Three Essays on International Commercial Arbitration

Antonio Monti

Arbitration and Corporate Law

Francesco Trezzini

The Challenge of Arbitral Awards for Breach of Public Policy according to Art. 190 para. 2 lit. e) of the Swiss Private International Law

Francesco Wicki

Lugano-Übereinkommen und Schiedsgerichtsbarkeit Ausgewählte Fragen
INTRODUCTION

It is not unusual to find essays on international commercial arbitration, especially by Swiss writers and from a Swiss perspective. Somewhat more unusual (and this is the reason why it was done) is the publication of such writings in Lugano, by three authors who are active - either as lawyers or as a commercial judge - in the juridical reality of Lugano.

In Switzerland there are, traditionally, two outstanding places for commercial arbitration: Zurich and Geneva. It is not surprising that these cities are respectively the first and second cities in Switzerland for finance and commerce and have developed over the years as being efficient and friendly places for arbitration, both in terms of the competence of the arbitrators, the high standards of the juges d'appui and the arbitration institutions (respectively the Zurich and Geneva Chambers of commerce).

Lugano, however, does not have this same tradition, although it is undeniable that this city plays an important role in commerce and finance in Switzerland: being the third financial centre in Switzerland after Zurich and Geneva. Furthermore, its unique proximity to Northern Italy, which is one of the most economically productive regions in all of Europe, gives Lugano a distinctively international commercial character.

Recently, some efforts have been made to also apply this potential to commercial arbitration. Firstly, the Lugano Chamber of Commerce issued in March 1997 a set of rules, the "Lugano Arbitration and Conciliation Rules", designed for regulating an institutional arbitration under the auspices of that Chamber. One of the characteristics of those rules is their very liberal nature, very much less rigid than the Statute of Civil procedure of Canton Ticino (which is applicable to the State Courts). Thus the “Lugano Rules” are therefore completely free from legal
regionalism. This is, indeed, in line with a general trend concerning commercial arbitration, - and not only in Switzerland - to reduce the intrusion and influence of the State in arbitration, and to grant the latter as much independence, flexibility and freedom as possible.

The Swiss legislator took great care to protect this ideal by issuing the new rules governing international arbitration (entered into force on January 1st, 1989), that is Chapter XII of the Swiss Private International Law (PIL). These laws grant substantial freedom in arbitration jurisdiction by reducing, as far as possible, any interference by the State in awards, procedure and the will of the parties. Accordingly, in this law there are very reduced numbers of provisions of a mandatory nature (which, in practice, are only aimed at guaranteeing an adequate standard of due process), the rest being up to the parties: the choice of applicable law on the merits and on procedure, the language of the proceedings, the seat of the arbitration tribunal, the waiving of the right to file an appeal, etc.

This same approach is embodied in the law with respect to grounds for challenging arbitration awards before a State Court (that is the Supreme Court), which are usually of very moderate emphasis and more of an exceptional nature. Furthermore, the Supreme Court, through consistent case-law, interprets the grounds for attack laid down in the law very narrowly, and for example has never granted an appeal for grounds of breach of public policy.

On the other hand arbitrators have also been empowered to issue provisional measures, without any recourse to State Courts which intervene - in synthesis - only upon request to assist the arbitration tribunal in the taking of evidence.

Finally, Switzerland is member State of the New York convention, which undeniably means the free circulation in the world of arbitration awards rendered in our country.
Nowadays, however, the mere existence of a contractual undertaking to arbitration is no longer sufficient to preclude the concurrent exercise of jurisdiction by public authorities. It may happen that a particular dispute involving the same parties could appear simultaneously before a national court and an arbitration tribunal. This may result a conflict of judgements. The effect of this reciprocal interference may be, on the one hand, concurrent or parallel proceedings and, on the other, conflicting decisions that arise when both the arbitrator and the court judge decide the dispute in contradictory ways. Among the decisions of a national court that may affect international commercial arbitration are decisions taken by a State court concerning the validity of an arbitration agreement; decisions on provisional measures or in support of arbitration; and decisions concerning the setting aside or the enforcement of an award in a particular county. Neither international conventions on arbitration, nor those on civil and commercial matters, offer a clear solutions to these questions, so that conflicts often have to be solved by national laws, which may be in favour of or against arbitration. In such a context it necessary that parties and their representatives evaluate their choice of procedure carefully, so as to avoid chaotic or negative results.

Somewhat similar problems arise in the context of arbitration in corporate law, although from another point of view. In fact, this kind of arbitration has now become a very topical issue. Companies, directors and shareholders of company are becoming more and more interested in the swift and confidential settlement of disputes that arbitration can offer in this field. Such people cannot allow either themselves or their companies the usually quite lengthy periods of waiting than can attend state court rulings. Companies and their shareholders need to settle all disputes as rapidly as possible, so as to avoid these having an
unpredictable impact on the future of the company and its profitability.

Thus, within the corporate sector, one can now quite frequently encounter cases in which corporate disputes, relating to competing interests either of companies and their shareholders, or of company structures and shareholders, are settled by arbitration tribunals rather than through the state courts. Thus, on the one hand, there is a clear need to settle disputes through arbitration tribunals rather than through state courts. On the other hand, however, the many individual differences between the various national approaches to legislation concerning arbitration and certain particular features of such legislation may, in fact, be having exactly the opposite result: in effect, actually limiting the use of arbitration in corporate law. This is because the development of the individual national arbitration acts has not, historically, been uniform.

The causes for this should be sought principally in the origins and in the development of arbitration within the national legislation of each individual state, with particular reference to the ordinances and parameters imposed by specific legislation in force at different particular times and places. However, even though many differences remain between the various national internal regulations regarding arbitration in corporate matters, in the adoption of recent reforms in the field of international arbitration, much account has been taken of the evolution and the ever-growing importance of this subject. A revision of these norms, which can still be able to needlessly obstruct arbitration in corporate matters, would thus be auspicious – even through case-law – or, at least, the adoption of more uniform standards within the European Union.
The three essays gathered in this book by the authors were presented in 2002 as final papers in postgraduate courses at the University of Zurich in International Business Law.

Lugano, October 2002, 

The authors
Arbitration and Corporate Law

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### Abbreviations

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<td>Abs.</td>
<td>Subsection</td>
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<td>AG</td>
<td>Shares company and or joint stock company (Germany)</td>
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<td>AktG</td>
<td>Shares company law (Germany)</td>
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<td>Art.</td>
<td>Article</td>
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<td>ASA</td>
<td>Swiss Arbitration Association</td>
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<td>BGE</td>
<td>Decision of the Swiss Federal Tribunal</td>
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<td>BGH</td>
<td>German Supreme Court</td>
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<td>CA or Concordat</td>
<td>The Concordat on arbitration accepted by the Conference of the directors of the cantonal ministries of justice March 27, 1969 and approved by the federal Council on August 27, 1969</td>
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<td>C. civ.</td>
<td>Civil Code (France)</td>
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<td>C. com.</td>
<td>Commercial Code (France)</td>
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<td>CC-it</td>
<td>Civil Code (Italy)</td>
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<td>CCS</td>
<td>Civil Code (Switzerland)</td>
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<tr>
<td>CPC</td>
<td>Code of civil procedure (Italy)</td>
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<td>CO or OR</td>
<td>Code of Obligations (Switzerland)</td>
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<td>EEIGs</td>
<td>European Economic Interest Grouping</td>
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<td>FC</td>
<td>The Swiss Federal Constitution</td>
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<td>GmbH</td>
<td>Limited liability company (Germany)</td>
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<td>NCPC</td>
<td>Code of civil proceeding (France)</td>
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<td>PILS</td>
<td>Swiss Federal Statute on Private International Law</td>
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<td>ZPO</td>
<td>Code of civil procedure (Germany as well as Swiss Cantons)</td>
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I. Introduction and Scope of the Paper

1. Arbitration and Corporate Law

Arbitration in general and in particular with regard to corporations is assuming ever greater importance at both national and international levels. Not only are organisations and private law companies increasingly turning to arbitration\(^1\), but communities and international institutions\(^2\) as well.

Internal relations within companies are characterised by a highly complex and extremely cohesive long-term legal association\(^3\) which, in the event of a dispute, involves a continuous learning process concerning an adaptation to the company’s unique requirements rather than the identification of who is right or wrong in any given case. In this sense substantive law alone cannot provide the tools to deal with the daily challenges confronting companies.

As a result, a need has developed for a higher jurisdiction to hear cases of “mediation”, which can assist in resolving disputes quickly, without necessarily being subject to the pressure of the illusion of a supposedly objective application of substantive law regulations.

Within the corporate sector, therefore, there are frequently cases in which corporate disputes relating to competing interests of shareholders and the company, respectively its structures and its shareholders, are settled by an arbitration tribunal rather than

\(^1\) GE 118 IB 562, in re Groupement d'Entreprises Fougerolle v. CERN.

\(^2\) See art. IX of the articles of agreement of the IBRD and recent judgments of the European Court of Justice, including the judgment T-206/99 dated March 21, 2002 in re Métropole Télévision / Commission concerning competition.

\(^3\) ROTH GÜNTER, Beiträge zum internationalen Verfahrensrecht und zur Schiedsgerichtbarkeit, Festschrift für Heinrich Nagel zum 75. Geburtstag, S. 319 und ff.
ordinary courts. Some authors are even anticipating that corporate
disputes will be dealt with exclusively by such tribunals.\footnote{KOHLER, Die moderne Praxis des Schiedsgerichtswesens, Diss., 1966, S. 25}

The reasons for this are many, and include the possibility of
settling disputes in a quicker and more confidential fashion, and
this is becoming increasingly important for modern economic and
corporate dealings\footnote{BIANCHI GIORGIO, l'arbitrato nelle controversie societarie, CEDAM 2001, Introduzione, S. XI.}.

This paper will briefly examine the current status of corporate
arbitration in Switzerland and States adjacent to Switzerland,
namely Germany, France and Italy, with some reference in related
fields to the situation in the European Community.

In order to examine the issue of corporate arbitration it will be
necessary, from time to time, to make some references to general
concepts pertaining to arbitration.

Generic references in this paper to comparative law are intended to
take into consideration only the systems in the countries mentioned
in the previous paragraph.

The subjects considered are mainly corporations and their organs,
both within the context of their functions and with respect to their
private relations with the company, including reference to partnerships.

Obviously this paper cannot provide a complete analysis of the
topic, with respect to comparative perspectives and all its many
facets; it, in fact, will limit the review to highlighting the main
issues with respect to Swiss law, and law in the other countries
considered, by examining common points and main differences.
2. Arbitration and Corporation upon Swiss Law

a) Intercantonal Arbitration Convention “Concordat”

The Concordat on arbitration accepted by the Conference of the directors of the cantonal ministries of justice March 27, 1969 and approved by the Federal Council on August 27, 1969 (hereinafter: the "Concordat" or “CA”), applies to every proceeding before an arbitration tribunal with its seat in a Canton that is party to the Concordat (art. 1 CA). Arbitration regulations relating to private and public agencies and organisations, and arbitration clauses apply as long as they do not derogate from the compulsory provisions of the Concordat. All Swiss Cantons have accepted the Concordat.

In accordance with art. 4 CA, the agreement to arbitrate [also commonly referred to, in a general way, as an arbitration agreement] may be concluded by means of an arbitration agreement [in the proper sense of term] or an arbitration clause. In an arbitration agreement, the parties submit an existing dispute to an arbitration tribunal, while an arbitration clause can only refer to future disputes arising from a specific legal relationship. The arbitration may rule on any claim that either party is permitted to freely dispose of, as long as the agreement comes under the exclusive competence of the judicial authority pursuant to a mandatory provision of the law.

The arbitration agreement must be in writing (Art. 6 CA). It may be included in a written document by which a party becomes associated with a legal entity, if this document expressly refers to the arbitration clause contained in the statutes, or in a regulation derived from it (Art. 6 Abs. 2 CA). The parties must therefore submit themselves, in writing, to the arbitration agreement and the latter cannot be the subject matter of a judgement by reference. The requirement that the agreement be in writing is intended to

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ensure that the parties are aware of their obligations relative to the arbitration agreement, thereby excluding any tacit or documentary agreement, with reference to the specific circumstances provided for in Art. 8 CA. With respect to arbitration involving corporations, Art. 6 Abs. 2 CA contains a fundamental and in some ways very restrictive approach concerning the application of arbitration to corporate issues, at least as far as companies governed by Swiss law are concerned.

Art. 6 Abs. 2 CA also applies to matters relating to collective ownership [Stockwerkeigentum]. If the regulations for condominium provide for an arbitration clause in the administrative regulations, this clause must be expressly accepted by the new co-owner of the condominium, failing which the clause will not be binding on the new co-owner. In order for such a clause to be binding, the deed of purchase, in written form, must contain, *in casu*, express reference of acceptance of the arbitration clause contained in the administrative regulations of the condominium.

It generally follows, as it will be seen later in this paper, that the mere fact of becoming associated with a legal entity does not imply the acceptance of an arbitration clause contained in bylaws of that entity.

If the validity of the arbitration agreement, or its content and scope, are disputed before the arbitration tribunal, the tribunal will rule within its competence by way of an interlocutory or final judgement (Art. 8 CA). This concept is generally referred to as "Kompetenz-Kompetenz": Art. 8 CA is quite important within the context of corporate arbitration, since, within certain limits, it can remedy the deficiency contained in the provisions of Art. 6 Abs. 2 CA. A similar defect can in fact be remedied by means of a tacit acceptance of the competence of the arbitration tribunal, within the meaning of Art. 8 CA, when the respondent participates in the

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7 KGer. GR 9.3.1992
9 BGE 110 IA 62
proceedings without objecting to the competence of the court dealing with the matter\textsuperscript{10}.

Again, with respect to corporate arbitration, Art. 36 CA also takes on an important role, in particular regarding the requirement of independence for an arbitration tribunal.

When a judgement is qualified as an arbitration award, as opposed to, for example, the so-called “association resolution” [the "Vereinsbeschlüsse", which expresses the internal intentions of an association], the award must respect certain conditions, so that it can have the same value as judgements issued by ordinary courts. One of these conditions is that the arbitration tribunal must offer sufficient guarantees of impartiality and independence, as required in the provisions of Art. 30 Federal Constitution (FC) (formerly Art. 58 FC), otherwise, the award cannot have the same value as a civil judgement, which is enforceable throughout Switzerland pursuant to Art. 122 (3) FC (formerly Art. 61 FC);

A court that acts simultaneously as an organ of an association, participating as a party to the proceedings, cannot provide guarantees of sufficient independence.

This premise, commonly accepted even with respect to comparative perspectives, represents an important requirement, with repercussions on corporate issues, as will be seen below.

The distinction between the “rules of the game” and the “rules of law” assumes a particular significance, especially for sports associations. If the dispute relates to the “rules of the game”, then it is beyond the application of the law, and a judge will have no jurisdiction to make a ruling. In this sense, the dispute does not give rise to any proceedings for assessment by an arbitrator, or an association member, to determine whether the rules of the game have been correctly applied. Any penalty levied by arbitrators in

\textsuperscript{10} LALIVE/POUDRET/REYMOND, le droit de l'arbitrage interne et international en Suisse, Lausanne 1989, n. 3 to Article 6 CA, pag. 61.
such a context relates to the area within their field of competence and arises, as previously mentioned, from the “rules of the game”.

These judgements represent the simple expression of the intentions of the relevant association; they are not legal acts, but acts that concern the management of the particular association. Such judgements can therefore not be considered as being arbitration awards within the meaning of the CA; therefore, they cannot be object of appeal by means of an application for setting aside, as provided for in Art. 36 of the Concordat11.

On the other hand, if the sanctions issued, as distinct from the “rules of the game”, can be considered a violation of the personality rights of the person concerned, for example in the case of suspension from competition or important duties, then a such decision may no longer be based on the simple “rules of the game”, and the person concerned may seek a ruling from an ordinary court, unless the sanction issued against the person, while still within the limits set by Art. 5 CA, emanates from an arbitration tribunal that is duly constituted12, that is, with respect to form (Art. 6 CA), and as long as the procedure satisfies the minimum requirements set out in Art. 25 CA.

In conclusion, apart from the terms used in the previous three paragraphs, it is necessary to establish that circumstances relate to an entity that has been organised to express the internal intentions (i) of a legal entity or (ii) of a true arbitration tribunal13, and organised in such a way as to provide an irrevocable decision with respect to disputes, thus ruling out referral of the matter to ordinary courts.

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11 BGE 119 II 271 cons. 3b
12 ATC (1e Cour civile) des 2 novembre 1989 et 13 février 1990, Ligue Suisse de Hockey sur Glace c/ Norman Dubé.
In the first case, the decision will express the inner will of the legal entity, which cannot be the subject of invalidity proceedings pursuant to Art. 36 CA, since it is not an arbitration award, while the second case - relating to a regular arbitration tribunal, to which the task of ruling on a dispute has been assigned, instead of to an ordinary court - will be subject to the observance of the rules laid down in the Concordat, in particular with respect to Art. 6, 25 and 36 CA.

b) Swiss Federal Statute on Private International Law (PILS)

Swiss international arbitration is regulated by chapter 12 of the PILS, article 176 to 194. It does not govern domestic arbitration, i.e. the so-called “Concordat” (CA), the competence of which is a right reserved for the Cantons. With the introduction of the rules of international arbitration, the legislator chose greater flexibility and freedom as compared to the rules of the Concordat. The legislator took account of the will of the parties to regulate their international arbitration proceedings autonomously.

Chapter 12, in particular, grants concerning so-called “procedural law autonomy” [Art. 182 PILS], an authority for ordering interim measures [Art. 183 PILS], a so called “conflict of laws autonomy”, as well as a “substantive law autonomy”. Certain restrictive provisions in the Concordat have been omitted, e.g. those relating to arbitrability and setting-aside\(^\text{14}\). Art. 176 PILS provides that an Arbitration is international, if at least one party at the time of the conclusion of the Arbitration Agreement, has its registered office/s domiciled outside Switzerland, with an agreement pursuant to which the arbitration tribunal should have its seat in Switzerland, and that the parties did not validly opt out of Chapter 12 by an agreement in writing, fulfilling the requirements of sub-section 2.

This solution is more precise compared to that of the French Law\textsuperscript{15}, under which an arbitration is deemed to be international if the interests involved are related to international trading, and that this gives rise to the related definitions and interpretations. An intermediary solution is that of Italian law, which defines (in Art. 832 CPC) that an arbitration is international if, on the date of the signing of the arbitration agreement, at least one of the parties was domiciled abroad or had its effective registered office outside Italy, or a relevant portion of the business to which the agreement relates, is in effect executed abroad.

As already said, Chapter 12 deals with international arbitration. Here, some articles are relevant, in particular, to arbitration in corporation matters. The purpose of art. 176 is to set out the conditions of applicability of Chapter 12 as to the function, the place and the object. Arbitration must be distinguished from evaluation to which in depth reference will be made in section II, 1, d) below.

It is a prerequisite for the application of Chapter 12 of the PILS that the seat of the arbitration must be in Switzerland at the time of the conclusion of the arbitration agreement. In the case of companies, at least one of the parties must not have domicile in Switzerland. It must be noted that the fact that a party domiciled abroad has a branch in Switzerland does not prevent the application of chapter 12\textsuperscript{16} and, conversely, that Chapter 12 is not applicable in the case of two non-domestic branches of Swiss companies concluding a contract\textsuperscript{17}.

Another issue that could be of a certain relevance for companies, is the de-localisation of arbitration procedures\textsuperscript{18}. This means that, although Switzerland is designated as a place of the proceeding,

\textsuperscript{15} Art. 1492 NCPC [French Code of Civil Procedure].
\textsuperscript{16} LALIVE/POUDRET/REYMOND, 293/4.
\textsuperscript{17} EHRAT FELIX, International Arbitration in Switzerland. An introduction to and a commentary on articles 176 - 194 of the Swiss Private International Law Statute, The Hague 2000, no. 35 on art. 176 PILS.
\textsuperscript{18} EHRAT, no. 19 on art. 176 PILS.
the parties expressly exclude the application of Swiss arbitration laws. The de-localisation of the arbitration procedures may however incur the risk of the award becoming impossible to enforce, in particular because of a lack of sufficient relations with Switzerland. The seat of the arbitration is not considered in itself as being sufficient to justify reference to a state court as “juge d’appui”\textsuperscript{19}.

Art. 177 PILS determines objective arbitrability (\textit{ratione materiae}), i.e. it determines the nature of claims that can be the object of an arbitration. However, the term arbitrability is also used in a wider sense, so as to include the subjective validity of the arbitration agreement\textsuperscript{20}. Art. 177 PILS establishes a substantive conflict rule. Arbitrability is, therefore, governed by \textit{lex arbitri} without any consideration of the \textit{lex causae}. In any case, the Federal Tribunal\textsuperscript{21} has ruled that the Arbitration Court is competent in itself, and that it must, itself, analyse whether an Agreement concluded under the Art. 85 of the ECC Treaty is valid or not. This is so as to avoid that the resulting rules might become contradictory in themselves and so as to ensure that the award can be recognised abroad.

Another relevant issue, relative to arbitration in corporate matters, is that concerning the definition of the term “dispute involving pecuniary interests”. Corporation matters can usually be divided into disputes involving pecuniary interest, and those involving non-pecuniary interests. Pecuniary interests usually concern the right to participate in profits, in assets on winding-up, and the duty of contribution to the company assets, which is limited to amount that has been undertaken by the shareholder, and so on. To the second group belong such matters as: the right to contest the resolution of general meeting of shareholders; the right of access

\textsuperscript{19} BGE 106 Ia 152 [probably obsolete today!]
\textsuperscript{20} BRINER ROBERT, International Arbitration in Switzerland. An introduction to and a commentary on articles 176 - 194 of the Swiss Private International Law Statute, The Hague 2000, no. 2 on art. 177 PILS.
\textsuperscript{21} BGE 118 II 193
to corporate information; the right of inspection; or the right to file for a winding-up of the company\textsuperscript{22}.

Subsection 1 of art. 177 PILS, in describing “any pecuniary interests\textsuperscript{23}”, did not refer to the definition of Art. 5 of the Concordat\textsuperscript{24}, which includes “those disputes of which the parties may freely dispose”, but chose other criteria such as the specific rule of Swiss international private law related to the nature of matter (causae) and not to the applicable law, i.e. independent from the classic rules of conflict of laws\textsuperscript{25}. In this sense, there is no reserve in favour of the state courts, as in art. 5 of the Concordat. By doing this the Federal legislator took account of the fact that, in some circumstances, awards rendered in Switzerland may not be executed abroad due to the fact, in particular, that the award could be considered violation of the relative foreign “ordre public”\textsuperscript{26}.

The Federal Tribunal\textsuperscript{27} interprets the term “dispute involving pecuniary interests” in a very wide sense, by defining them as all rights pertaining to property, which have a pecuniary value; that can be used, are generally transmittable and can be inherited, and that can be used as collateral against debts of the holder of the property. The Federal Tribunal also includes those rights which do not have, in themselves, a pecuniary or utility value, and which by themselves are not transmittable and cannot be used as collateral for debts, but which are closely connected with a legal relationship having a proprietary aspect, such as the right of a shareholder to contest a resolution by the general meeting, or that of an employee to receive a reference from his employer. The Federal Tribunal\textsuperscript{28}

\begin{itemize}
\item \textsuperscript{22} ZILLES STEPHEN, Schiedsgerichtsbarkeit im Gesellschaftsrecht, Neuwied und Kriftel, Luchterhand 2002, 36, 91 und ff.
\item \textsuperscript{23} PATOCCHI PAOLO MICHELE/GEISINGER ELLIOTT, Internationales Privatrecht, Zürich 2000, Rz. 2 zu Art. 177 Abs. 1 IPRG.
\item \textsuperscript{24} BGE 118 II 353; in re Fincantieri-Cantieri Navali S.p.A. et Oto Melara S.p.A. gegen M.
\item \textsuperscript{25} BGE 118 II 358, Erw. 3 lit. d), in fine.
\item \textsuperscript{26} BGE 108 II 77, Erw. 1a
\item \textsuperscript{27} BGE 119 II 271, Erw. 3c
\end{itemize}
in one case even went so far as to hold that measures, which were the object of the case, constituted “measures, which without doubt pertained to the personal and economic sphere”.28

Finally, as compared to other legislative systems29, a distinction between pecuniary interests and non-pecuniary interests, as far as corporate matters are concerned, is not really relevant in Swiss international arbitration law, and the same also applies with reference to the Concordat. This is also true regarding the distinction as to whether an arbitration is ad hoc or institutional, because Chapter 12 applies to both forms with the same effect.

The PILS, among other things, provides some articles which are relevant to corporation matters, such as Art. 178, 182 and 187. Art. 178, subsection 1 PILS, deals with the formal prerequisites of the arbitration agreement and states that an agreement to arbitrate complies with the formal requirements, if it is done in writing or in another manner or form of communication, such as telegram, telex or fax, which evidences the agreement reached. In introducing the PILS, the Swiss legislator was inspired by Article 7 no. 2 of the UNCITRAL Model Law regarding the requirements necessary for establishing an arbitration agreement. Article 7 no. 2 UNCITRAL Model Law allows that an agreement to arbitrate shall deemed to be concluded where - apart from compliance with formal requirements - “the reference is such as to make that clause part of the contract”.

This provision confirms the admissibility of the conclusion of an arbitration agreement by reference30 also to corporation matters, without the requirements provided in Art. 6 subsection 2 of the Concordat. The provision states that an arbitration agreement may take the form of a written declaration in which the parties agree to adhere to the statutes of a body corporate, provided that the

28 BRINER, no. 10 to art. 177 PILS
29 Italy and Germany
30 WENGER WERNER, International Arbitration in Switzerland. An introduction to and a commentary on articles 176 - 194 of the Swiss Private International Law Statute, The Hague 2000, no. 52 to art. 178 PILS.
declaration expressly refers to the arbitration clause contained in the statutes or rules made under them.

In this sense the Swiss international arbitration rule of Art. 178 PILS is much more liberal than the Concordat and takes account the principle of favor validitatis as well as of international arbitration practice. The Federal Tribunal went further and admitted that there is no doubt that an arbitration agreement, in some circumstances, can also bind parties who did not sign that arbitration agreement. The question as to under what conditions reference to the text fulfils the requirement of consent, thus making the arbitration clause in the text referred to a part of the contract, must be answered under Swiss law pursuant to Art. 178 subsection 2 PILS. The solution must take into account the principle of good faith, which has been developed from Art. 1 et seq. Code of Obligation and art. 2 of the Swiss Civil Code. It is in this way, therefore, that Chapter 12 may apply to arbitration agreements.

Depending on the circumstances, this principle can lead to allowing access of a company to a contract concluded by another company of the group (the so-called “theory of controlled companies”). In the case of an abuse of rights, the same result can occur, i.e. being bound to an arbitration agreement, despite the absence of any formal declaration of consent, by virtue of the doctrine of the piercing of the “corporate veil” or on the basis of an “implied agency”.

Usually the choice of the seat of the arbitration tribunal is, in fact, simply a choice of the applicable arbitration law. With regard to this, there are several different opinions regarding the possibility

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31 BLESSING, no. 488
32 BGE 120 II 155 and 164
33 ASA Special Series No. 8, December 1994, Arbitration clause “by reference”, by Lucius Huber, S. 84
34 WENGER, no. 56 and 57 to Art. 178 PILS.
35 Pro BUCHER ANDREAS, liber amicorum Keller, 570 et seq.; contra KARRER PIERRE International Arbitration in Switzerland. An introduction
to de-localise arbitration procedures, even if Switzerland is designated as the seat of the proceeding and as consequence, the procedural rules of Chapter 12 are excluded. If the parties choose to de-localise the arbitration procedure, they may incur the risk of the non-enforceability of an award, as well as being confronted with other important issues, which can arise in connection with the applicable corporate law.

In fact, it is the applicable substantial corporate law, e.g. art. 154 PILS, which determines the corporate (or “personal”) statute and, therefore, the rules applicable to the corporation and, consequently, to the rights and the duties of the shareholders. Thus, if rules other than those of a corporation must apply to an arbitration agreement lodged in the statutes of that corporation, or in rules made with reference to them, it can follow that certain specific rules allowing arbitration in corporate matters may no longer be applicable.

In particular, this could be the case with reference to German, Austrian and French Law. Therefore, the actual convenience in choosing a law for arbitration different from that of the agreement to arbitrate must be carefully evaluated, especially with reference to possible problems concerning the invalidity of an arbitration agreement in corporate matters, or the non-enforceability of the arbitration award once made.

3. Comparative examination of some foreign laws

a) German Law

In Germany, arbitration is governed by §§ 1025 et seq. of the ZPO. Pursuant to § 1030 Abs. 1 ZPO any pecuniary interest can be the subject of arbitration. It therefore follows that any pecuniary interest within a company can also, in principle, become the object of arbitration. However, in particular circumstances, as will be seen below, mandatory company regulations may set limits on the admissibility in principle of arbitration for corporations. Similarly, an arbitration that does not involve a pecuniary interest is valid to the extent that the parties are able, both objectively and subjectively, to conclude a settlement on the issue. If this is the case, and bearing in mind the mandatory exemptions provided for in company law, the dispute must be considered pursuant to § 1031 Abs. 2 ZPO as subject to arbitration.

