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Judicial Control of Arbitral Awards in Switzerland

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1 GENERAL COMMENTS ON INTERNATIONAL ARBITRATION LAW IN SWITZERLAND

Switzerland has long been a New York Convention (NY Convention)[1] state. Although Switzerland's arbitration law is not based on the UNCITRAL Model Law (Model Law), it does by and large conform to the fundamental principles of the Model Law as amended in 2006, in particular in relation to the interpretation of arbitration agreements, and the vacation and enforcement of international arbitration awards.

Swiss law distinguishes between international arbitration and domestic arbitration. This proceeds from article 176 of Switzerland's arbitration statute, Chapter 12 of the Swiss Private International Law Act[2] (PIL), which defines the scope of international arbitration as arbitrations with their seat in Switzerland and in which, at the time of the conclusion of the arbitration agreement,[3] at least one of the parties had neither its domicile nor its habitual residence in Switzerland. Domicile for registered corporate entities is treated as the place of formal registration.[4] For registered corporate entities, habitual residence does not apply. No other provision in Swiss international arbitration law is more stringent than those under the NY Convention.[5]

If, within the meaning of article 176 of the PIL, an arbitration is a Swiss international arbitration then the arbitration provisions of the PIL will apply. If the arbitration is seated in Switzerland, but it is not an international arbitration within the meaning of that article, then the arbitration provisions of the Swiss civil procedure code (CPC) will apply, namely part three of that code. The one exception is that, even if the requirements under article 176 of the PIL are satisfied for an arbitration to be international, by paragraph 2 of that article the parties may by

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[1] New York Convention as transposed into Swiss law: RS 0277.12 (approved by the Federal Assembly on Mar. 2, 1965; date of signature Dec. 29, 1958; date of ratification June 1, 1965; date of entry into force Aug. 30, 1965).

[2] All references to the PIL and any other Swiss statutes are in unofficial English translation.

[3] Although Art. 176 of the PIL expressly indicates that it is the situation at the time of the entering into of the arbitration agreement that is decisive, a degree of uncertainty about the relevant timing does exist under Swiss law. Nonetheless, under a draft bill published by the Swiss Federal Council on Oct. 24, 2018, seeking to reform Swiss international arbitration law this uncertainty is decisively resolved in favor of the express wording of the PIL.

[4] Art. 21 of the PIL, applied to arbitration by analogy.

[5] Notably the formal requirements for the recognition of an arbitration agreement in Art. 178(1) of the PIL are less stringent than those in Article II (1) and II(2) of the NY Convention.

"express declaration" exclude the application of the arbitration provisions of the PIL, in which case those under part three of the CPC will apply.

This country report will confine itself to Swiss international arbitration. Chapter 12 of the PIL was intended as a complete code for Swiss international arbitration. Nonetheless, since its adoption in 1989 various matters under it needing clarification have arisen, and the Swiss Supreme Court has done so in a number of cases over the years. There is currently a legislative reform of Swiss international arbitration afoot, expected to come into force in 2020. This reform is proceeding on the basis that Swiss international arbitration law has been a success and only a limited number of minor adjustments to it are necessary. One of the types of adjustments is to include in the statute provision on the various items identified as in need of clarification to ensure it is a complete code.

One of the prominent features of Swiss international arbitration law is that it is ordained to support and promote arbitration as a dispute settlement mechanism. One sees this feature certainly in the way arbitration agreements are construed and also in the high degree of finality which international arbitration agreements enjoy in Switzerland in both law and actual practice. Challenges to Swiss international arbitration awards lie exclusively to the Swiss Supreme Court (article 191 PIL). This promotes finality both in that there is only one stage of challenge and in that the Swiss Supreme Court is institutionally and legally constituted only to intervene in particularly grievous cases. Statistically, between 1989 and 2017 there have been 438 decisions of the Swiss court on the merits in cases challenging international arbitration awards. Of these, only 33 have succeeded, even partially, that is 7.53 percent.[6]

2 JUDICIAL INTERPRETATION OF SCOPE OF ARBITRATION CLAUSES

Article 178(2) of the PIL governs most matters relating to the scope of Swiss international arbitration agreements. This comprises, for the most part, temporal, personal ,and substantive scope, and therefore notably which parties and subject matter are included in the arbitration agreement. The wording of article 178(2) of the PIL does not, however, suggest that it is the provision governing the scope of arbitration agreements and almost exclusively so. It states: "Furthermore, an arbitration agreement is valid if it conforms either to the law chosen by the parties or to the law governing the subject-matter of the dispute, in particular the main contract, or to Swiss law." On its face, one sees that the provision is mainly concerned with, first, the substantive validity of arbitration clauses and, secondly, dictating what law applies to determine such substantive validity in an arbitration-friendly manner.[7] Substantive validity is essentially the question of whether there has been at all a valid agreement on arbitration and not yet on what particular matters and between whom.

It is, of course, a related but further step to deal with questions of the scope of any such substantively valid agreement to arbitrate, but in the virtual absence of any other provision in the PIL it is article 178(2) of the PIL which is used to answer these questions, and it does so in the same

[6] F. Dasser & P. Wójtowicz, *Challenges of Swiss Arbitral Awards – Updated Statistical Data as of 2017* 36 ASA BULLETIN [hereinafter ASA BULL.], 276–294 (2018).

[7] B. BERGER & F. KELLERHALLS, INTERNATIONAL AND DOMESTIC ARBITRATION IN SWITZERLAND 131, para 395 (3d ed. 2015) ("The rule *in favorem validitatis* implicates that it is in all cases the most favourable law among those listed in PIL, Art. 178(2) that determines the validity of the arbitration agreement"); P.-Y. Tschanz, *Commentary on Art. 178 PILA, in* COMMENTAIRE ROMAND LDIP 1538, 178 N 72 (A. Bucher ed., 2011) ("*Ce critère est celui du résultat le plus favorable à la validité de la convention d'arbitrage (favor validitatis)*") (This criterion is that of the result which is most favorable to the validity of the arbitration agreement (favor validitatis)).

pro-arbitration manner as it does in respect of its treatment of substantive validity – there is arbitral jurisdiction if permitted under any of (1) the law chosen by the parties to govern the arbitration agreement, (2) the law chosen by them to govern their main contract, or (3) Swiss law. It is very rare in practice for parties to choose a law specifically applicable to their arbitration agreement and even rarer for them to choose any such law at variance to what they have chosen for their main contract in general. Therefore, the doctrine of separability of arbitration agreements[8] notwithstanding, in practice the more arbitration-friendly outcome of any scope enquiry as between the chosen law of the contract and Swiss law will prevail. Given Swiss contract law's flexible and liberal character, it will in practice usually be Swiss law which, of the two, proves more inclusive in terms of subject matter and persons bound. Therefore, it is usually the more arbitration-friendly of the two, and the one that is ultimately applied. In the case law, one rarely sees interpreting the scope of arbitration agreements under article 178(2) of the PIL any law applied but Swiss law, but that may as much be an emanation of Swiss courts being principally kitted out with the "hammer" of Swiss law and therefore seeing every problem as a nail!

