunal may base its decision on the merits on its own perception of justice without being bound by (even mandatory) law (see ATF 4P.114/2001 reason 2c/bb/aaa). The arbitral tribunal must nevertheless render a reasoned award (but see art. 189, note 6).

**8. Limits of the decision ex aequo et bono.** The same restrictions as for the parties' choice of law apply with respect to international public policy and the 'lois d'application immédiate' (see note 4). Unless the parties have agreed otherwise, the arbitral tribunal is bound by the contract: it may construe it ex aequo et bono, but must not rule against clear contractual provisions even if it considers them unjust, unless the law would also allow the tribunal to do so, for instance, under the concept of *clausula rebus sic stantibus* (see Berger/Kellerhals, *Schiedsgerichtsbarkeit*, N 1321; Berti-Karrer, n 201 ad art. 187). In any event, the arbitral tribunal must respect the applicable procedural rules and, in particular, the parties' right to be heard and to be treated equally (see ATF 4P.23/2006 reason 2).

## [Decision on the merits: partial award]

### Article 188

**Unless the parties have agreed otherwise, the arbitral tribunal may render partial awards.**

**1. Power of the arbitral tribunal.** Art. 188 gives the arbitral tribunal the power to render partial awards if it deems it appropriate, and thus serves the interests of procedural economy. The parties can agree to waive this power either individually or by reference to a set of arbitration rules that excludes partial awards.

**2. Notion of partial awards.** It is controversial whether the term ‘partial awards’ only includes awards on the merits that are final with regard to a quantitatively limited part of the action, for example, final awards on individual claims, awards on individual and independent prayers for relief and awards against only some of the respondents (so-called partial award *stricto sensu*, see ATF 128 III 191 reason 4a), or whether it also refers to interim awards on substantive or procedural questions that are not final but are merely a step on the way to the final award. Such questions would include, for example, decisions on jurisdiction, the validity of the contract or exceptions raised by the respondent, for instance, the exception of the statute of limitations or of *res judicata* (on the concept of interim awards, see ATF 130 III 76 reason 3.1.3). The distinction is especially relevant when determining the extent to which awards can be directly subject to setting aside proceedings under art. 190 (see art. 190, notes 3 and 15). The Federal Supreme Court has taken the restrictive view that art. 188 only refers to partial awards *stricto sensu* (see ATF 130 III 755 reason 1.2).

**3. Effects of partial and interim awards.** Although only partial awards *stricto sensu* have *res judicata* effect, the arbitral tribunal is also bound by interim awards for the rest of the proceedings (see ATF 128 III 191 reason 4a). To the extent that direct setting aside proceedings are admissible against partial or interim awards under art. 190 (see art. 190, notes 3 and 15), the parties must file such motions directly against such awards as they are otherwise deemed to have waived their right to invoke these grounds for challenge against any later awards (see, e.g., ATF 4A\_370/2007 reason 2.3.1 with further references). Although it is possible to also award costs in a partial award, this is, in practice, seldom appropriate (Basel Commentary-Wirth, n 19 ad art. 188).

## [Decision on the merits: arbitral award]

### Article 189

**(1) The arbitral award shall be rendered in conformity with the procedure and in the form agreed upon by the parties.**

**(2) In the absence of such an agreement, the arbitral award shall be rendered by majority vote, or, in the absence of a majority, by the chairperson alone. The award shall be in writing, shall state the reasons for the award, and shall be dated and signed. The signature of the chairperson is sufficient.**

**1. Notion of arbitral awards.** Art. 189 applies to binding awards including final awards, partial awards *stricto sensu* (on this concept see art. 188, note 2) and also, we submit, to interim awards (for support of this opinion, see Berti-Wirth, n 2 ad art. 189; see also Berger/Kellerhals, *Schiedsgerichtsbarkeit*, n 1331/2). Although they do not, in principle, apply to procedural orders, the provisions of art. 189 should also be applied by analogy to the procedure of rendering more important procedural orders (Berti-Wirth, n 3 ad art. 189; for a different view see, e.g., Berti-Schneider, n 43 ad art. 182). Moreover, the fact that a decision by an arbitral tribunal is named ‘Procedural Order’ does not exclude its characterization as an interim award (see art. 190, note 15).

**2. Party autonomy.** According to art. 189(1), the procedure for rendering the arbitral award and determining its form are subject to the parties’ agreement. This agreement can be made prior to or during the arbitration proceedings, either individually or by referring to a set of arbitration rules. As a principle, the parties’ agreement prevails over the requirements contained in art. 189(2) (but see note 3). Any agreements under art. 189 prior to the commencement of the arbitration become part of the arbitral contract with the arbitrators (see art. 179, note 8) and thus can only be substantially changed subsequently if the arbitration rules so provide or if the arbitral tribunal agrees to do so (Berti-Wirth, n 4 ad art. 189). With regard to the issues dealt with by art. 189(2) (quorum for decisions, form, date and signature of the award, stating of reasons), an agreement by the parties generally prevails. In the absence of such an agreement, and within the framework of art. 189(2), the arbitral tribunal is free to determine the procedure.

**3. Deliberations and voting.** Regardless of the parties’ agreement, a panel of arbitrators must deliberate on the decision, as this is part of the parties’ inalienable right to be heard (see ATF 4P.115/2003 reason 3.2). In the absence of such deliberations, the award can be set aside under art. 190(2)(a/d/e). Unless the parties have agreed otherwise, the arbitrators are free to deliberate and vote personally, by telephone or in writing (for example, by circulating a draft award and collecting comments) as long as all the arbitrators have an opportunity to express their views on all relevant questions and on the other arbitrators’ comments (see ATF 4P.115/2003 reason 3.2). If one arbitrator declines to participate in the deliberations or refuses to vote without justification and without having formally resigned (see art. 179, note 9), the other arbitrators can continue their deliberations and render an award, provided that the arbitrator who has declined to participate had the opportunity to be involved at all times (see ATF 128 III 234 reason 3b). Art. 189(2) provides for a majority decision, which means a decision by the majority of the tribunal members. If no majority is reached, the chairperson can decide alone, regardless of his fellow arbitrators’ views. The voting and the deliberations must be kept confidential (see ATF, 12 November 1991, reason 1b/bb), unless the parties agree otherwise prior to the appointment of the arbitrators, or unless the arbitrators agree to waive their right to secrecy thereafter (Berti-Wirth,

n 21 ad art. 189). It does not, however, violate the confidentiality of the deliberations if one arbitrator (against good practice) informs the parties of the outcome of the deliberations prior to the parties being notified of the award (see ATF 4P.154/2005 reason 6.2).

**4. Form and notification.** Unless the parties agree otherwise, the award must be rendered in writing. The waiver of a written award may restrict the parties' right to challenge the award, as it will then be impossible, or very difficult, to establish grounds for having the award set aside. The parties must be notified of the award, at which point the period for filing a motion to set aside the award starts. The modalities of the notification are determined by the parties, or by the arbitration rules chosen by them, or, lacking such determination, by the arbitral tribunal (see ATF 4P.273/1999 reason 5a). In practice, delivery by registered mail or by special courier, with acknowledgment of receipt, is standard, even for parties with their domicile abroad (see ATF 4P.273/1999 reason 5a; Basel Commentary-Wirth, n 74 ad art. 189). When communicated orally, the award is only deemed to have been properly conveyed once it has been delivered in writing with the reasons included, unless the parties have explicitly waived the written form and/or the requirement to give reasons. If a party to an arbitration with its seat in Switzerland refuses to accept delivery of the award, judicial assistance of the state courts pursuant to art. 185 may be requested (see Berger/Kellerhals, *Schiedsgerichtsbarkeit*, n 1378).

**5. Content.** Art. 189(2) only provides for a minimum content of the award, namely the reasons for the decision (see note 6), the date of rendering the award and the signatures of the arbitrators. Signing the decision does not signify the arbitrators' unreserved consent to it, but only their participation and acknowledgement of the finality of the decision (see ATF 4P.154/2005 reason 3.1). The signature of the chairperson or the signature of both or even only one of the co-arbitrators is sufficient for the decision to be legally valid (see ATF 4P.154/2005 reason 3; Berger/Kellerhals, *Schiedsgerichtsbarkeit*, n 1366). In addition to this minimum content, it is advisable for the award to contain the information necessary to ensure its recognition and enforcement, such as the names and domiciles of the persons involved (parties, counsel, arbitrators), the seat of arbitration, the parties' prayers for relief and a summary of their pleadings, a brief description of the proceedings demonstrating that the parties' right to be heard and their equal treatment have been respected, the findings on the arbitral tribunal's jurisdiction, a description of the facts, the decision on each prayer for relief and the reasons for it, and the decision on costs (see note 8).

**6. Reasons.** Unless the parties have agreed to the contrary, reasons for the award must be included. These can be submitted in a concise fashion and it is sufficient for the arbitral tribunal to address the more important arguments brought forward by the parties and to restrict the stating of its reasons to those arguments which are relevant for its decisions; it does not have to deal with each and every argument as long as it respects the parties' right to be heard

(see art. 182, note 7). If the award does not state the reasons even though the parties have not waived this requirement, the consequences are unclear. The Federal Supreme Court has held that omitting to state the reasons does not in itself constitute grounds for having the award set aside (see ATF 130 III 125 reason 2.2; ATF 116 II 373 reason 7b; under the FSCA ATF 4A\_244/2007 reason 6.4; see also Berger/Kellerhals, *Schiedsgerichtsbarkeit*, n 1362). Some distinguished writers take a different view, at least with regard to cases where the omission of stated reasons makes an efficient challenge to the award impossible (see, e.g., Basel Commentary-Wirth, n 38/39 ad art. 189). Other writers support the analogous application of art. 112(1) to (3) FSCA, according to which the parties can request the reasons within thirty days after the tribunal notified them of the award or the Federal Supreme Court can make such a request in setting aside proceedings (Poudret, *Tribunal fédéral*, at 695-696).