Initially, objective arbitrability was confirmed if, in accordance with substantive law, the parties were able to freely conclude a settlement on the issue. Nowadays the approach to the issue is different and can be considered by asking whether, in specific sectors, the State has reserved a legal monopoly with respect to the rights concerning the legal subject matter. The standard reference relates to family matters, and more particularly on the issue of whether the parties are married. Within the context of company law, in which economic interests are predominant, it can be stated that there is a presumption in principle that the State does not intend to reserve for itself a legal monopoly.37

To the extent that objective arbitrability has been confirmed, then subjective arbitrability, namely the ability and opportunity to deal with the subject matter of the dispute, is nearly always affirmed. However, there are exceptions, namely for insolvent debtors who, as a result of the prohibition to conclude settlement, which may

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37 ZILLES, 14 et seq. LIONNET KLAUS, Handbuch der internationalen und nationalen Schiedsgerichtbarkeit für die Praxis der Parteien, München 2000, 35 und ff.
affect other parties, cannot subjectively submit a dispute to arbitration.

In general it can be stated that any pecuniary interest can be the subject of arbitration, while an arbitration clause relating to non-pecuniary interests is valid to the extent that the parties are able to conclude a settlement of the dispute\textsuperscript{38}.

Some authors\textsuperscript{39} suggest that corporate disputes be considered as disputes involving pecuniary interests, since the motive is always of an economic nature, or has strictly economic implications and is, therefore freely, arbitrable.

In this regard, an important recent judgement of the BGH dated 29.3.1996 must be noted, which rejected the validity of an arbitration agreement contained in the statutes [bylaws] of a limited liability partnership [GmbH], in the context of a dispute concerning a corporate resolution. It was considered not to have a pecuniary interest, essentially because an arbitration award has no effect upon the constitution, and therefore may not be asserted with respect to those who had not participated in the dispute, since the regulations in § 246 concerning joint-stock company [Aktiengesellschaft], provide an \textit{erga omnes} effect in the event of the invalidation of a resolution of a meeting of a joint-stock company, including for those who have not participated in the dispute, that cannot be applied by analogy in the context of limited liability partnerships.

Many authors have commented on this subject, with diverging assessments, which will be reviewed in detail below; however it must be said that they do not sanction the prohibition in principal of the arbitrability of corporate resolutions, in particular for GmbH companies, but with respect to the problems referred to above,

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\textsuperscript{38} K. H. SCHWAB und G. WALTER, Schiedsgerichtbarkeit, 6. A., München 2000, 35.
\textsuperscript{39} SCHRÖDER MATTHIAS, Schiedsgerichtliche Konfliktbeilegung bei aktienrechtlichen Beschulmängelklagen, Köln u.a. 1999, 92 m.w.N.; However this point of view does not appear to be shared by everyone.
\end{flushright}
they have only denied in these circumstances the validity of an arbitration clause, since third-party members are not involved in the proceedings and, therefore, an arbitration award cannot be enforced as against these members, thereby creating a dichotomy with respect to those who have taken part in the proceedings and those who have not taken part. To this extent, the judgement implies several possible solutions, including the nomination of an arbitrator by a simple, or a qualified majority, of non-participating members, or the constitution of an arbitration tribunal through a neutral authority. However, all of this must be supported by the statutes.

In particular, it is essential that members who have not contested the members' resolution be informed in a time of the proceedings relating to the decision, and that company bylaws be provided for governing the timetable, formalities and, in particular, the specific conditions. In addition, there must be provision for a procedure in the event that the parties do not agree on the common appointment of an arbitrator, with the designation of an arbitrator to protect of the interests of the members who have not participated in the resolution that has been contested by one, or more, associates\(^{40}\).

Equally important is the fact that parallel proceedings may be joined into a single proceeding, to avoid divergent awards or judgements\(^{41}\).

When a company provides a set of regulations in its own bylaws, as described in the previous sub-section, the provisions negating the validity of an arbitration clause contained in the bylaws of a limited liability partnership [GmbH] within the context of a members' resolution, should be considered invalid.

In conclusion, whether an arbitration award may properly be applied, or not, to a dispute relating to members' meetings with respect to a limited liability partnership, will, in principle, essentially

\(^{40}\) ZILLES, 43 et seq.
\(^{41}\) ZILLES, 45 lit. e).
depend on the suitability of the award in that particular context, and on detailed regulations for the protection of third parties, who are not participants in the proceedings, since the legislator has not provided regulations along the lines of § 248 AktG concerning companies limited by shares.

b) French Law

In French law, arbitration is governed by Art. 1442 et seq. of the NCPC. Arbitration, as a general concept, may be concluded in the form of an arbitration agreement (Art. 1442 NCPC) or an arbitration clause (Art. 1447 NCPC). With regard to substantive law and in particular company law, arbitration is accepted in the form of an arbitration clause or an arbitration agreement. The arbitration clause is governed by Art. 631 of the Commercial Code [hereinafter “Com. C.”], whereas the arbitration agreement is not expressly governed by legislation.

Art. 631 Com. C. makes reference to "disputes relating to obligations and transactions amongst traders, merchants and bankers", while Art. 631 (2) Com. C. accepts arbitration clauses for "disputes between members in the context of business enterprises", introducing various cumulative conditions with respect to the parties and the subject of the dispute. In addition, with respect to sub-section 2, the dispute must refer to the bylaws, or be connected in some way to it.

In this section, aspects relating to the company, its members, and the subject of the dispute will be analysed.

Art. 631 (2) Com. C. refers to members of a commercial company, and therefore it is necessary to interpret the scope of this regulation. In accordance with art. (1) of the Law of 24 July 1966 regarding business enterprises, the business character of an enterprise is determined by its form, whatever its purpose; enterprises

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can be partnerships, limited partnerships, limited joint stock companies and corporations. An arbitration clause may therefore be included in the bylaws of all of these types of enterprise, which comprise the vast majority of commercial enterprises.

According to statistical research, the adoption of an arbitration clause is common for small and medium-sized businesses, especially for family businesses, but is often absent for large entities.

However, an enterprise, although it may not be a commercial undertaking in the form described above, may be so by virtue of its purpose, since the purpose of a holding company may include commercial activities and, therefore, in the event of a dispute amongst members, it may be considered valid if an arbitration clause has been included in the bylaws.

It should be noted that if the bylaws of a holding company specify international activities, disputes between the members would take on an international character and therefore the limitations contained in Art. 631 Com. C. and 2061 Civ. C. may be disregarded because of the international character of the circumstances.

The arbitration clause may also be adopted by other types of enterprises and, in particular, in the context of companies relating to the liberal professions, to the extent that the members or associates agree in the bylaws to submit to arbitration any disagreements that may arise amongst them with respect to the enterprise43.

There also are other kinds of company that may be interested in arbitration in particular circumstances, for example state-owned companies. For companies governed by public law, Art. 2060 (1) Com. C. generally prohibits the use of arbitration for disputes

43 Art. 15 of the Law of 31 December 1990 relating to a liberal professional enterprise, subject to a legislative and regulatory statute, or where the title is protected.
involving communities and public law institutes. The prohibition is general and any arbitration clause in such circumstances is null and void. However, the prohibition is not enforceable with respect to international matters. The State, like any legal entity governed by public law, may accept an arbitration clause, for example within the context of an international agreement of a commercial nature. In addition, it must be noted, in general, that for all mixed companies of this type in which stakes are held by public authorities\textsuperscript{44}, these will be considered as being commercial companies when States hold less than half of the capital and, as a result, the use of arbitration is freely permitted without particular restrictions.

Having examined matters relating to commercial enterprises, it should be recalled that, in principle, Art. 631 (2) Com. C. does not permit the use of arbitration for companies that do not have commercial purposes, in particular for companies defined as "civil" including, for example, real estate companies and law firms. The basis underlying the principle of prohibition is contained in a combination of provisions, namely Art. 2061 Civ. C. and 631 Com. C., which provides that the arbitration clause is null and void to the extent that the law does not provide validity otherwise. In this regard, Art. 631 Com. C., in fact, provides the power to include an arbitration clause only for commercial enterprises. As a result, and in contrast, a civil undertaking may not include an arbitration clause. The French courts have already issued several judgements with respect to this issue\textsuperscript{45}.

If the members of a company that is considered non-commercial are themselves traders, the prohibition set out in Art. 631 (2) Com. C., which governs disputes between shareholders of a commercial enterprise, does not apply, since in such a case Art. 631 (1) Com. C., which relates to disputes between traders, will apply.

\textsuperscript{44} Law of 7 July 1983.
\textsuperscript{45} Civ. 3e, 18 May 1971 in re Cgne v. Chevron; 1re Ch., 29 October 1990 in re Sté Rodin v Sté Wilmart.
Finally, some consideration must be given to law firms, which generally take the form of civil enterprises and which are, therefore, non-commercial. On this subject, the various regulations that law societies provide for a mandatory procedure (e.g. in certain cases of disputes between associates), cannot be considered as being of the same standard of a true arbitration clause, which is based on mutual consent and the free will of the parties. Notwithstanding differing assessments with respect to this subject, and the fact that a legislative solution would neither be objectively justified, nor appropriate (and would require amendment of Art. 2061 Civ. C. to allow an arbitration clause unless the law provides otherwise), there are at present no valid reasons to justify or accept the lawfulness of including an arbitration clause in a law firm, thus bypassing the prohibition provided by the law.

Finally, the right or the lack of rights to include an arbitration clause in the context of associations of persons organised within corporations, in two main forms, namely associations and the European Economic Interest Grouping [EEIG], must be considered.

With respect to EEIG, the possibility of including an arbitration clause within the organisation of the structure always depends on the issues that have been discussed above, namely the premises imposed by the set of provisions of Art. 2061 Civ. C. and Art. (631) Com. C. If applied rigidly, this solution would contrast with the enormous possibilities for organisation of the EEIG. Logically, there does not appear to be any reason that an arbitration clause could not be included with legal effect.

Again with reference to the application of Art. 2061 Civ. C. and 631 Com. C., the opinion of some authors diverges. Some authors suggest that the solution lies in the acceptance of an arbitration clause only if all the members of the Group can be defined

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as "traders", while others suggest that it would be possible only if all the members of the Group, and also the Group itself, can be described as "traders" in the "commercial" sense. For other authors, the possibility of including an arbitration clause would have to be permitted in applications analogous to the considerations already expressed with respect to civil enterprises.

In any case, although the arguments and opinions of the authors who are favourable to the possibility of including arbitration clauses within the context of an EEIG, it should not be forgotten, as will be seen subsequently from the comparative perspective of the other cases, that there will always be restrictions arising from legal provisions that, at the moment, have still not been interpreted in accordance to the meaning suggested by the authors cited above.

In this sense it should be remembered that within the context of the dispute between EIG Acadi c Sté Thomson Anware, the Paris Appeal Court pronounced null and void the arbitration clause between the parties, affirming that in that specific case the EEIG, whose activity consisted of providing technical assistance for computer equipment to its own members (who were stockbrokers), was civil in nature and thus could not be considered commercial: the arbitration clause was therefore deemed null and void.

Finally, associations will be considered in accordance with Art. 1 of the law of 1 July 1901 and the amendment of the law on 4 January 1978, which introduced the possibility of associations carrying out economic activities, if provided for by their bylaws. From a tax perspective, an association having an economic and, therefore, a for-profit purpose, becomes the equivalent of an enterprise from the perspective of direct taxes.

48 COHEN, p. 50, note 96.
49 COHEN, p. 49, note 92 et 93.
Nevertheless, although associations have similarities and affinities with business enterprises, important differences remain. One difference is the fact that, even though an association can have an economic purpose it may, in some cases, not necessarily be considered as being a commercial enterprise. In this case associates have a position that is different from the members of an enterprise, as a result of which - with respect to the current state of positive law - an arbitration clause may not be used between associates or between the association and its associates.

This fact poses a series of questions within the context of arbitration proceedings of a so-called "disciplinary" nature within the association. In reality, this does not constitute a true arbitration agreement that is exempt from ordinary courts, but rather an arbitration proceeding within the context of the autonomy of the association. A judgement of the Court of Paris\textsuperscript{51} in 1986 declared an arbitration procedure between associates and the association as being null and void, by considering that the dispute was of a disciplinary rather than contractual nature, which ruled out the use of arbitration, also observing that the designated arbitrators were members of the association and, as a result, the requirement for independence was not met, and the procedure could not be considered arbitration within the meaning provided for by the law.

In effect, the decision is based on the absence of presumed independence of the arbitrator, leading to the rejection of the qualification for arbitration. In light of the above, even in the case of the internal arbitration proceeding of an association being of disciplinary nature, particular care is required when permitting such a procedure, even if there are no convincing arguments that generally prohibit a procedure of this type for disciplinary matters.\textsuperscript{52}

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\textsuperscript{51} Paris, 1re Ch. A 3, 3 Déc. 1986 in re Michaut et Remenieras c Cie d'expertise en antiquités et objets d'art; Rev. arb. 1987.353.
\textsuperscript{52} COHEN, p. 52, note 100.
\end{flushleft}
In conclusion, it can be asserted that current legislation seems excessively restrictive, and that amendment of the set of provisions in Art. 631 Com. C. and 2061 Civ. C., authorising the use of an arbitration clause in a substantially broader fashion, (including, in principle, any type of enterprise, such as EEIG, as well as associations having an economic aim) would be suitable.

Now that the aspects of arbitration relating to the various forms of undertakings have been considered, the issue will be considered with respect to members.

Art. 631 (2) Com. C. refers to "disputes between members within the context of a commercial enterprise". Having analysed the concept of commercial enterprise, the concept of member/s will be examined. In this sense it is the law governing the enterprise that determines who is a member, and the arbitrator must draw his conclusions accordingly, since the validity of the arbitration clause status depends on the fact of being a member (of a corporation, etc.).

In general, determining who is a shareholder does not pose any particular problems, and such a status is granted: to shareholders of a shares company, to quota holders, to limited liability companies, to limited partners and to general partners in a partnership and to members of a partnership.

Other figures such as bond holders, auditors and employees cannot be considered shareholders within the context of an enterprise.

Within the category of members expressly provided for in positive law, and the other persons described above who are excluded from the valid membership, there are intermediate categories with dual functions, such as member employees, member tenants, and non-member executives.

In general it can be stated that, in the important case of employee members, if the dispute relates to corporate matters, including cases of renewal of appointments, payment of attendance fees and
executive actions for liability, the use of arbitration is permitted, whereas if the dispute relates for example to working relations, the use of arbitration is prohibited and at most, only settlement of the issue may be contemplated.

On the other hand, in the case of member tenants, and to the extent that the enterprise is considered to have a commercial nature, rather than civil, it appears that such a possibility exists. In this sense, a judgement to the contrary seems to have been issued by the Court of Appeal of Paris dated 14 May 1961, in which the necessity of having the status of member as opposed to that of tenant is affirmed, in order to be able to adopt an arbitration clause that will have legal effect.

Finally, for corporate officers, namely the executives, administrators and the board of directors that are not members, the use of an arbitration clause is generally not permitted, since they do not meet the requirements of Art. 631 Com. C. This solution, however, is not completely satisfactory.

One simply needs to examine the subject of the dispute, which must refer to or be related to the “pacte social”, meaning the setting-up, the operation and liquidation of the company as well as its existence, the terms, the regulations and the application of the bylaws. An arbitration clause, in fact, may not be concluded with respect to disputes relating to issues that do not relate to this field of application.

The law does not make specific reference to the limitation of the field of application of the arbitration clause to the social pact, but, in addition to permitting it on a virtually unanimous basis, the jurisprudence extends it even to disputes between members, within the meaning of Art. 631 subsection 2 Com. C.

The reference to the social pact implies a concept that is broader than the enterprise's mere bylaws, and includes, among other

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things, regulations, minutes and agreements between the members. More generally, case law confirms that disputes which lie within the field of application are those that arise from the organisation, the operation or the winding-up of the enterprise, and more generally disputes that place the interests of the enterprise in issue. Roughly speaking, it can be stated that "corporate" disputes are those in respect of which the Commercial Tribunal is competent to rule.

To sum up: under French law and its relative consolidated case-law, arbitration clauses may be used, subject to the set of provisions contained in Art. 2061 Civ. C. and 631 Com. C., only with respect to corporate matters between a commercial enterprise and its own members, as well as between themselves.

c)  Italian Law

With the law of 5 January 1994, no. 25, which came into effect on 17 April 1994, i.e. 90 days after its publication in the Official Gazette of the Italian Republic, issued 17 January 1994, Italy carried out a sweeping reform of the institution of arbitration, introducing progressive provisions with respect to both domestic and international arbitration.

Before analysing the more important provisions in detail, it is worthwhile making specific reference to some concepts that relate to domestic arbitration. The provisions governing arbitration find their sedes materiae in Art. 806 et seq. of the Code of Civil Procedure [CCP]. In accordance with long-standing case law, whether arbitration takes the form of a clause or a separate agreement, it is always subdivided into formal and informal arbitration (also called either free arbitration or, more generally, from a comparative law perspective, ad hoc arbitration), although the case law has never adopted elements that are substantially relevant enough to clarify the substantial characteristics that are appropriate for distinguishing the two forms of arbitration54.

54 BIANCHI, l'arbitrato nelle controversie societarie, Cedam 2001, 45 et seq.
A prime distinction between the two forms of arbitration lies in the fact that formal arbitration is that which is governed by the provisions of the CCP, while informal or free arbitration is not governed by the provisions of the civil code.

While acknowledging that there is a structural and functional similarity between the two institutions\(^{55}\), it is recognised that the procedural institution of formal arbitration is focused upon the element of decision-making, while informal arbitration is focused upon acts pertaining to substantive law. The determination of the formal or informal character of an arbitration award must be ascertained automatically by the judge hearing the proceedings\(^{56}\).

In conclusion, formal arbitration is defined by the procedure governed by Art. 806 et seq. of the CCP, which must be applied in order to avoid a judgement with respect to the dispute being issued by an ordinary court, submitting it instead to arbitrators selected by the parties.\(^{57}\) However, even with an arbitration agreement or a clause relating to informal arbitration, the parties must have the disputes arising between them decided by arbitrators, as is expressly provided in Art. 806 CCP. Case-law and legal writings both agree, even subsequently to the reforms made to the institution in 1983 and 1994, that there is a substantial homogeneity of the two species of arbitration from the point of view of the structure of the decision based on consensual contractual choice.

Despite the fact that the material distinction remaining between the two methods has diminished, there is still a significant difference regarding to the effects of the two types of arbitration. The distinction, based on the effects of formal and informal arbitration, consists in the fact that formal arbitration concludes with a decision that is suitable for obtaining an enforceable ruling, and therefore one that has executive effect that must be requested by

\(^{55}\) Cassazione civile, SS.UU, 3 July 1989, no. 3189, in Giur. it., 1991, I, 1, p. 220.

\(^{56}\) Cassazione civile, Sez. I, 10 marzo 2000, n. 2733.

means of the filing of the award pursuant to Art. 825 CCP with the clerk's office of the court of first instance in the jurisdiction of the arbitrator's office, while informal arbitration results in the issuance of the award, which has effect within the context of the transactional autonomy of the parties. In informal arbitration, arbitrators do not contribute to case law.58

This circumstance has been - and remains – however, source of opposing opinions59 concerning the enforceability in Italy of awards made outside that country and, in some cases, the enforceability of Italian awards in other states and foreign territories, with respect to informal or ad hoc arbitration.

From the perspective of domestic arbitration, the legislative amendment of 1994 has introduced important new concepts contained in Art. 808 et seq. CCP, including the principle of the independence of the arbitration clause and the recognition that the right to enter into a contract also includes the right to include an arbitration clause, which is quite relevant in the context of the ordinary powers of a corporation. This provision is not directly matched by many other provisions, in which no distinction is made between ordinary and extraordinary powers of management with respect to directors of the enterprise. In addition, obsolete provisions were abrogated, such as the requirement for the award to be issued on Italian territory pursuant to Art. 824 CCP, provisions introduced stating that the agreement should be considered to be in writing, where the intention of the parties is expressed in a telegram or telex (Art. 808 CCP), and by recognising that the jurisdiction of the arbitrators is not excluded by the fact that the dispute, referred to them, is connected with an action pending before the court (Art. 819-bis CCP).

One should also note the amendment to Art. 825 CCP, which required the filing in the Magistrates' Court of only the formal

arbitration award within five days of its issue, failing which, it would become null and void. As previously mentioned, the party that intends to carry out the award must file it. Filing is only possible with respect to formal awards, and not for informal arbitration. There may be failure to file the formal award, for various reasons, including the financial burden that the filing may entail. As a result it is not unusual for a formal award not to be filed, unless it is enforced.

The two types of arbitration often are the subject of an evaluation within the context of their use by the enterprise. Despite the fact that formal arbitration is subject to rigorous monitoring of the application of the provisions (the violation of which may result in the award being rendered void) and the intervention of an ordinary judge with respect to sequestration orders, it appears that there is a greater propensity in favour of formal arbitration over informal arbitration, which will soon be accentuated by the possibility of obtaining enforceable protection with respect to the award.

Having examined aspects of domestic arbitration we note that the amendment to the legislation also relates to international arbitration, which was previously not governed by the provisions, through the introduction of new provisions relating to this very subject.

In particular it is worth remembering that Art. 833 CCP (relative to the form of the arbitration clause), which acknowledges the validity of the arbitration clause contained in general conditions of contract or standard forms, is not subject to the specific approval provided for in Arts. 1341 and 1342 of the Civil Code (which is a vexation clause), and also acknowledges the validity of the clause contained in the general conditions that are incorporated in an agreement in writing made by the parties, if the parties either knew of the clause, or should have known of it by using ordinary

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60 For example, in the case of a transfer or constitution of real rights with respect to real property or other rights, there is a 3% tax, while in cases of certifying rights relating to economic interests, there is a 1% tax, that must be paid within 60 days.
diligence. Article 834 CCP (referring to the norms applicable to the merits) is also noteworthy, since it confirms that the parties may either agree on the norms that the arbitrators apply to the merits of the dispute, or provide that the arbitrators decide *ex aequo et bono*. In both cases, the arbitrators can take into account the provisions of the contract and trade usage, which is of considerable significance, since it authorises arbitrators to consider not only legislative provisions, but also contemporary trade practice.

d) From a European perspective (EuGH)

From a European perspective, the Judgement of the Court of 10 March 1992, in re Powell Duffryn plc v Wolfgang Petereit (Case C-214/89) regarding Art. 17 of the Brussels Convention of 27 September 1968 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters - as amended by the 1978 Accession Convention and, in particular, referring to an Agreement conferring jurisdiction by a clause in the statutes of a company limited by shares - is very interesting. This is because of the significance of the considerations contained in, and related to, the interpretation of art. 17 of the Brussels Convention, even though these matters have no relation to arbitration agreements, and though this field of application is excluded from the ambit of the Brussels Convention.

The Judgement was based on the following facts that arose in proceedings between W. Petereit, acting as liquidator of the company IBH-Holding AG, which was in liquidation, and Powell Duffryn plc [which we will refer to below as: "Powell Duffryn"].

It appears from the relative documents that Powell Duffryn, a company under English law, had subscribed for registered shares in IBH-Holding AG (referred to below as "IBH-Holding"), a company limited by shares under German law, when the capital of the latter was increased in September 1979. On 28 July 1980 Powell Duffryn participated in the proceedings of a general meeting of IBH-Holding during which, by a show of hands, the
shareholders adopted resolutions amending the statutes of IBH, in particular by inserting into them the following clause:

"By subscribing for or acquiring shares or interim certificates the shareholder submits, with regard to all disputes between himself and the company or its organs, to the jurisdiction of the courts ordinarily competent to entertain suits concerning the company."

In 1981 and 1982, Powell Duffryn subscribed for further shares on successive increases in the capital of IBH-Holding, and also received dividends. In 1983, IBH-Holding was put into liquidation and Mr Petereit, acting as liquidator, brought an action before the Landgericht Mainz, claiming that Powell Duffryn had not fulfilled its obligations to IBH-Holding of making the cash payments due in respect of the increases in capital. He also sought to recover dividends which, he maintained, had been wrongly paid to Powell Duffryn.

Powell Duffryn maintained that a clause conferring jurisdiction contained in the statutes of a company limited by shares cannot constitute an agreement because the statutes are normative by nature and, thus, the contents are not open to discussion by shareholders; shareholders even face the risk of clauses being introduced against their express wishes, if such a possibility is provided for in the statutes or the applicable national law.

In contrast, Mr Petereit and the Commission argued, on the basis of German law and in particular the provisions of the German Aktiengesetz (Law on share companies), that the statutes are contractual by nature and, therefore, a clause conferring jurisdiction contained therein constitutes an agreement within the meaning of Article 17 of the Brussels Convention.
The Landgericht dismissed the plea of lack of jurisdiction raised by Powell Duffryn whereupon the latter appealed to the Oberlandesgericht Koblenz. That court considered that the dispute raised a question of interpretation of Article 17 of the Brussels Convention, and then stayed the proceedings referring the follow-
ing questions to the Court of Justice for a preliminary ruling:

The Court ruled that a clause contained in the statutes of a company limited by shares, and adopted in accordance with the provisions of the applicable national law and those statutes them-
selves conferring jurisdiction on a court of a Contracting State to settle disputes between that company and its shareholders, constitutes an agreement conferring jurisdiction within the
meaning of Article 17 of the Brussels Convention.

The Court further ruled that, **irrespective of how shares are acquired**, the formal requirements laid down in Article 17 must be considered to be complied with in regard to any shareholder, if the
clause conferring jurisdiction is contained in the statutes of the company and those statutes are lodged in a place to which the shareholder may have access, or are contained in a **public register**.

There are several considerations in this ruling of the Court that need to be quoted, which have possible implications for arbitration in corporate matters:

“The requirement, that a dispute arose in connection with a par-
ticular legal relationship within the meaning of Article 17, is satisfied if the clause, conferring jurisdiction contained in the statutes of a company, may be interpreted as referring to the disputes between the company and its shareholders as such”.

From a comparative examination of the different legal systems of the Contracting States, the characterisation of the nature of the relationship between a company limited by shares and its shareholders is not always the same. In some legal systems the
relationship is characterised as being contractual, and in others it is regarded as being institutional, normative or *sui generis*.

The concept of "agreement conferring jurisdiction" is decisive for the assignment, in derogation from the general rules on jurisdiction, i.e. on the exclusive jurisdiction of the court of the Contracting State, designated by the parties. Accordingly, as the Court has held for similar reasons, the concept of "agreement conferring jurisdiction" in article 17, must be regarded as an independent concept.

Similarly, the links between the shareholders of a company are comparable to those between the parties to a contract. The setting up of a company is the expression of the existence of a community of interests between the shareholders in the pursuit of a common objective. In order to achieve that objective, each shareholder is assigned, as regards other shareholders and the organs of the company, rights and obligations set out in the company statutes. It follows that, for the purposes of the application of the Brussels Convention, the company statutes must be regarded as a contract covering both the relations between the shareholders and, also, the relations between them and the company they set up.

It follows that a clause conferring jurisdiction in the statutes of a company limited by shares is an agreement within the meaning of Article 17 of the Brussels Convention, which is binding on all the shareholders.

It is immaterial that the shareholder against whom the clause conferring jurisdiction is invoked opposed the adoption of the clause, or that he became a shareholder after the clause was adopted.

By becoming and by remaining a shareholder in a company, the shareholder agrees to be subject to all the provisions appearing in the statutes of the company and to the decisions adopted by the organs of the company, in accordance with the provisions of the
applicable national law and the statutes, even if he does not agree with some of those provisions or decisions.

Any other interpretation of Article 17 of the Brussels Convention would lead to a multiplication of the heads of jurisdiction for disputes arising from the same legal and factual relationship between the company and its shareholders. It would also run counter to the principle of legal certainty.

As the Court held in Case 24/76 Estasis Salotti v Ruewa [1976] ECR 1831, paragraph 7, the purpose of the formal requirements imposed by Article 17 is to ensure that the consensus between the parties is in fact established.

It must nevertheless be emphasised that the situation of shareholders as regards the statutes of a company - which are the expression of the existence of a community of interests between the shareholders in the pursuit of a common objective - is different from that, referred to in the above mentioned judgement, of a party to a contract of sale as regards general conditions of sale.

First of all, in the legal systems of all the Contracting States, the statutes of a company must be in writing. Moreover, in the company law of all the Contracting States it is acknowledged that the statutes of companies play a particular role in so far as they constitute the basic instrument governing the relations between a shareholder and the company.

Furthermore, irrespective of how shares are acquired, every person who becomes a shareholder of a company knows, or ought to know, that he is bound by the company statutes and by the amendments made to them by the company organs, in accordance with the provisions of the applicable national law and the statutes.

Consequently, when the company statutes contain a clause conferring jurisdiction, every shareholder **is deemed to be aware** of that clause and actually to consent to the assignment of jurisdiction for which it provides, if the statutes are lodged in a place to which the
shareholder may have access, such as the seat of the company, or are contained in a public register.

Another case to be mentioned in this context, is that of the conclusions very recently given by the general attorney in re Fonderie Officine Meccaniche Tacconi S.p.A. v Heinrich Wagner Sinto Maschinenfabrik GmbH, concerning the issue as to whether or not pre-contractual liability can be considered within the field of application of Art. 5 no. 3 of the Brussels Convention, which deals in matters relating to tort, delict or quasi-delict.