Interpretation of arbitration clauses to ascertain their scope in terms of subject matter depends, under Swiss law, for the most part upon the general principles of contractual interpretation set out in article 18 of the Swiss Code of Obligations (CO). In accordance with article 18 CO, an arbitration agreement is first interpreted with a view to ascertaining the real common intention of the parties. If that fails, for example, because the parties did not, in fact, have a discernible real common intention, as a second step, the interpretation proceeds in accordance with the principle of confidence, that is, with the meaning that objectively should be ascribed to the expressions used by each party. The words that the parties used, as well as all the surrounding circumstances at the time of contracting, are evaluated so as to determine this objective meaning.

In relation to this second-stage analysis, Swiss law applies certain presumptions specific to the interpretation of arbitration clauses. One of these is that once an arbitration clause is accepted as valid in relation to any one matter or matters in dispute, there is a presumption that it has a broad material scope, with a view to the efficacy of arbitration and in particular to avoid the inefficacy of dispersing among different fora disputes arising from the same factual matrix. Once it has been established that the parties have agreed on arbitration and thereby waived their constitutional right of access to the ordinary courts, it is presumed that they intended to vest the arbitral tribunal with comprehensive jurisdiction over the differences in respect of the defined legal relationship to which the arbitration agreement refers.[9]

[8] Both this separability doctrine as formulated in Swiss international arbitration law (Art. 176(3) PIL) and that in Article 16(1) of the Model Law would appear, however, not to extend to the question of whether the law applying to the contract cannot without more be taken to apply to an arbitration agreement within it.

[9] *See* Berger & Kellerhalls, *supra* note 7, at 162–163, para. 484, as well as at 164–165, paras. 489–490, and the decisions of the Swiss Supreme Court cited there:

> 489. Once it has been established that the parties intended to derogate from the jurisdiction of the courts, the Swiss Federal Tribunal no longer applies a restrictive interpretation. To the contrary, it states that in such a case one should take into account the parties' common intention to have the difference decided by an arbitral tribunal. Therefore, it shall be assumed that the parties, if they have indeed concluded an arbitration agreement, wish the tribunal to have broad jurisdiction.
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> 490. A 'broad jurisdiction' means that a liberal or 'pro-arbitration' approach with regard to the scope and content of an arbitration agreement shall apply. This entails, first of all, that the arbitration agreement, even if combined with the main contract in a single document, has its own autonomous fate, unless otherwise agreed by the parties. In cases of doubt, the parties shall thus be considered as having intended not only to submit disputes arising from the performance of the main contract to arbitration, but also differences in relation to the formation, validity, invalidity and termination thereof. Moreover, the liberal or 'pro-arbitration' approach

It might legitimately be contended that this is not just a practical result of making arbitration a viable alternative to state court litigation but also an expression of a general presumption of subject matter inclusiveness in article V(1)(c) of the NY Convention where the burden of proving the arbitration agreement is of narrower scope is on the party challenging it. The parts outside of the substantive scope of the agreement may be severed, and those within saved for arbitration.

Swiss law, by contrast, contains no presumption of inclusiveness of persons, but there are various doctrines under Swiss law to include nonsignatories, notably where the party seeking to escape the arbitration has involved itself in the performance of the contract subject to the arbitration.[10]

Also, Swiss law leans in favor of efficiency of arbitration and, therefore, its viability as a dispute settlement mechanism, in that substantially similar arbitration clauses in two or more contracts are interpreted as one arbitration clause over all claims of all parties to all contracts. Also, article 112(2) CO is quite generous (by comparative law standards, in particular, vis-à-vis English law under the Contracts (Rights of Third Parties) Act 1999) in accepting actions for nonparties to a contract, and Swiss law treats such third parties as benefiting from any arbitration provision in the contract.

The scope of an arbitration agreement as limited in time is in practice of lesser importance than substantive and personal scope. Nonetheless, two questions in relation to scope in time that do arise in practice are in relation to (1) arbitrations started without prior satisfaction of preconditions, such as a requirement to mediate, and (2) arbitrations concluded after an agreed period for the award has expired. In a 2016 decision,[11] the Swiss Supreme Court provided clarity on what pre-arbitration requirements must be complied with and the consequences of a failure to do so. On the facts there, prior to arbitration there was a requirement for a party to make a conciliation attempt under the 2001 ICC Alternative Dispute Resolution Rules (ICC ADR Rules). When the dispute arose the claimant duly filed its request for conciliation under those rules, and there were written exchanges, and even a conciliator was appointed. But when complications arose in the setting of a conference to discuss procedure, the claimant stopped the conciliation and initiated the arbitration. The Swiss Supreme Court found that the claimant had not complied with the pre-arbitration requirements since article 5(1) of the ICC ADR Rules requires at minimum before withdrawing the conciliation that at least one discussion had taken place between the conciliator and the parties and that this on the facts had not occurred. The Swiss Supreme Court stated that the consequence of this failure to comply with a clear pre-arbitration requirement was that the arbitration was suspended until the claimant had satisfied the requirement.

On the subject of requirements to render the award within a certain time, the Swiss Supreme Court distinguishes between, on the one hand, express specific agreements between the parties on time periods and a tribunal's unexcused failure to observe them in rendering the award, and, on the other, time periods within arbitration rules where there is some excuse for the lateness of the award. Therefore in ATF 140 III, the Swiss Supreme Court held that the arbitrator had lost jurisdiction ratione temporis by failing without excuse, subsequent to repeated reminders, to render the award within a period of time expressly agreed between him and the

> means – without any indication to the contrary – that the parties shall be deemed to have agreed that the arbitral tribunal's jurisdiction not only covers contractual claims … but also extends to claims arising from *culpa in contrahendo* or liability based on trust … and other extra-contractual claims.

Id. at 164–165.

[10] See most recently, Decision of the Swiss Supreme Court 4A_459/2016 of Jan. 19, 2019, at consid. 2.1.

[11] Decision of the Swiss Supreme Court 4A_628/2015, Mar. 16, 2016.

parties. But in a decision of January 11, 2017,[12] the Swiss Supreme Court declined to hold that the tribunal had lost jurisdiction for its failure to meet the six-month time limit under the expedited procedure in article 42 of the Swiss Rules of International Arbitration.