**7. Dissenting opinion.** According to the Federal Supreme Court, an arbitrator has no right to attach a dissenting opinion to an arbitral award or to communicate such dissent to the parties together with the award unless the parties' agreement so provides or unless the majority of the arbitral tribunal consents (see ATF, 11 May 1992, reason 2b). This issue, however, is being heavily debated throughout Europe (see Poudret in *Liber Amicorum Raymond*, at 243 et seq.; Kaufmann-Kohler/Rigozzi, *LDIP*, n 692). In a given case, institutional rules or practice may provide further guidance. In any event, the dissenting opinion does not form part of the arbitral award, even if it is formally included (see ATF 4P.196/2003 reason 1.2).

**8. Costs.** The question of arbitration costs and the parties' costs, and their amount and allocation to the parties, is often dealt with by the arbitration rules agreed upon by the parties. In the absence of such an agreement, the arbitral tribunal's authority to determine the arbitration costs in the strict sense (arbitrators' fees and costs and expenses) is based on art. 182(2) (Basel Commentary-Wirth, n 63 ad art. 189). Subject to an agreement by the parties, the arbitral tribunal has discretion with respect to the allocation of costs, as long as it follows reasonable, objective criteria such as the degree of success obtained by each party in the proceedings, differences in the amount of effort necessary to adjudicate various claims, frivolous or bad-faith motions, delaying tactics or other behaviour causing additional costs (Berti-Wirth, n 56 ad art. 189). With regard to parties' costs, the arbitral tribunal has the authority to render a decision (Berti-Wirth, n 58 ad art. 189). If the parties' agreement or the applicable arbitration rules do not oblige the arbitral tribunal to award parties' costs, the parties must file a motion to this effect, as the arbitral tribunal would otherwise decide *ultra petita* (Basel Commentary-Wirth, n 68 ad art. 189). The parties should be invited to submit their costs and be granted the opportunity to comment on the cost submission of the other party. The arbitral tribunal has discretion when determining the amount of parties' costs and usually applies the general test of reasonableness. For the impact of contingency fees and *pactum de palmario* arrangements on the award on

costs, see Wehrli, *Contingency Fees*, at 252 et seq. The tribunal can also award a party the costs of in-house counsel (Berti-Wirth, n 60 ad art. 189). The parties' costs, as a rule, will be allocated following the principles referred to above with regard to arbitration costs.

**9. Termination of the proceedings based on the parties' declarations or behaviour.** If the parties have agreed on a settlement of the dispute, the arbitral tribunal usually renders a decision as requested by the parties or as provided for in the applicable arbitration rules. In the absence of any such agreement, the arbitral tribunal is free either to render a consent award (or an award on agreed terms), or to close the proceedings by means of an order for termination. Either way, it must include a ruling on the costs. Unless applicable procedural rules provide otherwise, the proceedings should be terminated by an award in cases of recognition of the claim by the respondent or of a waiver of the claim by the claimant. Where a withdrawal of the action with the possibility of reintroduction is admissible (see Berti-Wirth, n 47 ad art. 189), the arbitral tribunal may consider issuing a termination order. If one party does not pay the requested advance on costs, the parties' agreement or the applicable arbitration rules determine the consequences (see ATF 4P.2/2003 reason 3). In the absence of such an agreement, and if the other party does not advance the entire costs, the arbitral tribunal will render a resolution not to enter into the proceedings (Berti-Wirth, n 50 ad art. 189; Lalive/Poudret/Reymond, *L'Arbitrage*, n 17 ad art. 182).

[Finality, setting aside: principle]

#### Article 190

**(1) The award is final from the time when it is communicated.**

**(2) The award may only be set aside:**

- (a) if the sole arbitrator was improperly appointed or if the arbitral tribunal was improperly constituted;**
- (b) if the arbitral tribunal wrongly accepted or declined jurisdiction;**
- (c) if the arbitral tribunal ruled beyond the claims submitted to it, or failed to decide on one of the items of the claim;**
- (d) if the principle of equal treatment of the parties or their right to be heard was violated;**
- (e) if the award is incompatible with public policy.**

**(3) Preliminary awards can be challenged only on the grounds of the above paragraphs 2(a) and 2(b); the time limit for filing the challenge runs from the notification of the preliminary award.**

**1. Overview and scope of application.** Swiss law provides for only very limited options for setting aside arbitral awards rendered in Switzerland.

The Federal Supreme Court, as the exclusively competent court, traditionally applies the grounds for challenge contained in art. 190(2) restrictively. Statistics show that the chances of an even partially successful challenge to an arbitral award on the merits are very limited (Dasser, *International Arbitration* at 452-453). The PILA regime for setting aside arbitral awards reflects to a large extent the provisions of art. V New York Convention on the refusal to recognise and enforce awards, and is also broadly in line with art. 34 of the UNCITRAL Model Law. Art. 190 is applicable to awards rendered by arbitral tribunals with their seat in Switzerland, provided that the requirements of art. 176(1) are fulfilled, that the parties have not agreed on the exclusive applicability of cantonal arbitration law/the third part of the FCCP (art. 176(2)) and that they have not waived the right to challenge the award (see art. 192).

**2. Final nature of the arbitral award.** According to art. 190(1), once the parties have been notified of the award (see art. 189, note 4), it is final and binding under art. V(1)(e) New York Convention. This means that it has *res judicata* effect and can be enforced, unless the Federal Supreme Court explicitly grants suspensive effect to a motion to set aside the award (see art. 191, note 2). If the parties have not agreed otherwise, the clarification of an unclear award or rectification of errors by the arbitral tribunal remain possible (see ATF 126 III 524 reason 2b). A rectification is not an addition to the initial award, but forms an integral part of it (see ATF 131 III 164 reason 1.1). Motions to set aside the tribunal's decision on rectification are admissible to the same extent as against the initial award, but can only be based on grounds referring exclusively to the rectification (see ATF 131 III 164 reason 1.2). If such an appeal is successful, the rectification will be annulled, but the initial award will remain effective. In contrast, setting aside the original award would render ineffective any awards that rectified or interpreted it (see ATF 131 III 164 reason 1.2.4). If the arbitral award is incomplete, the parties can request an additional award. The additional award may add something to the original award, but cannot withdraw anything that has already been awarded. The additional award is considered to be an independent award, subject to independent setting aside proceedings (Berger/Kellerhals, *Schiedsgerichtsbarkeit*, n 1417).

**3. Motion to set aside the award.** The grounds for setting aside an arbitral award contained in art. 190(2) are exhaustive (see, e.g., ATF 128 III 50 reason 1a). Grounds not listed in art. 190(2) do not provide the right to challenge. Not subject to challenge are, for example, a clearly incorrect interpretation of a contract (see ATF 4P.134/2006 reason 4-7), the incorrect application of the substantive law, or arbitrariness for example, in findings of facts that allegedly contradict the evidence (see, e.g., ATF 4P.134/2006 reason 3 with further references). In particular, objections directly based on the ECHR are not admissible (see ATF 4P.105/2006 reason 7.3). The principles of the ECHR can, however, fall within the scope of substantive public

policy (see ATF 4A\_370/2007 reason 5.3.2). Final awards and partial awards *stricto sensu* (on this concept see art. 188, note 2) can be challenged on the grounds contained in art. 190(2) (see ATF 130 III 755 reason 1.2.2), provided that no previous interim or partial award has already been or could have been challenged on the same grounds (see, e.g., ATF 4P.298/2005 reason 2.3). Interim awards, on the other hand, are subject to art. 190(3) (see notes 15-16). Procedural mistakes must be challenged by objections to the next appealable award, and the aggrieved party must have already duly objected during the proceedings, as otherwise it shall be deemed to have waived its right to object (see ATF 4P.96/2002 reason 4.3.2).

**4. Incorrect constitution of the arbitral tribunal (art. 190(2)(a)).** The incorrect constitution of an arbitral tribunal will often be an issue when an interim award is challenged (see notes 15-16). The parties must object to the constitution of the arbitral tribunal during the arbitration procedure and within the deadlines provided for by the applicable procedural rules (see, e.g., ATF 4P.196/2003 reason 3.2.1). In principle, Art. 190(2)(a) allows the challenge that one or several arbitrators were incorrectly appointed, dismissed or replaced, i.e. in contravention of the requirements of art. 179. It also allows the challenge that all or some arbitrators were not independent or impartial (see ATF 129 III 445 reason 3.1). An award can thus be set aside if an arbitration institution dismissed a legitimate challenge to one or several arbitrators under art. 180 (see ATF 118 II 359 reason 3b; art. 180, note 9). A motion to set aside is excluded, however, if the challenge was dismissed by a state court (see ATF 128 III 330 reason 2.2). The Federal Supreme Court made an important restriction to the application of art. 190(2)(a): in a case where the arbitration institution dismissed a challenge to an arbitrator, the Federal Supreme Court held that it would not set aside an award under art. 190(2)(a) on the grounds that the dismissal of the challenge violated the parties' agreement, in particular requirements that they had agreed upon (see art. 180(1) (a) and (b)), unless there was a violation of the parties' right to independent and impartial justice (see ATF, 30 June 1994, reason 4; less explicitly ATF 4P.188/2001 reason 2e). The Federal Supreme Court has not yet decided the question whether the same applies with respect to art. 179, i.e. whether it would verify if the constitution of the arbitral tribunal complied in all respects with the procedures agreed by the parties. Art. 190(2)(a) can also be invoked if the constitution of the arbitral tribunal was temporarily incorrect, e.g., if one arbitrator was missing at a hearing (see ATF 4P.154/2005 reason 3.1; for cases where an arbitrator intentionally refuses to participate in the deliberations or the decision, see art. 189, note 3).