This was the first time that the Court was requested to deal with the interpretation of this issue within the application of the Brussels convention. The conclusions of the general attorney to the query as to whether or not pre-contractual liability can be considered within the field of application of Art. 5 no. 3 of the Brussels Convention which deals in matters relating to tort, delict or quasi-delict, were affirmative and, therefore, it was proposed … by the Advocate General that pre-contractual liability, incurred by a party, can be considered an inherent part of the contractual matter and therefore belonging to Art. 5 no. 3 of the Convention.

Although, as already said above, the Convention does not apply to arbitration, the considerations, contained in both the Judgement of the Court of 10 March 1992 in re Powell Duffryn plc v Wolfgang Petereit (Case C-214/89) and in the conclusions of the general attorney in the case Fonderie Officine Meccaniche Tacconi S.p.A. v Heinrich Wagner Sinto Maschinenfabrik GmbH (Case C-334/00), may be well interpreted per analogiam as being applicable to arbitration, in particular within arbitration in corporate matters.

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62 N.B. the term delict is applicable especially to Scots law.
4. Conclusions

The brief examination of arbitration relating to corporations from a comparative perspective reveals an interesting convergence, but also approaches that are notably different from the various arrangements dealt with respect to the issue under discussion.

Some typical premises of French law, for example the requirement relating to commercial enterprises set out in Art. 631 (2) Com. C., which *de lege lata* is difficult to avoid, do not have analogous provisions in other jurisdictions, which in turn impose particularly onerous requirements, for example, those provided for in Art. 6 Abs. 2 CA in Switzerland or Germany, for lack of a legal basis, for example, with regard to obtaining the possibility of stipulating an arbitration agreement for limited liability partnerships [GmbH] in the context of disputes on shareholders' resolutions, circumstances that are essentially foreign to other systems.

Similarly, it is expected that for other systems of law there should be no particular problem. For example, the distinction between formal arbitration and *ad hoc* arbitration, as regards Italy, relates to important differences with respect to the effects arising from an *ad hoc* arbitration. Generally, in the various systems, and for historical reasons, there is a host of specific provisions governing arbitration, in particular with respect to corporate matters that do not have counterparts in other systems. Something that is an important requirement in one system may not be at all important in another, and vice versa. From this perspective, harmonisation would be favourable.

References and judgements on a community level do not directly relate to arbitration in general nor, in particular, to corporate matters, since arbitration is not included in the field of application of the Brussels Convention. However, the interpretation and the significance of some judgements relating to Art. 5 and 17 of the Convention of Brussels – as well as the considerations in the
Powell v. Petereit judgement – are, on the other hand, of considerable interest. These are also of possible application per analogiam to the extent that they address topics of fundamental importance with respect to corporations: aspects such as the validity of a clause (in this case the choice of jurisdiction) contained in the bylaws of a corporation. Such bylaws do, in fact, bind all shareholders without distinction as to the way in which the status of shareholder was granted: whether through subscription by the shareholders to the shares of the corporation upon constitution; through an operation of increase in share capital; or simply by acquiring shares from third parties.

The Court of Justice has emphasised current and fundamental concepts, including the complexity of the relationships between the shareholders of a corporation, the fact that a person acquiring the status of shareholder of a corporation knows or must know that he or she is bound by the bylaws of the corporation and any amendments to it made by its organs in compliance with applicable national law and, not least, on the promotional value provided by the ability of each shareholder to obtain information relating to corporations.

The First Council Directive 68/151/EEC of 9th March 1968 on co-ordination of safeguards which, for the protection of the interests of members and others, are required by Member States of companies within the meaning of the second paragraph of Article 58 of the Treaty, with a view to making such safeguards equivalent throughout the Community and, in particular, as provided for by article 2, no. 1 upon which the Member States shall take the measures required to ensure compulsory disclosure by companies of at least the following documents and particulars: (a) the instrument of constitution, and the statutes if they are contained in a separate instrument; (b) any amendments to the instruments mentioned in (a), including any extension of the duration of the company; (c) after every amendment of the instrument of constitution or of the statutes, the complete text of the instrument or statutes as amended to date.
These various considerations of the Court of Justice, which lead us to consider shareholders as being bound to the content of a clause, contained in the statute of a company, that confers jurisdiction, find a parallel in the concept of arbitration by way of reference to the Swiss International Arbitration Act.

It is upon the basis of this Act that questions concerning which specific conditions that refer to the text actually fulfil the requirement of consent, must be answered under Swiss law, pursuant to Art. 178 subsection 2 PILS. Also to be taken into account is the principle of good faith, which has been developed from Art. 1 et seq. of the Code of Obligations.

If the findings of the Court of Justice were also to be recognised and incorporated into national laws in the arbitration matters, this could lead to a very widespread use of arbitration in corporate law.

II. The Arbitration Agreement

1. Switzerland

a) Introduction

Art. 4 of the Concordat distinguishes between arbitration agreement and arbitration clause. The PILS does not distinguish between these two diverging rules, and uses the term agreement to arbitrate, or arbitration agreement, for both scenarios. In this sense arbitration agreement is to be considered a general concept.

b) Arbitration Agreement

As per art. 4 of the Concordat, arbitration agreement means an agreement concerning disputes which have already arisen. This form of arbitration is not very widespread as compared to the arbitration clause which this paper concentrates on. But this

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63 WENGER, no. 2 to Art. 178 PILS.
distinction is useful anyway, because, in the international perspective, the term arbitration agreement is commonly used as meaning the “arbitration clause as *per* art. 4 of the Concordat”.

c) Arbitration Clause

An arbitration clause differs from an arbitration agreement, because it signifies an agreement concerning possible future disputes. Both situations in arbitration have elements of both substantive and procedural law, although this qualification, today, is outmoded.

d) Expert evaluation

In arbitration, the parties' intention is directed to conferring the task of settling disputes that have arisen between them upon the arbitrator (or arbitrators), instead of turning to the courts. In the context of expert evaluation, or arbitration, the parties transfer to a third party or third parties, generally identified as experts or arbitrators [art. 1349 CC-It], chosen on the basis of their particular technical and sometimes managerial competence, not for the resolution of a legal dispute, but for the formulation of an assessment or technical consideration that the parties undertake in advance to accept as the direct expression of their intentions. The difference essentially consists in the fact that in the expert evaluation or mediation, there are no proceedings similar to a trial concluding with an award and therefore it is not an arbitration\(^4\). In addition, once the arbitration has been agreed upon and is under way, its result is binding on the parties, the execution of which is therefore mandatory. This is not the case for expert evaluation or mediation, which remain binding only on the parties, but do not constitute a decision or an award that carries the value of a judgement\(^5\).

\(^4\) BORIO GIAN FRANCO, p. 20.
\(^5\) ZILLES, 153 and BORIO, 19.
It is certainly the case in some circumstances (for instance in the context of the determination of the value of the shares of a company or part of it, in the context of the liquidation of a shareholder and in analogous contexts relating to shareholders' agreements) that if the clause is not defined exactly, it is not always clear whether it relates to a provision for mediation, expert determination or is a true arbitration clause. In some cases, owing to the range and the complexity of the case, only an arbitrator will be appropriate for determining a settlement of the matter instead of an ordinary judge. If, on the other hand, the subject of the dispute relates to accounting or to sums owed to a divesting shareholder, then the best solution could be that of a technical evaluation. Finally, it should be noted that the distinction between expert evaluation or true arbitration is determined by the outcome, since expert evaluation does not fall within the ambit of the Concordat, and is therefore not liable to enforcement.

Expert evaluation signifies a mandate from the parties for a binding (or non-binding) appraisal of questions of facts, preliminary legal issues or questions of law. In this sense, the parties involved conclude a contract that, if binding, can be subject to challenge for the usual reasons pertaining to a contract. Sometimes the intention and the words used by the parties may give rise to uncertainties regarding the role of the “expert” which can be confused with the “arbitrator”. In such cases, it should therefore be analysed whether the parties intended an expert evaluation or an arbitrator who decides according to the rules of the Concordat or of the PILS, i.e. by way of exercising jurisdiction.

The distinction of whether expert evaluation is intended, or actual arbitration, is decisive regarding the consequences, as the expert report is outside the application field of both the Concordat and the PILS and, thus, not subject to enforcement.

e) Alternative Dispute Resolution [ADR]

66 BLESSING, no. 975.
Besides arbitration, there are other possibilities for resolving disputes voluntarily, such as conciliation, mediation and the so-called mini-trial. The mini-trial consists of the parties presenting their dispute in adversative (but highly condensed) proceedings before a mini-trial Panel made up of one high-ranking executive from each of the parties concerned, together with a neutral presiding arbitrator\(^6\). Among several Institutions it should be noted that in the USA, the Federal Mediation and Conciliation Service (FMCS), was already created by Congress in 1947 as an independent agency to promote sound and stable labour-management relations.

In general, mediation, also in the form of preventive mediation, is intervention by a neutral third party in a dispute or negotiation, with the purpose of assisting the disputing parties to voluntarily reach their own settlement. A mediator may make suggestions, and even procedural or substantive recommendations.

The aim of alternative dispute resolution consists in a variety of joint problem-solving processes, which aims to improve operations and reduce expenses and time spent in litigation. These processes usually involve the use of a neutral third party to help disputants to find mutually-acceptable solutions. Mediation and conciliation provide a "snapshot" of attitudes and perceptions at a particular moment. The principal features of mediation or of conciliation usually consist in neutrality, confidentiality, responsiveness, empathy and facilities when needed, and provide the parties (or the customers) with the highest possible quality facilities, equipment and materials. ADR require a radically different attitude and a better thinking as compared to the classic concept of disputes. ADR is, however, gaining in importance.

In order to underline the growing importance of ADR it should be mentioned that in the recent English decision of Dunnet v Railtrack plc\(^6\), the Court of Appeal, confirming the judgement of

\(^6\) BLESSING, no. 979.
\(^6\) The Times, April 3, 2002.
the Cardiff County Court, refused to order the unsuccessful claimant to pay the defendant’s costs of an appeal, because the defendant had refused to contemplate alternative dispute resolution. Lord Justice Brooke specifically stated that he hoped that any publicity given to this part of the judgement would draw the attention of lawyers to their duties regarding overriding objectives, so as to encourage parties to use ADR. If parties freely turn down the opportunity of ADR, when suggested by the court, they may have to face the “uncomfortable consequences of costs”.

f) Validity of an Arbitration Agreement

An arbitration agreement must be made in writing, by telegram, telex, telefax or in some other form of communication that allows the agreement to be evidenced by the text. Written form does not necessary mean that a document containing an arbitration agreement must be signed. This in accordance with the needs of modern commerce. Agreements to arbitrate are often incorporated in a further text, such as general business conditions, or in the statutes of a corporation. In these cases, the arbitration agreement is incorporated by the parties by reference to their agreement.

Anyway it must be recalled the mandatory requirements, provided in Art. 6 subsection 2 of the Concordat, state that an arbitration agreement may take the form of a written declaration whereby the parties agree to adhere by the statutes of a body corporate, provided that the declaration expressly refers to the arbitration clause contained in the statutes or rules made under them. This is an important limitation for use of domestic arbitration in corporate matters.

70 JOLIDON, pag. 169.
71 JOLIDON, pag. 173.

710 WENGER, no. 17 to Art. 178 PILS.

g) Severability of the Arbitration Agreement

The severability of the arbitration agreement signifies the independence of the arbitration clause from the main contract in which
it may be embedded, or to which it may refer (so-called “autonomy”, “separability” or “severability” of the arbitration clause\(^\text{72}\)). The assignment of a claim deriving from a contract which contains an arbitration clause, usually implies as well that the arbitration clause passes to the assignee, with the consequence that the latter is bound by the arbitration clause. However that is not absolutely true in all cases\(^\text{73}\), but depends on the specific circumstances. In a recent case\(^\text{74}\) the Federal Tribunal ruled that a contract containing a provision prohibiting the assignment of any obligation deriving from the contract, also implies that the arbitration clause cannot be considered validly assigned and, therefore the arbitration tribunal has no jurisdiction on the case.

h) The Requirements of Independence and the Impartiality of the Arbitration Court

The Concordat, regarding the constitution of an arbitration tribunal, provides for guarantees of the independence of the same, in particular in art. 11 and 19 CA. Constantly, in the relative case-law, the Federal Tribunal\(^\text{75}\) has underlined the necessity that none of the parties may exercise an overdriving influence regarding the appointment of the members of the Arbitration Court. This case-law essentially derives from arbitration in the field of associations, including sports associations. The fundamental considerations on which Federal Tribunal case-law is based, are those according to which only a truly independent arbitration tribunal may have the recognised faculty to make awards equivalent to judgements given by ordinary [i.e. state] tribunals\(^\text{76}\).

The premise of impartiality may also be verified by the Judge at the moment when the request for enforceability of an award is made. On that occasion, but not afterwards, for instance during the proceeding for setting aside (for example within the context of

\(^{72}\) BLESSING, no. 523.  
\(^{73}\) BGE 117 II 94 et seq.  
\(^{74}\) BGE 128 III 50 ff.  
\(^{75}\) BGE 107 Ia 158, Erw. 2b.  
\(^{76}\) BGE 76 I 92
proceedings of dismissing the debtor’s objection to a summons to pay – Rechtsöffnungsverfahren), the Judge is authorised to verify whether the necessary conditions of impartiality have been respected, or not. If that is not the case, the award cannot be enforced\textsuperscript{77}.

Art. 180 cpv. 1 lit. c. PILS provides that an arbitrator can be challenged in circumstances which give rise to justifiable doubts as to his independence.

However, the law does not specify which circumstances give rise to justifiable doubts as to the independence of an Arbitrator. It is the specific case that determines them. With reference to this, the Federal Tribunal has always maintained a justifiably strict attitude in evaluating the specific cases\textsuperscript{78}. This is also due to the fact that Article 30 of the Swiss Federal Constitution entitles all the parties to an impartial judge, and that this applies not only within the framework of the state jurisdiction, but also to international arbitration\textsuperscript{79}.

In one particular instance\textsuperscript{80} an Arbitrator was both sole director and, probably holding interest in a company that, at the same time, was acting as one of the parties in arbitration proceedings. The Federal Tribunal found the proceedings not to have been impartial and, therefore ruled that the Arbitration Court had not been properly constituted and, thus, consequently upheld the appeal and set aside the award that had been made.

For these reasons, as well, the organs of a company in dispute between members and the company cannot generally be considered impartial. Therefore the directors, as well as the auditors of a company, can give rise to justifiable doubts as to their independence, because they are, in fact, bound to, and dependent on it. Thus, these circumstances can be evaluated against the

\textsuperscript{77} BGE 117 III 57 and BGE 107 Ia 324, Erw. 6 in fine.
\textsuperscript{78} BGE 124 I 121
\textsuperscript{79} BGE 113 Ia 407
\textsuperscript{80} BGE 111 Ia 72
principle of impartiality and, therefore, the organs may not be able to intervene as arbitrators in an arbitration proceeding between that company and the members.

2. From a Comparative Perspective

The requirement of the written form *ad substantiam* is also common in different substantial law systems, including German\(^1\), Italian and French law, and does not generally require, that the negotiations be expressed in a single document, with the signatures of both parties\(^2\), but may simply refer to a document that contains the arbitration clause. In the field of consumer law, however, more rigid rules are applied, that specifically require the signing of the arbitration clause\(^3\).

From a comparative perspective\(^4\), the issue of independence and impartiality of an arbitration tribunal is also important. Generally case-law\(^5\) is inclined to deny the admissibility of the statutory clause that designates as arbitrators, for example, the directors or auditors of a corporation, since there is the admission that the latter have the duty to act in the interests of the corporation that is remunerating them and, therefore, that it may be difficult to reconcile this position with the duty of being impartial\(^6\).

To the extent that the clause relates exclusively to disputes between shareholders, and not between shareholders and the corporation, the possibility of an auditor acting as arbitrator is not necessarily incompatible with the requirement of impartiality\(^7\).

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\(^2\) Cfr. Art. 807 CPC-it; Art. 1443 NCPC.

\(^3\) § 1031 Abs. 5 ZPO (Germany).

\(^4\) BIANCHI, 12; ZILLES, 150 et seq.; COHEN, 202, no. 399.


\(^7\) L. PAOLUCCI, le clausole di deferimento delle controversie sociali ai probiviri, in Le societá, 1993, p. 1040.
In Swiss law - even at a comparative level - the will of the parties in arbitration is such as to confer on the arbitrator (or on the arbitrators) the task of deciding disputes that have arisen between the parties instead of state courts, while in the field of arbitration evaluation or in arbitration itself, the disputing parties concede to other third parties, generally defined as experts or arbitrators [art. 1349 CC-it], chosen on the basis of their particular technical, or sometimes managerial, competence, not the resolution of the juridical dispute, but the formulation of a judgement or technical evaluation, that the parties a priori undertake to accept as the direct expression of their will.

The difference essentially consists in the fact that in the expert evaluation and in the arbitration, there will not be proceedings in the essential procedural sense, i.e. that they would conclude with an award and, thus, constitute true arbitration. Furthermore, the arbitration - once agreed on and begun - will eventually arrive at a final decision that will be binding on the parties, and thus liable to subsequent enforcement, even by coercion, a fact that does not apply to arbitration evaluation, or to arbitration which simply remains binding between the parties but does not constitute a decision or an award, which acquires the value of a juridical sentence.

It is certain that in some cases when the clause may not be exactly defined, it is not always evident whether it refers to arbitration clauses, to expert evaluation, or to specific arbitration clauses: for example in the field of determining the value of shares of a business, or of a part of it; in the field of liquidation of a member or of a partner; also in analogous situations, referring to shareholder agreements. In this sense, it is necessary to investigate both the wills of the parties and the objectives intended by them. In some cases, because of the size and complexity of the problems, only the arbitrator would be preferable for resolving such cases.

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88 BLESSING, no. 971.
89 BORIO, 20.
90 ZILLES, 153 and BORIO, 19.
questions, instead of an ordinary tribunal. If, however, the questions involved are simply the quantification of what must be paid to a withdrawing member, the best solution may probably be that of an expert evaluation.

The same uncertainties are present in French law\textsuperscript{91} - even with reference to the specific terminology – in particular with regard to art. 1592 C. civ. with specifically refers to “\textit{arbitrage}” and which contrasts art. 1442 NCPC. The arbitration in the sense of art. 1592 C. civ. should have the significance and the influence of an evaluative arbitration on the basis of common mandate between the parties, but without the will to exercise jurisdictional functions.

\section*{III. The Nature of the Arbitration Clause}

\subsection*{1. Pertaining to procedure}

In accordance with Art. 122 Federal Constitution (formerly Art. 64 3 FC), legislation in the field of civil law is a federal matter. The organisation of the courts and of the administration of civil justice are cantonal matters, excepting specific disposition of the law.

On the basis of these categories\textsuperscript{92}, it is necessary to determine whether arbitration agreements, arbitration proceedings and arbitration awards are, in fact, procedural or substantive in nature.

According to some authors\textsuperscript{93} arbitration agreements should be qualified in the same way as procedural contracts\textsuperscript{94}, for example, or as agreements on forum. In support of this theory, a series of elements is presented, including the fact that (i) the effects of the

\textsuperscript{91} COHEN, no. 346, 170.
\textsuperscript{92} See the message from the Federal Office of Justice dated 15 February 1980, JAAC-VPB-45-49 295.
\textsuperscript{93} Among many, see GULDENER, ZSR 1961 II, S. 9 f.; GULDENER, Zivilprosessrecht, a.a.O., S. 594 ff; VOYAME, a.a.O., S. 146 ff.
\textsuperscript{94} LALIVE/POUDRET/REYMOND, comment at art. 1, note 1.1., 26.
arbitration agreement arise from a procedural context, (ii) arbitration tribunals exercise a function of authority and are part of the judicial system, (iii) arbitration awards, unlike contracts, are not subject to appeal, but may be subject to attack by means of an application for setting aside.

Within the context of the Private International Law Statute, the Federal Office of Justice issued a document dated 15 February 1980 dealing at length with the nature of arbitration agreements.

In relation to this, two main theories were considered, namely the "procedural" and "substantive" approaches, with interesting references with respect to international arbitration. The Federal Tribunal has not excluded the competence of the Confederation with respect to governing arbitration agreements, but has simply noted that the Code of Obligations, unlike other systems, does not contain regulations with respect to this issue. It follows that the Confederation has waived the right to govern the facility of the arbitration agreement not because of a lack of jurisdiction, but rather because it has deemed that, from a political and institutional perspective that there was no need to substitute cantonal regulations by introducing regulations contained in the Code of Obligations.

The predominance of the procedural theory, at least with respect to domestic arbitration, is shared by the Federal Tribunal which has reconfirmed the procedural nature of the arbitration agreement, subject to cantonal procedural law and which determines the premises for the validity of an arbitration agreement, excluding application to the Federal Tribunal for violation of federal law. This is also the case if the arbitration agreement is subject to the Concordat, since the Concordat also contains cantonal law.

96 BGE 101 II 168 Erw. 1
97 BGE 110 IA 59
Since the Confederation may be competent to govern arbitration in general, it is all the more to be considered in the field of private international law, in accordance with the necessity of establishing arbitration on the basis of a wide private autonomy of the parties, pursuant to the Convention of New York of 10 June 1958\(^98\), with respect to the acknowledgement and execution of external arbitration awards.

In this sense, and in view of Art. V (a) of the Convention of New York, a contractual rather than procedural nature is generally acknowledged in cases of international arbitration.

From a comparative perspective, for example in Germany, opinions on the nature of the arbitration agreement are various\(^99\) although the “theory of the procedural nature” seems predominant\(^100\), according to which the main effect of an arbitration clause is to exclude the jurisdiction of the courts and thus justify a plea of want of jurisdiction.

2. **Contractual**

In Italy, the contractual nature of arbitration prevails\(^101\), since even the legislator has opted for an express reference in Art. 807 (3) and 808 CPC referring to the provisions of Art. 1325 of the CC, namely the requirements of the contract.

The same applies in France, where a concept analogous to the Italian approach prevails\(^102\), since also the law set out in Art. 631 of the Com. C.

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\(^98\) SR 0.277.12  
\(^99\) K. H. SCHWAB/G. WALTER, Schiedsgerichtbarkeit, 6.A., München, Rz. 37, S. 76.  
\(^100\) ZÖLLER, ZPO, 23. Auflage, § 1029, Rz. 15 - 17.  
More generally, on comparative examination of the European perspective of the different legal systems of the Contracting States, it appears that the characterisation of the nature of the relationship between a company limited by shares and its shareholders is not always the same. In some legal systems the relationship is characterised as being contractual, and in others it is regarded as institutional, normative or sui generis.

In this context it must be recalled that, when requested to interpret the concept of "matters relating to a contract", referred to in Article 5 of the Convention, the European Court held that the obligations imposed on a person in his capacity as member of an association were to be considered contractual obligations, on the grounds that membership of an association created, between the members, close links of the same kind as those that are created between the contracting parties.

The links between the shareholders of a company are comparable to those between the contracting parties. The setting up of a company is the expression of the existence of a community of interests between the shareholders in the pursuit of a common objective. It follows that, for the purposes of the application of the Brussels Convention, the company statutes must be regarded as a contract covering both the relations between the shareholders, as well as and relations between them and the company they set up.

3. Institutional, normative or sui generis

Some authors\(^\text{103}\) are of the opinion that the nature of an arbitration clause, contained in the statutes or in the related regulations of a company, cannot simply be defined as pertaining to the contract or to procedure. They consider that the binding nature of articles of association of corporate entities is not a result of agreement, but an operation of corporate law (such as \textit{lex specialis}), and thus also

\(^{103}\) HABSCHEID, Punkt 2, 159.
binding for those members who do not consent to the relevant provision in the articles of association.

4. Conclusions

In Switzerland, the long-standing confrontation between the two main theories concerning the nature of the arbitration agreement, namely whether it is procedural or substantive, mainly in the domestic context, has not contributed greatly to the general understanding of arbitration. Except for certain consequences of this distinction, including, as established in the case-law of the Federal Tribunal, arbitration agreements, from a domestic and therefore cantonal perspective (and also pursuant to the Concordat), are of a procedural nature, and an application to the Federal Tribunal on the basis of a reprimand for invalidity of an arbitration agreement is not possible, since it would only be possible in the event of violation of federal law.

The examination from a comparative perspective showed that although there is not an unique characterisation of the nature of the arbitration clause in particular in corporation matters and also having regard to the rules of the European Court of Justice although not only with regard to arbitration, it appears that the general tendency is to consider the arbitration clause as a contract of a procedural nature, even though the reference to its contractual nature, in some circumstances, is regarded as more as a contract of a procedural nature rather than as a true contract.

In general it should be noted that the general characteristics of the Swiss International Arbitration Act are very liberal and take full and complete account of the parties' desire to be able to regulate their arbitration procedure in an independent fashion. Chapter 12 allows the so-called "procedural law autonomy", the authority to order interim measures, a so-called "conflict of laws autonomy"

104 WENGER, no. 62, Art. 178 PILS.
105 BLESSING, p. 164, Rz. 398.
106 BGE 101 II 168, Erw. 1.
107 BLESSING, no. 469.
as well as a "substantive law autonomy" also taking into account the international treaty requirements including the New York Convention of 1958 on the Recognition and Enforcement of foreign Arbitration Awards (NYC 1958).

Arbitration agreements have, in any case, two different aspects. The first is that of an agreement of the parties to submit themselves to awards given; to promote collaboration; and to abstain from other actions that could compromise the arbitration proceedings. The second is that concerning procedure. Here, the parties are given two basic means: that of opposing the deficiency of jurisdiction of the state courts; and that of allowing enforcement of the award as per the sentence of a state court.

IV. Arbitrability in general

1. Objective Arbitrability

   a) Introduction

   Art. 177 PILS determines objective arbitrability (ratione materiae), i.e. what claims can be the object of an arbitration. The term “objective arbitrability” is very wide in meaning, and covers all claims of economic interest, irrespective of the fact that substantive law governing contractual relationships might provide for a more restrictive definition of objective arbitrability\(^{108}\). Under Art. 5 of the Concordat, only claims which the parties are free to dispose of are arbitrable. In this sense, the Concordat has a different and more restrictive approach to PILS, regarding objective arbitrability.

   b) Common features and Distinctions in Different Legal Systems

\[^{108}\text{BLESSING, no. 474.}\]
From a comparative perspective, there is no unambiguous solution. Although similar compared with Swiss law, individual national domestic laws usually make reference in both terms of pecuniary interest and to claims which the parties can freely dispose of, as well as to commercial matters. This is a consequence of the historical development of the arbitration institution in each single nation, without there having been any particular international harmonisation. In Germany, for instance, there is a difference between pecuniary and non-pecuniary interest, which can give rise to problems in corporation matters\(^{109}\), in particular in cases of the setting aside of resolutions deriving from the members’ meetings of limited liability companies [GmbH]. Another particularity arises in domestic French arbitration law, which still limits arbitrability in cases regarding commercial matters.

c) Limits of objective Arbitrability

The are some limits to “objective arbitrability”, i.e. of the freedom of disposal by the parties regarding claims. Anyway there must be a distinction between domestic and international arbitration. Some “classic” limitations imposed by the Concordat are no longer applicable in international arbitration. In general, it can be said that the main limitations in international arbitration are those of status and family law, as well as those of debt collection and bankruptcy law. Domestic arbitration law imposes additional limitations, in particular on consumers, credit sale agreements, leases, labour, securities, and on investment fund law\(^{110}\).

2. Subjective Arbitrability

a) In Switzerland

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\(^{109}\) ZILLES, S. 14.
\(^{110}\) JOLIDON, 165 et seq.
Subjective arbitrability (*ratione personae*) signifies the capacity of parties to enter into an arbitration agreement. The capacity of natural persons and of legal entities is, as a rule, governed respectively\(^{111}\) by the law of domicile or seat. Consequently, if an arbitration is subject to Swiss law under Art. 178 PILS, Swiss law is also applicable to the form of power of attorney\(^{112}\) and to the right to represent the corporation against third parties\(^{113}\).

b) From the perspective of comparative law

From the perspective of comparative law, there are no particular differences to Swiss law. However, it should be noted that with the reform of the Italian Arbitration Act, the law expressly took account of the typical Italian domestic distinction between powers of ordinary and extraordinary administration of the directors of a corporation, which states that agreements to arbitrate belong to the ordinary powers of a director.

This can be important, because the powers of extraordinary administration of a company pertain to the members and not to the directors of a corporation.

3. **Disputes involving a pecuniary interest and those not-involving a pecuniary interest**

a) In Switzerland

As already seen\(^{114}\) the interpretation of disputes involving pecuniary interest is very wide and includes, for instance, disputes arising from membership of economic associations as pertaining to property rights which have pecuniary value\(^{115}\).

b) From a comparative law perspective

\(^{111}\) WENGER, no. 23 to art. 178 PILS.
\(^{112}\) See Art. 396 Abs. 3 CO.
\(^{113}\) Art. 718 CO.
\(^{114}\) BGE 108 II 77, cons. 1a.
\(^{115}\) BRINER, no. 10 to Art. 177 PILS.
The solution adopted by Swiss law is similar to the results of other substantial foreign laws; there are, however, some distinctions. French domestic arbitration law is the most restrictive, as compared to other legislation, due to the terms imposed by the Art. 631 C. com, in combination with Art. 2060 and 2061 C. civ.