It is important to note that although Swiss international arbitration law treats arbitration agreements in a pro-arbitration manner, in particular with a view to vindicating the parties' presumed intention of one-stop dispute resolution, the court's review of arbitrators' decisions on jurisdiction is an exacting one. Whereas in regard to all other bases of setting aside an arbitral award, the only remedy is the nullification (partial or complete) of the award;[13] with regard to jurisdiction challenges, the court is empowered to substitute its own decision.[14] Moreover, the Supreme Court affords no deference to the arbitral tribunal's legal treatment of its jurisdiction but rather freely assesses legal questions on jurisdiction and preliminary questions. Although the Supreme Court will not supply legal arguments for parties challenging arbitral jurisdiction,[15] the Supreme Court is not bound by the parties' and the tribunal's legal reasoning providing the facts have been sufficiently established to support the reasoning supplied by the Supreme Court.[16] As regards jurisdiction, the Supreme Court is nonetheless bound by the facts found by the arbitral tribunal.[17]

In a recent case,[18] the Swiss Supreme Court rejected the arbitral tribunal's decision that it had jurisdiction over a natural person in connection with his founding of a legal person (a limited company under Turkish law) which was subject to the arbitration agreement. The arbitral tribunal had found on the facts that the natural person had entered into an agreement for and on behalf of that legal person which at that time had not yet been registered. Under article 645 CO, a person who enters into obligations on behalf of a legal person not yet registered is liable in respect of those obligations unless the legal person assumes the obligation within three months of its registration. The arbitral tribunal found that the legal person once registered had not assumed the obligation, with the result that the person who entered into the obligations on its behalf was liable. The arbitral tribunal found moreover that, as a matter of law, the person who acted on behalf of the not-yet-registered company was a certain natural person, and on that basis that natural person was subject to the arbitration agreement in the obligation. No party had ever raised the possibility that the person who acted was anyone other than the natural person acting in his or her personal capacity, and the arbitral tribunal's decision was based on the acceptance that it was the natural person in his or her own capacity who had so acted. The complainant before the Supreme Court argued unsuccessfully that the natural person had no personal liability based on a supposed ratification by conduct. For the Supreme Court, however, once the complainant has raised the plea contesting personal liability the Supreme Court is entitled to apply the law ex officio to examine if there was some other legal basis to deny such personal responsibility. In this case, the Supreme Court did, in fact, conclude that no personal liability existed and that, therefore, the arbitral tribunal had wrongly found that it had jurisdiction over that natural person. The Supreme Court's approach was to find that the natural person had acted in his capacity as a representative of another incorporated entity, this one registered,

[12] Decision of the Swiss Supreme Court 4A_188/2016.
[13] This is by operation of article 77(2) of the Supreme Court Act (SCA) read in conjunction with article 107(2) SCA.
[14] ATF 136 III 605, consid. 3.3.4, ATF 117 II 94, consid. 4, decision 4A_394/2017.
[15] 4A_7/2019, consid. 2, 4A_378/2015, consid. 3.1, ATF 128 III 50, consid. 1c).
[16] B. Corboz, Commentaire de la LTF 77 N 86, 106 N 36 (2d ed. 2014); ATF 142 III 239, consid. 3.1; ATF 140 III 86, consid. 2.
[17] ATF 142 III 239, consid. 3.1; ATF 140 III 477, consid 3.1.
[18] 4A_473/2018.

and that it was this other corporate entity, which by article 645 CO was liable, and not the natural person himself. In coming to this conclusion, the Supreme Court based itself on what might be considered the rather slender evidential foundation that the counterparty originally intended to contract with this other legal person but later contracted with the company as yet unregistered.

This case stands as evidence for the degree to which the Supreme Court considers itself unconstrained, as far as legal questions are concerned, in reviewing arbitrators' treatments of their own jurisdiction. Indeed, statistically, by far the highest success rate for all grounds of challenge is an error in jurisdiction. About 11.3 percent of challenges on this basis between 1989 and 2017 succeeded (in whole or in part), compared to the next most successful basis, procedural violations, at 5.5 percent.[19]

3 REQUIREMENTS FOR ENFORCEABILITY OF AWARDS

By article 190(1) of the PIL, Swiss international arbitration awards are enforceable as of the time of receipt by any party against whom it is being enforced. The award may be validly sent by any agreed means, and, in the absence of agreement, even notification by email is sufficient.[20] Article 193(2) of the PIL provides that upon application by a party the court will certify the enforceability of an award. The court to which application must be made is the general first instance court of the Swiss canton where the seat of the arbitration was. Thus, for Geneva, the court having jurisdiction is the Court of First Instance. The procedure is a fairly simple and swift one. Aside from paying the modest court fees, one also must pay the ad valorem stamp duty. The certification procedure includes a stage where the court consults the Geneva tax office for the ascertainment of the amount of the tax payable. Unfortunately, this can take several weeks. Court certification of the enforceability of an arbitration award is not constitutive of enforceability as a matter of Swiss law but only evidence of it. It is a violation of article IV of the NY Convention for an enforcing court to require certification of enforceability of the award at the State of the seat. It is probably also a violation of article III of the NY Convention to require so.

To be enforceable in Switzerland, a Swiss international arbitration award must comply with the requirements of article 189 of the PIL. This means that the award must comply with any decision-making procedure (providing all members of the tribunal have had an opportunity to participate in the deliberations and decide[21]) and requirements of form agreed by the parties. Failing any such agreement, the award is that agreed by the majority of the members of the tribunal or, in the absence of a majority, by the president alone, and it must be in writing, supported by reasons, dated and signed. The parties may validly dispense with the requirement of writing for the arbitral award, such that an oral award will be treated as enforceable. But such agreement is rarely found, as it risks attracting serious difficulties of enforcement.[22] The signature of all arbitrators is required in principle, but not if for legitimate reasons an arbitrator (who is not the president) is not able to sign. It was generally thought that it was always required that at least the president sign the award,[23] but the Swiss Supreme Court held that an award

[19] Dasser & Wójtowicz, *supra* note 6, at 280.
[20] Decision of the Swiss Supreme Court 4P.273/1999, at consid. 5b.
[21] Decision of the Swiss Supreme Court 4P.115/2003 at consid. 3.2.
[22] M. Molina, *Chapter 2, Part II: Commentary on Chapter 12 PILS, Article 189 [Arbitral Award]*, *in* ARBITRATION IN SWITZERLAND: THE PRACTITIONER'S GUIDE 255, NN 46–47 (M. Arroyo ed., 2d ed. 2013).
[23] *Id.* at 260, N 61.

cannot be annulled even if the president did not sign it if it is proven that he or she took part in the deliberations.[24]

Not just in relation to the form of the award, but more generally concerning the enforceability of an award, (as far as Swiss law is concerned) the principle of party autonomy prevails. The parties may thus not only waive what otherwise would be required of an arbitration award for enforceability, but they may also add requirements for example to ensure the efficiency of the award's enforcement and to evidence the sufficiency of the proceedings. Among the possible requirements proposed by legal commentators[25] are these: the names of parties, the seat of the arbitral tribunal, the prayers for relief, the history of the procedure, and a recitation of the relevant facts.