**5. Wrong decision on jurisdiction (art. 190(2)(b)).** A challenge is possible if the arbitral tribunal wrongly declined jurisdiction in a final award, or wrongly accepted jurisdiction in a final or interim award (see note 15), provided that the party duly raised its objections during the arbitration proceedings (see, e.g., ATF 130 III 66 reason 4.3). The decision on jurisdiction

under art. 186 is wrong if it violates art. 177 or 178, or if it wrongly extends the scope of the arbitration agreement, for example, if it decides on claims not covered by the arbitration agreement (see art. 178, note 8), or if it wrongly accepts jurisdiction over non-signatories (ATF 4P.298/2005 reason 2.2; see art. 178, note 9). The decision on jurisdiction is also wrong if it was incorrectly based on chapter 12 PILA instead of on cantonal law/the third part of the FCCP and vice versa (see art. 176, note 5). For the consequences of commencing arbitration despite a binding obligation to first resort to mediation or conciliation, see art. 186, note 4. Art. 190(2)(b) applies if the arbitral tribunal declares itself not competent to apply the EU antitrust law even though the contract in dispute affects the EU market and one party has alleged the invalidity of the contract on these grounds (ATF 132 III 389 reason 3.3; see art. 187, note 4). An arbitral tribunal is also competent to examine, and even has a duty to examine, whether a contract violates the applicable criminal law against corruption and money laundering when determining the validity of a contract whose performance is at issue in the arbitration (see ATF 133 III 139 reason 5). Under the new art. 186(1bis), an arbitral award cannot be set aside on the grounds that the arbitral tribunal continued proceedings although the dispute was already pending before a Swiss or foreign state court or another arbitral tribunal (see art. 186, note 5).

**6. Decision on jurisdiction by the Federal Supreme Court.** The Federal Supreme Court examines the legal grounds for alleged jurisdiction or lack thereof, including substantive preliminary questions, with unfettered powers (see, e.g., ATF 4P.48/2005 reason 3.1). In case foreign law governs a substantive preliminary question, the Federal Supreme Court will also examine the foreign law with unfettered powers. It will follow the clearly prevailing opinion under the foreign law and, in case of controversies between jurisprudence and doctrine, the decisions of the highest court in the foreign country (ATF 4A\_428/2008 reason 3.1). The Federal Supreme Court is, however, bound by the facts established by the arbitral tribunal, unless the findings on the facts are themselves subject to an objection under art. 190(2)(d) or (e) (see, e.g., ATF 4P.48/2005 reason 3.1 with further references) or unless the arbitral tribunal's award itself gave rise to a need to introduce new facts (art. 99(1) FSCA; see art. 191, note 5). If the arbitral tribunal wrongly denied jurisdiction, the Federal Supreme Court can bindingly establish the competence of the arbitral tribunal (see ATF 127 III 279 reason 1b).

**7. Decision *ultra petita* or *extra petita* (art. 190(2)(c)).** The award can be set aside if the arbitral tribunal went beyond the claims submitted to it and thus decided *ultra petita* or *extra petita partium*. Art. 190(2)(c) guarantees a particular aspect of the right to be heard and aims to protect the other party from an award on claims it had no reason to expect, taking into account the fact that it is the claimant's responsibility and decision to assert its claims and to dispose of them as it chooses (see ATF 4P.154/2005 reason 5). The tribunal only decides *ultra petita* or *extra petita* if the award is not covered

by the parties' prayers for relief, i.e. if it adjudicates more, or something else, than what has been requested in the prayers for relief (see, e.g., ATF 4P.54/2006 reason 2.1). If the arbitral tribunal is requested to declare that a certain legal relationship does not exist (negative declaratory relief), it does not decide *ultra petita* or *extra petita* if it declares that the legal relationship exists instead of simply dismissing the request (see ATF 4A\_220/2007 reason 7.2). A so-called catch-all clause, introduced by the claimant with its prayers for relief, may render a later *ultra petita* objection ineffective unless the respondent objected against this unspecified prayer for relief at the earliest possible opportunity in the arbitration proceedings (see ATF 4P.114/2001 reason 3b). The award cannot be set aside if the tribunal determines higher amounts for some parts of the claim than were requested, as long as the total amount granted remains within the framework of the total amount requested (see ATF 4P.54/2006 reason 2.1). Neither can the award be set aside if the tribunal adjudicated the amount claimed based on different legal grounds, e.g., if it awarded the amount as damages and not as specific performance of the contract (see, e.g., ATF 4P.260/2000 reason 5c). The arbitral tribunal is thus not bound by the legal grounds invoked by the parties, but applies the law *ex officio* (see ATF 4A\_220/2007 reason 7.2), provided that it respects the parties' right to be heard (see art. 182, note 8).

**8. Decision *infra petita* (art. 190(2)(c)).** The award can be set aside if it is incomplete, i.e. if the arbitral tribunal failed to decide on a prayer for relief or a formally valid request by the parties (see ATF 128 III 234 reason 4a). It does not constitute grounds for challenge if the arbitral tribunal did not evaluate the prayers for relief on all possible legal grounds or if it globally dismissed 'any other or further claims' (see, e.g., ATF 4P.269/2003 reason 2).

**9. Violation of the equal treatment of the parties or the right to be heard.** Art. 190(2)(d) covers the violation of the equal treatment of the parties (see art. 182, note 6) and of their right to be heard in adversarial proceedings (see art. 182, note 7 et seq.; for failure to give reasons for a decision, see art. 189, note 6). The motion to set aside requires the aggrieved party to have duly raised a sufficiently specific objection during the arbitration proceedings (see, e.g., ATF 4P.129/2002 reason 7.1 with further references). If the right to be heard is violated, the award is set aside, regardless of the party's chances on the merits (see ATF 127 III 576 reason 2d; for a different view, see, e.g., Berger/Kellerhals, *Schiedsgerichtsbarkeit*, n 1592).

**10. Violation of public policy.** Art. 190(2)(e) ensures that the arbitral award complies with fundamental legal principles. In recent years, the Federal Supreme Court has not been consistent in deciding whether the notion of public policy refers to Swiss or to universal principles (see ATF 132 III 389 reason 2.2.2). For example, having previously referred to 'the fundamental legal or moral principles that are recognised in all civilised countries' (see ATF 128 III 234 reason 4c), the Federal Supreme Court in 2006 defined public policy

as ‘the essential and widely recognised values that should, according to the prevailing concepts in Switzerland, form the basis of every legal system’ (see ATF 132 III 389 reason 2.2.3). This definition presupposes that the principles in question do not fundamentally differ between different countries within a common culture (see ATF 132 III 389 reason 3). Arbitrariness (‘Willkür’) does not in itself constitute a violation of public policy (see ATF 132 III 389 reason 2.2.2). The term ‘public policy’ encompasses procedural public policy and substantive public policy. When filing a motion to set aside an award on the grounds of public policy, the applicant must show in detail which legal principle was violated and how it was violated, and must demonstrate that the principle in question is part of public policy (see, e.g., ATF 4P.23/2006 reason 4.3). It must be established that the result of the decision, not the reasoning behind it, violates public policy (see, e.g., ATF 4P.240/2006 reason 4.1 with further references). Statistics show that until 2005, not a single challenge based on art. 190(2)(e) was successful (Dasser, *International Arbitration* at 455-456).

**11. Substantive public policy.** The following principles form part of substantive public policy: (i) the principle of *pacta sunt servanda*, which is violated if the arbitral tribunal applies a contractual provision in contradiction of its own interpretation of it – if, for example, it imposes on a party a contractual obligation it has held to be invalid or if it denies the performance of a contractual obligation it has held to be valid. If the tribunal applies the wrong contractual provision or incorrectly construes or applies the contract, the principle is not violated (see, e.g., ATF 4P.206/2006 reason 4.1; ATF 4P.134/2006 reason 5.2); (ii) the principle of good faith, including the concept of *culpa in contrahendo*, which is violated if the arbitral tribunal misconstrues the general application and concept of *culpa in contrahendo* – the Federal Supreme Court cannot, however, examine whether the facts of a given case lead to a liability under *culpa in contrahendo* (see ATF 4P.88/2006 reason 4.2); (iii) the prohibition against the abuse of rights (see ATF 120 II 155 reason 6a), including the prohibition against *venire contra factum proprium* (see ATF 4P.143/2001 reason 3c/aa); (iv) the prohibition against discrimination (see ATF 4P.12/2000 reason 5a/aa); (v) the prohibition against expropriation without compensation (see ATF 4P.200/2001 reason 2b); (vi) the protection of legally incapacitated persons (see, e.g., ATF 132 III 389 reason 2.2.1); (vii) the right to terminate the contract for important reasons (see ATF 4P.172/1999 reason 5d); (viii) the prohibition against bribery (see ATF 4P.208/2004 reason 6.1); (ix) the prohibition against serious violations of personal rights (see ATF 4P.12/2000 reason 5b/aa). This list is not exhaustive. In any event, the Federal Supreme Court has stressed that the chances are extremely slight of having an award set aside for reasons of substantive public policy (see ATF 132 III 389 reason 2.1).