German law expressly foresees in § 1030 ZPO, a distinction between disputes involving and not-involving pecuniary interest. The latter can form the object of an agreement to arbitrate, in so far as the parties can subjectively and objectively settle a dispute. The Italian Arbitration Act is more liberal, and simply lists in art. 806 CPC the various kinds of dispute that cannot be disposed by the parties.

V. Arbitration in Corporate Law in general

1. Advantages

The most important advantages for an arbitration agreement in corporate law are the favourable framework, the length of the proceedings, the high percentage of dispute resolution, the cost and confidentiality, one’s own legal counsel, the enforceability, the limitation of judicial control and liability claims\footnote{BLESSING no. 375 et seq.}.

2. Disadvantages

Although there are really no particular disadvantages in using arbitration in corporate law, some authors\footnote{ZILLES, 11.} see possible inconveniences in the fact that an arbitrator could be bound to a party too much, that in some cases there is a certain delay in the
constitution of the Arbitration Tribunal, and a certain lack of a consolidated case law.

3. Corporate (and Personal) and Arbitration Statutes

Since the personal status of a commercial corporation must be located within a particular national legal system, arbitration must have its own foundation in a particular domestic law.\textsuperscript{118}

In fact, rather than the personal status of a corporation, even though it represents a very widespread concept, for sake of clarity, reference should be made to corporate status\textsuperscript{119}, since the reference to personal status should mainly refer to natural persons (for example, in the chapter on family law and the law of succession).

Currently, except in certain very particular cases\textsuperscript{120}, there is no true supranational statute for either the corporation or for arbitration that is completely free of the national systems.

The corporate bylaws of commercial enterprises, which in general are associated with the place of incorporation, or to the law of the state in which the corporation has been organised\textsuperscript{121}, dominate practically every aspect of the organisation of the corporation. This includes the legal structure, the organisation, its very existence, internal relations and numerous other aspects. Alongside the theory of the place of incorporation of an enterprise [\textit{Incorporation theory}], other theories have always existed, namely the effective control theory (now in disuse) and the effective head office of the

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{118} ROTH, 320 et seq.
\item \textsuperscript{119} BEHRENS PETER, (Hrsg.), Internationales Gesellschaftsrecht und Fremdenrecht, aus: Die Gesellschaft mit beschränkter Haftung im internationalen und europäischen Recht, 2. A., 1997, Rz. 5, 5.
\item \textsuperscript{120} For the corporation we refer for example to the statute for a European Company, EC regulation no. 2157/2001 of 8 October 2001, in particular see point 7 of the recitals and article 9 of the regulation [Council Regulation on the statute for a European Company (SE)].
\item \textsuperscript{121} Art. 154 PILS.
\end{itemize}
\end{footnotesize}
management of a corporation [*effective Head Office theory*]. The control theory refers to the law of the state in which the shareholder controlling the corporation is based. This theory, now in disuse, has greater value in the context of foreign law than with respect to international corporate law. Finally, according to the effective head office theory, a corporation is subject to the law of the state in which the effective head office of a corporation is located, regardless of the fact that the corporation is formally organised in accordance to the laws of another state.

In substance, it is a matter of determining whether the founders of a corporation are permitted to choose which law the registration of their corporation will be subject to. In Germany and other so-called Continental nations, from the perspective of international company law, the so-called theory of the effective head office [*"Sitztheorie"*] dominates. The ability to choose is denied, since it affirms the principle that the existence of a corporation as such may, under certain conditions, not be acknowledged if the effective head office is not the same as the statutory head office. As a result, the corporation in its current form may not be acknowledged and may be transformed into a partnership, with all the particular liabilities of this type of company.

Although this theory is not expressly acknowledged, it may be applied in a limited fashion and in particular cases in accordance with Art. 154 (2), 156 and 159 PILS in Switzerland as well, where the theory of incorporation is used.

On the other hand, with respect to international arbitration, there is practically unlimited private autonomy, so that the problem is reduced to the issue of whether the arbitration clause must necessarily follow the law applicable to the corporation, or whether the parties may agree otherwise. In this sense the arbitration clause does not necessarily have to follow the law applicable to the corporation and therefore the parties may provide otherwise.\[^{122}\]

\[^{122}\] BGE 117 II 94, 98; PATOCCHI/GEISINGER, no. 3 to Art. 178 PILS.
Art. 178 PILS provides for alternate connecting factors; the arbitration agreement is "otherwise" valid – i.e. apart from the formal requirements of subsection 1 – provided it complies with one of the three laws specified, i.e. either the law chosen by the parties, the law applicable to the dispute, or Swiss law\textsuperscript{123}. All aspects of the question of the validity of the Arbitration Agreement must be determined by the application of a single law, not by applying any of the three possible laws with respect to the various issues involved. "Law" is taken to mean a national system, in the sense of the relevant provisions. It is only within the framework of such a system that references made by the parties to arbitration rules, trade practice or general principles of law can have any effect.

In practice, parties rarely avail themselves of the possibility of subjecting their arbitration agreement to a foreign law\textsuperscript{124}.

The corporate statute of commercial entities are generally determined by the law of the state of domicile or incorporation\textsuperscript{125}. This regulates almost all the organisational aspects of the company. Amongst these there are those aspects of a juridical nature and those concerning organisation, the existence of the company, its internal relationships and many other aspects.

Besides the theory “of the place of incorporation” of the company [in German: “Incorporationstheorie”], there have always existed other theories, that known as “of the effective control” (now in disuse), and that called the “effective Head Office” theory.

The “theory of effective control” refers to the law of the state of which the member who controls the company has citizenship. This obsolete theory more then having value in international company law, had its justification relative to rights of foreigners.

\textsuperscript{123} WENGER, no. 22, Art. 178 PILS.
\textsuperscript{124} WENGER, no. 25 to Art. 178 PILS.
\textsuperscript{125} Art. 154 PILS.
Lastly, according to the theory of “the effective head office”, a company is subject to the law of the state in which its administration effectively resides, independently of the fact of whether, or not, the company was formerly incorporated in another country.

With reference to arbitration in international matters, there is practically unlimited private autonomy, so much so that the problem is reduced to questions of whether the arbitration clause should obligatorily follow the law applicable to the company or whether the parties may choose differently.

In this sense the arbitration clause does not necessarily have to follow the law applicable to the company and, thus, that the parties may decide differently.\footnote{BGE 117 II 94, 98; PATOCCHI/GEISINGER, no. 3 zu Art. 178 PILS.}

VI. The parties involved in a Corporation Agreement

1. Introduction

In this paper and in this section, the subject of the parties involved in arbitration will be dealt with, except for the arbitrator or the arbitration tribunal. In this sense, reference will still made to some considerations concerning the requirement of independence and the impartiality of the arbitration tribunal dealt with in section II (1) (h), for example the judgement of the Federal Tribunal 117 III 57 E. 4 b) relating to the corporation acting as arbitrator.

Although arbitration clauses contained in the statutes of a company are usually widely interpreted, it must be noted that, depending on the kind of drawing up of an arbitration clause, the field covered by such a clause may be very different from case to case.\footnote{HABSCHIEID, Point 4, 160.} Also depending on the result that parties might want to achieve, it is necessary to draw up the arbitration clause carefully. Further
specific considerations regarding this problem are dealt in point VIII, 2, b), below.

2. Corporations

a) Switzerland

In Switzerland, there exists a *numerus clausus* of the different kinds of companies possible. The law distinguishes between companies based on persons [partnerships] and companies based on capital [corporations]. These are defined by the law as commercial companies and co-operative companies, as *per art. 552 - 926 CO.* Besides these two types of company, the Code of Obligations also regulates so-called “simple companies” [einfache Gesellschaften], through art. 530 – 551 CO.

There are also two other juridical entities: associations and foundations – i.e. corporate organisations of persons and autonomous institutes with specific purposes - regulated by art. 52 of the Swiss Civil Code (CCS).

aa) The Inclusion of Arbitration Agreements in Corporation documents

Arbitration Agreements regarding corporations shall be placed either in the memorandum, in the articles of association or in related regulations.

bb) Form of Arbitration Agreements

In order to adopt an arbitration clause within a corporation, it is necessary to do it through a notary public. The same is true in cases of the successive introduction of arbitration clauses. Although foundations are not considered to be corporations, the law provides for them except in cases of set-up through wills, or public deed. Therefore, in this case an arbitration agreement should also be adopted through the offices of a public notary.
cc) The significance of Arbitration clause

If, formally, the arbitration clause is validly adopted, it becomes binding for the company and for those shareholders who agreed with the arbitration clause. That is the case of a domestic arbitration. For international arbitration (Chapter 12 of the PILS) the limitations imposed by the Concordat are no longer applicable.

b) From the perspective of comparative law

In Germany an arbitration agreement must be lodged in the articles of association of the shares company [AG], or in the company contract in the case of a limited liability partnership [GmbH]. In both cases, a notarised deed is necessary. This requirement concerns only corporation matters. Therefore for non-corporation matters there is no special requirement for a notarised deed. Similar conditions are provided for in Italy and in France.

3. Partnerships

a) Switzerland

For the setting up of a partnership, it is not necessary to go through a notary public. Similarly, for corporations, an arbitration agreement must be lodged either in the memorandum, in the articles of association or in related regulations. The agreement must be in writing and in order to be binding for all the associates, it must be signed by all of them. The same is required for other forms of associations such as private association or condominium.

b) From the perspective of comparative law

In Germany the written form is usually required for arbitration agreements concerning partnerships, although in some cases the verbal form could also be sufficient. A double agreement is finally required by the special form of the German GmbH & Co. KG.

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128 ZILLES, 21.
129 COHEN, no. 381 e 382, 190.
Germany there was much debate as to whether an arbitration agreement within a partnership should be lodged in the partnership contract, or within the statutes. With the reform of 1. January 1998 of the German arbitration act, the requirement that an arbitration agreement should be stipulated in a separate document [old § 1027 ZPO], or in the statute of the partnership and not in the partnership contract, was dropped. The written form, however, is generally required in France and in Italy.

4. Individuals

a) Switzerland

It must be clearly established whether a claim concerns corporate or non-corporate matters. If corporate matters are concerned and a comprehensive arbitration clause was validly agreed, then there is no particular problem and the shareholders, the limited partners and organs of the corporation, acting in their institutional functions, can be bound by the arbitration agreement. This does not, however, cover private relationships between the organs of a corporation and the corporation self. That could be the case in an employment agreement. In all these cases, arbitration clauses must, in each single case, be agreed to by the parties involved.

b) From the perspective of comparative law

The same considerations are recognised in Germany, Italy and in France, however, in the latter case with a domestic limitation imposed for commercial matters as well as for objective arbitrability, in cases of employment agreements.

5. Conclusion

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130 HABSCHEID, 164, lit. b).
131 ZILLES, 25.
132 Soc. 12 févr. 1985: “La clause compromissoire incluse dans un contrat de travail, même international, soumis à la loi française est nulle”.

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If the formal requirements of an arbitration agreement are respected and the claims involved are those of corporation matters then, in general, it can be said that there is no particular problem involving the company, its organs, the shareholders and the limited partners, in an arbitration clause. However if the claim is other than a corporate one, then the arbitration clause is not covered by what is stipulated in company regulations and therefore it must be expressly established in a separate contract between the parties.

VII. The moment of adoption of an arbitration agreement

1. At the time of the setting-up of the company

a) Switzerland

Arbitration clauses in corporations and in limited partnerships can be agreed on at the time of the setting-up of the company, in the form provided by the law, and lodged either in the memorandum, in the partnership contract, in the articles of association or in related regulations. For individuals in private matters, this must be done at the time of the conclusion of the contract. In these cases, all the parties involved are bound by the arbitration, irrespective of whether it was based on the Concordat or on Chapter 12 of the PILS.

b) From the perspective of comparative law

Similar considerations are generally valid from the perspective of comparative law.

2. Introduction of an arbitration clause after the setting-up of a company
a) For Corporations

An arbitration clause can be also introduced after setting-up through an alteration of the articles of association or of the memorandum or of the related regulations. For corporations this must be made by a public deed.

aa) Switzerland

The introduction of an arbitration clause after the setting-up of the company gives rise to several problems. According to the Concordat, the subsequent introduction of an arbitration clause in corporation acts has been variously commented and, in principle should not be binding for those members who do not accept it. This derives from art. 6 of the Concordat, which requires either the written form for an arbitration agreement or a written reference to a corporation in its statutes or relative regulations the arbitration clause is contained. The Federal Tribunal\textsuperscript{133} still reaffirms the compliance of a domestic arbitration agreement with art. 6 of the Concordat. There is also the important case of the defendant who did not agree with the introduction of an arbitration clause, but who then accepted arbitration proceedings without setting aside the competence of the arbitration tribunal which could theoretically, overcome the requirements of art. 6 of the Concordat\textsuperscript{134}.

Mainly for these reasons some authors suggest that arbitration clauses should not be adopted in the regulations of a corporation\textsuperscript{135} In fact, this could contribute the creating of two categories of shareholders; those that are bound and those that are not bound by an arbitration agreement. In addition to this problem, and with reference to the old case law of the Federal Tribunal\textsuperscript{136}, the setting aside of a resolution of the general meeting of a

\textsuperscript{133} BGE 110 Ia 106; BGE 107 Ia 157.
\textsuperscript{134} BGE 125 I 389.
\textsuperscript{135} FORSTMOSER PETER, Schweiz. Aktienrecht I, Lief. 1981 § 7 N. 70; Peter Böckli, Das neue Aktienrecht, Zürich 1992, N. 4, Rz 1919.
\textsuperscript{136} BGE 80 I 398, Erw. 4.
company cannot be validly agreed upon by the parties in a settlement in arbitration proceedings.

The PILS is more liberal and, in general, does not require the same conditions as those imposed by the Concordat. Regarding this, reference must be made to point V. 3 above. Therefore, it is generally admitted - with the sole reservation of the abuse of rights - that an arbitration clause can be subsequently introduced by way of alteration of the regulations of a company\textsuperscript{137} by the vote of an absolute majority of members present at the meeting.

bb) From the perspective of comparative law

The subsequent introduction of an arbitration clause in corporate regulations is generally admitted in French, German and Italian law. French law admits it however with some requirements: art. 1836 al. 2 C. civ. says that additional duties cannot be imposed on a member without his consent. Therefore, these must first be a statement as to whether the introduction of an arbitration clause, in company statutes, represents an addition duty for a member.

This should not be the case, as no additional duty is in fact imposed on members by this fact\textsuperscript{138}. They only renounce ordinary tribunals in favour of an arbitration court, which has jurisdictional competence equivalent to national courts, and whose rulings (awards) produce the same effects as compared of those of an ordinary tribunal. In the case of companies limited by shares, French law imposes that subsequent adoption of arbitration must happen by way of an extraordinary general meeting of the company with a qualified quorum of two thirds of its members.

A further requirement, as in the case of art. 178 of PILS, is that of the reservations in case of abuse of rights. That could be the case for instance, if the adopted arbitration clause provides for the appointment of arbitrators recruited only from members, or from a

\textsuperscript{137} WENGER, no. 63 to Art. 178 PILS.

\textsuperscript{138} COHEN, no. 384, p. 191.
specific group of members to the exclusion of the others. That could however be considered a violation of the principle of equal treatment of the parties, or of their right to be heard and, therefore, could form grounds for setting aside.

German law provides requirements similar to French law. It was debated whether the alteration of the memorandum, or the statutes, needs to be unanimously approved by all the members or by simple majority of them. A finding of the court of appeal (OLG) of Munich of 9th February 1999 conclusively stated that the introduction of such a clause could happen by simple majority of the members, likewise French and Swiss law applied the same, with the sole reservation of abuse of rights. It must be noted that, despite the finding of the court of Appeal, some authors are of the opinion that an arbitration clause cannot be introduced in a company limited by shares, even if adopted by a majority of three fourth of the members, if 10% of the represented shares voted against it.

Articles 2464 of Italian Civil Code, regarding the limited partnership by shares, and 2486 CC, concerning the limited partnership, make reference to art. 2365 CC concerning companies limited by shares. The latter provides for companies limited by shares that any alteration of the statutes must be adopted in an extraordinary general meeting by the majority of the shareholders as defined in the memorandum or in the statutes of the company.

Therefore corporations can generally introduce an arbitration clause in the statute that is binding for all the members through an extraordinary general meeting of the members.

b) For Partnerships

In cases of partnerships, too, an arbitration clause can be introduced, in a second step, through alteration of the partnership

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139 SCHRÖDER MATTHIAS, Schiedsgerichtliche Konfliktbeilegung bei aktienrechtlichen Beschlussmängelklagen, Köln, u.a. 1999.
contract. In Switzerland the rules of the business association state that relationships between members are regulated by the partnership contract. In cases of lack of agreements between the partners, the rules of the civil company become applicable to the partnership.

Regarding art. 534 subsection 1 CO this means that resolutions among the partners must be adopted unanimously. Subsection 2, however, says that, if the terms of the contract provide for majority instead of unanimity, then that must be calculated on the basis of the number of partners.

Irrespective of the theoretical possibility of agreement in the contract, the principle of a majority, instead of a unanimity for deliberations, cannot be applied without restrictions, for instance, even if the majority is agreed to contractually, for some deliberations, such as increases of contributions or the acceptance of new partners, unanimity would be required. Consequently prevailing legal writing affirms that an alteration of the contract, introducing an arbitration clause into a domestic or an international partnership contract, requires the unanimity of the partners.

This question poses at least two kinds of issue. The first relates to the applicable rules of how resolutions should be adopted. The second one the arbitration clause as such. In this way, it may be argued that Art. 6 sub. 2 of the Concordat should be reserved for corporations only, and not for partnerships, because partnerships are not a corporate entity.

Anyway, in the case of a dispute involving the validity of an arbitration clause for a new part-owner, which does not expressly refer to the arbitration clause contained in the regulatory provisions of the condominium, the Federal Tribunal did apply the

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140 HANDSCHIN LUKAS, Kommentar zum schweizerischen Privatrecht, Obligationenrecht II, Art. 530 - 1186 OR, Basel 1993, oo. 5 zu Art. 534 OR; Wenger, no. 62 zu Art. 178 PILS.
rules of the Concordat\textsuperscript{141}, even though the condominium was not a corporate entity.

This conclusion may be reasonable but would necessarily lead to the conclusion that the subsequent introduction of an arbitration clause would be considered, in a certain sense, as a particularly relevant limitation of the original rights of the partners, which should not really be the case. Despite Swiss law and essentially based on the consideration that the adoption of an arbitration clause \textit{per se} does not necessarily signify additional reductions on the original rights of the partners, and with the reservation of the abuse of right, French legal writings seem to accept the adoption of the arbitration clause by majority of the partners\textsuperscript{142}.

Another possibility could already exist at the moment of the conclusion of the partnership contract, in order to preview what kind of amendments of the partnership contract could be adopted by the majority of the partners.

In German law that is possible, but there are doubts if it could happen by simple majority of the partners, even if a majority quorum for alteration of the contract was agreed to in the partnership contract. The dominant opinion in legal writing is that of the need of unanimous consent by the partners\textsuperscript{143}. German law is similar to Italian law. For partnerships (i.e. for business associations), the law provides that the rules of the civil company become applicable for what is not expressly regulated in their respective chapters. Art. 2252 CC-it states that the partnership contract can be only altered by the unanimous consent of the partners. It follows that in Italian law, the subsequent introduction of an arbitration agreement in a partnership is possible, but needs to be agreed by all the partners.

\begin{footnotesize}
\begin{enumerate}
\item BGE 110 Ia 106.
\item COHEN, 191, no. 384.
\item ZILLES, 28.
\end{enumerate}
\end{footnotesize}
As already mentioned, French law is slightly different from other legislations and seems to admit the principle of subsequent adoption, but does not impose the unanimous consent of the partners.

3. Arbitration regarding new Members

a) For Corporations

New members can join a corporation in different ways. The most common way is to join a corporation by purchasing shares or quotas, but it can also happen in other ways, such as by capital increase, by inheritance, by gift, by consequence of divorce and in other cases as described in point 4 below.

The important question is actually whether or not an arbitration clause validly contained in the articles of association, or in related regulations, either at the setting-up of the company or subsequently adopted, can be imposed on a new member.

aa) Switzerland

In Swiss law the distinction as to whether the Concordat or Chapter 12 of PILS is applicable to single cases must be clearly made. In the first case, where art. 6 sub. 2 of the Concordat is applicable, the arbitration clause is binding for new members on two conditions: a) only if these agree - in writing - to the arbitration clause (art. 6 sub. 1 Concordat) or b) if, by way of a written declaration, new members agree to adhere by the statutes of a corporate entity, provided that the declaration expressly refers to the arbitration clause contained in the statutes or rules made by the parties (art. 6 sub. 2 Concordat). When the Concordat was adopted, the problems that could have arisen due to the specific rule of art. 6 CA, were well known and fully debated. Therefore it cannot be said that the legislator did not contemplate this problem, but rather that the legislator preferred a stricter solution to protect the parties more fully from ambiguities and

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144 HABSCHEID, 159, Fn 19.
clauses not fully understood, or agreed to and adopted by reference. In this sense, the non-specific reference of new members to the statutes of a corporation in which an arbitration clause is contained, was not found sufficient\textsuperscript{145} to validly adhere to the arbitration clause. However, it must be said that even if the legislator has opted for the solution of art. 6 sub. 2 of the Concordat, perhaps at that time the real consequences that such a choice might imply for corporations had not been sufficiently evaluated\textsuperscript{146}.

Another issue that complicates the finding of possible solutions to admit that new members have adhered to the arbitration clause is the existence, in Swiss law, of bearer shares. In this case, if third parties become new members by way of purchasing bearer shares of a company, it is practically impossible - except in cases of specific acceptance - to find a practical solution by which their adherence to the arbitration clause would become implicit\textsuperscript{147}.

An intermediate solution, for small family corporations, could be that of having only registered shares (as the name implies, not bearer shares) so that the requirement of their purchase would specifically involve acceptance in writing of the arbitration clause as per art. 6 Concordat. A solution of this kind, however, would not work for large or listed corporations\textsuperscript{148}. Because of these problems, some writers\textsuperscript{149} recommend the non-adoption of arbitration clauses in Swiss corporation statutes.

The requirements of Art. 178 PILS are less rigid, as compared to art. 6 of the Concordat. Art. 178 PILS says that the arbitration agreement must be made in writing and may take form of a telegram, telex, fax or communicated in any other manner which allows the text of the agreement to be established.

\textsuperscript{146} JOLIDON, art. 6, pag. 173
\textsuperscript{147} DREIFUSS/LEBRECHT, Rz. 30 und 31 zu Art. 706 OR.
\textsuperscript{148} HABSCHEID, 159 in fine.
\textsuperscript{149} FORSTMOSER, SJZ 1992, 169.
The Federal Tribunal in the Tradax-case\(^{150}\) held that parties had been submitted to an arbitration agreement because they\(^{151}\) had made reference to a contract in which an arbitration clause was contained. However the considerations of the Federal Tribunal, in admitting arbitration, were essentially based on the following facts: The PILS was not relevant to the case, and the parties involved were both trading companies acting in their proper common field (oil), which led to the consequence that they must have been aware of the applicable international usage in that field.

Although the PILS was not relevant and, therefore, any considerations concerning the requirements of Art. 178 PILS could not be examined, the Federal Tribunal did not admit the possibility of a global reference to arbitration clause from which, *per analogiam*, it could be assumed that such a global reference would be sufficient for identifying, in the company articles of association containing the arbitration clause, a written document evidencing their intention to join the corporation\(^{152}\).

At the present state of this finding, it must, therefore, be generally recognised that the arbitration clause is not binding for new members in cases where they did not expressly accept the clause as such, or make reference in writing to it.

In any case, the considerations of the European Court of Justice, in the case of Powell Duffryn Plc. v. Peterlei, are of a great importance. This is due, in particular, to the combined effect of the consequences of the public nature of public registers, with the fact that, if third parties become members of a company, they automatically become subject to all the provisions appearing in the statutes of the company, among them the arbitration clause and, therefore, they are in effect, bound to this specific clause.

\(^{150}\) BGE 110 II 54.

\(^{151}\) It shall be specified that in this case, one party did not take part to the agreement but was considered to know the terms and conditions of it.

\(^{152}\) In this sense BERTI, Some Thoughts on the validity of arbitration clauses in the articles of association of corporations under Swiss law, ASA Special Series No. 8, December 1994, Article no. 6.
bb) From the perspective of comparative law

From the perspective of comparative law, the situation is slightly different as compared to Swiss law. In Italian law, this is generally admitted by case-law\(^\text{153}\) and by legal writings \(^\text{154}\), so there is no need of specific acceptance of the arbitration clause by new members. Art. 1341 CC-it provides that, in the case of so-called vexation clauses, the latter must be expressly approved. If not, the clause is null and void. Art. 1341 CC-it does, however, only refer to simple contracts, i.e. where there is a contrast of interests. This is not the case when joining a company. Furthermore, it is generally assumed that new members cannot contest that they were not aware of the statutes or of the regulatory provisions of the company.

German case law\(^\text{155}\) and legal writings \(^\text{156}\) also admit, without any particular problem, the fact that new members that join a company - either a limited liability companies or a stock corporations - automatically adhere to the arbitration clause contained in the regulatory provisions of that company. This also in the case when third parties become members of a company through inheritance\(^\text{157}\). In the case C.C.I. no. 4381/198, the principle of the global reference was admitted even though, in France case-law\(^\text{158}\) and legal writing\(^\text{159}\), the principle of the express reference is admitted, and preferred to that of the implied reference. In this sense French case law is similar to Swiss international case law.

\(^{155}\) BGH, Urteil vom 28.5.1979, NJW 1979, 2567 (für GmbH).
\(^{157}\) BGH, Urteil vom 28.5.1979, NJW 1979, 2567.
\(^{159}\) COHEN, no. 390, 196.
b) Partnerships

aa) Switzerland

For partnerships, the question does not pose particular problems. Partnerships are business associations and not corporate entities. Art. 6 sub. 2 Concordat should not, therefore be applicable\textsuperscript{160}. This signifies that adherence to an arbitration clause contained in a partnership contract must be agreed to in writing and not by expressed reference by the new partner. In PILS this must be in respect to the requirements imposed by art. 178 sub. 1 PILS\textsuperscript{161}.

bb) From the perspective of comparative law

On 1 January 1998, the reform of the rules for arbitration proceedings came into force in Germany. From this date on, arbitration agreement may be lodged in a partnership contract and no longer has to be lodged in a separate document as was required by the previous law. Therefore, new partners joining a partnership are bound to the arbitration clause contained in the partnership contract\textsuperscript{162}.

Italian law admits that a new partner, when joining a partnership, can simply make reference in writing to the partnership contract, or to the regulatory provisions of the partnership. In Italy, it could be the case that a new partner signing a resolution adopted by the partnership, concerning his admittance as a new partner, states that he knows and accepts the partnership contract\textsuperscript{163}. In French law, reference can be made to the same considerations that were referred to in point 3 bb) above.

4. Particular cases

\textsuperscript{160} See however the already referred case of a condominium, BGE 110 Ia 106, Erw. 4.
\textsuperscript{161} WENGER, Rz. 62 zu Art. 178 PILS.
\textsuperscript{162} ZILLES, 30/31, Punkt II.
\textsuperscript{163} Cass. civ., sez. I, 18 febbraio 1985, n. 1367.
a) Merger, split, re-organisation and the change of category of a company

The transfer of the arbitration agreement takes place in cases of universal succession\(^{164}\), of which merger is one of the possible cases. This implies that there is no need for the successor to accept the arbitration clause, with respect to the continuation of the relationships\(^{165}\). The same considerations find application in splitting and/or re-organisation (with some reserves\(^{166}\), however, in the latter case: in particular in cases concerning enterprises controlled by foreign states. Finally, in cases of changes of category of a company, e.g. from a limited liability partnership to a shares company, the arbitration clause contained in the statutes of the company of the previous type will be passed to the new form adopted. In order to implement this, members must deliberate the change of category with a majority as required by the law or by the relative statutes.

Regarding this, it must be underlined that all these proceedings (i.e., merger, splitting and re-organisation) belong to corporate matters and, therefore, can be an object of arbitration\(^{167}\).

b) Assignment, Assumption of Debts and Purchase of Assets

Assignment, assumption of debts and purchase of assets differ from merger and related cases, because succession is individual. The new party does not substitute the previous one in all relationships, but only in some of them. In corporate law, this means that new parties are generally not bound by an arbitration clause contained in the articles of association of the company, but by arbitration clauses contained in the specific relationships that are objects of assignment or purchase of assets. In cases of an assignments of credit, the assignee also assumes an arbitration

\(^{164}\) WENGER, Rz. 66 zu Art. 178 PILS.
\(^{165}\) BIANCHI, 16 e 17.
\(^{166}\) WENGER, Rz. 66 zu Art. 178 PILS.
\(^{167}\) ZILLES, 126.
clause that is contained in the contract between the assignor and the debtor.\textsuperscript{168}

Once again, regarding the subject of assignment, it must be noted that, if the assignment of a claim deriving from a contract had been prohibited in the main contract - irrespective as to whether or not the claim actually derives from it - the debtor can plead a lack of jurisdiction of the Arbitration Court\textsuperscript{169}.