The PIL does not distinguish between the enforcement of NY Convention awards and the enforcement of foreign awards not subject to the NY Convention.[26] Article 194 of the PIL simply provides that "the recognition and enforcement of a foreign arbitral award are governed by the New York Convention of June 10, 1958, on the Recognition and Enforcement of Foreign Arbitral Awards." So all "foreign arbitral awards" are subject to the NY Convention as far as enforcement in Switzerland is concerned.

Article IV NY Convention sets forth formal requirements to apply for the enforceability of an award. According to article IV(1) NY Convention, the party requiring recognition and enforcement must provide for the original award (or certified copy) and the original arbitration agreement (or certified copy).[27] In accordance with article IV(2) NY Convention, a translation of the award and the arbitration agreement must be submitted in a Swiss Federal official language (German, French, or Italian). Subject to party agreement in derogation, the award must be legally signed by the arbitrators, which Swiss embassies and consulates can certify.[28]

Swiss courts require that copies and translation certifications must comply with the law of the State in which the procedure was conducted; although the NY Convention itself does not indicate the applicable law on this matter.[29] Swiss courts will ask for no other documents and will not be restrictive on these matters. Swiss courts are increasingly flexible in the application of article IV NY Convention.[30] Indeed, certain Swiss cantonal courts do not require translation in certain circumstances and will not even review formal requirements if they are not raised by the defending party. They have also admitted documents in satisfaction of formal requirements submitted after the initiation of enforcement proceedings.[31]

In Switzerland, enforcement proceedings of foreign arbitral awards differ according to whether the relief in the award is monetary or non-monetary and whether or not the debtor is domiciled in Switzerland. The enforcement of monetary awards proceeds under the Swiss Debt Enforcement and Bankruptcy Act (DEBA).[32] In outline, under article 67 DEBA the award creditor requests the debt enforcement office at the Swiss domicile of the award debtor to send

[24] Decision of the Swiss Supreme Court 4P.154/2005 consid. 3. *See also* Molina, *supra* note 22, at 260, N 61.
[25] Molina, *supra* note 22, at 261, N 65.
[26] The Federal Council withdrew its reciprocity reservation by Federal Decision dated Dec. 17, 1992 (RO 1993, 2434; RO 1993, 2439).
[27] E. Geisinger & N. Voser, International Arbitration in Switzerland: A Handbook for Practitioners 210 (2d ed. 2013).
[28] *Id.*
[29] *Id.*
[30] *Id.*
[31] *Id.* at 211.
[32] D. Girsberger & N. Voser, International Arbitration: Comparative and Swiss Perspectives 457 (3d ed. 2016). *See also* Geisinger & Voser, *supra* note 27, at 203–205.

the latter a request for the payment. The debt enforcement office does so under 69 DEBA. If the debtor objects to the payment order within ten days, the court will examine the enforceability of the award pursuant to articles IV and V NY Convention in summary proceedings. In these summary proceedings, the court will limit itself to consideration of any validly invoked and ex officio NY Convention grounds to refuse the debt enforcement. Subject to any appeal to the canton's higher court and then in some limited circumstances to the Swiss Supreme Court, if the court finds that there are none, the procedure for the seizure of the debtor's assets may begin.

The court will consider the enforceability of the award as a matter incidental to the request for monetary relief and will not order enforcement in its decision unless the creditor has expressly applied for such relief. Therefore, where there is in addition non-monetary relief in an award requiring enforcement it is important to include in the application to the court in the debt proceedings a separate and express request for enforcement of the award. It may also be advantageous to obtain the freezing of the debtor's assets as preliminary relief. The circumstances where a freezing order is available are enunciated in article 271 DEBA. The Swiss Supreme Court held that an NY Convention foreign arbitration award satisfies the ground in article 271(6) DEBA, i.e., it is prima facie a document justifying the final removal of opposition to debt enforcement (*titre de mainlevée définitive*).[33] The Swiss Supreme Court's reasoning in this case admits that any foreign arbitral award enforceable in Switzerland under article 194 PIL satisfies this requirement (and not just NY Convention awards).

Where the award debtor is not domiciled in Switzerland, subject to some exceptions, it will usually be necessary first to obtain a freezing order, in order under article 52 DEBA to create the jurisdiction of the debt enforcement office (at the place of the assets subject to the freezing order). Non-monetary awards are enforced in Switzerland in summary proceedings under articles 335 to 346 CPC.[34] In outline, there are two steps. First, the court assesses compliance with articles IV and V NY Convention. If such compliance is ascertained, then the award is enforced by means of the coercive measures under article 343(1) CPC (e.g., fines for noncompliance).

4 BIAS OF ARBITRATORS

Article 180(c) of the PIL provides that an arbitrator may be challenged if justifiable doubts as to his or her independence exist. The German, French, and Italian equivalents of "justifiable doubts" (*berechtigte Zweifel*, *douter légitimement*, and *dubitare legittimamente*) make clear that not just any doubts will suffice to remove an arbitrator for bias. The case law of the Swiss Supreme Court has in fact specified that not only is the test for bias an objective one (and not merely bias in the subjective eyes of a party) but there must be cogent proof of such bias.