**12. Substantive public policy: counter-examples.** The non-application or wrong application of interventionist provisions (see art. 187, note 4) only

constitutes a violation of substantive public policy where such provisions are considered essential and widely recognised values as defined in note 10 et seq. (see ATF 132 III 389 reason 2.2.2). The Federal Supreme Court has held that, because of significant national differences, national and EU antitrust laws do not belong to public policy in the sense of art. 190(2)(e) and, therefore, that the incorrect application of these laws cannot justify setting aside an award (see ATF 132 III 389 reason 3; but see note 5). Regarding punitive damages, the Federal Supreme Court has held that the principle of prohibiting enriching the aggrieved party, and consequently the limitation of the compensation to the actual damage suffered by the party, is part of Swiss public policy. It has left undecided the question of whether this principle also belongs to international public policy in the sense of art. 190(2)(e) (see ATF 4P.7/1998 reason 3c). However, the prevailing view in Swiss legal doctrine is that the granting of punitive damages is not a violation of international public policy (e.g. Berger/Kellerhals, *Schiedsgerichtsbarkeit*, n 1604 with further references; Kaufmann-Kohler/Rigozzi, *LDIP*, n 908). The awarding of compound interest does not violate Swiss public policy (see ATF, 9 January 1995, reason 7), nor does it violate, a fortiori, art. 190(2)(e) (Berger/Kellerhals, *Schiedsgerichtsbarkeit*, n 1604). In a sports arbitration, the Supreme Court held that neither the enforcement of disciplinary sanctions by a private association (here, FIFA; ATF 4P.240/2006 reason 4.2), nor strict liability for doping with a shift in the burden of proof (see ATF 4P.105/2006 reason 8) violates public policy. An allocation of parties' costs that is considered excessive can only violate public policy if it is clearly out of proportion with the necessary costs a party consented to for defending its rights (see ATF 4P.280/2005 reason 2.2.2). Neither arbitrariness ('Willkür') alone, nor a clear violation of the applicable law or a decision *ex aequo et bono* instead of the application of the chosen law, constitute a violation of public policy, unless the actual outcome of the award is in itself incompatible with public policy (see ATF 4P.253/2004 reason 3.1 with further references; this is controversial in the case of a decision *ex aequo et bono*, see ATF 4A\_370/2007 reason 5.6 with further references). The mere fact of an award being legally unsustainable does not amount to a violation of public policy (see ATF 4P.54/2006 reason 3.1).

**13. Procedural public policy.** Procedural public policy contains guarantees that ensure, like the guarantees explicitly mentioned in art. 190(a) to (d), an independent consideration of all the applications and allegations that the parties filed in accordance with the applicable procedural rules (see, e.g., ATF 4P.207/2002 reason 2.2). For example, the following principles form part of procedural public policy: the right to a fair procedure (see, e.g., ATF 4P.143/2001 reason 3a/aa); the observance of the *res judicata* effect of previous awards (see, e.g., ATF 4P.98/2005 reason 5.1 with further references); the requirement that the decision not contravene the reasoning behind the award (see ATF 4P.99/2000 reason 3b/aa); and the independence and impartiality of experts appointed by the tribunal (see ATF 126 III 249 reason 3c). Generally, procedural public policy is violated if a breach of fundamental procedural

principles unacceptably contravenes the sense of justice (see, e.g., ATF 4P.143/2001 reason 3a/aa).

**14. Procedural public policy: counter-examples.** It does not per se constitute a violation of procedural public policy if the arbitral tribunal wrongly evaluates the evidence or wrongly establishes the facts (see, e.g., ATF 4P.48/2005 reason 3.4.2.1). Neither does it per se violate procedural public policy if the arbitral tribunal applies the arbitration rules incorrectly or arbitrarily (see ATF 4P.23/2006 reason 4.2) or if it fails completely to apply a procedural provision (see ATF 4P.280/2005 reason 2.2.1), unless the violated provision is essential for ensuring the fairness of the proceedings, and is, therefore, part of public policy (see ATF 4P.196/2003 reason 5.1). It does not violate procedural public policy if the Court of Arbitration for Sport (CAS) deems an appeal withdrawn because the appellant did not pay the advance of costs within the time limit, provided that the CAS informed the appellant of this consequence beforehand (ATF 4A\_600/2008 reason 5.2).

**15. Grounds for a challenge to interim awards.** Unlike partial awards *stricto sensu* (see note 3), interim awards (see art. 188, note 2) are subject to art. 190(3) and can thus only directly be challenged on grounds of lack of jurisdiction or wrong constitution of the arbitral tribunal (see ATF 130 III 76 reason 4). This is regardless of whether the interim award deals directly with these issues or whether the arbitral tribunal implicitly took its jurisdiction and correct constitution for granted (see ATF 130 III 76 reason 3.2.1). The Federal Supreme Court follows the same practice under the FSCA and has held that the defendant could not challenge a final award on grounds of lack of jurisdiction since it had not challenged the interim award that took the tribunal's jurisdiction implicitly for granted (see ATF 4A\_370/2007 reasons 2.3.1 and 4.2, see also Besson, *Le recours contre la sentence* at 10-12; for a different view see Kaufmann-Kohler/Rigozzi, *LDIP*, n 713 FN 336). With the decision ATF 130 III 76, the Federal Supreme Court put an end to the old jurisprudence according to which interim awards could also be challenged on the grounds listed in art. 190(2)(c) to (e) if they caused irreparable harm to the party concerned (see ATF 116 II 80 reason 3). According to the new practice, an interim award cannot be challenged directly for the reasons contained in art. 190(2)(c) to (e), but only alongside a challenge to the subsequent partial award *stricto sensu* or the final award that has been based on the interim award (see ATF 4P.74/2006 reason 2.1). The fact that a decision by an arbitral tribunal is named "Procedural Order" does not exclude its characterization as an interim award that can be challenged (and has to be challenged if the party wants to avoid being deemed to have waived its objection, see note 3). It is the content of the decision that is decisive for determining whether setting aside proceedings are admissible, not the title of the decision (ATF 4A\_210/2008 reason 2.1). For instance, if the "Procedural Order" contains an implicit decision on the tribunal's jurisdiction, it constitutes to this extent an interim award (see ATF 4A\_210/2008 reason 2.1).

**16. Requirements for the challenge to interim awards.** The challenge to interim awards is only subject to the requirements outlined in note 15. Any deviating requirements contained in arts. 90 to 94 FSCA are not applicable (e.g. Besson, *Le recours contre la sentence* at 11-12; Kaufmann-Köhler/Rigozzi, *LDIP*, n 713 et seq.; Poudret, *Tribunal fédéral*, at 678, 689/90, 701). This will be explicitly clarified in an amended version of art. 77(2) FSCA that enters into force in 2011. The aggrieved party must file a motion to set aside the interim award to the extent possible, as it is otherwise deemed to have waived its right to invoke art. 190(2)(a)-(b) (see, e.g., ATF 4P.162/2003 reason 4.3).

**17. No appeal against delay or refusal of an arbitral award.** The Federal Supreme Court held that, under the FSCA, a challenge based on the duration of the arbitral proceedings (art. 94 ICSA) is inadmissible because art. 190 does not provide for such grounds for appeal (see ATF 4A\_160/2007 reason 6; see also Besson, *Le recours contre la sentence* at 11-12). The Federal Code of Civil Procedure will amend art. 77(2) FSCA as of the year 2011 so that the applicability of art. 94 FSCA is expressly excluded.

**18. Revision.** Art. 190 does not include any provisions on revision. This gap is filled by applying arts. 123-127 FSCA by analogy (see ATF 134 III 286 reason 2.1). Revision of all awards, i.e. final, partial and interim awards, is possible (see ATF 134 III 286 reason 2.2), but not revision of procedural orders (see ATF 4P.237/2005 reason 3.2).

**19. Grounds for revision.** The Federal Supreme Court admits requests for revision where it is established as a result of criminal proceedings that criminal acts influenced the award to the detriment of the applicant. A conviction by the penal court is not necessary (see ATF 4A\_596/2008 reason 4, in which the Federal Supreme Court granted revision based on a foreign investigating magistrate's order to discontinue criminal investigations against a witness who, according to the investigating magistrate, had deceived the arbitral tribunal and thus influenced the award but had passed away in the meantime). If criminal proceedings are not possible, the criminal acts can be proven by other means (art. 123(1) FSCA). Revision is furthermore admissible where the applicant subsequently discovers relevant facts or decisive pieces of evidence that were already in existence when the award was rendered, but that it was unable to plead or adduce in the earlier proceedings despite reasonable diligence (art. 123(2)(a) FSCA), unless such new facts can be introduced in set aside proceedings under art. 99 FSCA (Poudret, *Tribunal fédéral*, at 681; see art. 191, note 5). The new facts and evidence must affect the factual basis of the contested award with the result that they would probably, upon correct legal assessment, lead to an award with a different outcome (see ATF 134 III 286 unpublished reason 4.1; ATF 4P.117/2003 reason 1.2). The new evidence must serve to either prove newly discovered relevant facts on the basis of which revision is sought or relevant facts that were already alleged

during the arbitral proceedings but remained unproven (see ATF 4P.117/2003 reason 1.2). More particularly, the new evidence must serve to determine still unproven facts, and not merely to differently assess already known and proven facts (see ATF 134 III 286 unpublished reason 4.1). The requirement that the party be unable to adduce the new evidence in the earlier proceedings despite reasonable diligence is not fulfilled if the evidence was available in the applicant's own domain, for example, in his archives (see ATF 134 III 286 unpublished reason 4.2).