In relation to assignment of claims, Italian legal writings usually admit that the debtor may oppose the assignee in all pleas that he could have pleaded against the assignor, among them, that of the existence of an arbitration clause. This is because, if, an arbitration clause had been agreed, it then belongs to the contract in such a way that it cannot be modified by an assignment of rights or by an assumption of debts.

Italian legal writings\textsuperscript{170}, however, point out that the assignee does not assume the contract between the original parties and, therefore only debtors (and not assignees) can themselves plead the existence of an arbitration clause. On the other hand, it is the assignee who can be forced to accept the arbitration clause\textsuperscript{171}.

In French law, the distinction between domestic and international arbitration is also relevant to the assignment of interest. The transfer of interests is generally considered as pertaining to civil matters. The considerations referred to in point 3 b) above, concerning the limitation imposed by art. 631 cpv. 1 C. com. to domestic arbitration, must be kept in mind. According to Art. 631 cpv. 1 C. com, arbitration clauses, among other things, can be agreed to, principally between traders. This, therefore, implies, that arbitration clauses are not validly agreed to if the involved parties are concerned with trade, or belong to categories referred to in art.

\textsuperscript{168} WENGER, Rz. 67 to Art. 178 PILS; BIANCHI, 18 in fine.
\textsuperscript{169} BGE 117 II 94.
\textsuperscript{170} BIANCHI, 16.
\textsuperscript{171} Cassazione SS.UU., 17 dicembre 1998, n. 12616.
631 C. com.: French international arbitration is no longer limited by such restrictions.

VIII. Claims between Members and claims involving the Body of the Corporation

1. Introduction

Arbitration agreements in corporate matters cover principally two categories of claims\textsuperscript{172}. The first concerns claims on membership interests, which include claims between members and the company, and/or among members. The second group of claims concerns those relative to organs of the company. This second group can arise between different organs of the company, or between those organs and the company, itself. Arbitration clauses in corporate matters can, generally, cover all relationships governing a company, but will not cover further interests that are outside the company. This could be the case, for instance, for a claim deriving from an employment contract between the company and one of its officers\textsuperscript{173}.

Arbitration in corporate law is, as a result, generally admitted from the perspective of comparative law. However, the approach is not always the same. For some laws, a distinction between claims, involving pecuniary and non-pecuniary interests within corporate law, is of a certain relevance\textsuperscript{174}. For other laws, this is not at all relevant\textsuperscript{175}. The Federal Tribunal\textsuperscript{176} defined pecuniary interests in a very wide sense and, as a consequence, it can be affirmed that PILS covers all corporate claims. The Concordat is similar to PILS, although based on another concept of arbitrability.

\textsuperscript{172} HABSCHEID, 160; COHEN, 66.
\textsuperscript{173} HABSCHEID, 164, lit. b); WESTERMANN, Gesellschaftsrechtliche Schiedsgerichte, in: Festschrift Robert Fischer, 1979, 853 ff.
\textsuperscript{174} German law.
\textsuperscript{175} Italian Arbitration Act, The Concordat and the PILS.
\textsuperscript{176} BGE 108 II 77, cons. 1a.
Members of companies have rights and duties. Among the rights, there are the three classic divisions depending on the type of request asked for (in the German language expression of Swiss law, these categories are defined as: “Leistungs-, Feststellungs-, and Gestaltungsklagen”). These three categories of action can generally be object of arbitration in corporate law.

2. Claims between Members and the Company

a) Distinction between categories of claims

Usually there are two kinds of claims, those that oppose members to the company and those concerning interests between members of a company. A further distinction can be made, in certain cases, between claims involving pecuniary interests and non-pecuniary interests. From the Swiss point of view, because of the very comprehensive definition of pecuniary interests, the classification of the individual rights of the members, in the two categories, is neither easy nor relevant. It may be said that, irrespective of the theoretical distinction of claims into categories, all of them, if within corporate matters can, in principle, be object of an arbitration clause.

b) Disputes involving a pecuniary interest and not-involving pecuniary interests

The distinction between disputes involving a pecuniary interest and involving non-pecuniary interests in corporate law, has a certain relevance for some body of laws. For others, because of the very wide definition of pecuniary interests which covers all corporate claims, it is not relevant, at all. Therefore this distinction is not really appropriate to classify the individual claims from the perspective of comparative law.

The most relevant issue, concerning this category of claims, is that of the setting aside of resolutions of general meetings. Apart from this central right of a member of a company, other rights must be mentioned. These are: the right to information and inspection; the
right of exclusion of a partners; the right to wind-up a company; the right to sue the company for a declaration of voidness, and other rights, too. In general, all of these rights can be object of arbitrability.

As already mentioned, the theme of arbitrability – or at least of challenges of meeting resolutions and, in particular, those relative to the approval of the balance sheet – is of particular importance in the field of companies. With reference to this and from a comparative perspective, there are various opinions based on different approaches to the problems involved. The most important aspects are essentially those concerning the effect *erga omnes* of the voidance of meeting deliberations as *per* the concept of the prevalence of the public interest, with the consequence of suspension of the free availability of the parties. One should also mention those aspects relative to joint-litigation and to the terms within which, for example, resolutions may be contested. The latter have common aspects in Italian and in German law:

In Italian law, according to a part of legal writings and case-law, controversies concerning approval of balance sheet are not arbitrable. The same is true for the increase or reduction of capital; for the winding-up of a company, or of the suspension and justifiable removal of an administrator. The most common justifications for non-arbitrability of the claims described here are based on the principle that determined rights have the character of being either mandatory, or of public policy (ordre public). Thus, they are not at the disposal of individual members. However, in a recent and innovative decision, the Tribunale di Milano confirmed the concept of arbitrability through arbitration agreements and arbitration clauses for disputes between members and

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177 Only in some legislations.
179 Tribunale di Milano, sentenza del 10.1.2000, in re Sidam s.r.l.
companies, relative to resolutions concerning the approval of balance sheets of corporations.

The Tribunale di Milano\(^1\) distinguishes between mandatoriness and public policy, with respect to arbitrability, underlining that there are private and public organs that have the right to impose voidance to meeting resolutions, through the concept of rights to the observance of norms, which is one of the allowed grounds for opposition. This decision is, among other things, a preview of the draft of law for the reform of company rights approved by the Council of Ministers on 25.6.2000. This draft provides, in art. 11 (new jurisdictional norms), that company statutes may provide arbitration clauses – contrary to art. 806 and 808 CPC-it, which are being repealed – thus, even for disputes that have as their object matters that cannot be object of compromise, and even with the limits of arbitration upon law rules (subject to setting aside).

Lastly, as mentioned in the preceding paragraphs and admitting that meeting resolutions can be considered arbitrable – as per the new tendencies in Italian law – there are further important problems among which those concerning the respect of terms and co-litigation. Art. 2377 cpv. 2 CC-it provides that an action of voidness can be brought within a term of three months from the date of the deliberation. The ratio of the norm is to be found in the protection of a member who was absent or dissented, and to assure the certainty of those acts deriving from the resolutions. This term may not be avoided by arbitration proceedings, because the arbitration is an alternative to judgements and, thus, not suitable to modify the rules of the law.

The arbitration process must thus take account of the terms\(^2\) provided for by the law\(^3\). The second aspect concerns that of co-litigation (joint), when more than one member, individually, declare their intention to set up an arbitration tribunal. In this case,

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\(^{1}\) In particular, reference must be made to possible forgery of the members’ resolutions.
\(^{3}\) BIANCHI, 179.
it is necessary that the arbitration clause provides for the appointment of a single arbitrator, or of an arbitration tribunal through the offices of a third party. Furthermore, according to Italian law [Art. 2287 CC-it] and the prevailing legal writing, the possibility of excluding a member from a partnership has become an accepted right and thus arbitrable. Equally arbitrable is the liquidation of the portions of a withdrawn member from a partnership.

In German law, it is controversial whether the setting aside of meeting resolutions is arbitrable. Legal writing is profoundly divided on this question even if it would seem that those favourable to arbitrability have the upper hand.

Case-law, both for GmbH and for AG companies has, in principle, excluded this faculty. For shares companies [AG], it is essentially the combinations of articles § 23 Abs. 5 AktG – which provide that statutes can be modified within the law, only if this is expressed provided for – and § 246 Abs. 3 AktG, that provide for the exclusive competence of ordinary tribunals. Analogous considerations are also valid for GmbH companies, even though in this case the principal aspect is the impossibility of applying per analogiam § 248 AktG, which provides the erga omnes effect in cases of the voidance of resolutions adopted by a general meeting. Even so, for GmbH companies, the voidance of resolutions...
adopted by a general meeting can be the object of arbitration, whenever the statutes provide specific norms for the protection of absent or dissenting members.

In this sense, even a substantial part of recent legal writings and recent case-law – using general considerations on these specific cases – seems to admit the principles of arbitrability both for GmbH and Ag companies, believing the present legal writing and case-law to be, at least, partially out of date. The same considerations are also valid for action of annulment [Nichtigkeitsklagen] and for action of positive assessment [positive Feststellungsklagen].

Analogous considerations are valid for rights to information and consultation on behalf of members and the same for disputes concerning dividends and for actions of voidance towards a company. Concerning the latter – as for cases concerning exclusion of a member – it is necessary in actions of winding-up and of the setting aside of meeting deliberations of GmbH companies, to provide detailed norms in the statutes for the protection of absent or dissident members, specifically for the fact that awards intrinsically signify erga omnes effects. Similarly, problems concerning liability of subscription, liability of constitution and rights on dividends can in German law be considered as being disputes involving pecuniary aspects and, as such, they may be arbitrable.

According to French law, all relationships that are relevant to the company statutes, for example disputes concerning subscription, contributions, transformations of the company, approval of the balance sheet, division of profits or losses, in

192 ZILLES, 35; Lionnet, Rz. 4 zu § 1031.
193 BGH, Urt. v. 29.3.1996 - II ZR 124/95, Erw. 1.
194 ZILLES, Punkt 5, 90 u. 91.
195 ZILLES, 104.
196 Cass. civ. 7.11.1899.
197 Civ. 2, 28.2.1979 in re Gouault c/ J.B. Gouault.
the case of liquidation\textsuperscript{200} and in the case of the voidance of resolutions adopted by a general meeting\textsuperscript{201}, can be object of arbitration in company matters. The arbitration clause is to be also considered valid in respect of disputes between members and the liquidator of the company for the whole period of the liquidation\textsuperscript{202}.

Finally, according to Swiss law in company matters, the following issues can be object of arbitration: the exclusion of a member of a limited liability partnership\textsuperscript{203} [GmbH] or of a co-operative company\textsuperscript{204} as well as actions for the voidance of the general meeting deliberations of an association\textsuperscript{205}, of shares company, limited partnership by shares, limited liability partnership and co-operatives\textsuperscript{206}, and the winding-up of a shares company\textsuperscript{207} (art. 736 subsection 4 CO) and also, in general, all the internal questions concerning companies and associations\textsuperscript{208}. The same is not valid in matters concerning the suspension of a foundation\textsuperscript{209} through art. 88 and 89 CCS.

At a domestic level one should recall the limits imposed by the Swiss art. 6 cpv. 2 CA, in particular for actions with constitutive effects [Gestaltungsklagen], as is the case of actions with \textit{inter omnes} effect, \textit{in primis} those of the setting aside of meeting resolutions.

3. \textbf{Arbitration Agreements concerning the organs and officers of a company}

200 COHEN, 71.
202 COHEN, Rz. 54, 32.
203 BGE 69 II 118.
204 BGE 71 II 176.
205 RSJ 1960, 314.
206 RSJ 1962, 307
207 RSJ 1964, 310 e 1965, RSJ 61 et. seq., BGE 112 II 191 ff. (with some reserves in connection with problem of the ordre public).
208 JOLIDON, 159 et 160.
209 RIEMER H. M., Berner Kommentar, n. 31 zu Art. 88-89 ZGB.
The use of arbitration is admitted, generally, by starting from the assumption that the matters relative to the organs of a company belong to company matters. In Swiss law, in general, there are no particular objections concerning the arbitration clause between the organs of a company\textsuperscript{210}. For instance, there can be claims between the directors and the auditors concerning the duties of the directors based on art. 728 sub. 2 CO. Although an arbitration clause can also cover these kinds of claims, it would be safer to adopt an additional specific arbitration clause between the organs in regulatory provisions\textsuperscript{211}.

In particular, according to Swiss law, among other possible issues, an action of responsibility, \textit{ex} art. 752 e ff. CO, concerns setting-up. The administration and winding-up of share companies and cooperatives (art. 916 e ss. CO)\textsuperscript{212} – consequently, also in the sense of art. 827 CO for limited liability partnerships – can be the object of arbitration.

German and French law admit arbitration, in general, also in matters that concern company organs, i.e. managers and directors of limited liability partnerships\textsuperscript{213} \textsuperscript{[GmbH]} (211), the board of governors for share companies, and for auditors in general. In this sense, for example, matters concerning the lack of observance of directives and decisions of the members\textsuperscript{214} by directors and managers as well as actions of responsibility concerning company matters, are also admitted to arbitration. The same is valid in cases of the removal of managers, in particular after the reform of 1.1.1998, according to which, the arbitration tribunal is also competent for provisional measures, as well as for actions concerning liability and indemnification claims against managers and for the release for reasons of their professional undertakings. Without wanting to list all possible disputes, one must cite those relative to the set-up of a supervisory board, and those relative to

\textsuperscript{210} HABSCHEID, 164 et 165.
\textsuperscript{211} HABSCHEID, 161.
\textsuperscript{212} HABSCHEID, 163.
\textsuperscript{213} ZILLES, 141; WESTERMANN, FS für Fischer, 853 (854 f.).
\textsuperscript{214} ZILLES, 135.
the necessary number of members of the board, of the relative deliberations, of the right to control and have access to acts and documents, as per other disputes in corporate matters.

Italian law admits, as a principle, arbitration in the field of matters that concerns the organs of the company. One must specify, however, that this principle has important limits, by virtue of the principle of the norms designed to protect the collective interests of members or third parties, for example in the case of removal of an director for justified reasons concerning the duties of precise and clear accountancy and of the control in administration by members. It must be remembered however, that this principle (already cited above), has been relativised by the Tribunale di Milano decision of 10.1.2000, which is in a sense an important precursor of recent legislative tendencies.

IX. General Conclusions

These brief perspectives on comparative law show the features and the differences between several approaches to individual national arbitration acts. The development of the individual domestic arbitration acts has not, historically, been uniform.

The causes should principally be sought in the origins and the development of arbitration inside each individual legislation, with reference to the ordinances and the parameters imposed by the specific legislation at that time in force.

Even though there remain many differences between the various national internal regulations, considered here with reference to arbitration in corporate matters, with the adoption with the respective reforms above all in the field of international arbitration, account has been taken of the evolution and of the ever-growing importance of the subject. This is valid, even though arbitration has not been universally harmonised, because of the influence of restrictions, principally caused by the existence of
specific national regulations, that readily lend themselves to be used as obstacles to arbitration in corporate matters.

Thus, a revision of these norms, which still obstruct arbitration in corporate matters, would be auspicious, even through case-law, so as to allow the adoption of international standards at least uniform within the European Union and among those nations, such as Switzerland, that are closely related to it in law, procedure and, most importantly, in spirit.
The Challenge of Arbitral Awards for Breach of Public Policy according to Art. 190 para. 2 lit. e) of the Swiss Private International Law

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List of Abbreviations

Bull ASA  Bulletin de l'Association suisse de l'arbitrage
CC        Civil Code
CO        Code of Obligations
Conc.     Concordat
Const.    Swiss Federal Constitution
DE CJ     Decision of the European Court of Justice
DFT       Decision of the Federal Tribunal
ECJ       European Court of Justice
ECT       European Community Treaty
EHRC      European Convention on Human Rights
FT        Swiss Federal Tribunal
GestG     Gerichtsstandsgesetz
ICC       International Chamber of Commerce
IPRax     Praxis des Internationalen Privat- und Verfahrensrechts
JI Arb.   Journal of International Arbitration
NCPC      Nouveau code de procédure civile français
NYC       New York Convention
PIL       Swiss private international law
RabelsZ   Rabels Zeitschrift für ausländisches und internationales Privatrecht
Rep.      Repertorio di giurisprudenza patria
RIW       Recht der Internationalen Wirtschaft
SJ        Sémaine Judiciaire
SZIER     Schweizerische Zeitschrift für internationales und europäisches Recht
Introduction

1. The function of asserting justice enters traditionally among the tasks of the State, even though the State does not have a monopoly either over law or justice. For instance, in international business, arbitration is the usual way of solving litigation of a commercial nature, because it has been found to be an efficient and predictable method of solving disputes in a way that can enhance commercial trade.¹

2. States accept (almost always for direct, or indirect, economic reasons²) and to some extent favour international arbitration, by applying very liberal regimes and allowing a very wide autonomy to international arbitration, in relation to the choice of both substantive and procedural law. Nevertheless this liberal approach suffers, practically everywhere, a precise limit: compliance with public policy.

In other words, public policy represents the major resistance-factor, the principal obstacle fixed by the State against there being a complete autonomy in international arbitration.³ Thus, a tension between the autonomy of international arbitration and the need to defend public and general order is unavoidable. It therefore requires a difficult mediation and

¹ Legally the underlying logic is the following: Art. 30 para. 1 of the Swiss Federal Constitution and Art. 6 of the European Convention on Human Rights makes certain that every person is entitled to be tried by an independent and impartial tribunal established by law, but with the freedom to abdicate this right by entering into an arbitration agreement (DFT 128 III 50 cons. 2c); DFT of 11.6.2001 cons. 2d) aa) in DFT 127 III 429 and in Bull ASA 2001, 566 European Commission of Human Rights of 4.3.1987 in Bull ASA 1990, 251; DFT 112 Ia 166 cons. 3a).


³ A good example of this approach is Art. 1 (b) of the English Arbitration Act 1996: "The parties should be free to agree how their disputes are resolved, subject only to such safeguards as are necessary in the public interest".
compromise between the interests of specific parties and international business on the one hand, and the general interest on the other.  

3. This scheme clearly emerges from the provisions of Chapter XII PIL, which are the product of a very liberal conception of arbitration. For instance, parties can freely arrange arbitration proceedings (with the sole mandatory limit of Art. 182 para. 3 PIL), by choosing rules of law of any kind, including non-state rules of law, general principles of law or substantive rules of law of the type of *lex mercatoria* (and especially the UNIDROIT Principles). Thus, it is a logical outcome that the grounds for setting aside arbitral awards have been reduced in number to any five and, among them of course, compliance with public policy (Art. 190 para. 2 lit. e) PIL).

4. In order to understand this provision it is necessary to focus the entire question on the role played by public policy in international private law, in connection with both judgements of State courts and arbitral awards. In fact, irrespective of the different functions performed by public policy there is, in effect, a common source and a "gioco di equilibri", able to produce not only clear distinctions, but also surprising similarities.

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5. See among others BLESSING, The Predominant Features of Chapter Twelve, in International Arbitration in Switzerland, 2000, N. 465 et seq.; *Lalive/Poudret/Reymond*, Le droit de l'arbitrage interne et international en Suisse, Lausanne, 1989, 273 and DFT 118 II 353 cons. 3a), where the Federal Tribunal made it clear that contrary to the Concordat the Federal legislator wanted to grant ample access to international arbitration.


Chapter I
Definitions and Distinctions

5. Public policy has three major functions in Swiss private international law (PIL). First, it limits the autonomy of the parties to chose the substantive law applicable to their dealings. Second, it represents an important barrier to limit and control the enforcement on their territory of foreign judgements and awards. Finally, public policy is, itself, grounds for setting aside arbitral decisions by Swiss State courts at the place of arbitration. Because of the legal uncertainty of this concept of public policy and the alteration of its outline, depending on its function, it is futile to attempt a single, all-encompassing definition. It is not surprising, that, as a consequence, the Swiss Federal Tribunal (FT) has opted for a pragmatic approach: i.e. case by case.\(^8\) It has recently proposed a (very ample) definition of public policy, which holds that public policy clause acts preclude protection in situations, which breach essential principles of the judicial order, as defined in Switzerland.\(^9\)

6. Thus, the Federal tribunal put an end to a jurisprudential uncertainty, that had lasted for over a decade, regarding the question of defining the concept of public policy by virtue of art. 190 para. 2 lit. e) PIL. The Court denied that it was a purely universal notion, by introducing a specifically Swiss element. But more than the actual result, what is really sensational, is the reasoning. In fact the FT has built its definition of public policy on the grounds of five precedents: DFT 126 III 534, pertaining to the Lugano Convention; DFT 125 III 443, pertaining to Art 17 PIL; DFT 126 III 327 pertaining to Art. 27 PIL; DFT 126 III 249 and DFT 120 II 155, both pertaining to Art. 190 para. 2 lit. e) PIL. Thus, the barriers erected until then, among the different functions played by public policy, were broken, and these

\(^8\) DFT 120 II 155 cons. 6 (168)
functions took on a new capacity to absorb global values, more or less interchangeable between those functions.

At this point it may be useful to point out some distinctions, so as to maintain a correct "pragmatic approach", and to provide some content to the above definition, beginning (as the Federal Tribunal does) with the functions played by public policy in international private law, through ascertaining the common points and peculiarities.

I. The function, in reducing the total autonomy of the parties, by choosing the substantive law applying to their relations (Art. 17-19 PIL)\(^\text{10}\)

Art. 17, 18 and 19 PIL interfere with the normal operation of conflict of laws rules codified by law, through giving predominance to the interests of the Forum State. With reference to this, public policy has three aspects, which are: negative public policy, positive public policy and Art. 27 PIL.

1. Negative public policy (Art. 17 PIL)

1.1 General aspects

First of all, public policy assumes the so-called negative function of public policy. That is to say a refusal to consider applicable foreign law according to the conflict of law rule of Forum PIL, when such application leads to a result that is inconsistent with Swiss public policy (Art. 17). Thus, in this context, public policy operates as a bar to the application of foreign law to a dispute, which is to be tried in Switzerland. It introduces a material assessment founded on the law of the Forum; that is to say a function of control anchored in

\(^{10}\) Of course, Art. 17-19 apply even when there is no room in PIL for a choice of law, which is evidently not the case in international arbitration (Art. 187 para. 1 PIL).
substantive law, in a system based on remands.\textsuperscript{11} Obviously, even in this field the recourse to public policy must remain exceptional, because it is contrary to the entire logic of the PIL system. Consequently, it has to be considered only in cases where there is an important breach of the meaning of law and justice, as they are conceived in Switzerland.\textsuperscript{12}

10. Art. 17 PIL, in contrast to art. 190 para 2 lit. e) PIL mentions "Swiss" public policy explicitly or, to be more precise, Swiss international public policy. It also imposes the identical comparative examination that was prescribed by art. 27 PIL (i.e. that based on concrete results and not on applicable provisions).\textsuperscript{13}

The essential question which arises at this point is defining the term: "Swiss international public policy". The answer proposed here has two aspects:

\textbf{1.1.1 Domestic vs. international public policy}

11. The distinction between domestic and international public policy is, in fact, very well known. Over many years there have been numerous legal writings (both Swiss and foreign) and many examples in case law. For instance, Art. 19 para. 1 of the Swiss Code of Obligations (CO) uses the word "public policy" to qualify specific principles at a domestic level, which are to be distinguished from public policy in an international context (i.e. international public policy).

There are in fact two different concepts. What is to be considered pertaining to public policy in domestic relations does not necessarily pertain to public policy in international relationships. This distinction is justified by the different purposes of

\textsuperscript{11} VISCHER, in IPRG-Kommentar, Art. 17, N. 1, 7
\textsuperscript{12} VISCHER, op. cit., Art. 17, N. 4-6 with further ref.; DFT 125 III 443, where the supreme Court ruled that Swiss public policy does not constitute an obstacle to the application of Saudi Arabian law prohibiting interests.
\textsuperscript{13} DUTOIT, Commentaire de la loi fédérale du 18 décembre 1987, 1997, Art. 17, N. 4, 6; VISCHER, op. cit., Art. 17, N. 19; infra §§ 59., 82..
law in specifically domestic or international relationships. In fact international private law, by reason of its specifically international contents and its intrinsic function to harmonise the different national legislations, is perfectly adapted to conceive solutions which may be unfamiliar to Swiss law (with the exception, of course, of the "lois d'application immédiate" ex Art. 18 PIL).

In synthesis this means that a domestic mandatory rule does not necessarily violate international public policy.

1.1.2 The role played by the "Binnenbeziehung"

12. Second, both in the execution of this comparative analysis and in the application of Swiss international public policy, one must take account the intensity of the connections, between the facts being considered and the Swiss State ("Binnenbeziehung"). In fact, the prerequisites for applying Art. 17 PIL are simply the particular links (territorial, substantive or personal) between the legal relationship and the lex fori.

13. If the case being considered has only tenuous connections to Switzerland, a situation may arise where these links may be insufficient to involve the concept of mere Swiss international public policy. However one also has to consider external elements of assessment that may have international pertinence. In fact the FT adopted a formula which, in these cases, states: "public policy defence must be taken into account in such situations only in the event of violation of a rule of the judicial order, which is nearly permanent and universal".

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15 See DFT 117 II 494 cons. 7 (501); DFT 117 II 490 cons. 3 (493); DFT 111 II 175 cons. 3c) (181); DFT 103 la 531 cons. 3a); DFT 102 la 574 cons. 7 c(d) (581); DFT 93 II 379; DUTOIT, op. cit., Art. 17, N. 4. Infra §§ 68.-70.

The Federal Tribunal made these principles quite clear in a decision of 28.3.2001, regarding a question as to whether a contract governed by Swiss law, that violates foreign mandatory rules (UN- Weapons' Embargo against the territory of former Yugoslavia), may be incompatible with the *bonos mores* (Art 20 CO). The answer was: yes. The reasoning was that a breach of the principle of "non violence" laid down in the UN-Charta represents not only a violation of Swiss fundamental values (that is the Swiss public policy), but is also an infringement of basic ethical values common to all civilised States (that is "universal public policy"). Therefore, an infringement of the UN-Embargo, aimed at fortifying that aforesaid principle, could lead to voidness of a contract because it is in breach of *bonos mores* (Art. 20 CO).

14. To sum up, the forum State must justify an interest, in order to impose its own principles of law, and this can be the case only when the aforesaid important specific link exists with that particular Forum State. In all other cases, the Tribunal must take into account - additionally - other elements of international significance.

**1.2 Implementation of negative public policy defence by international arbitral tribunals ?**

15. In international arbitration, the compliance with a given negative public policy can be very difficult, in particular, where the specific seat of the arbitral tribunal is the only relationship with the forum, there being no other connections: factual, legal, territorial or personal.

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17 According to which the supply of weapons and war material is banned in territories where a war is taking place or is threatening to break out.
18 DFT 89 II 202; VISCHER, op. cit., Art. 17, N. 20
19 Notice that according to Art. 176 PIL all arbitral tribunals having their seat in Switzerland are bound by the arbitration law of their seat (the *lex arbitri*).
The first question arising here is whether this negative correction factor also binds arbitrators and arbitral tribunals. In other words, are there overriding notions which form part of a public policy? As a matter of law, chapter XII PIL constitutes a special system, quite separate from other Chapters of that law and, above all, based upon the concept of lex arbitri. It is also important to remember that chapter XII PIL can also not be assimilated by the concept of lex fori. In brief, an international arbitration seating in Switzerland must solely comply with Chapter 12 of PIL, and is not subjected to the conflict of law rules that a State court must apply in contractual matters.20 This having been said, one must nevertheless bear in mind that Art. 187 para. 1 PIL is not only the counterpart to Article 116 and 117 PIL, but represents the entire Private international law for arbitral tribunals. Therefore, the matter of applicable law encompasses not only the determination of "the rules of law with which the dispute has the closest connection", but includes, also, the issue of possible application of negative public policy, as a correction factor and, moreover, the question of whether interventionist norms, which are not a part of the lex contractus, must nevertheless be applied (positive public policy).21 Thus, it is clear that arbitral tribunals may not take refuge behind parties' autonomy in order to avoid any compliance with public policy.

The second question arising is obvious: what kind of negative public policy does the arbitral tribunal have to apply? It is evident that neither the domestic public policy of the lex arbitri, nor even the international public policy of the State in which the arbitral tribunal has its seat, can be adequate when this seat has no effective connection with the case in point.22

20 DFT of 8.12.1999 cons. 2b) bb), in Bull ASA 2000, 546 (554)
21 KARRER, op. cit., Art. 187, N. 76-79. By contrast, there is no room in international arbitration, even in the absence of a choice of law, for the right of closer connection according to Art. 15 PIL (KARRER, op. cit., Art. 187, N. 143).
22 See DFT 125 III 443, cons. 3 d) and DFT 120 II 155 cons. 6 (167)
From another point of view, however, one has to admit that there has been a progressive evolution in the case law regarding Art. 190 para. 2 lit. e) PIL, up to June 2001, concerning a particular idea of universal public policy. That is to say an idea based on general principles of law which are common to "civilised nations", in particular in international commercial law. The underlying idea is quite simple. International trade is independent of any given State, because of its intrinsically denationalised nature. Thus, arbitration must assume the same independence from specifically national values. Thus, one can see the arbitrators must disengage themselves from the public policy of any given State, and move towards a more independent, neutral, concept of universal public policy.