Although article 180(1)(c) of the PIL refers only to the independence of an arbitrator, it is interpreted to include a requirement of impartiality; inasmuch as any distinction may be taken between the two concepts. This reflects constitutional guarantees of an impartial and independent tribunal of article 30(1) of the Swiss Federal Constitution. In the result, in Swiss international arbitration, arbitrators must be free of specific objective indications giving rise to serious doubts that they are not positioned to deal with the case based on merits considerations alone.[35] So the test is substantially that in article 12(2) of the Model Law, an objective one, and the standard of

[33] 5A_355/2012.
[34] Girsberger & Voser, *supra* note 32, at 458. *See also* Geisinger & Voser, *supra* note 27, at 205–206.
[35] ATF 118 II 359 at consid. 3c.

proof is a fairly high one. The Swiss Supreme Court is restrictive in recognizing a violation of article 180 PIL.[36] However, according to the Swiss Supreme Court,[37] an arbitrator must be sufficiently independent and impartial to the same level of national judges. Since this requirement extends from constitutional principles, the assessment must be conducted in accordance with the Constitution.[38]

In applying the Swiss constitutional test for bias in the arbitration context the Swiss Supreme Court often refers to the IBA Guidelines on Conflicts of Interest in International Arbitration[39] since they are of specific application in the arbitration context. The Swiss Supreme Court has described the IBA Guidelines as "useful" and "susceptible to contributing to the harmonization and unification of standards governing conflicts of interest in international arbitration."[40] It certainly does not consider them binding although no case has arisen where the Parties have specifically adopted the IBA Guidelines as rules (not just guidelines) for their arbitration. Furthermore, the Swiss Supreme Court takes into account the practical fact of the existence of large international law firms and international networks of law firms. It has held that a particular lawyer acting in an arbitration, whether as an arbitrator or as counsel, is not necessarily synonymous with his or her law firm or network of law firms for the purposes of conflict analysis.[41] The Swiss Supreme Court has stated and emphasized that the particular circumstances of the instant case must be assessed. In this way, the fact that different law firms in their marketing emphasize their network and its advantages for their clients, but that such law firms within the network are in fact financially independent has been found not to constitute a conflict of interest.[42] The fact that there is no sharing of profits also convinced the court of the absence of a conflict of interest.[43]

There is a lack of independence under Swiss arbitration law if there is a personal tie of sufficient importance between an arbitrator and a party or its counsel.[44] There is a lack of impartiality where an arbitrator has in the past publicly associated herself with a position in relation to a sufficiently important legal issue in the arbitration.[45] In assessing challenges to arbitrators for bias, the Swiss courts require that an application will first have been made to any arbitration institution notably pursuant to a set of arbitration rules. A failure to have acted first and in a timely manner in accordance with such rules will generally be treated as a waiver of the particular facts of bias.

Challenges to arbitral awards on the basis of arbitrators' bias are made under article 190(2) (a) of the PIL, which refers to the tribunal being improperly constituted. It will not be a surprise that the Swiss bias challenge is conceptualized as a species of improper constitution of the tribunal, as the basis under the NY Convention for refusing to enforce an arbitration award tainted by bias, that, in Art. V(1)(d), is also described as a complaint in relation to the composition of the arbitral tribunal. Since Art. Art. V(1)(d) of the NY Convention refers to the requirements of

[36] M. Orelli, *Chapter 2, Part II: Commentary on Chapter 12 PILS, Article 180 [Challenge of an Arbitrator]*, *in* Arbitration in Switzerland: The Practitioner's Guide 118, NN 12 (M. Arroyo ed., 2d ed. 2013).
[37] ATF 142 III 521.
[38] *Id. See* F. Robert-Tissot, *Arbitrage – Chronique de jurisprudence du Tribunal fédéral en matière d'arbitrage international et internes (1er mars 2016 au 28 février 2018)*, Jusletter, Dec. 3, 2018, p. 5.
[39] *See* Robert-Tissot, *supra* note 38.
[40] ATF 142 III 521 consid. 3.1.2 (free translation).
[41] *Id.* at 3.3.1.1.
[42] *Id.* at 3.3.1.2.
[43] *Id.* at 3.2.2.
[44] ATF 92 I 271 and ATF 111 Ia 72 at consid. 2a.
[45] ATF 133 I 89 at consid. 3.4.

the place of arbitration to the constitution of the tribunal, and article 194 of the PIL, as we have seen, refers to the NY Convention for enforcement of foreign arbitration awards, enforcement may be denied on the basis of arbitrators' bias (article 190(2)(a) PIL) on the same basis as bias challenges to arbitrators (article 180(c) PIL).

5 PROCEDURAL IRREGULARITIES AND ARBITRATORS' MISCONDUCT DURING PROCEEDINGS

A violation of due process (the right to be heard) is a ground to set aside the award under article 190(2)(d). It is equally a ground to refuse to enforce the arbitral award in Switzerland (article V (1) let. b NY Convention read in conjunction with article 194 PIL).[46] Even though the NY Convention only mentions due notice to the defending party or otherwise not being able to present a case, Swiss courts treat this provision as including all aspects of mandatory procedural rights (enunciated in article 182(3) PIL; see later in the chapter).[47]

In Swiss international arbitration, there is, at least conceptually, the same constitutional right to a fair procedure as that before Swiss State court judges. But in practice, the protections in arbitration are less stringent than before the Swiss courts. This results from the acceptance of a greater degree of procedural flexibility in international arbitration than before courts. The mandatory procedural guarantees in international arbitration are set forth in article 182(3) of the PIL. The tribunal and parties are free to choose the arbitral procedure (article 182(1) and (2) PIL), but they must be treated equally, and their right to be heard in adversary proceedings must be ensured.[48]

In Swiss arbitration, one needs to protest immediately, clearly, and with a sufficient degree of insistence at any perceived violation of one's procedural guarantees or one will be deemed, by operation of the principle of good faith, to have waived that basis of the objection.[49] In decision 4A_40/2018 the Swiss Supreme Court considered the interesting legal issue of whether there was a violation of the right to be heard because the arbitrator based his decision on evidence the claimant never had access to. The Supreme Court held, however, that that claim had been validly dismissed by the arbitral tribunal since the claimant failed to protest against this alleged violation before the arbitral tribunal with sufficient alacrity.

In decision 4A_478/2017 the Swiss Supreme Court recalled that it is only entitled to examine the right to be heard but not whether the arbitral tribunal has come to the right legal result.[50] The challenge was, however, partially successful as the Swiss Supreme Court concluded that it was not possible to infer from the award that the arbitrator had implicitly rejected arguments that the claimant presented in its second brief.[51] The court added that these arguments were important for the result of the case and that it was not a simple lack of reasons, which is no basis to set aside an award under article 190(2)(d) PIL. In decision 4A_247/2017 the Swiss Supreme Court rejected a claim of a violation of the right to be heard. The court

[46] J. Knoll, *Chapter 2, Part II: Commentary on Chapter 12 PILS, Article 182 [Procedure: Principle]*, *in* ARBITRATION IN SWITZERLAND: THE PRACTITIONER'S GUIDE 141, N 26 (M. Arroyo ed., 2d ed. 2013).

[47] GEISINGER & VOSER, *supra* note 27, at 214.

[48] Knoll, *supra* note 46.

[49] *Id.* at 145, N 32.

[50] 4A_478/2017 consid. 3.3.2.