#### **20. Subsequent discovery of incorrect constitution of the tribunal?**

Under the old Statute on the Organisation of the Federal Judiciary, revision of an arbitral award was not possible on the grounds of subsequent discovery of an incorrect constitution of the arbitral tribunal (e.g. subsequent discovery of lack of independence of an arbitrator), which was held to be subject to art. 190(2)(a) exclusively (see ATF 118 II 199 reason 4). Under the FSCA, it is controversial whether art. 121 FSCA, which provides for such ground for revision, applies by analogy or whether revision is still excluded (see Besson, *Le recours contre la sentence* at 26; Kaufmann-Kohler/Rigozzi, *LDIP*, n 859 for an analogous application of art. 121(a) FSCA; see Berger/Kellerhals, *Schiedsgerichtsbarkeit*, n 1788 for the opposite view). The Federal Supreme Court left the question undecided (see ATF 4A\_528/2007 reason 2.4-2.5). In any case, revision is excluded if the applicant could and should have discovered the alleged incorrect constitution of the tribunal during the arbitration proceedings (see ATF 4A\_528/2007 reason 2.5) or if the applicant discovered it within the time-limit for challenging the award, even if the challenge is excluded under art. 192 (ATF 4A\_234/2008 reason 2.1).

**21. Revision proceedings.** The applicant must file a motion for revision with the Federal Supreme Court within 90 days of discovering the grounds for revision but not before receipt of the reasoned arbitral award or the closing of the criminal proceedings (art. 124(1)(d) FSCA). After ten years, revision is only admissible in the case of criminal acts (art. 124(2) FSCA). The motion must indicate the changes to be made to the award and the repayments that are being claimed, the grounds for revision and the related evidence, and must also show that the motion was filed in time. The Federal Supreme Court can grant the application suspensive effect (art. 126 FSCA). It serves the motion to the other party and to the arbitral tribunal for their comments (art. 127 FSCA). If the Federal Supreme Court upholds the motion for revision, it will annul the award and refer the matter either back to the former arbitral tribunal or to an arbitral tribunal that will be newly constituted for this purpose (see ATF 4P.102/2006 reason 1; ATF 4P.237/2005 reason 2).

**22. Nullity of the award.** If an arbitral award is null and void, the nullity can be asserted by a declaratory action or by objection in the course of recognition and enforcement procedures (see ATF 130 III 125 reason 3.1). The award is null and void only in exceptional cases if the shortcomings of the proceedings are unacceptable, for instance, if an arbitral award is rendered

without an arbitration agreement and without any proceedings (see ATF 130 III 125 reason 3.1).

**[Setting aside: competent authority]**

**Article 191**

**Setting aside proceedings may only be brought before the Swiss Federal Supreme Court. The procedure is governed by art. 77 of the Federal Supreme Court Act of 17 June 2005.**

**1. General.** Awards rendered by arbitral tribunals with their seat in Switzerland can only be challenged before the Federal Supreme Court. On 1 January 2007, paragraph 2 of art. 191, which allowed the parties to agree on the jurisdiction of a cantonal court instead of the Federal Supreme Court, was abolished. The procedure before the Federal Supreme Court is governed by art. 77 of the Federal Supreme Court Act (FSCA), which entered into force on 1 January 2007 and replaced the provisions of the Federal Statute on the Organisation of the Federal Judiciary. The Federal Code of Civil Procedure will amend art. 77(2) FSCA as of 2011. For a detailed analysis of the proceedings under the FSCA, see Besson, *Le recours contre la sentence* at 13 et seq. For statistics regarding the duration of set aside proceedings, see Dasser, *International Arbitration* at 456-459.

**2. Suspensive effect.** The setting aside proceedings do not suspend the challenged award: it remains effective and enforceable, unless the judge in charge of the proceedings grants the suspension upon request or – in theory – ex officio (art. 103(1) and (3) FSCA). The suspension will only be granted to safeguard the legally protected interests of a party from a serious and irreparable damage; if, for example, the award requires the appellant to pay a certain sum, suspension can only be obtained if the payment would cause him financial difficulties, or if the solvency of the creditor is doubtful so that any restitution would seem unlikely (Président ATF, 14 December 1993). The decision is thus subject to a weighing of interests. Furthermore, a suspension may only be granted if a prima facie examination shows the likelihood that the challenge is well-founded (Berti-Berti/Schnyder, n 25 ad art. 191; Kaufmann-Kohler/Rigozzi, *LDIP*, n 781; Poudret, *Tribunal fédéral*, at 683).

**3. Deadline for the challenge.** The motion to set aside the arbitral award must be filed with the Federal Supreme Court in Lausanne within thirty days of notification of the award (art. 77 together with 100(1) FSCA; see art. 189, note 4). It is sufficient if the brief is delivered to the Swiss mail service by the deadline (art. 48(1) FSCA). Submitting the motion by telefax does not meet the deadline (ATF 4A\_258/2008 reason 2). The thirty-day time period does not include court holidays (15 July to 15 August, 18 December to 2 January, and the seven days preceding and following Easter, art. 46(1) FSCA); it cannot be extended (art. 47(1) FSCA). However, an aggrieved party or its

representative, who have been prevented from meeting the deadline through no fault of their own, can ask for a new time limit to be established and can challenge the award if both the motion to set it aside and a request for a new time limit (noting the reason for the party's failure to submit on time) are filed within thirty days of whatever event prevented the party from submitting its motion on time (art. 50 FSCA).

**4. Further requirements of the challenge.** Setting aside proceedings are admissible against final awards, against partial awards *stricto sensu* (see art. 188, note 2, art. 190, note 3) and, under certain conditions, against interim awards (see art. 190, notes 15-16). The parties to the arbitration can file the motion if they demonstrate a legal interest in having the award set aside (art. 76 FSCA). It has not yet been decided whether the requirement for a minimum amount in dispute in pecuniary matters (CHF 15,000 for matters of labour law and law of tenancy, CHF 30,000 for other matters, art. 74(1) FSCA) also applies to challenges against arbitral awards. The majority of legal commentators deny the applicability of art. 74(1) FSCA (Berger/Kellerhals, *Schiedsgerichtsbarkeit*, n 1622; Besson, *Le recours contre la sentence* at 16-17; Kaufmann-Kohler/Rigozzi, *LDIP* n 737 et seq.; Poudret, *Tribunal fédéral*, at 688-689).

**5. Content of the written brief.** The brief must be written in German, French or Italian, must identify the challenged arbitral award (which should, preferably, be attached), and must contain the appellant's requests, his signature, the grounds for the challenge and the evidence (art. 42(1) and (3) FSCA). With regard to the grounds for challenge, the brief must set out the grounds for setting aside the award under art. 190(2) and must show in detail which parts of the challenged decision violate which principle laid down in art. 190(2) and in what way (art. 77(3) FSCA; e.g. ATF 4A\_160/2007 reason 2.2; ATF 4P.114/2003 reason 1.3). If, for example, the appellant invokes a violation of public policy, he must show in detail which legal principle was violated and how it was violated and must demonstrate that it forms part of public policy (see, e.g., ATF 4P.23/2006 reason 4.3). If the appellant invokes a violation of the right to be heard, he has to demonstrate in detail that the arbitral tribunal did not examine certain (clearly identified) facts, pieces of evidence or arguments that the appellant had submitted in accordance with the procedural rules and that these elements were relevant for the outcome of the case; it is not required that the appellant demonstrate the reasons why the arbitral tribunal omitted these elements. The burden is on the arbitral tribunal or the counterparty to justify the omissions (see, e.g., ATF 4A\_18/2007 reason 5.1). The requirement of substantiated objections is of utmost importance; the Federal Supreme Court regularly rejects objections because they have not been sufficiently substantiated (see, e.g., very incisively ATF 4P.32/2007 reason 3.2). Only when the arbitral tribunal's decision on jurisdiction is challenged under art. 190(2)(b) is it sufficient to simply state why this decision is wrong and in violation of the law (see ATF 4P.137/2002 reason 5.1 with

further references). However, even in this case the appellant must draw the attention of the Federal Supreme Court to the legal arguments that justify the challenge (see, e.g., ATF 4P.32/2007 reason 3.1). If the arbitral award is based on several independent arguments, the appellant must effectively challenge all of these arguments, since otherwise the Federal Supreme Court will dismiss the motion without examining the merits (see ATF 4P.114/2006 reason 4.4). The appellant's objections and arguments must be based on the facts established by the arbitral tribunal; the appellant cannot simply present his own view of the relevant facts and base his arguments on them (see, e.g., ATF 4A\_220/2007 reason 5.2). The Federal Supreme Court can only exceptionally review the facts established by the arbitral tribunal (see note 9). The brief may contain new facts and new evidence only if the arbitral award has given rise to these (art. 99(1) FSCA, see also note 9), i.e. if it is only as a result of the award that the new facts and evidence have become relevant (Besson, *Le recours contre la sentence* at 25; Poudret, *Tribunal fédéral*, at 680 with examples). If, for example, the award states that all the arbitrators participated in the deliberations, the appellant can introduce the new fact that one of the arbitrators did not, in fact, participate. New prayers for relief are inadmissible (art. 99(2) FSCA).