18. But it is also true that arbitrators are persons and not artificial entities. They - as anyone else - have a given cultural identity and a specific judicial background, for instance they may come from either a continental or a common law tradition, or, perhaps, even from other traditions. Therefore the following questions arise naturally: through whose eyes are the arbitrators to look, if there is an infringement of public policy? Through common law or continental law? Or is the law to be applied on some sort on "merit" basis?

23 DUTOIT, op. cit., Art. 17, N. 5; VISCHER, op. cit., Art. 17 N. 28-30; BLESSING, Das neue internationale Schiedsgerichtsrecht der Schweiz. Ein Fortschritt oder ein Rückschritt?, in Böckstiegel: die internationale Schiedsgerichtsbarkeit in der Schweiz (II), 1989, 63, 68-69. To sum up: at this stage, there are three different levels of intervention by public policy. Firstly, domestic public policy, which is the result of domestic provisions and which operates in the domestic context; secondly Swiss international public policy, which is of domestic origin but aimed at operating in the international context and, finally, the transnational or really international public policy, which is not the product of a national judicial system, but of perceptions of public policy conceived by civilised States in general and by the principal actors of international trade (see LALIVE, Ordre public transnational ou réellement international et arbitrage international, Rev. Arb. 1986, 329 et seq.). Infra §§ 71.-77.

There is only one answer, if one assumes the universal public policy theory: none of these solutions.

In this proposal, one is forced to construct, independently from a particular law, an independent analysis of what public policy is, or what it is supposed to be. But, taking a transnational view in those circumstances would be difficult, if not impossible because, logically, this proposal is in fact saying, that you cannot make judgements by looking at given national legal principles, and that you have to find some sort of "foggy" international or supranational set of fundamental rules common to "civilised" nations. The difficulty is evident: what kind of supranational principles are applicable? Is it certain that any particular principles could be considered fundamental everywhere in the world? and who, indeed, is culturally independent enough to consider himself free from national tradition and culture or from given national law system? Certainly, in this case, numbers would be very limited.

One cannot build a house without solid foundations, and those foundations are the recognised judicial practice on which arbitrators (such as judges) have constructed their judicial dimension.25 The opposite would lead to great uncertainty, unpredictability and, in the end, to arbitrariness.26 Thus the approach of the Austrian arbitrator, quoted by Lalive,27 must not surprise anyone. In this bribery case, he gave his judgement

25 Schwab/Walter, op. cit., Kap. 30, 310 N. 8, draw the same conclusion, arguing that there are no supranational arbitral awards and that (quoting Raape): "Ein Schiedsgericht thront nicht über der Erde, schwebt nicht in der Luft, es muss irgendwo landen, irgendwo, erden".

26 One must not forget the judicial system around the word could be very different from one place to another. For instance, the contradictions between common - and continental - law system pertain even to the conclusion and performance of contracts, i.e. the so-called "consideration" and "specific performance" theories (see for a brief summary Döser, Vertragsgestaltung im internationalen Wirtschaftsrecht, Munich 2001, N. 34-52). The risk for the "independent international" arbitrator would be for him to become a kind of "sorcerer's apprentice"!

on the grounds of the applicable French law. Only afterwards, ad abundantiam, did he rule that questions of this sort might be decided, even outside national legislation, because this kind of behaviour would have been clearly unacceptable in international trade anywhere.

19. Of course, one may object by saying that, differently from State judges - who are by nature very bound to national realities - international arbitrators are more used to applying supranational rules pertaining to international trade and above all to the so-called lex mercatoria. This is quite true and the aptness of arbitrators, in considering international or even supranational factors of assessment, is likely to be more effective than that of a State judge. On the other hand Lalive\textsuperscript{28} is right when he points out the difficulties of knowing what pertains specifically to transnational public policy and what, on the other hand, simply constitutes general principles of the lex mercatoria. In fact, one might think that, within these principles, only those that are essential - i.e. based upon a very large consensus and which are particularly mandatory - deserve to be considered as a component of public policy.

There is also a second problem, which contributes to an already considerable and still growing uncertainty: i.e. the judicial content of lex mercatoria is not, in itself, exactly well defined!\textsuperscript{29}

2. Positive public policy (Art. 18 and 19 PIL)

2.1 General aspects

20. The second aspect pertains to the positive effect of public policy, which consists in giving preference to certain mandatory provisions of Swiss law, and not of foreign law, by way of the "loi d'application immédiate" (Art. 18 PIL).\textsuperscript{30}

21. Public policy also intervenes, by determining whether, and to what extent, it is conceivable to consider even the mandatory

\textsuperscript{28} Lalive, op. cit., Rev. Arb. 1986, N. 11
\textsuperscript{29} Frick, op. cit., 419
\textsuperscript{30} Vischer, op. cit., Art. 18, N. 2
provisions of a third State: a) which are not designated by the Swiss conflict of laws rule and b) "when interests that are legitimate and clearly preponderant according to the Swiss conception of law so require" (Art. 19 PIL).\textsuperscript{31} The hypothesis is that of a third State which claims - at international level - the exclusive application of certain provisions of its domestic law so much so, that public policy assumes, in this light, the function of harmonisation, by considering precisely the will of the foreign legislator to apply mandatorily the rule in question.\textsuperscript{32} As is true for public policy by virtue of Art. 17 PIL, the judge must examine the result to which the application of the law of this third State would lead, by virtue of Art. 19 PIL, and this examination must also be operated in the light of the very basic principles of Swiss law.\textsuperscript{33}

2.2 Implementation of the positive public policy defence by international arbitral tribunals in cases of rules of law agreed upon by the parties pursuant to Art. 187 para. 1 part 1 PIL

22. Because of the applicability of interventionist norms even in the case of rules of law agreed upon by the parties,\textsuperscript{34} the question gains importance also in the arbitral context. In legal writings and in case law, this arose not with regard to Art. 18 PIL, but in relation to Art. 19 PIL and in the following terms: is the choice of law made by the parties only subjected to the adjustment of negative public policy, or is it also restricted by interventionist norms of the \textit{lex contractus} or of third States?

\textsuperscript{31} DUTOIT, op. cit., Art. 17, N. 2
\textsuperscript{32} DUTOIT, op. cit., Art. 19, N. 1, 3
\textsuperscript{33} SCHWANDER, Einführung in das internationale Privatrecht, Allgemeiner Teil, St. Gallen, 1990, N. 552
\textsuperscript{34} VISCHER. op. cit., Art. 19, N. 24
2.2.1 Interventionist norms of the law chosen by the parties

23. First of all, case law gives precedence to the interventionist norms of the law chosen by the parties, that is to say that the choice of a certain law encompasses all provisions applicable to the particular case according to that law, including its interventionist norms.

24. The Swiss Federal Tribunal laid down these principles by a decision of 28.4.1992 (in the matter Gamma SA vs. Sigma SA), where the parties had chosen Belgian law for their contract, ruling that this choice also embraced anti-trust law of the European Union, which is part of Belgian law. The Supreme Court specified also that, in regard to an arbitral award, it would be in breach of the public policy of the Community, if it were inconsistent with Art. 85 of the Treaty (now Art. 81). Therefore arbitrators also have the duty to examine the agreements before them in the light of the Community legal system, in order to avoid decisions which are inconsistent with it. As a result, in the case in point, the refusal by the arbitral tribunal to deal with these questions -arguing that it had no jurisdiction relative to them - and despite the plea of one of the parties, was considered by the Federal Tribunal as being in breach of Art. 190 para. 2 lit. b) PIL.

25. The Federal tribunal refined this principle in a leading case of 19.4.1994, stating that the arbitral tribunal must in any case comply with the public policy of the chosen applicable law (lex causae), and that the award could be amended by the Federal tribunal, only if it is in breach of universal, or transnational public policy.

35 DFT 118 II 193 (198) also published in Bull ASA 1992, 368 with footnote; see also the note by IDOT, in Rev. Arb. 1998, 133-134 and by SCHWANDER, in AJP 1993 89 et seq.

36 According to KARRER, op. cit., Art. 187, N. 133, that is to say of the domestic public policy of the lex causae and not its negative "ordre public international".

37 DFT 120 II 155 cons. 6 (168) and infra §§ 71 et seq., regarding this second aspect.
26. On close examination, it becomes clear that these two decisions deal with matters that are very similar but not identical: the first decision deals with interventionist norms and the latter with public policy norms. If the application of the public policy norms might be voluntarily dispensed with by the parties (for example by choosing only part of those rights), this is not the case, in principle, for those concerning interventionist norms.38

27. In brief, it would also seem quite evident that, in such cases, arbitral tribunals with their seat in Switzerland must comply with the public policy of the *lex causae* chosen by the parties, both in its interventionist norms and with reference to public policy as per Art. 190 para. 2 lit. e) PIL.39

2.2.2. Interventionist norms of foreign laws (Art. 19 PIL by analogy)?

28. This question frequently arose in regard to: a) foreign public law prohibiting employment of, or payment to, agents or broker; b) Competition Law of the European Community, in cases where the parties had chosen Swiss law governing their agreement; c) UN-Embargo measures taken against some Nations. It is also interesting to mention a particular case in the field of broadcasting (the so-called Reteitalia decision) (d). The question may be summed up in these terms: can a rule of foreign public law statute invalidate the effects of an agreement which, under Swiss law, is valid and binding?

38 DERAINS, L'ordre public et le droit applicable au fond du litige dans l'arbitrage international, Rev. Arb. 1986, N. 43, 59. This is comprehensible, because the *"lois d'application immédiate"* are laws whose application is necessary to safeguard the political, social and economic structure of a State (DUITOIT, L'ordre public: caméléon du droit international privé ?, Mélanges Flattet, 1985, 467-468).

a) Foreign public law prohibiting employment of, or payment to, agents or broker

29. By a decision of 30.12.1994 (regarding such rules in Kuwait) the Federal Supreme Court left open the question of whether, where a choice of law has been made, the interventionist norms of the law chosen by the parties must be applied to the exclusion of the interventionist norms of all other laws. The Court made however a dictum supporting the opinion, voiced by the majority of legal writings, which grants party autonomy precedence, and releases the arbitral tribunal from Art. 19 PIL, especially in case of choice of law. Moreover the Court found convincing the unanimous opinion of legal writings, according to which the non-compliance with interventionist norms of foreign laws does not itself violate public policy by virtue of Art. 190 para. 2 lit. e) PIL.  

b) Competition Law of the European Community

30. In a case of 13th, November 1998 the Federal Tribunal dealt with a licensing agreement, submitted to Swiss law by choice of the parties and aimed at operating in the European Community. No one raised the question of a possible infringement of EU competition law (Art. 81 of the Treaty) during the arbitral proceedings and the arbitrators did not examine this aspect on their own motion.

31. First the Supreme Court, quoting Blessing, extended the Gamma SA vs. Sigma SA case-law. It therefore became the duty of arbitrators to examine the contract in the light of Art. 81 of the Treaty - even in cases in which the parties had decided to submit their relations to Swiss law - under the premise that the voidness of that contract had been invoked by at least one party.

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41 DFT of 13.11.1998 cons. 1 in Bull ASA 1999, 529. See also, on this subject: infra §§ 169.-174.
before the judge or before the arbitral tribunal.\textsuperscript{42} The reason was that, otherwise, as it had been applied in the aforementioned decision, the arbitrator who denied its latitude and jurisdiction to apply Art. 81 of the Treaty, violated Art. 190 para. 2 lit. b) PIL. This is of course a very important principle. It is not a refinement of the Gamma SA vs. Sigma SA case-law but in fact this is a really new dogmatic approach. In fact, for the first and only time the FT ruled the duty of arbitrators to apply a "lois de police" of a third judicial entity (i.e. the EC competition law), irrespective of the applicable substantive law and even if that law is the result of a choice made by the parties.\textsuperscript{43}

Evidently, in this context, one has to stress at this regard the will of the Supreme Court of Switzerland, which is not a member State of the EC, to co-operate in the implementation of the EC competition policy. What does such readiness to co-operate imply? There are in fact other examples of European public policy and "lois de police", for instance: the four freedoms, all of the provisions of the EC Treaty against discrimination based on nationality or gender.\textsuperscript{44} The application field may be very wide (it has even been argued that all provisions of EC law with direct effect, pertain to public policy) so that this case law might lead to the paradox that the real barrier against the choice of law (i.e. of Swiss law) is no longer "Swiss" public policy but the interventionist norms of the European Community.

\textsuperscript{42} In fact there are some authors who believe that the arbitrators must go further by applying Art. 81 ECT on their own motion, even though none of the parties may have pleaded issues of competitive nature (BLESSING, Introduction to Arbitration - Swiss and International Perspectives, 1999, N. 737; HOFFET, Plädoyer für die ex officio Anwendung von Kartellrecht durch Schiedsgerichte in der Schweiz, in Bull ASA 2000, 697).

\textsuperscript{43} RIGOZZI, Arbitrage, ordre public et droit communautaire de la concurrence, in Bull ASA 1999, 465

\textsuperscript{44} The issue is obviously much too complex to be resolved in a few lines. See therefore, for a far more complete analysis on this question: LIEBSCHER, European Public Policy, A Black Box?, in JIArb. 2000, 73 et seq. (78, 80)
This premise gives rise to two kinds of questions:

32. (a) The first sort of question is: what would be the solution in the inverse situation? The federal tribunal did not reach the same result for two main reasons. First of all it denied the direct application of Art. 81 of the Treaty in term of a "loi de police", arguing that it is not conceivable to oblige an arbitrator, mandated to apply Swiss law, to also consider foreign law normally applicable, in the event that this law had been invoked by none of the parties and nobody had raised the question of voidness of the contract.\(^4\) Thus, there had not been, in any case, a violation of public policy simply because the arbitrators did not take into account the foreign law. Furthermore, the Federal tribunal exposed its scepticism regarding the possible corollary, that provisions of national or European competition law belong to fundamental judicial or moral principles, that they are recognised as such in all civilised States, and therefore their infringement should be considered a breach of public policy (see: infra §§ 169.-174.)

33. (b) The second type of question, on the other hand, is: what if the arbitrators were not to take into consideration Art. 81 of the Treaty despite a plea of the parties involved, i.e. what if there were no reference in the decision regarding the application of Art. 81 EC.

\(^4\) One may admit with Rigozzi (op. cit., Bull ASA 1999, 469) that the argument proposed by the FT is not really convincing ("on ne peut pas exiger de l'arbitre qu'il connaisse ou qu'il recherche systématiquement les lois de police dans chacune des législations présentant un point de contact significatif avec la relation litigieuse) with regard to competition and the well known importance of these EC provisions. But this does not change the solution proposed by the FT. For this is simply an argument proposed - \textit{ad abundantium} - to concur with a principle firmly established in law, which has just one exception. One the other hand it may be the case to remember that the obligation to annul a decision contrary to Art. 81 ECT is only mandatory for a member State of the EC and not for Courts of jurisdictions outside the EC (IDOT, in Rev. Arb. 1999, N. 16).
This was exactly the problem raised in a case adjudicated by the federal tribunal on 1st February, 2002, where the fact that the arbitral tribunal omitted to examine the plea by one of the parties regarding the consistence of the contract with Art. 81 of the Treaty, went unchallenged. The Federal court ruled firstly that Art. 190 para. 2 lit. c) and d) PIL do not encompass such circumstances and - with respect to the lit. e) quoting Rigozzi - concluded by saying that, the arbitrator seating in Switzerland, indeed, must apply the competition law of the European Community when it is asked to, but the violation of this duty cannot be sanctioned on appeal.

In other words, there would be no breach of public policy. One may admit that this result has some peculiarities. If an arbitral tribunal declines its jurisdiction to apply Art. 81 ECT, the award may be successfully appealed by means of lit. b). By contrast, if the arbitral tribunal simply omits to examine the pleas of a party concerning this same provision, its award will be upheld by the FT by means of lit. e).

**c) UN-Embargo measures taken against some Nations**

In a decision of 28.3.2001, the crucial question was whether a contract governed by Swiss law, that violates foreign mandatory rules (UN- Weapons' Embargo against the territory of former Yugoslavia), could be incompatible with bonos mores (Art 20 CO). The answer was: yes, but not by means of a direct implementation of these UN provisions, however, but through the violation of public policy.

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46 DFT of 1.2.2002 cons. 4c) (case 4P.226/2001). Note that this is not the same problem that arose in the aforementioned decisions in the matter Gamma SA vs. Sigma SA and DFT of 13.11.1998 cons. 1, where the arbitrators positively denied their latitude and jurisdiction to apply Art. 81 ECT. Here the decision is simply silent on this problem and the grounds invoked by the appellant were based on lit. c)d)e) but not on lit. b) of Art. 190 PIL.

47 Rigozzi, op. cit, in Bull ASA 1999, 474

35. In synthesis we may learn the following from this decision: the arbitral tribunal need not take into account foreign mandatory rules as a piece of law to be applied directly or by analogy, but only as a parameter on which one must build public policy analysis. In other words the query to be faced is the following: can a contract, governed for instance by Swiss law, violate public policy by means of Art. 17 respect. 190 para. 2 lit. e) PIL, because of its infringement of a UN-Embargo? As mentioned before, the FT gave an affirmative answer, and this is valid not only for UN Embargo provisions, but for every foreign mandatory rule of a fundamental nature and whose violation evidently infringes bonos mores even in the light of the domestic point of view.

d) A particular case: the RETEITALIA decision

36. La Cinq, a French commercial television channel, was managed by the group Hersant and the Italian group Reteitalia. The group Hachette succeeded Hersant in Spring 1990 and it negotiated a settlement with Reteitalia (with arbitration agreement and the choice of Swiss law). According to this settlement, Hachette was obliged to acquire the shares of Reteitalia in "La Cinq", or to allow their acquisition by a third authorised person, for a price which was to be equivalent to the amount invested by Reteitalia in that corporation. The arbitrators ruled that this agreement was void by virtue of Art. 20 CO for reason of its initial impossibility. In fact, the acquisition by Hachette of the sharehold belonging to Reteitalia would have meant that its proportion of the share capital of "La Cinq" would have been above the limit fixed by French audio-visual public law.

It was exactly this reasoning that was challenged by Reteitalia on appeal before the Federal Tribunal, through the claim that this conclusion was in breach of public policy by virtue of Art. 190 para. 2 lit. e) PIL and - more precisely - of the
principle according to which *pacta sunt servanda*. The appeal was, in fact, dismissed.\(^49\)

**e) Synthesis**

In synthesis, the decisions summarised above give rise to four comments:

37. (a) The Reteitalia judgement shows that, in order to decide the question as to whether the contract was initially impossible or not, according to Art. 20 of the Swiss Code of Obligations, it was necessary to consider the French audio-visual law, although the parties had chosen Swiss Law. This demonstrates that an interventionist norm of a third State could play a role, not only in terms of immediate application but also indirectly, that is in terms of a prerequisite for the application of Swiss law.\(^50\)

38. (b) As a rule, it is left to the discretion and responsibility of the arbitral tribunals to apply or not interventionist provisions and if they do not, this is not a violation of public policy and therefore would not be subject to any review by the Federal Tribunal.\(^51\)

39. (c) There is a narrow interrelation between the two forms of public policy: the positive and the negative one. In fact, according to the logic of the system, the subject matter of these (inapplicable) interventionist norms of a third state (for instance the prohibition of employment of, or payment to, agents or

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broker) should be evaluated in the light of public policy pursuant to Art. 190 para 2 lit. e), respectively Art. 17 PIL. This is perfectly demonstrated by the aforementioned decisions of the Federal tribunal of 13th November 1998, 1st February 2002 and of 3rd March 2001, and this is exactly the path followed by a remarkable ad hoc award made in Geneva in 1989, where the arbitrators ruled that a contract, which violates a mandatory foreign law, may be considered in breach of the Swiss public policy (and void because of immorality according to Swiss law), only if the violated rule of foreign law serves to protect fundamental interests of the individual, or of the community, or the defence of juridical rights which, in an ethical order, have precedence over the principle of contractual liberty.

For instance, this would not have been a case for giving precedence to an Algerian Law of a protectionist nature (and aimed at granting the State monopoly over exporting commerce), nor would it have been a case for giving precedence to any administrative prohibition edicted to discourage graft and corruption in that third State.

40. (d) The autonomy of the parties is granted precedence, save in cases of abusive exercise of rights (in fraudem legis). This problem becomes obviously very relevant in cases when the parties choose a law deprived of interventionist provisions for

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52 Bull ASA 1991, 239 (252-256)
53 This is the famous case Hilmarton Ltd vs. Omnium de Traitement et de Valorisation (OTV) (Bull ASA 1993, 247, decision of 19.8.1988 of the arbitral tribunal, and Bull ASA 1993, 253, decision of 17.4.1990 of the FT) which has been strongly criticised by legal writings (see for a synthesis MEBROUKINE, Le choix de la Suisse comme siège de l'arbitrage dans les clauses d'arbitrage conclues entre entreprises algériennes et entreprises étrangères, in Bull ASA 1994, 4 et seq., and which demonstrates the difficulties for arbitrators and for judges, at the seat of arbitration, to seize the application field and the subject matter of a foreign mandatory law, i.e. its nature as "lois de police").
the sole purpose of eluding interventionist norms of a third State which would otherwise have been applicable.

But even if it is clear that an arbitrator need not respect the will of the parties to the extent of deliberate fraud of the laws of a State (or of the EC), this does not yet mean that particular interventionist norms must be applied directly. The notion of international public policy encompasses also, among other things, the abuse of law and, therefore, even fraud in the context of a given law, caused by the contractual choice of another one. Furthermore, it is theoretically conceivable that some of these "lois de police" violate international public policy (for instance racial laws) and it is evident that such rules could not be applied in any circumstances. Thus, there is no reason why any specific situation should always be solved by means of a direct application, rather than by means of a public policy verification.

2.2.3 Interventionist norms of Swiss law (Art. 18 PIL by analogy)?

41. According to KARRER and SCHNYDER such substantive provisions or interventionist norms are certainly not applicable by an arbitral tribunal merely because it had its seat in Switzerland and Swiss provisions were involved. Swiss interventionist norms are on an equal footing with foreign interventionist norms and take no precedence.

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56 In this sense, see USA Supreme Court in the matter Mitsubishi vs. Soler (1985), regarding the issue of arbitrability under US competition law of a contract providing Swiss law as the applicable law on the merit: "We merely note that in the event the choice-of-forum and choice-of-law clauses operated in tandem as a prospective waiver of a party's right to pursue statutory remedies for antitrust violations, we would have little hesitation in condemning the agreement as against public policy" (at N. 62).

57 KARRER, op. cit., N. 144; SCHNYDER, Anwendung ausländischer Eingriff-normen durch Schiedsgerichte, RabelsZ 1995, 302
In effect, public policy also has the function of setting aside arbitral proceedings before Swiss courts at the place of arbitration (Art. 190 para. 2 lit. e) PIL). By consequence, following the theory voiced by KARRER and SCHNYDER, the arbitrator runs the risk that such Swiss interventionist norms may be considered as being part of public policy according to that provision and, thus, their miscompliance would lead to setting aside the award by the Federal tribunal.

Summing up, it is advisable that the arbitrators, in order to guarantee effectiveness to their award, moderate the results of a merely juridical analysis by verifying public policy and interventionist norms of the place of arbitration.\(^{58}\)

2.3 Implementation of positive public policy defence by international arbitral tribunals in cases of absence of a choice of law

Art. 187 para. 1 Part 2 PIL lays down the criterion of "the rules of law with which the dispute has the closest connection" and accordingly the arbitral tribunal will have to apply even interventionist norms when they show a closer connection with the case.\(^{59}\)

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\(^{58}\) DERAINS, op. cit., Rev. Arb. 1986, 413, N. 62; LAZAREFF, op. cit., 541

II. The function in enforcement proceedings relative to foreign awards or judgements

1. Art. V para. 2 lit. b New York Convention (NYC) 60

1.1 General aspects

42. The NYC applies to the recognition and enforcement of foreign awards, that is to say when the seat of the arbitration is not in Switzerland, irrespective of the (substantive or procedural) applicable law. It provides in Art. V NYC an exhaustive system of grounds on which enforcement may be refused and especially public policy defense (Art. V para. 2 lit. b NYC), which has to be determined of its own motion by the court before which the enforcement is sought. 61

43. Not every provision which is mandatory under Swiss law is necessarily a public policy rule of the lex fori, but only those rules which are of utmost importance according to the Swiss concept of procedural or substantive law are to be considered as public policy rules. 62

Moreover, already through an old decision of 12.12.1975, the Swiss federal Tribunal held that, in this context, public policy has a more restrained significance than in case of direct jurisdiction of Swiss Tribunals (supporting thereby the so-called theory of the mitigated effect of public policy). 63

60 Art. V para 2 lit. b) NYC: "Recognition and enforcement of an arbitral award may also be refused if the competent authority in the country where recognition and enforcement is sought finds that: (...) (b) the recognition or enforcement of the award would be contrary to the public policy of that country".

61 SJ 1980, 65 cons. 2 (70-71); SCHWAB-WALTER, Schiedsgerichtsbarkeit, München, 2000, 544, N. 4

62 This principle is nothing but "international public policy" (see also DFT of 23.10.1989 cons. 3a) in Bull ASA 1990, 51 (54). Infra § 68.

63 DFT 101 Ia 521 cons. 4. Accordingly, it seems evident that, under Swiss law, public policy is a narrow ground of defense and must be applied restrictively (see DFT of 9.1.1995 cons. 7, in Bull ASA 2001, 294 (302-303); PATOCCHI, The New York Convention - The Swiss Practice, N. 51-52, in The New York Convention of 1958, Bull ASA Special Serie N.9,
Furthermore, the Swiss Court before which enforcement is sought, must not determine whether the foreign law applied in the award is consistent with basic concepts of Swiss law, but only whether the practical result, which enforcement of the award would bring about (both on the merit and on the procedure applied in the award), is irreconcilable with those principles.  

To sum up, the grounds for refusal of enforcement mentioned in Art. V are exhaustive and, in particular, the court before which the enforcement of an award is sought may not review the merits of that award, save for the control ex officio of its effects in the light of public policy.  

1.2 Discrepancies between the NYC and the Chapter XII PIL  

In a remarkable synthesis, Prof. Poudret pointed out five discrepancies: two of them pertaining to the arbitration agreement (Art. 178 (1) and (2) PIL vs. Art. II NYC); the third regarding the capacity of States to agree to arbitration (Art. 177 (2) PIL vs. Art. V (1a) NYC); the fourth in the matter of ability to arbitrate itself (Art. 177 (1) PIL vs. Art. V (2a) NYC); and the
fifth to the violation of the procedure chosen by the parties (Art. 190 (2) PIL vs. Art. V (1d) NYC).

47. It seems to me, however, that there is also a sixth field of potential discrepancies: public policy (Art. V (2b) NYC). As a matter of law, this latter provision sustains international public policy of the country sought for enforcement, while the so-called universal or transnational public policy take a distant look from given national principles, leading therefore - under certain circumstances - to enforcement problems. Furthermore it is also possible that the Swiss international public policy differs from that applicable in the country sought for enforcement, although this seems to be a more theoretical than a practical problem.

48. A similar problem arises with regard to positive public policy, because it is conceivable that an arbitral award rendered in Switzerland may not be enforced in some foreign countries because interventionist provisions had not been applied. Therefore, it is not surprising that some authors give weight to the law of the presumptive place of enforcement of the award, and especially to their interventionist and public policy provisions.

This theory is fascinating because it takes into account the fundamental idea that, even more than a judgement, an arbitral award must be able to circulate freely all over the world without loosing its judicial effectiveness. Therefore, it is the precise duty of arbitrators to create, as far as possible, a product capable of being exported abroad, without being ruled against in the country sought for enforcement by application of the public policy of the latter country.

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68 KARRER, op. cit., Art. 187, N. 138
69 LALIVE/POUDRET/REYMOND, op. cit., Art. 187, 396, N. 13
70 For instance, this pragmatic approach also complies with Art. 35 of the ICC Rules, which provides that: "In all matters not expressly provided for in these Rules, the Court and the Arbitral Tribunal shall act in the spirit of these Rules and shall make every effort to make sure that the Award is
Of course, it might be argued that the presumptive place of enforcement is not clear, neither for the arbitral tribunal nor for the parties involved; or that, under the particular circumstances of a concrete case, this is not the crucial point, but nonetheless - in the other cases - this theory maintains much of great interest.

1.3 Synthesis

These premises give rise to three sorts of analysis:

49. (a) The Swiss legislator, due to the extreme liberalism of our legislation, has taken a somewhat deliberate risk of refusal of recognition and enforcement of awards which are perfectly valid in Switzerland. But, as the Federal Tribunal said, it is up to the parties - and not to the arbitrators - to evaluate the risk of non-enforcement abroad.