[51] *Id.* at 3.3.3 ("*Quoi qu'il en soit, il appert de ces observations que l'arbitre a passé sous silence des éléments que le recourant avait régulièrement avancés à l'appui de l'une de ses conclusions subsidiaires, sans que l'on parvienne à se convaincre qu'il les aurait réfutés de manière implicite*").

recalled that the principle of good faith required the invocation of the procedural irregularity without delay.[52]

The Swiss Supreme Court, in decision 4A_600/2010, also considered that the principle of good faith applied to arbitrators as well. In this case, the arbitral tribunal asked the parties to express their views on costs, which the parties did wish to do but requested an extended deadline. The arbitral tribunal ignored this request and stated that the parties had "voluntarily chosen not to file any brief."[53] The court concluded that the arbitral tribunal violated the principle of good faith and, thus, the right to be heard of the parties. In decision 4A_236/2017 the complainant submitted that the sole arbitrator had treated the parties unequally in comparable situations by allowing the respondent to introduce extensive new evidence into the proceedings only a few hours before an oral hearing. The court concluded that it was obvious that the arbitrator considered the evidence as admissible when he orally declared so during a hearing and that the claimant accepted this fact at the time. In 4A_214/2011 the Supreme Court held that there was no violation of the right to be heard in that the arbitral tribunal did not warn the complaining party that it considered the evidence insufficient.[54]

Equal treatment and rights of the defence have virtually identical content – the right to the "administration of evidence" and to comment on facts relevant to the outcome. The *administration of evidence* will be an unfamiliar term to common law practitioners. It is the functional equivalent of the right to submit evidence but reflects the fact that in Swiss civil procedure (typical of most continental European legal systems) it is the adjudicator who is principally active in deciding what specific evidence will be admitted and taken account of. In the result, parties' evidential rights become generic to the legal issue rather than in respect of specific pieces of evidence.

The right to be heard entails the duty of the arbitral tribunal to treat the parties equally in the administration and weighing of evidence but more generally in all aspects of the procedure.[55] However, small differences of treatment cannot be avoided and are therefore accepted "as long as neither of the parties is substantially disadvantaged by the way the procedure is carried out."[56] The Swiss Supreme Court defines the right to be heard as follows:

> in particular the right of the parties to express themselves on all facts that may be relevant to the outcome of the case, to make legal arguments, to adduce evidence to their relevant factual allegations in the appropriate and timely form.[57]

The right to adversarial proceedings entails in its core the right to comment on the adversary's case, meaning that the arbitral tribunal shall offer to the parties the opportunity to give counter arguments and to have a debate on the other party's evidence and legal reasoning.[58]

In practice, what is most important is the way the arbitral tribunal takes into account the parties' factual and legal submissions. What is decisive is whether a party's argument is relevant to the making of the final decision.[59] The right to be heard is violated when

[52] 4A_247/2017 consid. 5.2.2.
[53] 4A_600/2010 consid. 4.4.1.
[54] Geisinger & Voser, *supra* note 27, at 245.
[55] Knoll, *supra* note 46, at 143, N 28.
[56] *Id.* at 143, N 29.
[57] *Id.* at 145, N 32; *see also* the Swiss Supreme Court decision 4A_234/2010.
[58] Knoll, *supra* note 46, at 145, N 33.
[59] *Id.* at 147, N 39, 40.

> inadvertently or by a misunderstanding, the arbitral tribunal does not take into consideration alleged facts, arguments, evidence and offers of evidence presented by one of the parties and that are important for the decision to be made.[60]

This was the case when, in its legal reasoning, an arbitral tribunal totally ignored a series of arguments presented over twelve pages regarding the legality of a penalty under a potentially applicable law. The court recognized in this particular case that they were *subsidiary* arguments, but it considered that the arbitral tribunal should have *explained* why it did not consider them relevant to make its decision.[61] A violation of the right to be heard was also recognized when an arbitral tribunal did not take into account objections of the appellant that were important and relevant to determine the number of damages.[62] The court considered that it was not possible to conclude that the arbitral tribunal considered those objections or "implicitly rejected them"[63] By consequence, the court found that the arbitral tribunal "did not satisfy its minimal duty to examine relevant issues."[64]

The tribunal is, however, entitled to make a selection of the evidence on which it decides, and the tribunal may make a factual determination as soon as it determines it has heard enough evidence on it and not wait until all evidence is submitted.

There is no right to an oral hearing,[65] but, if one is held, there is a right to active participation in it. The right to be heard in adversarial proceedings includes the duty of the arbitral tribunal to give notice in due time to the parties of the date, time, place, and detailed agenda of the hearings.[66]

The right to be heard in adversarial proceedings does not entail a right to a reasoned arbitral award. The Swiss Supreme Court ruled that it would be contrary to legislative intent to include the right to supporting reasons within the right to be heard in adversarial proceedings.[67] It stated that "article 190(2)(d) PIL only adopts the mandatory procedural provisions of article 182(3) PIL as a ground for appeal, but not the requirement to state reasons prescribed in article 189(2) PIL."[68] This decision has been criticized by some authors alleging that this interpretation of the right to be heard is more restrictive than its application before Swiss courts and according to the Swiss Federal Constitution and the European Convention on Human Rights.[69]

Conclusions manifestly contrary to the evidentiary finding of facts are in themselves not contrary to the right to be heard unless they amount to a formal denial of justice in the sense that party submissions have inadvertently been overlooked or misunderstood.[70] The Swiss Supreme Court stated that "a formal denial of justice exists only if the parties were deprived of their right to participate in the proceedings, to influence them, and to present their case, thus, if the obvious error has in fact negative their right to be heard."[71]

[60] ATF 133 III 235 consid. 5.2 (free translation). See also 4A_433/2009. Original text: "*Il [le droit d'être entendu] est violé lorsque, par inadvertance ou malentendu, le tribunal arbitral ne prend pas en considération des allégués, arguments, preuves et offres de preuve présentés par l'une des parties et importants pour la décision à rendre.*"
[61] ATF 133 III 235 consid. 5.3
[62] 4A_433/2009 of 26 May 2010 consid. 2.4.2
[63] *Id.* (free translation).
[64] *Id.* (free translation).
[65] *See* ATF 117 II 346 consid. E1b/aa.
[66] Knoll, *supra* note 46, at 145, N 35.
[67] ATF 116 II 373 consid. 7b.
[68] *Id.*
[69] Molina, *supra* note 22, at 257, N 55
[70] ATF 121 III 331 consid. E.3a; also 127 III 576 E.2d. *See also* Berger & Kellerhalls, *supra* note 7, at 610, N 1746.
[71] ATF 127 III 576 E.2d and E.2f. For the translation, *see* Berger & Kellerhalls, *supra* note 7, at 611, N1747.