**6. Setting aside proceedings.** If the motion to set aside the arbitral award is manifestly inadmissible or contains a manifestly inadequate substantiation, it will be dismissed by a single judge (art. 108 FSCA). Otherwise, the Federal Supreme Court notifies the other party and the arbitral tribunal of the motion and sets an appropriate deadline for them to file submissions and observations and to produce the file (art. 102(1) and (2) FSCA). Parties abroad must appoint a representative in Switzerland (art. 39(3) FSCA). After the exchange of briefs (see note 7), the president of the responsible chamber of the Federal Supreme Court can order a hearing (art. 57 FSCA); this is, however, the exception. Otherwise, the Federal Supreme Court, which normally consists of three or, upon request, one or five judges, directly renders its decision. The judges normally decide without oral deliberation; an oral deliberation can, however, be requested by an individual judge (art. 58 FSCA). At any stage of the proceedings, the judge in charge of the proceedings can grant interim measures in order to preserve the status quo or to protect endangered interests (art. 104 FSCA).

**7. Setting aside proceedings: second exchange of briefs.** There is usually no second exchange of briefs (art. 102(3) FSCA). The Federal Supreme Court will only invite the parties to a second exchange of briefs if the counterparty raised essential new arguments in its answer that the appellant could not have reasonably anticipated (see ATF 4P.114/2006 reason 3.2.1; for details, see Besson, *Le recours contre la sentence* at 19 et seq.). A reservation by the appellant in his first brief to be allowed a second exchange of briefs is premature and will not have any effect (see ATF 4P.114/2006 reason 3.2). The appellant can only request a second exchange of briefs after receiving

the counterparty's brief and/or the arbitral tribunal's observations and should do so without delay. The request should show which new arguments the appellant wants to respond to, why they are relevant to the outcome of the decision and why the second exchange of briefs is indispensable to respect the appellant's right to be heard (see ATF 4A\_268/2007 reason 2.2; Kaufmann-Kohler/Rigozzi, *LDIP*, n 783). However, the Federal Supreme Court is not consistent regarding whether such a request is advisable. In a case where the appellant had requested a second exchange of briefs, the Federal Supreme Court has held that if the appellant considers it necessary to submit comments on new arguments raised by the counterparty without being invited to do so, he should submit his comments without seeking leave and without any delay (see ATF 4A\_137/2007 reason 2.2 with further references).

**8. Publicity of the proceedings.** If a hearing and/or oral deliberations take place, both are, as a rule, open to the public (art. 59(1) FSCA). However, the Federal Supreme Court can exclude the public if, inter alia, publicity would be against the interests of one party (art. 59(2) FSCA). When ruling on this issue, the Federal Supreme Court takes into account the increased need for confidentiality in many arbitrations (see ATF 4P.74/2006 reason 8.3). The Federal Supreme Court has held that the principle of publicity should not lead to a party waiving its right to a challenge due to a fear of publicity (see ATF 4P.74/2006 reason 8.3). After the Federal Supreme Court has rendered and announced its decision, it makes the outcome (dismissal/approval) with the parties' names at the seat of the Federal Supreme Court publicly available, unless the parties state an interest in keeping their names and the existence of the proceedings confidential (see ATF 4P.74/2006 reason 8.4). Publication of the full decision will then appear on the internet, normally in an anonymised form as long as the knowledge of the parties' names is not necessary for the understanding of the significance of the decision (art. 27(2) FSCA; see ATF 4A\_244/2007 reason 2), and unless the parties present an argument against publication that prevails over the public's right to be informed about the jurisprudence of the Federal Supreme Court (see ATF 4P.74/2006 reason 8.5).

**9. Scope of examination by the Federal Supreme Court.** The Federal Supreme Court only examines the objections under art. 190 to the extent that they have been sufficiently substantiated (see note 5). To this extent, however, the Federal Supreme Court examines the objections with unfettered powers (Besson, *Le recours contre la sentence* at 24; Poudret, *Tribunal fédéral*, at 684). The Court is bound by the facts as established by the arbitral tribunal (arts. 77 together with 105(1) FSCA), unless the establishment of the facts itself violated art. 190(2)(d) and (e) (see ATF 4P.48/2005 reason 3.1 with further references; see also note 5) or unless the Court may take into account new facts and new evidence pursuant to art. 99(1) FSCA (see note 5). Under art. 190(2)(b), the Federal Supreme Court examines the legal grounds for alleged jurisdiction or lack thereof with unfettered powers, including the consideration of any relevant substantive preliminary questions such as a

valid assignment of a contract that includes an arbitration agreement (see ATF 128 III 50 reason 2a; art. 190, note 6).

**10. Decision by the Federal Supreme Court.** If the appellant's motion is upheld, the Federal Supreme Court generally sets aside the arbitral award and refers the matter back to the arbitral tribunal (arts. 77(2) together with 107(2) FSCA). However, if the party objected to the arbitral tribunal's decision on jurisdiction (art. 190(2)(b)), the Federal Supreme Court bindingly establishes the arbitral tribunal's jurisdiction or lack thereof (e.g. ATF 127 III 279 reason 1b). If the Federal Supreme Court establishes the arbitral tribunal's jurisdiction and refers the matter back to the tribunal, the arbitral tribunal is bound by this decision and must decide on the merits (see ATF 117 II 94 reason 4). It has not yet been decided whether the Federal Supreme Court can itself dismiss an arbitrator if his challenge is upheld under art. 190(2)(a) (see ATF 4P.196/2003 reason 2.2; in favour of this possibility are, e.g., Besson, *Le recours contre la sentence* at 22, Kaufmann-Kohler/Rigozzi, *LDIP*, n 779; Poudret, *Tribunal fédéral*, at 686).

## [Waiver of setting aside proceedings]

### Article 192

**(1) If none of the parties have their domicile, their habitual residence, or a business establishment in Switzerland, they may, by an express statement in the arbitration agreement, or in a subsequent written agreement, waive all setting aside proceedings, or limit such proceedings to one or more of the grounds listed in Article 190(2).**

**(2) If the parties have waived all setting aside proceedings and if the awards are to be enforced in Switzerland, the New York Convention of 10 June 1958 on the Recognition and Enforcement of Foreign Arbitral Awards applies by analogy.**

**1. Possibility and effect of a waiver.** Unlike many other jurisdictions, Swiss law allows a complete waiver of setting aside proceedings either in the arbitration agreement itself, or in a subsequent written agreement, provided that the parties do not have close connections to Switzerland. Although this waiver option has been criticised by a number of legal commentators, the Federal Supreme Court, lacking the authority to examine the constitutionality of a federal statute, is obliged to apply art. 192, and the debtor cannot invoke public policy against the waiver (see ATF 4P.198/2005 reason 2.2). If a foreign 'loi d'application immédiate' (see art. 187, note 4) prohibits the waiver of remedies against arbitral awards, this prohibition will have no effect in Switzerland (see ATF 4P.198/2005 reason 2.1). Unless it is only partial (see note 5), a waiver excludes setting aside proceedings for all grounds listed in art. 190, including an objection that the arbitration clause and the waiver do not cover the dispute (see ATF 134 III 260 reason 3.2.4) or that they do not

bind a non-signatory (see ATF 131 III 173 reason 4.1; legal commentators have criticised this decision, see e.g., Besson, *Etendue du contrôle* at 1080; Basel Commentary-Patocchi/Jermini, n 19 ad art. 192 with further reference). In any event, the parties still enjoy some protection, as art. 192(2) calls for an examination of the award under the New York Convention at the enforcement stage (see note 8).

**2. Requirements of a waiver.** The parties can only waive their right to challenge the arbitral award if they do not have close connections with Switzerland, as defined by art. 192(1) (see note 3); if they explicitly express the waiver, either in the arbitration agreement or subsequently (see note 4); and if the agreement on the waiver is in writing, as defined by art. 178(1). On the face of art. 192(1), there are no further requirements. However, with regard to international sports arbitration, the Federal Supreme Court held that a waiver is not valid if the athlete in question had no choice but to sign the declaration in order to participate in the events of the professional sports organisation (see ATF 133 III 235 reason 4.3.2.2 and 4.4.2; also Kaufmann-Kohler/Rigozzi, *LDIP*, n 766/7). If the parties to a contract include by reference an arbitration agreement contained in another contract between them (arbitration agreement by reference), they automatically also include the waiver contained in this arbitration agreement (see ATF 4P.198/2005 reason 1.3).

**3. No close connection to Switzerland.** A waiver requires that the parties to the arbitral proceedings have neither a domicile, nor a habitual residence nor a business establishment in Switzerland. The situation at the time of the waiver is decisive (see ATF 4P.113/2001; Basel Commentary-Patocchi/Jermini, n 12 ad art. 192 with references). The nationality of the parties and any connection of the subject matter of the dispute to Switzerland are not relevant. The domicile of a person is the place where he resides with the intent of permanently settling there (art. 20(1)(a) PILA). The habitual residence of a person is the place where he lives for an extended period (e.g. a couple of months), even if this period was limited from the beginning (art. 20(1)(b) PILA). The business establishment of a person is the place where he has the centre of his business activities (art. 20(1)(c) PILA). The domicile of a company is the statutory seat or, failing such designation, the place of actual management (art. 21(1) and (2) PILA). The business establishment of a company is in the state where it has its registered office or a branch (art. 21(3) PILA). If one party has a branch in Switzerland, the possibility of a waiver is excluded even if the dispute has no connection with this branch (Berger/Kellerhals, *Schiedsgerichtsbarkeit*, n 1673 with references). The existence of a subsidiary in Switzerland does not exclude the waiver, as long as the subsidiary is not involved in the proceedings (Berger/Kellerhals, *Schiedsgerichtsbarkeit*, n 1673 FN 239).