50. (b) The theoretically perfect award, rendered under the regime of Chapter XII PIL, is an award compatible with interventionist and public policy provisions of the lex contractus, of the lex arbitri and of the law of the country where the award is likely to be enforced, taking into consideration, of course, international public policy by virtue of Art. 190 para. 2 lit. e) with respect to all of these approaches. But, in fact, what is important is not theory, but practice. From a practical point of view, in fact, such theoretical considerations would lead one, for instance, to apply the competition rules of the State, where the award would probably be enforced (and, if necessary, Art. 81/82 of the ECT, too), irrespective of the law governing the lex contractus. To sum up, such an approach should not be automatic, but well reasoned and based upon specific circumstances, i.e. case by case, even though it is clear enough that an arbitral enforceable at law”. It is, in fact, the theory of (positive) public policy "d'envoi" voiced by KAUFMANN-KOHLER, L'ordre public d'envoi ou la notion d'ordre public en matière d'annulation des sentences arbitrales, in SZIER 1993, 273 et seq. (infra § 86). Once again, the responsibility and the autonomy of arbitrators emerges in very relevant terms.

71 KARRER, op. cit., Art. 187, N. 151
72 DFT 118 II 353 cons. 3d)
tribunal should be allowed to apply a mandatory law in derogation of the law chosen by the parties, only under stringent conditions.\textsuperscript{73}

\subsection*{51. (c) There are narrow interrelations between the function of public policy laid down in Art. Art. V (2b) NYC, not only relative to the negative function of this same concept codified in Swiss municipal law and in the Lugano Convention, but also in relation to its positive function. On the one hand, Art. V (2b) NYC is the vehicle by means of which the arbitrator might implement (through Art. 19 PIL) a certain concept of positive public policy. On the other hand, although this provision is not part of the precedents quoted in the UEFA decision,\textsuperscript{74} this norm is undoubtedly a part of the scheme ruled by this recent case law, aimed at creating a sort of platform of interchange between the different functions of public policy. In fact, Art. V (2b) NYC and Art. 190 para. 2 lit. e) PIL are the poles of closely related realities and it is obvious that they somewhat attract each other, so that the existence of a certain coherence between these two fields of law is necessary.\textsuperscript{75}

Pursuant to these existing interrelations, the FT already through a decision of August 21st, 1990\textsuperscript{76} referred to a precedent of December 12th, 1975,\textsuperscript{77} pertaining to the context of enforcement in Switzerland of foreign awards, in order to conclude that a non-reasoned award does not in itself violate public policy by virtue of Art. 190 para. 2 lit. e) PIL.

\begin{footnotesize}
\begin{itemize}
  \item In this sense, \textit{mutatis mutandis}, see also: \textsc{Lazareff}, op. cit., 544 et seq.
  \item See in this sense also \textsc{Jermini}, \textit{Die Anfechtung der Schiedssprüche im internationalen Privatrecht}, Zurich 1997, 251-252, N. 508; \textsc{Walter}/\textsc{Bosch/Brönnimann}, Internationale Schiedsgerichtsbarkeit in der Schweiz, Bern, 1991, Art. 190 II-194, 213
  \item DFT 116 II 373 cons. 7
  \item DFT 101 Ia 521 cons. 4
\end{itemize}
\end{footnotesize}
2. Council Regulation (EC) No 44/2001 of December 22nd, 2000 on jurisdiction and the recognition and enforcement of judgements in civil and commercial matters (Art. 34 para. 1)78 and Lugano Convention (Art. 27 para. 1)

2.1 The Council Regulation No 44/2001

52. The underlying conceptual idea of the Regulation is to facilitate, to the greatest possible extent, the free movement of judgements within Europe by providing for a simple and rapid enforcement procedure. Therefore, as a general rule, decisions rendered by other member States must be recognised and enforced and, as an exception, that enforcement may be refused, but only through application of grounds for refusal, exhaustively laid down by the law.79

As a consequence, public policy is very narrow grounds of defence and must be interpreted strictly inasmuch as it constitutes an obstacle to the attainment of one of the fundamental objectives of the Convention. It applies only in very few situations, so much so that the Regulation expressly codifies that the breach of public policy has to be manifest. In other words, in order to refuse enforcement, the foreign judgement must violate with such intensity fundamental principles and the whole idea of justice of the domestic legal system, in order to be considered unacceptable.80

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78 Article 34: "A judgement shall not be recognised: 1. if such recognition is manifestly contrary to public policy in the Member State in which recognition is sought."


80 KROPHOLLER, op. cit., vor Art. 33, N. 7; Art. 34, N. 4, 7, 17; PISANI, Grenzen des anerkennungsrechtlichen ordre-public-Vorbehalts im EuGVU am Beispiel englischer conditional fee agreements, in IPRax 2001, 295 with further ref.
All things considered, it might be interesting to notice that the requirements of that Regulation seem to be quite similar to those provided by the New York Convention, although with some distinctive features:

(a) the grounds for refusal by virtue of Art. 34 Reg. are exhaustively laid down and are to be interpreted restrictively, since they represent an obstacle against free circulation of judgements.

(b) crucial is the public policy of the second State (lex fori), although this concept does not mean that public policy has to be performed only under national backgrounds. On the contrary, the European civil procedure is an instrument that serves integration among the member States, therefore the mere national interests must be relativised.

(c) the concept of public policy encompasses both the procedural and the substantive public policy and for the latter only the results of the foreign judgement are conclusive.

(d) under the abrogated Brussels Convention, the judge had to intervene on his own motion to verify the grounds of refusal, a principle that the doctrine relative to the new rules now puts in doubt.

It is interesting to notice that, although the New York Convention and the Regulation 44/2001 are dealing with two distinct fields conceptually very different (the former with arbitral award and the latter (only) with State judgements), the final product has, in fact, similarities and in both cases is very liberal. The backgrounds of these provisions are, in fact, the

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81 Although the application field is clearly different (Art. 1 para. 2 lit d) of the Reg.) (See Bull ASA 1999, 68: Van Uden Maritime BV, and Bull ASA 1992, 279: Marc Rich).


84 See Art. 1 para 2 lit. d) of the Reg. 44/2001; REP. 1997, 230
same: to grant the free circulation of decisions, on the one hand of State judgements within Europe as an integration factor and, on the other hand, as a feature of the autonomy and "State-independence" of international arbitration.

Obviously, the significance of the New York Convention is far greater than Regulation 44/2001, which operates only within the European Community, whilst the NYC has almost planetary value, so vast are the number of member States.

2.2 The Lugano Convention

55. The Lugano Convention used to be the twin agreement to the Brussels Convention, but that is no longer exactly the case after the entrance into force of the Reg. 44/2001. But, of course, the underlying basic principles are still almost the same. As a matter of fact, the perspective of these two pieces of law are quite different and this has a certain influence even regarding the concept of public policy. One has in fact to bear in mind that the Brussels Convention before, and the Reg. 44/2001, nowadays, is an instrument of integration and contributes to the implementation of the EU internal market and of the four basic freedoms that define it (free movement of goods, persons, services and capital). This aspect must be considered in the definition of public policy, which assumes, accordingly, a certain European dimension, 55 unknown to the public policy according to Art. 27 para. 1 of the Lugano Convention.

56. Furthermore, the text of Art. 27 para. 1 LC does not refer to the notion of judgement manifestly incompatible with the public policy, but irrespective of this failure the case-law has always interpreted this notion very narrowly. 86 For instance, by a

85 DECJ of 28.3.2000 in the matter Krombach v Bamberski (Case C-7/98) N. 20-21; DECJ of 6.10.1976 in the matter Industrie Tessili Italiana Como vs. Dunlop AG, N. 9; PISANI, op. cit., 296-298
decision of 28.3.2000\textsuperscript{87} the ECJ (in respect with Art. 27 para. 1 of the Brussels Convention (whose text was identical to that of the Lugano Convention), stated once again that art 27(1) was to be construed restrictively. As it was in derogation to the Convention's objective of facilitating the free movement of judgements to the greatest extent possible, it could only be successfully used if there were a manifest infringement of a rule of law regarded as essential, or a right regarded as fundamental, in the legal order of the state applied to.

3. PIL (Art. 27)

Art. 27 PIL has common points with the described Conventions but also diverging elements. The common points are, obviously, the exhaustive system of the grounds for the refusal of the enforcement; the existence of a substantive and procedural\textsuperscript{88} public policy; the narrow interpretation of public policy defence (which is expressly laid down by the law: "manifestly" incompatible with Swiss public policy), that is to say the so-called theory of mitigated effect of Swiss public policy; the serious breach of the results of a foreign judgement with the Swiss conception of (substantive) law; finally the ex-officio examination, which is reduced solely to substantive public policy.\textsuperscript{89}

Different and certainly more anchored to the present Swiss legal system, on the other hand, is the way the examinations are

\textsuperscript{87} DECJ of 28.3.2000 in the matter Krombach vs. Bambersky, where the Court dealt with the question of whether the refusal to hear the defendant's lawyer by the foreign Court in France was infringing German public policy (that is the State in which enforcement was sought).

\textsuperscript{88} Swiss public policy imposes the respect of the fundamental rules of civil procedure, granted by the former Art. 4 Federal Constitution (now Arts. 29-30). In particular, it consists in the regular serving of writs, fair procedure, right to be heard and absence of identical proceedings pending in Switzerland or of an enforceable judgement rendered on the same matter (see DFT 116 II 625 cons. 4a). \textit{Infra} §§ 101.-106.

\textsuperscript{89} DFT 126 III 327 cons. 2b with further ref.; DFT 116 II 625 cons 4a; DFT 109 Ib 232 cons. 2a, DFT 103 Ib 69 cons. 3d with further ref. \textit{Infra} § 104
made by virtue of Art. 27 para 1 PIL. Evidently, this is not a reassessment on the merits of a specific foreign judgement, but is a comparison between the concrete result in the case of the enforcement of that judgement and the result of an hypothetical decision rendered by a Swiss judge, with the condition that the enforcement be granted, if this comparison leads to acceptable results. Finally, in carrying out this examination, one has also to consider the importance of the relationship between the case in point and Switzerland ("Binnenbeziehung"): the more this relationship is narrow, the more public policy defence will have greater influence.90

III. The function of setting aside arbitral proceedings before Swiss courts at the place of arbitration (Art. 190 para. 2 lit. e) PIL)

59. Art. 190 para. 2 lit. e) PIL relates to grounds on which an award made in Switzerland is to be set aside in Switzerland. As already mentioned, public policy is a complex and undefined concept, thus a way to describing the essence of public policy may be through explaining the interrelation with the entire system of the grounds for setting aside an award, its evolution and, finally, its function in an international arbitral context.

60. Finally, in order to really comprehend the weight of the rule in point, one should also assess the prerequisites related to the existence of an international arbitration proceedings in Switzerland subjected to the rules of the PIL; the possibility of appeal to the Federal court and the procedure applicable to this appeal. For our purposes it is enough to refer the reader to reading the relative doctrine and case-law.91

91 See, especially, CORBOZ, Le recours au Tribunal Fédéral en matière d'arbitrage international, in SJ 2002, 1-15; WALTER, Praktische Probleme
1. Art. 190 para. 2 lit. e) PIL vs. Art. 36 lit. f) Concordat

1.1 General principles

61. The federal legislator defined in Art. 190 para. 2 lit. a) and d) PIL the grounds for the setting aside of Art. 36 lit a) and c) Concordat, while it abandoned the grounds of arbitrariness of the lit. f), replacing it with public policy. This was not an easy formal change but it was a significant dogmatic alteration and case-law has never failed to note the profound difference between the Concordat and PIL.

62. First, the Federal tribunal made it clear that, by restricting the usable means of recourse and by giving jurisdiction solely to the Federal tribunal, the legislator intended to reduce the possible latitude available for setting aside arbitral awards (as compared to the CIA), in order to guarantee greater fluidity in these proceedings. Second, the Supreme Court ruled that the grounds of lit e) are not to be confused with grounds of arbitrariness and that this is not a barrier against the implementation of Art. 87 Statute on the Organisation of the Federal Judiciary, these being much more restrictive grounds in comparison to those based on Art. 4 (old)Const. and Art. 36 lit. f) CIA.

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92 BERTI/SCHNYDER, op. cit., Art. 190, N. 24; JOLIDON, Commentaire du Concordat Suisse sur l'arbitrage, Bern, 1984, 515 et seq. particularly N. 92, where the author makes clear that the latitude of reviewing the award on the merits is extremely reduced and the case must be extremely serious; RÜEDE/HADENFELD, Schweizerisches Schiedsgerichtsrecht nach Konkordat und IPRG, II. Auflage, Zurich, 1993, 344 et seq.; Poudret, Les recours au Tribunal fédéral suisse en matière d'arbitrage interne et international, in Bull ASA 1988, 58-59; DFT of 1.2.2002 (4P.226/2001) cons. 4a; DFT 105 Ib 431 cons. 4b (which confirms that the grounds of art. 36 CIA and (old)Art. 4. Const. - now art. 29 para. 2 Const. - are identical).

93 DFT 119 II 380 cons. 3c; DFT 117 II 604 cons. 3; DFT 116 II 721 cons. 5b (728); DFT 115 II 288 and DFT 116 II 373 cons. 7 where the FT mentions - as an example - the absence in art. 190 para. 2 PIL of grounds for setting aside, referred to non-reasoned awards.
There is a limited number of consequential points:

63. (a) Through a decision of 25.7.1990,\(^\text{94}\) referring to the abrogated Art. 4 Const., the Federal tribunal ruled in synthesis that everything which is not admissible to the field of an appeal for arbitrariness based on Art. 4 Const., will also not be admissible by reason of Art. 190 lit. e) PIL.

64. (b) Contrary to Art. 36 lit. f) Concordat,\(^\text{95}\) even findings of fact obviously in contrast to the elements resulting from the dossier, or an evident violation of law and discretion, are not sufficient to setting aside the award.\(^\text{96}\) This is also valid in cases where the applicable law confers ample power of discretion to the arbitrators, for instance in the calculation of the sanctions against those responsible for the tort.\(^\text{97}\)

In other words, the Federal tribunal cannot review the accuracy of the findings of law or of facts made by the arbitral tribunal. Its leeway to review does not extend all the way up to the arbitrariness of the award, but it is limited specifically to the question of public policy, and accordingly that an award may be successfully challenged only if it is inconsistent with public policy.\(^\text{98}\)


\(^{95}\) See, on the notion of "Arbitrariness", the recent DFT of 8.1.2001 cons. 4b in Bull ASA 2001, 516

\(^{96}\) Note that, according to the case-law of the FT, both the State and the arbitral tribunals have the duty to apply the relevant rules of law to the regularly alleged and ascertained facts, without being bound by the reasoning defended by the parties in this respect. (DFT of 2.3.2001 cons. 5b, in Bull ASA 2001, 531 quoting also Berti/Schnyder, op. cit., Art. 190, N. 58, for an exception to this principle).

\(^{97}\) DFT 127 III 429 cons. 2 ec).

\(^{98}\) DFT of 8.1.2001 cons. 4b in Bull ASA 2001, 516; DFT of 10.6.1996 cons. 3a, in Bull ASA 2000, 764 (775); DFT 121 III 331 cons. 3a; DFT 120 II 155 cons 6a (166); DFT 119 II 271 cons. 8; DFT 117 II 604 cons. 3; DFT 116 II 634 cons. 4; DFT of 25.7.1990 in SJ 1991, 12 and in Bull ASA 1991, 169; Waldner, op. cit., Bull ASA 2001, 19 (with an example regarding a foreign applicable law which lays down a prohibition of interests); Schwab/Walter, op. cit., Kap. 24, 261; Jermini, op. cit., 276 N. 553 (reporting an example). See also the interesting opinion voiced by: Berti/Schnyder, op. cit., Art. 190 N. 68 according to whom "open
Because the infringement of public policy is much more restrictive, as compared to the grounds of arbitrariness laid down by the Concordat, the annulment of an award is justified only if it violates substantive public policy in its result, and is inadmissible if the sole reasoning seems to be in contrast to public policy.\(^9\) In other words it would be insufficient, if the sole reasoning were that of violation of public policy but, in fact, it is exactly the opposite: it is necessary to come to the same conclusion by means of its tenor.\(^10\) All of this does not mean that the tenor, in itself, should infringe public policy. It is sufficient that the intellectual reasoning, regarding an infringement of public policy, be clearly shown in the tenor. Furthermore, in cases where the tenor is based on more than one alternative reasoning, each of them must breach public policy, or must be built on a premise which is contrary to public policy.\(^10\)

1.2 **Arbitrariness and public policy: a maiore ad minus?**

This question is relatively easy: public policy is to be seen as qualified arbitrariness according to Art. 36 lit. f) Conc., for otherwise it would be conceivable that international awards might violate public policy by virtue of Art. 190 para. 2 lit. e) PIL without being necessarily arbitrary in light of the Concordat?

disregard of facts on file goes to the very heart of the parties's right to be heard”.

\(^9\) By contrast, this is not valid for procedural public policy; see infra § 104.

\(^10\) DFT of 6.9.1996 cons. 1c aa) in Bull ASA 1997, 291 (299) with further ref.; DFT of 10.6.1996 cons. 3a in Bull ASA 2000, 764 (775); DFT 120 II 155 cons. 6; DFT 116 II 634 cons. 4; KNÖPFLER/SCHWEIZER, in SZIER 1999, 623. The same restriction exists even by art. 36 lit. f) Concordat (JOLODON, op. cit., 516, 518; RÜEDE/HADENFELD, op. cit., 345) so that this rule of the Federal Tribunal must be understood in the sense that an extension (with the restrictive premises ruled by the case-law), in respect with what is laid down by the Concordat, is obviously unjustified.

Evidently, in cases where the Federal tribunal admitted arbitrariness under the Concordat, one can not neglect the question as to whether these same cases violate public policy under the PIL, because it is conceivable that what is considered arbitrary also violates Art. 190 para. 2 lit. e) PIL.\textsuperscript{102} But in the existing uncertainty\textsuperscript{103} it is unlikely that public policy be considered a \textit{minus} of arbitrariness, but rather as an \textit{aliud}, although of an even more restrained type.\textsuperscript{104} There is, in fact, no trace in case law of such a comparative process, i.e. a preliminary analysis based on grounds of arbitrariness and, only in a second phase - provided that the award is arbitrary - the examination as to whether it is also - in addition - contrary to public policy.

2. Public policy vs. mandatory rules

We have already mentioned that public policy allows the judge to exclude foreign law or to set aside an award, if that goes against the general feeling for justice, prevailing within a given judicial order, in an intolerable manner and violates the fundamental rules of this order, which is not necessarily the case if the foreign rule or award is contrary to a mandatory provision of Swiss law.\textsuperscript{105} For instance the Federal tribunal made it clear, years ago, that the abrogated Art. 144 CC (now Art. 15 GestG) did not pertain to Swiss public policy even if it was of mandatory nature, and thus this particular aspect is irrelevant from the point of view in discussion;\textsuperscript{106} or the legal requirement for a given form for some judicial dealings, although mandatory, is not part of public policy.\textsuperscript{107} On the other hand in a decision of

\textsuperscript{102} BUCHER, Le nouvel arbitrage international en Suisse, Bâle, 1988, N. 353

\textsuperscript{103} Already criticised by Walther J. Habscheid in 1989, see HABScheid, Die Schiedsgerichtsbarkeit und der Ordre public, in Festschrift für Max Keller zum 65. Geburtstag, Zurich, 1989, 585.

\textsuperscript{104} ARFAZADEH, op. cit., in SZIER 1995, 227

\textsuperscript{105} DFT 102 Ia 574 cons. 7d with further ref.

\textsuperscript{106} DFT 87 I 191 cons. 1

\textsuperscript{107} HABScheid, op. cit., 575
30th September, 1999 the FT gets into the heart of the question as to whether Art. 104 CO pertains to public policy, albeit not of mandatory nature. Summing up, there are two distinct notions, which are not to be confused.  

68. Evidently, the issue is, in fact, the practical distinction between these two concepts, which gave rise to ample discussions in legal writings, which voiced very different opinions. Therefore it is very difficult to propose clear definitions even though, as the Federal tribunal ruled in the above mentioned decision, the distinctive (or at least the characteristic) concept of public policy (at least the international one) is bound to the violation of fundamental rules and values of a given judicial order.

69. Defining the outcomes of "feeling of justice and fundamental rules of a given judicial order" is an epic task. Evidently the first element for assessment is the mandatory nature of the provision in discussion from the point of view of domestic law. It would be however unjust to deduce from the case-law (taking account of the above examples) that the prerequisite in order to admit the existence of a "fundamental principle" would be this mandatory nature of the norm in point. One the other hand this strongly contrasts with the idea of a transnational public policy, because this mandatory nature is bound to "rules of law" (not necessarily of State law but in any case to concrete norms), while such anchorage to a given law is extraneous to this notion. Alternative to this, backed up by § 9 para. 2 of the German AGB- Gesetz, are the fundamental principles which may be deduced, both from positively codified provisions and from the judicial order itself. BRANDNER, in this respect, proposes the following examples: (of) the purchaser's freedom to dispose; the equivalence principle; the recovery of damages bound to the principle of the fault of a

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108 DFT 125 III 443, cons. 3d)
109 DFT of 14.6.2000 cons. 5b(ja) in Bull ASA 2000, 582 (602-603)
111 For instance the UNIDROIT- Principles (Art. 1.5)
112 ULMER/BRANDNER/HENSEN, AGB-Gesetz, Köln 1997, § 9, N. 137 et seq.
party (the culprit), and so on. It is very clear the potential extent that this notion of "fundamental principles" might assume. But such importance is improper to the notion that interests us here, i.e. that of public policy (international or transnational as it might be). The point of view is evidently very different with respect to the above mentioned legislation, because the underlying philosophy is, in any case, always that in favour of arbitration, with the consequent exceptionality of public policy defence, as expressed by the requisite of manifest incompatibility, by its mitigating effect and, lastly, by the absolutely limited effect allowed it by the case-law.

To sum up, only a very serious, unacceptable, or flagrant infringement of very fundamental general principles of the judicial order could allow a public policy defence.¹¹³

### 3. The underlying concept of public policy

#### 3.1 Evolution of the case law

70. For a long time the Federal tribunal left open the question regarding the nature of public policy by virtue of Art. 190 para. 2 lit. e) PIL.

By two decisions of October, 1989 and July, 1990 the Federal tribunal confined itself to giving notice of doubts in legal writings (thus leaving the question unsolved). For some authors the question is that of the Swiss public policy in international matters, for others the arbitral tribunal must comply to international public policy of the law applicable on the merits (lex causae), to the law of third States or, more properly, to the transnational public policy.¹¹⁴

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¹¹³ DFT of 14.6.2000 cons. 5b)aa) in Bull ASA 2000, 582, WALTER/BOSCH/BRÖNNIMANN, op. cit., 238

In November 1990\textsuperscript{115} the Federal tribunal went a step further. Although it still left the crucial question undecided, it analysed the problem in a very different way. It asked itself whether, for the purposes of the assessment of public policy, what is really relevant to the question is the legislation and the fundamental principles of Swiss law, or whether it is that of the foreign judicial order or, more to the point, whether it is that of supranational and universal principles of law.

Finally, in a famous decision of 19th April, 1994 (in the matter Emirats Arabes Unis et consorts vs. Westland Helicopters Limited)\textsuperscript{116} the FT seemed to be willing to go the whole way and ruled that while the national source of (its) public policy is Swiss, the function of the same is international. In order to assure an uniform interpretation of that provision, the Supreme Court therefore affirmed the need to dissociate public policy according to Art. 190 PIL from that which must be taken into account by the arbitral tribunal in the application of law. In fact, in cases where the \textit{lex causae} is a "third (State) law" - and, therefore, the arbitral tribunal is not obliged to comply with Swiss public policy - there is, supposedly, no need to correct the award, in the framework of a motion for constitutional review, with reference to the Swiss public policy. Faced with the choice of setting out the relevant public policy, the FT reasserted once again the need for a uniform application of Art. 190 para. 2 lit. e) PIL and also seemed to opt for an extensive interpretation of public policy, that is for the choice of a transnational and universal public policy, which would encompass the fundamental principles of law that are essential regardless of the links relative to the dispute with any given State. The FT, however, quickly added that in most cases - particularly those in a commercial and contractual context - the choice of Swiss international public policy rather then that of

\textsuperscript{115} DFT 116 II 634. The question was still left undecided in DFT 117 II 604 cons. 3, where the Federal tribunal confined itself to Swiss law.

\textsuperscript{116} DFT 120 II 155 cons. 6), where it also emerges that this refinement of case law is the result of a comparison between art 17 PIL and the different functions played in PIL by public policy. See also: \textit{infra} § 155.
transnational public policy, would not lead to different results. This is the reason why it is more appropriate to prefer a pragmatic approach to the question in point, so long as public policy remains an undetermined judicial notion, that is difficult to define precisely one and for all.

73. This case law has been consistently confirmed for many years. The notion of universal public policy has thus been refined, in the sense that Art. 190 para. 2 lit. e) PIL should be understood as a universal notion, because a decision contrary to the fundamental judicial or moral principles in all "civilised States", would be inconsistent with public policy anyway. 117

74. By comparing the entire case law produced by the FT, one may deduce that the process of consolidation of this idea of universal public policy was not completely coherent, and that there are at least three notable episodes that blemish it. The first was a decision of 9th June, 1998118 in which the FT reaffirmed its pragmatic approach, but ruled that the question - as to whether public policy according to Art. 190 para. 2 lit. e) PIL represents a notion of national, foreign, international or universal policy - may remain undecided. There were, also, another two decisions (of 1999 and of 2000119) in which the FT omits to mention universal public policy and, instead, adopts a shortened formula.

75. In truth, these three episodes have never excessively concerned the commentators, because they have been promptly corrected by subsequent decisions which took the trend inaugurated with the Westland decision literally. But in a recent


118 DFT of 9.6. 1998 cons. 3b) aa), in Bull ASA 1998, 653 (659)

decision of 11th June, 2001 the Supreme court has varied its definition of public policy once again and - this is the crucial point - it has built that definition grounds of five precedents:

(a) DFT 126 III 534 pertaining to the Lugano Convention
(b) DFT 125 III 443 pertaining to Art 17 PIL
(c) DFT 126 III 327 pertaining to Art. 27 PIL
(d) DFT 126 III 249
(e) DFT 120 II 155 both pertaining to Art. 190 para. 2 lit. e) PIL

76. Based on the first two decisions it affirms that the defence of public policy is designed to protect parties against decisions violating the most essential principles of the judicial order as it is conceived in Switzerland. The Westland decision (e) is reduced to a justification of the existence of a material public policy. The third and fourth decisions confirm the existence of a procedural public policy. In particular there is no trace of the notion of a universal or transnational public policy. Even in its concrete examination of the arguments of the appellant, the FT refers to the conformity with Swiss case law of certain opinions expressed by the arbitral court as a factor of justification in excluding breach of public policy.

3.2 International or universal public policy ?
3.2.1 General aspects

77. This general outline of the case law gives rise to two affirmations and a question. The first observation is that the

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120 DFT of 11.6.2001 in the matter A vs. Union des associations européennes de football (UEFA) in DFT 127 III 429 and Bull ASA 2001, 566; which has been textually repeated in three following decisions: DFT of 7.8.2001 cons. 3b), in Bull ASA 2002, 93, where the FT makes clear that the actions of the arbitral tribunal was consistent with general principles as conceived in Switzerland, so that there was no trace of violation of public policy (cons. 3b)cc); DFT of 18.9.2001 (4P.143/2001) cons. 3a)aa); DFT of 30.1.2002 (4P.222/2001) cons. 3a.
Westland decision and all of the following ones until the 11th June, 2001 have, in fact, never withdrawn the reservation placed by the FT since 1989, regarding the nature of public policy by virtue of 190 para. 2 lit. e) PIL. In fact, the consistent affirmations and the consecutive refinements could lead one to think that the concept of universal public policy had been accepted, but the three above mentioned episodes and, of course, the UEFA decision itself clearly refute this position. Now it is clear that this reservation was withdrawn on the 11th June, 2001, together with the UEFA decision.

78. Secondly, in that decision there is a clear use of three precedents pertaining to the Lugano Convention, Art. 17 and 27 PIL and not to Art. 190 para. 2 lit. e) PIL, in order to build the notion of public policy to this latter provision. One the other hand, for the purpose of giving concrete form to procedural and substantive public policy the UEFA decision does make reference to the Westland decision, and to successive decisions that confirm it, but not to any of the three dissociated judgements mentioned above.

79. At this point, it is natural to ask oneself the meaning of this solution ruled in the FT case law, which has changed from the marked benevolence shown towards the concept of universal public policy, regardless of the links of a dispute with any given country (expressed *in primis* in the Westland decision), to a concept of public policy based upon essential principles of the judicial order of the UEFA judgement, as conceived in Switzerland.

In order to answer at this crucial issue it will be helpful to refer to the analysis proposed by GABRIELLE KAUFMANN-KÖHLER in 1993\(^\text{121}\) in light of the manner in which case law has developed in the meantime.

\(^{121}\) KAUFMANN-KÖHLER, op. cit., in SZIER 1993, 273 et seq.
3.2.2 The text of the law

80. The description of public policy found in Art. 190, 17 to 19 and 27 PIL are quite different. One may wonder of course whether the difference in wording is intended, or not, and what the meaning of it is but, in fact, the answer to this has little to do with the wording of the law; what is relevant, by contrast, is the function.