6 ANTI-ARBITRATION LAW AND PUBLIC POLICY

By article 177(2) of the PIL, anything of financial value is arbitrable in Swiss international arbitration. "A financial interest of at least one of the parties is fundamental" and

> as a consequence of the wide and liberal approach taken by the Swiss Supreme Court, disputes of financial interest do not only encompass claims based on contract, tort or corporate liability, but also pecuniary claims founded in family, inheritance or property law.[72]

Questions of status, like filiation, for example, are therefore not arbitrable, but very little else is not arbitrable in Swiss international arbitration. Only a "prevailing objective reason"[73] could exclude arbitrability. The Swiss Supreme Court considered that arbitrability could be denied in a case involving an *exclusivity* of jurisdiction of a state court in the context of public policy protection.[74] But Swiss law intervenes to remove certain vulnerable persons from arbitral jurisdiction by application of general contract principles (which may be non-Swiss principles if non-Swiss law applies). Interestingly, domestic arbitration in Switzerland has a different, and one thinks broader, conception[75] of inarbitrability. Article 354 of the CPC provides that the parties may submit to domestic arbitration any claim over which they have free disposition.

There is no proper class action available in Swiss civil procedure, that is, where a claimant or several claimants are certified as representative of a larger number of persons having the same or similar interests to those identified in the claim. Swiss civil procedure does not allow for representative actions (although terminology does vary from legal system to legal system, these may be conceived as a subset of class actions), that is where a person initiates a claim not seeking relief from any wrong caused to him- or herself but to one or usually more persons who allege to have suffered the wrong.

There is no concern about arbitrability and no prospect of an offence against public policy, as far as Swiss law is concerned, if arbitration results in parties being deprived of class and, in particular, representative action rights before foreign courts such as in the United States. Article 71 CPC does provide for joinder of parties whether as claimants or respondents where their interests arise from circumstances or legal grounds that are sufficiently similar. This test differs from the analysis under Swiss arbitration law for including such persons within the same arbitration proceeding since the latter focuses on the similarity of the arbitration clause and for institution arbitration provisions for joinder in the arbitration rules. In the result, joinder in an arbitration will frequently be more restrictive. Where joinder in an arbitration deprives a party of participation in an arbitration with others, this is nonetheless no ground for interfering with the arbitration on the basis of inarbitrability or with the award on the basis of public policy. Arbitrability in the arbitration law system of the state of the seat is of course not the only relevant source of arbitrability restrictions. A lack of arbitrability in the legal system of the state of enforcement is by article V(2)(a) of the NY Convention a ground for refusal of enforcement, and this will be raised sua sponte by the enforcing court.

[72] M. Orelli, *Chapter 2, Part II: Commentary on Chapter 12 PILS, Article 177 [Arbitrability]*, *in* ARBITRATION IN SWITZERLAND: THE PRACTITIONER'S GUIDE 62, N 4 (M. Arroyo ed., 2d ed. 2013)

[73] *Id.*

[74] ATF 118 II 353 consid. 3c, *see also* Orelli, *supra* note 72, at 62, N 5.

[75] BERGER & KELLERHALLS, *supra* note 7, at 735, N 2092; the Swiss Supreme Court has not yet commented on the relative scopes of arbitrability in Swiss international and domestic arbitration.

If an arbitration procedure is incompatible with public policy, arbitrability is equally excluded.[76] A violation of public policy is a basis upon which to set aside an award in Swiss international arbitration (article 190(2)(e) PIL), and by article V(2)(e) of the NY Convention it is a ground to refuse to enforce an award. (Substantive) Public policy is violated when "the material findings . . . are against fundamental principles of law and are therefore totally incompatible with the legal order and the system of values."[77] Such fundamental legal principles are for example pacta sunt servanda, good faith, the prohibition of abuse or rights, the prohibition of discriminatory measures or the protection of civilly disabled persons.[78] Public policy remains, however, a fluid concept.[79] The notion of public policy is interpreted extremely restrictively. Very few awards are interfered with on this basis (article 190(2)(e) of the PIL).[80]

Public policy can be either procedural or substantive.[81] Effectively, any setting aside of or refusal to enforce an international arbitration award in Switzerland for a violation of procedural public policy requires a violation of the fundamental procedural guarantees under article 182(2) of the PIL discussed in earlier and if the *result* (not the reasons) of the award itself is contrary to public policy.[82] There is an effective overlap between procedural public policy and the right to be heard.

In a 2010 decision setting aside an award for violation of procedural public policy, the Swiss Supreme Court ruled that the arbitral tribunal wrongly rejected a res judicata objection (procedural public policy).[83] The dispute involved a football player who terminated his contract with a football club (Benfica) to join another club (Atlético). Benfica requested compensation from Atlético according to the 1997 FIFA Regulations for the Status and Transfer of Players. In 2002, the FIFA special committee awarded Benfica compensation of US$2.5 million. Atlético appealed against this decision before the Commercial Court of the Canton of Zurich, which decided in 2004 that the FIFA Regulation was in violation of European and Swiss competition law. It then declared the previous decision as null and void. Later in 2004, Benfica once again claimed compensation for the same dispute before the FIFA Special Committee, which rejected the claim in 2008. In 2009, Benfica appealed against this decision before the Court of Arbitration for Sport (CAS). Atlético invoked especially the res judicata effect of the decision of the Court of Zurich dated 2004. In 2009, the CAS tribunal decided to award compensation of €400,000 to Benfica. This decision was challenged before the Swiss Supreme Court by Atlético, which requested the court set the CAS award aside, arguing that the CAS violated the res judicata effect and thus violated public policy as provided by article 190(2)(e) of the PIL. In its decision the Swiss Supreme Court held that a violation of public policy is effective if a court "disregards in its award the final and binding force of a previous decision."[84] In awarding compensation for Benfica, the CAS tribunal ignored the binding force of the decision made by the Zurich Court in 2004, which led to two contradictory decisions on the same matter. The Swiss Supreme Court concluded that such disregard of the res judicata principle was against procedural public policy.

[76] Orelli, *supra* note 72, at 66, N 20.
[77] ATF 120 II 155 consid. 6a; ATF 116 II 634 consid. 4, *see also* Orelli, *supra* note 72, at 66, N 21.
[78] ATF 120 II 155 consid. 6a.
[79] *Id*. at 2.1.
[80] 4A_248/2019 consid. 2.
[81] Berger & Kellerhalls, *supra* note 7, at 737, N 2098.
[82] M. Arroyo, *Chapter 2, Part II: Commentary on Chapter 12 PILS, Article 190 [Finality, Challenge]*, *in* Arbitration in Switzerland: The Practitioner's Guide 325, N 168 (M. Arroyo ed., 2d ed. 2013).
[83] ATF 136 III 345 consid. 2.2. *See also* Arroyo, *supra* note 82, at 340–342, NN 209–218.
[84] ATF 136 III 345 consid. 2.1.