**4. Explicit waiver.** The waiver must be explicit. First, this requires that the parties themselves formulated the waiver. It is not sufficient to globally refer to the by-laws of an organisation, to a set of arbitration rules or to similar

documents that contain a waiver (see ATF 133 III 235 reason 4.3.1 with references). In any event, Art. 28(6) ICC Rules of Arbitration is not considered to constitute a waiver. An exception exists with respect to waivers contained in investment treaties where the Federal Supreme Court held that they are also binding on the investor who is not a party to the treaty (see ATF 4P.114/2006 reason 5.4). Secondly, waiver requires that the parties unambiguously express their clear intent to waive all remedies against the arbitral tribunal's awards. Originally, the Federal Supreme Court required the parties to expressly state the excluded remedy (see ATF 116 II 639 reason 2c). However, it has since abolished this strict formulation and now acknowledges that it is a matter of the construction of each single agreement as to whether it unambiguously reflects the parties' intention to obtain a waiver (see ATF 133 III 235 reason 4.3.1; ATF 131 III 173 reason 4.2.3.1; ATF 4P.206/2006 reason 3). Even though it is recommended that the parties explicitly refer to art. 192, it is not mandatory (see ATF 131 III 173 reason 4.2.3.1). The Federal Supreme Court accepted the formulation 'the parties [...] exclude all and any rights of appeal from all and any awards insofar as such exclusion can validly be made' (see ATF 131 III 173 reason 4.2.3.2, see for another example ATF 134 III 260 reason 3.2.2). The formulation that the award is 'final and binding' upon the parties is clearly insufficient, even when contained in an investment treaty (see ATF 4P.114/2006 reason 5.3-5.4). The Federal Supreme Court also refused the formulation '[t]he application to the State Courts are [sic] excluded', as the clause did not make clear whether it constituted a waiver in the sense of art. 192, or only excluded the state court's jurisdiction to hear the case (see ATF, 2 July 1997, reason 1a). Either way, the construction is rather restrictive, even in cases where the dispute has no connection to Switzerland (see ATF 4P.114/2006 reason 5.2).

**5. Partial waiver.** Instead of waiving all remedies against arbitral awards, the parties can exclude just one or more grounds for challenge contained in art. 190(2). For example, they can exclude the challenge to the arbitral tribunal's decision on jurisdiction under art. 190(2)(b) (upheld in ATF 4P.98/2005 reason 4.2). For a valid partial waiver, the parties must explicitly state the grounds for challenge that they want to exclude, either by indicating the corresponding sub-paragraph of art. 190(2), by reproducing the legal text or by any other formulation that allows clear identification of the excluded ground for challenge (see ATF 131 III 173 reason 4.2.3.1 in fine). If the parties have waived their right to invoke one or more grounds for challenge contained in art. 190(2)(a) to (d), they cannot circumvent this waiver by invoking public policy if the waived grounds are part of public policy (see Basel Commentary Patocchi/Jermini, n 26-28 ad art. 192).

**6. Challenge to the award despite a possible waiver.** If it seems possible that the parties agreed on a waiver under art. 192, the party filing a motion to set aside the arbitral award must present its arguments on this issue in its first brief. If it fails to do so and the counterparty relies on the waiver in

its answer, the appellant will normally not, subject to special circumstances, be granted the option of a second exchange of briefs (see ATF 4P.114/2006 reason 3.2.2; see art. 191, note 7). The Federal Supreme Court, *ex officio*, makes a thorough determination of the existence or non-existence of a valid waiver, since the absence of such waiver is a requirement for entering into the merits (see ATF 4P.114/2006 reason 3.2.2).

**7. Waiver of other remedies.** It is controversial whether the parties can also waive their right to a revision of the decision (in favour of this possibility, see, e.g., Berger/Kellerhals, *Schiedsgerichtsbarkeit*, n 1812 et seq., against this possibility, see, e.g., Basel Commentary-Patocchi/Jermini, n 22 ad art. 192; for revision, see art. 190, note 18 et seq.). The parties cannot validly waive their right to appeal against court decisions under arts. 179(2), 183(2), 184(2) and 185 (Basel Commentary-Patocchi/Jermini, n 23 ad art. 192; Berger/Kellerhals, *Schiedsgerichtsbarkeit*, n 1684).

**8. Protection by the New York Convention.** If the parties have waived all remedies against the arbitral tribunal's awards, they are still protected by the New York Convention. When the arbitral award is to be enforced abroad, the foreign court will examine whether it has to refuse recognition and enforcement on the grounds of art. V New York Convention. If the award must be enforced in Switzerland, art. 192(2) declares the New York Convention applicable by analogy. Thus, the competent Swiss court in the course of the enforcement proceedings will refuse the enforcement based on art. V New York Convention if grounds for such refusal exist. However, the grounds for refusal contained in art. V New York Convention and the grounds for challenge stated in art. 190(2) are not congruent, the former being broader in scope than the latter. Where art. V New York Convention provides for a refusal of the enforcement although art. 190(2) would not allow setting aside the award, the majority of legal commentators apply the grounds for denying enforcement under art. V New York Convention only to the extent that these grounds would also lead to a setting aside of the award under art. 190(2) (Basel Commentary-Patocchi/Jermini, n 31 ad art. 192; Berger/Kellerhals, *Schiedsgerichtsbarkeit*, n 1695). Otherwise, the waiver would restrict the possibility of enforcing the award in Switzerland even though this was not the intention of the parties. If the parties have agreed on a partial waiver, the courts in Switzerland will exercise their supervisory function under art. 192(2) by examining whether enforcement may be denied under those grounds under art. V New York Convention that correspond to the grounds waived by the parties (Basel Commentary Patocchi/Jermini, n 35 ad art. 192). In any event, the decision of the state court is subject to cantonal remedies under the cantonal codes of civil procedure (as of 2011: the remedies under the Federal Code of Civil Procedure) and, in the last instance, to the appeal in civil matters under the FSCA.

[Deposit and certificate of enforceability]

Article 193

**(1) Each party may at its own expense deposit a copy of the award with the Swiss court at the seat of the arbitral tribunal.**

**(2) At the request of a party, that court shall certify the enforceability of the award.**

**(3) At the request of a party, the arbitral tribunal shall certify that the award has been rendered pursuant to the provisions of this Act; such certificate is equivalent to depositing the award with the court.**

**1. General.** Art. 193 provides for acts by the courts and the arbitral tribunal that are aimed at facilitating the enforcement of the arbitral award.

**2. Deposit of the award.** Depositing the award with the court under art. 193(1) has no legal effect under Swiss law. The parties may wish to deposit the award because it is so required by the law at the foreign place of enforcement, in order to have it safely stored, or to stress the Swiss nature of the award. Which court or judge has the competence is a matter of cantonal law; in the Canton of Zurich it is the Obergericht (§ 239(2) Zurich Code of Civil Procedure), and in the Canton of Geneva it is the president of the Tribunal de première instance (art. 461C Geneva Code of Civil Procedure).

**3. Certificate of enforceability.** The certificate of enforceability under art. 193(2) attests that the award is binding and enforceable as required by art. V(1)(e) New York Convention. It has declaratory meaning and is not a prerequisite of enforceability, as the award is already final and enforceable as soon as it has been communicated (art. 190(1)). The effects of certification are thus confined to facilitating proof of the formal legal status of the award as far as the Swiss law at the seat of the arbitration is concerned. If the arbitral award is to be enforced in Switzerland, the creditor can enforce it quickly and with little possibility of the debtor objecting if either the certificate under art. 193(2) or any other document that establishes the enforceability of the award is produced (Tribunal cantonal de Fribourg, 24 March 2004, reason 2; Obergericht Solothurn, 27 September 2001, reason 1a). If the creditor produces the certificate, it is binding on the Swiss court of enforcement (Obergericht Solothurn, 27 September 2001, reason 2a). The court can refuse enforcement only if the award is null and void (see art. 190, note 22), not because the applicant fails to produce the arbitration agreement, nor for grounds that could have been raised when challenging the award under art. 190 (see ATF 130 III 125 reason 2). Should setting aside proceedings have been waived under art. 192, the court of enforcement will examine art. 192(2).

**4. Issuance of the certificate of enforceability.** The certificate is issued by the competent court (see note 2) upon request by one party, provided that: either no motion to set aside the award has been filed within thirty days (see

art. 191, note 3); a motion has been filed but has no suspensive effect (see art. 191, note 2); it has been dismissed; or the parties have validly waived their right to challenge under art. 192, in which case the majority of legal commentators take the view that the certifying court should not carry out the examination under art. 192(2) (e.g. Berti-Berti, n 13 ad art. 193; Berger/Kellerhals, *Schiedsgerichtsbarkeit*, n 1836 with further references). The arbitral tribunal itself may also file a request, e.g., for the purposes of enforcing its fees (Obergericht Zürich, 1 December 2005). The certifying court examines whether the award is null and void or has obvious formal errors such as the lack of a signature (Berti-Berti, n 12 ad art. 193), and whether it is indeed an award rather than an expert determination (see ATF 130 III 125 reason 2.1.2). It is a matter of controversy whether the certificate is only to be issued if the subject matter of the dispute is arbitrable under art. 177 (in favour of this requirement Berger/Kellerhals, *Schiedsgerichtsbarkeit*, n 1835; against this requirement Lalive/Poudret/Reymond, *L'Arbitrage*, n 2 ad art. 193).