The violation of substantive public policy is often invoked in appeals but is very rarely accepted by Swiss courts. There has only ever been one award invalidated in Switzerland on this basis. This case involved a football player who terminated his contract with a Ukrainian football club before the agreed duration and without "just cause" or "sporting just cause" in 2007.[85] Later the same year, the player signed a new contract with a Spanish football club. In 2009, the player was transferred definitively to an Italian Football club. But on November 2, 2007, the FIFA Dispute Resolution Chamber awarded compensation of €6.8 million to the Ukrainian football club. A CAS tribunal in 2009 partly invalidated this decision and awarded compensation of 11.8 million euros. The challenge by the player and the Spanish football club was rejected by the Swiss Supreme Court in 2010. Later in the same year, the FIFA Disciplinary Committee informed the player and the Spanish club that they would open a disciplinary proceeding against them for not complying with the CAS tribunal's decision of 2009.[86] The punishment in the 2009 FIFA Disciplinary Code was a ban on taking part in football activities (articles 22 and 64) at the sole request of his former employer (the Ukrainian football club). The committee imposed a final deadline for the payment, and, if no payment was made, a ban on all football activities would be issued against him. Although the Spanish club paid the amount partially (because of serious financial difficulties), a CAS tribunal, on appeal, rejected said appeal and confirmed the ban.[87] The player and the Spanish club appealed against this decision before the Swiss Supreme Court. In this decision dated 2012, the court emphasized that the list of principles constituting substantive public policy was not exhaustive.[88] On this basis, the court ruled that an unlimited ban on a player according to the FIFA Disciplinary Code violated the personality rights of the appellant (article 27(2) CC).[89] The court explained that personality rights are fundamental in the Swiss legal system, are of a constitutional nature and that, in this case, personality rights of the player took precedence over the principle of pacta sunt servanda.[90] This violation was so serious, threatening the player's economic freedom and putting him under the control of his former employer, concluded the court, that it was contrary to substantive public policy.[91]

It should be noted that no violation of public policy has ever been recognized by the Swiss Supreme Court in an international *commercial* arbitration case, and that some authors emphasize that the facts of some of these cases involved rather serious shortcomings and that there is no reason to think that the court will be less restrictive in the future.[92] The Swiss Supreme Court ruled in several decisions that procedural rules established by the parties are not mandatory and that their breach does not necessarily imply a violation of public policy under 190(2)(e) PIL.[93] In decision ATF 130 III 125, the Swiss Supreme Court decided that the "lack of reasons" in an arbitral award is not a violation of procedural public policy nor a violation of the right to be heard.[94]

In decision ATF 4A_150/2012, the Swiss Supreme Court ruled that an intrinsic contradiction within the award's reasons is not a violation.[95] Similarly, the court ruled in decisions ATF 128 III

[85] ATF 136 III 345 consid. A.b.
[86] *Id.* at. B.a.
[87] *Id.* at B.b.
[88] *Id.* at 4.1; *see also* Arroyo, *supra* note 82, at 344, N 225.
[89] ATF 136 III 345 consid. 4.3.5. *See* Arroyo, *supra* note 82, at 346, N 232.
[90] ATF 136 III 345 consid. 4.3.1 and 4.3.4.
[91] *Id.* at 4.3.5.
[92] Arroyo, *supra* note 82, at 343, N 233.
[93] 4P.196/2003 consid. 4.2.2.2; 126 III 249 consid. 3b.
[94] Arroyo, *supra* note 82, at 330–331, N 184.
[95] *Id.* at 331, N 185.

191 and 4A_386/2010 that an intrinsic contradiction within the operative part of the award is not a violation.[96]

Arroyo summarizes the situation by saying that

> even a manifestly erroneous finding of fact or one which is in contradiction with the case record – and purportedly led to an obviously incorrect or unjust award – does not, as such, justify the setting aside of an international arbitral award.[97]

Neither an arbitrary assessment of evidence nor an arbitrary finding of facts constitutes a violation of public policy.[98] According to the Swiss Supreme Court, there is no breach of public policy in any of the following circumstances: the award incorrectly applied foreign or EU competition law,[99] the lawyers' fees were fixed on a contingency fee basis (pactum de quota litis) amounting to 30 percent of the amount of dispute,[100] compound interest has been awarded,[101] one arbitrator did not sign the award or the wrong law was applied,[102] the solution adopted is different from that under Swiss law or even unknown in Switzerland,[103] or the award failed to state the reasons on which it is based.[104] As Arroyo emphasizes, the principle of compatibility with public policy represents a *minimal* guarantee: "public policy simply seeks to ensure a minimum quality of awards rendered in international arbitrations having their seat in Switzerland."[105] The Swiss Supreme Court has held that an arbitration award ordering the payment of a success fee in respect of the winning party's Swiss lawyers' representation in an arbitration was no basis to set aside the award on public policy grounds even where the structure of that success fee[106] was contrary to Swiss bar rules and would be unenforceable before the Swiss courts.[107]

7 CONCLUSION

Although Switzerland is not a UNCITRAL Model Law country, its international arbitration law is decidedly pro-arbitration. It provides, on the whole, for the broad recognition and scope of international arbitration agreements and only in particularly grievous cases will the Swiss courts disturb an international arbitration award.

[96] *Id.* at 331, N 185. See also Berger & Kellerhalls, *supra* note 7, at 628, N 1788.
[97] Arroyo, *supra* note 82, at 332–334, N 189.
[98] Respectively, 4A_360/2001 consid. 4.1; ATF 116 II 634 consid. 4.b.
[99] ATF 132 III 389.
[100] *Decision of the Swiss Supreme Court, Jan. 9, 1995*, 19 ASA Bull. 294 (2001); *see also* 5A_409/2014.
[101] *Id.*
[102] Basel Country Court of Appeal, June 9, 1971 (1973) Basler Juristische Mitteilungen 193.
[103] 5A_409/2014.
[104] ATF 101 Ia 521, 525.
[105] Arroyo, *supra* note 82, at 330, N 183; *see also* 4A_612/2009 consid. 6.2.2.
[106] A percentage of the party's success in the arbitration, a so-called pactum de quota litis.
[107] 4A_125/2018.