**5. Certificate by the arbitral tribunal.** A certificate by the arbitral tribunal that the award has been rendered pursuant to art. 176 et seq. has the same effect as the deposit of the award under art. 193(1). The certification under art. 193(3) has no legal effect apart from documenting the statement of the arbitral tribunal that it proceeded pursuant to the rules of chapter 12 PILA. Whether a deposit of the award with a court is required or whether the certificate of the arbitral tribunal is accepted as equivalent depends on the law at the place of enforcement.

## [Foreign arbitral awards]

### Article 194

**The recognition and enforcement of foreign arbitral awards is governed by the New York Convention of 10 June 1958 on the Recognition and Enforcement of Foreign Arbitral Awards.**

**Note.** As the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards is dealt with separately in this Commentary, we shall limit our comments to those issues which are specifically related to the practice and procedure in Switzerland.

**1. General.** Art. 194 constitutes a declaratory reference to the New York Convention for the recognition and enforcement of awards rendered by arbitral tribunals with their seat outside Switzerland. Thus, the recognition and enforcement of a foreign award is completely governed by the New York Convention, which, for Switzerland, applies *erga omnes*, irrespective of whether or not the award was rendered in a contracting state of the New York Convention (see art. I New York Convention). For an award made in Switzerland, the New York Convention can only become relevant in Swiss enforcement proceedings if the parties have waived the setting aside proceed-

ings pursuant to art. 192 (see art. 192, note 8). Despite the reference to the New York Convention in art. 194 PILA, the New York Convention is not applicable in Switzerland as a national law, but rather as an international treaty. As a consequence, in order to ensure internationally uniform application, Swiss courts are also required to take into account foreign decisions interpreting the New York Convention (Berti-Patocchi/Jermini, n 20 ad art. 194). The New York Convention does not exclude the applicability of other multilateral or bilateral treaties, provided that their application is, in any given case, more favourable to the recognition and enforcement of the award (art. VII(1) New York Convention). For example, a foreign ICSID award must be recognised and enforced under art. 54 of the Washington Convention on the Settlement of Investment Disputes Between States and Nationals of Other States of 18 March 1965 without any form of control by Swiss courts. Bilateral treaties exist with Austria, Belgium, the Czech Republic, Germany, Italy, Liechtenstein, Slovakia, Spain and Sweden (see Zurich Commentary-Siehr, n 1 ad art. 194).

## **2. Recognition and enforcement under the New York Convention.**

Recognition of a foreign arbitral award means that the award has the same effect in Switzerland as in the state of origin, in particular the *res judicata* effect. Recognition and enforcement of an award are subject to the same requirements under the New York Convention. The New York Convention defines what constitutes an arbitral award. A party seeking recognition or enforcement must submit the documents set out in art. IV New York Convention to the competent court. In cases of non-compliance with art. IV(1) New York Convention, Swiss courts are not excessively rule-bound and are reluctant to deny recognition and enforcement for purely formal reasons, such as, e.g., if the authenticity of a photocopy is not disputed (see Cour de Justice de Genève, 15 April 1999, reason 5 with further references; see also ATF 4P.173/2003 reason 2).

## **3. Grounds for refusal under art. V(2) New York Convention.**

While the court examines the grounds for refusing recognition and enforcement under art. V(1) New York Convention only upon request of a party, the grounds contained in art. V(2) New York Convention are examined *ex officio*. Under art. V(2)(a) New York Convention, a foreign arbitral award will not be recognised and enforced in Switzerland if the subject matter of the dispute is not arbitrable. It is controversial whether this refers to the concept of arbitrability under art. 177 (Basel Commentary-Patocchi/Jermini, n 122 ad art. 194; see also Kaufmann-Kohler/Rigozzi, *LDIP*, n 898) or whether recognition and enforcement can only be refused if the non-arbitrability under art. 177 amounts to a violation of public policy (Berger/Kellerhals, *Schiedsgerichtsbarkeit*, n 1917). Swiss courts have not yet ruled upon this question. Under art. V(2)(b) New York Convention, the recognition and enforcement of a foreign award can be refused if they would violate public policy. The notion of public policy under art. V(2)(b) New York Convention comprises both substantive and pro-

cedural public policy and must be applied restrictively (see ATF 4P.173/2003 reason 4.1). This means that even if an award rendered in Switzerland could be set aside under art. 190(2)(e), recognition and enforcement can only be refused if the fundamental principles have been violated in an unacceptable manner (see ATF 101 Ia 521 reason 4a). The Federal Supreme Court has ruled that there was no violation of public policy under art. V(2)(b) New York Convention in cases where the arbitral award did not state any reasons for the award (see ATF 101 Ia 521 reason 4), where the arbitral tribunal issued an interim award on jurisdiction in which it ordered the respondent to reimburse the claimant for the respondent's share of the advance on costs which the claimant had fully paid (see ATF 4P.173/2003 reason 4.2) and where a *pactum de palmario* was agreed upon, i.e. a supplementary remuneration for the attorney should the case in question have succeeded on the merits (see ATF, 9 January 1995, reason 7).

#### **4. Concept of public policy under art. V(2)(b) New York Convention.**

Traditionally, the Federal Supreme Court has invoked only Swiss public policy and has held that art. V(2)(b) applies where 'the recognition or enforcement of a foreign award violates in an unacceptable way the Swiss concept of justice' (see ATF 4P.173/2003 reason 4.1; ATF, 9 January 1995, reason 7). In 2006, the Federal Supreme Court interpreted public policy under art. 190(2)(e) as an internationalised concept (see art. 190, note 10). As public policy at the stage of recognition and enforcement must generally be interpreted more restrictively, it can be expected that the Federal Supreme Court will now apply the same standard also under art. V(2)(b) New York Convention. The difference between a Swiss and an internationalised concept of public policy can become relevant with regards to, e.g., punitive damages. While a foreign punitive damages award would most likely be recognised and enforced under an internationalised concept of public policy, recognition and enforcement might be refused under a Swiss concept (see art. 190, note 12).

#### **5. Enforcement of awards of a sum of money.**

In Switzerland, the creditor of a sum of money can already start enforcement proceedings under the Swiss Debt Enforcement and Bankruptcy Law (DEBL) before he has obtained an enforceable judgement or award. The creditor can apply for enforcement proceedings at the place where the debtor has its domicile, seat or branch, has designated special domicile, or has assets for which the creditor has obtained a Swiss freezing order (arts. 46, 50, 52 DEBL). The enforcement office immediately issues and serves the debtor with a summons to pay (art. 69 DEBL), to which the debtor can object within ten days without stating its reasons. If there is no objection, the summons to pay becomes enforceable. If the debtor objects, the proceedings then hinge on whether or not the creditor has already obtained an award. If it has obtained a foreign arbitral award, it can apply to the court to definitively set aside the objection in summary proceedings. The local courts competent in this regard are: the *Einzelrichter* (single judge; § 213(2) Zurich Code of Civil Procedure) of the

Bezirksgericht in the Canton of Zurich, and the Tribunal de première instance (art. 20(1)(b) Geneva Code of Application of the DEBL) in the Canton of Geneva. In the course of the summary proceedings, the court decides as a preliminary question upon the recognition and enforceability of the award under the New York Convention. If it accepts enforceability, the court sets aside the debtor's objection unless the debtor successfully invokes the statute of limitations or produces documents showing that, since the award was rendered, the debt has been discharged or payment terms have been extended (art. 81 DEBL). As far as the application of the New York Convention is concerned, and if the requirements (e.g. the minimum amount in dispute) are fulfilled, cantonal remedies (as of 2011: the remedies under the Federal Code of Civil Procedure), as well as an appeal in civil matters to the Federal Supreme Court under the Federal Supreme Court Act, are admissible against the decision of the lower instance. If the debtor's objection is definitively set aside, the enforcement proceedings continue by means of seizure of assets or bankruptcy proceedings. If the creditor has not yet obtained an arbitral award but has succeeded in provisionally removing the debtor's objection to the summons to pay, e.g., on the basis of a written acknowledgment of debt, the debtor must start an action on the merits before the arbitral tribunal if it wants to have its objection upheld (see ATF 7B.55/2006 reason 3 and lower instance's decision cited in para. G.b.a).

**6. Enforcement of non-monetary awards.** The enforcement of awards ordering, e.g., specific performance or injunctions is still subject to cantonal law. Typically, these cantonal rules provide for summary proceedings similar to those applicable to the enforcement of monetary awards. When the Federal Code of Civil Procedure (FCCP) enters into force in 2011, these cases will be treated uniformly throughout Switzerland. Under the FCCP, the court carries out, in summary proceedings (art. 339(2) FCCP), the same examination of the enforceability of the award as in the case of a monetary award (note 5). In addition, the debtor can invoke the statute of limitations or forfeiture of the claims or can produce documents showing that, since the award was rendered, he has discharged the debt or the creditor has extended the performance terms (art. 341(3) FCCP). If the award orders the losing party to take certain actions, the court can order means of coercion or fines, or it can threaten a fine in case of non-compliance under art. 292 of the Swiss Criminal Code (art. 343 FCCP). If the award orders the losing party to make a declaration of intent (for example, to declare its consent to a transaction), the court may order that the award replace the party's declaration (art. 344 FCCP).