81. Art. 17 PIL, contrarily to Art. 190 para. 2 lit. e) PIL mentions explicitly "Swiss" public policy, but in fact, UEFA case-law has, in the end, unified the wording, by adding the concept of "Swiss" public policy in Art. 190 PIL. By contrast the functions carried out by these two provisions are still really different and it is undeniable - as will be amply expressed in our conclusions - that the concept of public policy in Art. 190 is denationalised further than in Art. 17 and 27 PIL, respectively Art. 5 para. 2 lit. b) NYC.

82. Furthermore, both Art. 27 PIL and Art. 27 para. 1 of the Lugano Convention contain, in themselves, the concept expressly codified in the Council Regulation N. 44/2001, i.e. the breach of public policy must be manifest. In other words, we have here the so-called "mitigated effect of public policy".122 It was never a question in former case whether this effect also was valid in Art. 190 PIL. Now - after the UEFA decisions - the answer should be reasonably affirmative,123 which leads to two consequential points.

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122 Dissenting KÜHN, Die Anfechtung und Vollstreckung des Schiedsentscheides, in Böckstiegel: Die internationale Schiedsgerichtsbarkeit in der Schweiz (II), 1989, 164. In fact even in German the solution seems to be the same and leaves aside a literal interpretation of the law (see SCHLOSSER, Ausländische Schiedssprüche und ordre public "international" in IPRax 1991, 219: "...gegenüber ausländischen Schiedsrichtern müsse die ordre-public-Kontrolle trotz identischen Gesetzeswortlauts liberaler gehandhabt werden als gegenüber inländischen Schiedsrichtern").

123 See also LALIVE/POUDRE/REYMOND, op. cit., Art. 190, 429, N. 5, with further ref.; ARFAZADEH, op. cit., in SIER 1995, 233-234. It is no accident that this question rises (only) after the UEFA case law because,
On the one hand, this solution reinforces the well-known idea that public policy intervenes only in very exceptional situations.\textsuperscript{124} On the other hand, and this is even more interesting, the background of the theory of mitigated effect of public policy is to be seen as a pragmatic concern to reduce the perturbing effect of public policy with respect to situations which have been created - from a judicial point of view - abroad. In such cases, the Forum State has not directly contributed to the specific situation, but simply has to manage a judicial reality which has already been formed abroad.\textsuperscript{125} The parallel with arbitration is seductive. One may argue that there are two alternative judicial orders, the State and the arbitral one, which have quite few points of contact and that State Courts do not participate in the composition of the judicial solution of the dispute, but have the reduced task of simply analysing and comparing its effects in light of public policy (among other things).\textsuperscript{126}

3.2.3 Legislative material

83. Legislative material is neither specific, nor clear. Even less so, are the opinions voiced by legal writings in this regard. POUDRET, referring to the debates in Parliament, argues that the notion of public policy provided by Art. 190 PIL is exactly the same as that laid down in Art. 27 PIL in the context of


\textsuperscript{125} DONZALLAZ, op. cit., N. 2791 with further ref.

\textsuperscript{126} In this sense see also JERMINI, op. cit., 251, N. 506-507
enforcement of foreign judgements. Other authors, relying on the same debates, assert by contrast that the relevant concept of public policy has an international (and even transnational) significance.

Thus, it is practically impossible to come to a reasonable conclusion and, to be frank, there is no real need to. A relatively long period of time (15 years) has elapsed and with the great evolution meantime occurred, this material has no more significance at all.

3.2.4 The legal writings

Legal writers traditionally distinguish between international Swiss public policy; the public policy of the arbitrator (that is that the FT should review the decision in light of the lex causae) and universal or transnational public policy.

To these traditional points of view one must add the innovative theory of KAUFMANN-KOHLER, which is based on pragmatic reasoning. First, she states that the case-law of the FT (as will can be seen elsewhere in this analysis), irrespective of the theoretical point of view endorsed, very often shows a tendency to examine the problem in the light of Swiss public policy. Second, she proposes that the purpose and the function of Art. 190 para. 2 lit. e) PIL is not to preclude the enforcement of a foreign decision on Swiss territory, but to assure that awards rendered in Switzerland are accepted by the international community, by way of compliance with fundamental principles common to the great majority of States. Thus public policy should not be defined as being of a "receiving nature" but, on the contrary, as being of a "sending nature" ("d'envoi").

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128 BLESSING, op. cit., in Böckstiegel: die internationale Schiedsgerichtsbarkeit in der Schweiz (II), 1989, 77; BUCHER, op. cit., 358a
129 KAUFMANN-KOHLER, op. cit., in SZIER 1993, 278
86. Of the same opinion we find BERTI\textsuperscript{130} who concludes that the assurance of exportability of an arbitral award is one of the functions of the grounds for setting aside as laid down in art 190 para. 2 lit. e) PIL. Thus, as well as having to have a minimal qualitative standard (of which more will be said below), the arbitration tribunal must comply with general principles of law common to all "civilised nations" and what is to be evaluated must be done in the light of the Swiss judicial order.

3.2.5 The case-law

87. By looking at the case law's production of the Federal Tribunal, it is undeniable that this case-law was infected (despite a couple of exceptions) by a profound internal contradiction, right up to when the Supreme Court finally rendered the UEFA decision. On the one hand, the FT used to repeat tirelessly the formula concerning universal public policy, which is deprived, as it is now clear, of judicial links with a given State law. But on the other hand, when the FT then analysed violations of public policy, the approach of the Court was based on Swiss law and on the judicial values and fundamental principles of the Swiss judicial order. ARFAZADEH\textsuperscript{131} even manages to voice the opinion that transnational public policy was an "abus de language": in effect, simply a stratagem to give universal significance to notions which, in fact, have a source that is Swiss and a corresponding latitude.

This distortion of the intellectual process emerges clearly for all questions encompassing procedural public policy; and the same

\textsuperscript{130} BERTI, Zur Anfechtung eines Schiedsentscheides wegen Unvereinbarkeit mit dem Ordre public nach Art. 190 Abs. 2 lit. e IPRG, in Festschrift für Anton Heini, Zurich, 1995, 6-7 ("..Die allen zivilisierten Staaten gemeinsamen Grundsätze sind aus schweizerischer Sicht gesollt, ungeachtet ihrer tatsächlichen Durchsetzung, deren empirische Feststellung in praxi ohnehin unmöglich ist.") and FN 35.

\textsuperscript{131} ARFAZADEH, op. cit., 240-241
is also valid for the majority of decisions concerning substantive public policy.  

3.2.6 Elements of comparative law  

88. It is a clear international trend that an award may not be set aside because of a violation of simple mandatory rules, but of fundamental rules pertaining to the given legal order. For example, the Austrian § 595(1) 6 of the ZPO speaks of "basic principles of the Austrian legal order", from which one has to infer the Austrian international public policy.  

The same is valid in French legislation (Art. 1502 (5) NCPC). In German law (§ 1059 II Nr. 2b ZPO), an award violates public policy when it infringes a rule, which is aimed at governing State- or economic life, or when it is unacceptably in contrast with the German feeling of justice.  

3.2.7 Conclusions  

89. At this point we have already mentioned that universal or transnational public policy is not the product of a national judicial system, but of perceptions of public policy conceived by all civilised States and by the parties of international trade. We have also stressed that the difficulty concerning universal public policy resides principally in its origin, since the absence of

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133 LIEBSCHER, op. cit., 360

134 LÖRCHER, Das internationale Handelschiedsverfahren in Frankreich, in Böckstiegel: Internationales Wirtschaftsrecht, 1997, 86-93

135 SCHWAB/WALTER, op. cit., Kap. 30, N. 21, who also denied the need in Germany of a distinction between international and domestic public policy.
references to a given national legislation implies a failure to be clear and, accordingly, much uncertainty and unpredictability. On the other hand it is also evident that the parochial concept that all disputes must be resolved under domestic laws, is really irreconcilable with the nature of international trade, which cannot be assessed and governed exclusively by municipal laws.

90. To sum up it is, in the end, reasonably clear that the UEFA decision excludes:

(a) the extreme terms of the problem: on the one hand the mere domestic public policy and on the other hand the pure transnational and universal public policy, with its stateless approach.

(b) and also excludes public policy pertinent to *lex causae*, by mentioning the word "Swiss". Besides, this theory introduces a parallel in judicial behaviour between State judges and arbitrators which, although very seductive, is contrary to the entire system and would have the inadvisable consequence that the FT would have to review the applicable law, included the "lois the police", with all its related difficulties.

So the question is: what is the meaning of this case law in this context? Especially, does it exclude entirely the idea of a universal public policy to the full advantage of that of "Swiss international" public policy, or does this give a more concrete possible form to intermediate systems?

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137 See also WALTER, op. cit., Bull ASA 2001, 18

138 HEINI, op. cit., Art. 190, N. 45. See also: *infra §§ 113.-115.*
Federal Justice CORBOZ\textsuperscript{139} provides an authentic interpretation of that case-law in a recent writing, voicing two fundamental statements:

(a) First of all, the UEFA case law is an act of modesty and intellectual realism. We have already mentioned the limits and the extreme uncertainty bound to the concept of public policy in general and of universal public policy especially. No wonder therefore, (above all for State judges\textsuperscript{140}), that public policy examination should be based upon a well known and well determined judicial order and it is natural that, for the Federal judges, it should be the Swiss order.

(b) Secondly, it is said here that this formula will give us a possibility to defend fundamental values relevant to the concept of civilisation of the country to which it refers.
It is evident that, although somewhat enigmatic, this statement implies that the relevant public policy is "Swiss" in its origin. On the contrary, it does not in fact prescribe that the FT simply withdraws into itself and evaluates the consistence of the award with public policy, by basing itself on merely domestic judicial concepts. In fact, the subject matter of this public policy "Swiss in its origin" must be adjusted in order to take into account its international vocation and accordingly defined, even by recourse to international evaluation factors for example, and if that is the case, to the morals of the international trade, as well as recognised and universal human rights.\textsuperscript{141}

This statement of fact is sustained by a certain amount of converging circumstantial evidence:

\textsuperscript{139} CORBOZ, op. cit., 25
\textsuperscript{140} So that not even the principal sponsor of universal public policy, that is prof. LALIVE, went so far as the FT did, that is to say to impose the application of transnational public policy not only to arbitrators, but also to State judges (LALIVE, op. cit., Rev. Arb. 1986, p. 368 "H"). See also ARFAZADEH, op. cit., 239.
\textsuperscript{141} LALIVE/POUDRET/REYMOND, op. cit., Art. 190, N. 5e), 428-429; JERMINI, op. cit., 265, N. 533-538 (who speaks of a "rechtsvergleichende Analyse"). See also § 13 and 122-123
92. (a) First of all public policy by virtue of Art. 190 PIL has also - according to the mentioned new theories of BERTI and KAUFMANN-KOHLER - a positive function. It is, in fact, undeniable that international arbitration relies on subject matters pertaining to international trade and is thereby denationalised to a great extent. The Federal tribunal despite the terminology used, has also confirmed the existence of such a positive or propositive function, by stating the need (as will be seen below) to guarantee a minimum level of quality for Swiss international awards.

93. (b) The quotation of DFT 125 III 443 which pertains to Art. 17 PIL and which, above all, lays down the famous formula according to which public policy defence must be taken into account (i.e. in situations deprived of narrow links with Switzerland) only in the event of violation of a rule of the judicial order, which is nearly permanent and universal (supra § 13.).

So, if it is true that the concept of "Binnenbeziehung", in the terms applied by the case law according to Art. 17 PIL, does not play a role in arbitral context, the underlying reasoning may however be applied mutatis mutandis to Art. 190 PIL. In other words, although it is not a question of "Binnenbeziehung", the qualified international character subtended to international arbitral proceedings imposes an intellectual process which to some extent may have some similarities.

To sum up, it is by starting from the "Swiss viewpoint" that decisions are to be taken as to whether an arbitral award violates those fundamental principles common to all "civilised States" (i.e. "universal principles" according to the meaning accepted by case law), provided that by this examination the judge concerned will take sufficient care to consider and to adapt - when and if necessary - the "Swiss by origin" character of its

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142 DFT 120 II 155 cons. 6a) (167); BERTI/SCHNYDER, op. cit., Art. 190 N. 75; KAUFMANN-KOHLER, op. cit. 281. Principle which is evidently not questioned by the significant regression of the importance of transnational public policy (see ARFAZADEH, op. cit., 242).
public policy to parameters that are truly international or transnational.

94. (c) The topicality of a certain concept of universal public policy, although defined by the limits described above, is proved by the fact that the FT refers to it, explicitly, in a decision of 1st February 2002\textsuperscript{143} that is subsequent to UEFA case law. In that particular case, although it was clear that Art. 81 ECT did not pertain to Swiss public policy, the FT added a paragraph stating its scepticism towards the idea that provisions of national or European competition law actually belong to fundamental judicial or moral principles, and that they should be recognised as such by all "civilised States" in such a way that any infringement of them should be considered a breach of public policy.

At this point it is quite legitimate to ask oneself what role is actually (and currently) played by the concept of universal or transnational public policy.

95. (a) Certainly in the event that an arbitral award were consistent with Swiss public policy (in the above mentioned "very international" concept of this term), there would be no reason to question as to whether there could be a contrariety to transnational principles.\textsuperscript{144} Indeed, at most, this latter concept may serve as a reinforcement of a solution already adopted anyway in the light of the Swiss viewpoint. In any case it is difficult to conceive that a rule of universal public policy could be infringed, without an equivalent infringement of Swiss public policy, as that would signify an evident rebuttal of the intrinsically civilised character of Switzerland which, evidently, would be false.\textsuperscript{145}

\textsuperscript{143} DFT of 1.2.2002 cons. 4c) (case 4P.226/2001).
\textsuperscript{144} This is exactly the scheme followed in a recent DFT of 7.8.2001 cons. 3b), in Bull ASA 2002, 88 (93). See also KAUFMANN-KOHLER, op. cit., 282
\textsuperscript{145} BERTI, op. cit., in Festschrift für Anton Heini, Zurich, 1995, N 23; KNÖPFLE/SCHWEIZER, in SZIER 1994, 105
96. (b) By contrast, where an award infringes Swiss public policy (as defined above) the problem is the following: must the Swiss judicial order withdraw from the annulment of the award, when the infringed provision is not a part of transnational public policy (that is to say the Swiss solution is not common to the civilised nations as a whole)? According to KAUFMANN-KOHLER\textsuperscript{146}, yes, whilst BERTI\textsuperscript{147} seems to be more prudent. Quoting a case of treble damages between two parties domiciled in USA and where Switzerland operated only as a neutral seat of the arbitral tribunal, without any other factual links, he voiced the following opinion: in such cases, where there is a qualified international feature one has to bear in mind the idea of capability of the award of being exported abroad, for example, like in the case in point the USA, where it would be perfectly consistent with the fundamental principles of the majority of these judicial systems.\textsuperscript{148} Accordingly, the requirements of Swiss public policy must be, by their very nature, very mitigated.\textsuperscript{149}

97. In synthesis it seems difficult in my opinion, to share the viewpoint of KAUFMANN-KOHLER in light of the (authentic) statement of Justice CORBOZ, that is the idea of a defence of the fundamental values of Swiss civilisation, including the judicial one, by means of Art. 190 para. 2 lit. e) PIL. Such a defence would be activated precisely in the event of Swiss public policy being violated and would be too easy to avoid - by applying the rules of universal public policy (regardless of the respective practical problems) - as soon as another "civilised" nation reached an opposite position.

\textsuperscript{146} KAUFMANN-KOHLER, op. cit., 282-283

\textsuperscript{147} BERTI, op. cit., in Festschrift für Anton Heini, Zurich, 1995, 9-10

\textsuperscript{148} See also DERAINS, Intérêt moratoires, dommages-intérêts compensatoires et dommages punitifs devant l'arbitre international, Études offertes à Pierre Bellet, Paris 1991, 101 et seq. (117).

\textsuperscript{149} This was exactly the approach of a remarkable decision 1.2.1989 of the ZivGer. Basel-Stadt (BJM 1991, 31) rendered in the context of art. 27 PIL. Here, after a detailed examination of the function actually played by the punitive damages awarded by a California Court, that judgement has been considered consistent with Swiss public policy.
Rather, by the construction of the "very international" Swiss "by its origin" public policy - following the lines of BERTI, and what has been put forward above - the State judge should carefully consider the pertinent international factors, even those of a universal or transnational character (above all in situations like those quoted by BERTI, where the international aspect is somewhat qualified) as elements of modulation and mitigation inherent in Swiss public policy.

3.3 Definitions of substantive and procedural public policy

3.3.1 Substantive public policy

98. The material findings regarding a litigious claim only violate public policy if they run against fundamental principles of law so as to be totally incompatible with the relevant legal order and system of values. These principles include, especially, the maxim pacta sunt servanda, the prohibition of the abuse of law, the principle of good faith, the prohibition of uncompensated expropriation, the prohibition of discrimination and the protection of the incapacitated.150

99. In fact, with reference to this last element - the incapacitated who are not represented in trial - case-law has ruled this principle since 1955.151 Thus this aspect of fundamental principles shows that it is not restricted merely to the substantive aspect of public policy, but that it also extends to procedural aspects.


151 DFT 81 I 139 cons. 5
3.3.2 Procedural public policy

100. The Federal Tribunal left undecided for many years the question as to whether Art. 190 para. 2 lit. e) PIL also encompasses procedural public policy.\textsuperscript{152}

Finally, by a decision of 30th December, 1994\textsuperscript{153} the Supreme Court formally acknowledged its existence,\textsuperscript{154} rapidly specifying, though, that it represents only a clause of defence, that is to say, it only plays a protective (negative) function and does not have any normative effect.

In fact the legislator did not intend that this principle might be extensively interpreted so that one may derive from it a code of arbitral procedure, to which the arbitral procedure freely chosen by the parties must be subject.\textsuperscript{155}

To sum up: procedural public policy simply guarantees parties the right to obtain independent decisions making process in respect of their pleas, and of the facts of the cases that have been

\textsuperscript{152} DFT 116 II 373 cons. 6


\textsuperscript{154} Even though the Federal tribunal mentioned this concept of procedural public policy (but in much less explicit terms) by decisions which are far earlier, particularly one of 23.10.1989 cons. 2) in Bull ASA 1990, 51 (see also the note by KNÖPFLE/SCHWEIZER, in SZIER 1991, 337); another of 1.7.1991 in DFT 117 II 346 cons. 1, both referring to the subject matter of defining the relations between the lit. d) and lit. e) of art. 190 para. 2 PIL.

\textsuperscript{155} DFT 126 III 249 cons. 3; DFT 120 II 155 cons. 6a); SCHNEIDER, op. cit., Art. 182 N. 1-2; KNÖPFLE/SCHWEIZER, in SZIER 1996, 549 e in SZIER 1999, 598-599, who stresses that - bearing in mind the definition of public policy and the limits set out by art. 182 para. 3 PIL to the procedural guarantees that can be invoked by the parties - the margin is extremely reduced. In fact, within the limits of art. 182 para. 3 PIL and since the silence of the PIL regarding any other procedural question, the arbitral tribunal benefits from a wide autonomy in determining and applying the procedure, which governs the dispute. For instance it is not bound to the domestic procedure of the seat of arbitration. BLESSING, op. cit., in Böckstiegel: die internationale Schiedsgerichtsbarkeit in der Schweiz (II), 1989, 51-(55). Infra §§ 119.; 125. (c) and 186. et seq.
submitted to the Tribunal, in compliance with the applicable procedural rules.\textsuperscript{156}

101. With respect to its subject matter, in that first decision of 1994, the Federal tribunal gave a very Swiss tone to its deliberations, ruling that a violation of procedural public policy must be affirmed in case of infringement of fundamental and generally-accepted procedural principles, whose non-compliance would bring about an intolerable contradiction with the feeling of justice, so as to make the award inconsistent with the fundamental values as they are conceived in Switzerland. Accordingly the procedural public policy is not at any rate violated when the solution stated in the award corresponds to a procedural provision in force in Switzerland.\textsuperscript{157}

Subsequently this "Swiss" valence has been a little edulcorated by the case law and replaced by the idea of incompatibility with legal and moral fundamental principles recognised in a democratic State\textsuperscript{158} and, of course, Switzerland naturally takes

\textsuperscript{156} The fact of mentioning the concept of "parties", implies that the tribunal recognises for these parties - physical or moral persons - the right to judicial action in defence of their rights. Because this a prerequisite of the entire definition of procedural public policy, it must necessarily have, in itself, a nature of this kind (see affirmatively also NIBOYET, Rev. Arb. 2000, 278 regarding French law).

\textsuperscript{157} Actually, the FT denied admitting a breach of procedural public policy within the arbitral award, which allowed an amendment of the action, because a variation of this kind (and under the condition that the initial exposition of the facts would not be modified) is admitted by the majority of the various Swiss Cantonal Statutes of procedure (cons. 1b). See also: infra §§ 186.-188.

\textsuperscript{158} DFT of 11.6.2001 cons. 2d) in DFT 127 III 429 and in Bull ASA 2001, 566; DFT 126 III 249 cons. 3a+b) with further ref., even though, once again the FT goes back to the Swiss domestic procedural principles in this latter decision, so as to define the boundaries of procedural public policy (with a note by K\ÖPFLE/SCHWEIZER in SZIER 2000, 595). To sum up, it is right to affirm that, in fact, the parameter of reference always be that of Swiss procedural law, exactly as is to be found with reference to LC and Reg. 44/2001 (DONZALLAZ, op. cit., 420-421).
her place alongside the others. For instance, the right to a fair trial, so-called "due process".\textsuperscript{159}

Having said that, the regime of procedural public policy is not necessarily the same of that governing the substantive one. It is, in fact, a world apart and shows some notable differences:

102. (a) Certainly, a procedural flaw must be immediately notified, if known, to both the arbitral tribunal and the opposing party. In fact, the procedural behaviour by which a party invokes such a flaw is important. For instance, if done simply by means of an appeal taken against the judgement - because it is unfavourable to the aggrieved party - it constitutes a violation of the good faith principle and of the principle of absolute subsidiarity of a motion for constitutional review.\textsuperscript{160}

103. (b) Secondly, a crucial question in this context is: is a causal nexus required between the violation of the procedural public policy and the result of the award? According to BRUNNER,\textsuperscript{161} quoting DFT 121 III 331, this is not the case because the scope of the challenge procedure is not to assure a correct decision on the merits, but to make sure that the parties may benefit from an independent adjudication of the relief sought and submitted, in compliance with the applicable procedural rules. This theory seems to me perfectly correct and in line with the system of the Lugano Convention and of Reg. 44/2001, as well as Art. 27 PIL.\textsuperscript{162}

\textsuperscript{159} DFT 126 III 327 cons. 2b) and further ref. See also: infra §§ 192.-203.
\textsuperscript{160} DFT of 25.7.2000 cons. 3a) (4P.212./1999/rnd); DFT of 25.7.1997 cons. 2d) in Bull ASA 2000, 96 (103); BRUNNER, Procedural public policy as a ground for setting aside international arbitral awards. Comments on the Swiss federal Supreme Court's decision of April 28, 2000 (Egemetal v. Fuchs; ATF 126 III 249) in Bull ASA 2000, 576; WALTER, op. cit., Bull ASA 2001, 8, 10.
\textsuperscript{161} BRUNNER, op. cit., in Bull ASA 2000, 571
Even federal justice CORBOZ, in his conclusions regarding the importance of a proper decision-making process, explicitly quotes only substantive public policy, when it is a question of confirming the existence of the causal nexus in point (p. 26).

104. (c) Finally, a brief consideration must be undertaken with respect to the theory of "mitigated effect of public policy", which seems to find its place even in the context of arbitration. The FT applies this theory both for substantive and procedural public policy. This gave rise to criticism by Prof. SCHWANDER who, in synthesis, argued that in response to the question as to whether due process has been violated or not, one may answer only by a yes or a no, and that intermediate solutions are not admissible.

This censure, to me, seems quite convincing: all the more in an arbitral context. The viewpoint of procedural public policy is, in itself, very narrow and there is little need to confine it even more, otherwise the aim to assure a proper decision-making process would become an illusion.

105. To sum up: although the FT did not catalogue the identity of such principles of procedural public policy, it is absolutely wrong to assert - as some commentators seem to do - that, in the end, it is an "empty category". Such a statement disregards the fundamental significance of a proper decision-making process, which has played for many years a pre-eminent role in the context of recognition of foreign awards and judgements (on those many occasions when it has been put into practice) and which has the same relevance within Art. 190 PIL.

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163 CORBOZ, op. cit., 30 ("...le recours au Tribunal fédéral est largement ouvert (...) lorsqu'il s'agit (...) de s'assurer que la procédure a respecté les standards minimaux d'un procès équitable...").

164 DFT 116 II 625 cons. 4a); DFT 85 I 39 cons. 4a); SCHWANDER, op. cit., 172-174. Supra § 83.

165 KREINDLER/KAUTZ, Agreed deadlines and the setting aside of arbitral awards, in Bull ASA 1997, 582.
3.4 Quality control of arbitral awards

In some decisions of the Federal tribunal, one may even find beside the traditional formula of public policy, an additional element of following tenor: Art. 190 lit. e) has the additional scope of guaranteeing a certain minimum qualitative level to Swiss international arbitral awards. Thus, an award is also contrary to public policy, if it is vitiated by an internal contradiction.\(^{166}\)

3.4.1 General aspects

What is the meaning of this notion of "guaranteed minimum quality" regarding an arbitral award? Where is the threshold below which the quality of a judgement becomes unacceptable? Of course the award may apply the law incorrectly, even manifestly wrongly, without being, for that, contrary to public policy. But there is a limit: and that limit is when the award is so wrong as to became absurd, and thus harmful to the reputation enjoyed by Switzerland as a privileged and suitable environment for international arbitration, in the unlikely event that the appeal Court would uphold the effectiveness of such a decision. In this case, such an award would be vitiated in its own terms by a flaw so fundamental as to be unworthy of carrying the distinction of being a Swiss international arbitral award.\(^{167}\)

\(^{166}\) DFT of 10.11.2000 cons. 3b)aa) in Bull ASA 2001, 102; DFT of 17.2.1999 cons. 4a) in Bull ASA 2000, 311 (318) (with a note by KNÖPFLE/SCHWEIZER in Szier 1999, 607); DFT of 30.12.1994 cons. 2b) in Praxis 1995 N. 204, 665 (671) and in Bull ASA 1995, 217: quoting BERTI, op. cit., in Festschrift für Anton Heini, Zurich, 1995, 7 et seq.; VISCHER, op. cit., Art 17, N. 32. This requirement is not exclusively Swiss. For example in England s. 68 of the Arbitration Act 1996, mentions as one of the serious irregularities under f): "uncertainty or ambiguity as to the effect of the award" and in the USA courts will set aside an award that is "incomplete, contiguous or contradictory" (SANDERS, Quo Vadis Arbitrations? Sixty years of arbitration practice, Kluwer, 1999, 337).

\(^{167}\) BERTI, op. cit., in Festschrift für Anton Heini, Zurich, 1995, 7-8. As can be seen, this requirement also operates for decisions of State courts, as is apparent in the comment - at times, most virulent - regarding the
3.4.2 Contradiction within the award

108. Interpreting literally the statement of the Federal Tribunal, it would seem that any contradiction within an award could be capable of violating public policy by virtue of Art. 190 para. 2 lit. e) PIL. On the one hand, this conclusion is perfectly consistent with the principle *pacta sunt servanda*, which would be violated were the arbitrator do contradict himself. On the other hand, a conclusion of this kind would be very difficult to sustain in the light of the concept of arbitrariness under Art. 36 lit. f) Concordat.

Precisely for this reason the FT has consistently repeated that public policy is, in itself, much more restrictive as a ground for setting aside a judgement than arbitrariness, whilst contradictory decisions are precisely one of the specific subject matters of arbitrariness. Furthermore, following this line of reasoning would risk extending the grounds for setting aside laid down by the law, thus undermining the aim and the logic of the system, because it is not unusual that judgements (and even arbitral awards) have contradictions of minor or little significance.

109. Therefore it seems necessary to limit the field of application of this principle only to contradictions so important that they can be defined as "qualified" and, therefore, constitute a violation of public policy. Where should the incompatibility threshold be established with reference to public policy?

In the first place, the contradictions would have to affect the result of the award and not just the reasoning; the opposite would distort the whole system of public policy. Regarding the incompatibility threshold, the theory of HABScheid seems

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"Bangladesh decision" by P. LALIVE Arbitrage international et ordre public suisse, in Revue de droit Suisse. 1978, p. 529 et seq. against the famous DFT 102 Ia 574 (in the matter SGTM vs. Bangladesh).

DFT of 15.5.2001 in the matter B vs. G. (4P.8/2001) cons. 1b; KNÖPFLER/SCHWEIZER, in SZIER 1999, 622 with further ref.

In this sense, see also KNÖPFLER/SCHWEIZER, in SZIER 2001, 531

HABScheid, op. cit., in Festschrift für Max Keller zum 65. Geburtstag, Zurich, 1989, 584
interesting. According to this theory, an incomprehensible award, or an award which is contradictory in itself, violates public policy: what cannot be comprehended, cannot be binding. The key concept seems therefore to be the incomprehensibility of the award (or of its tenor), subsequently to these whole contradictions that vitiate it, in certain types of similar applications regarding Art. 36 lit. h) Concordat. 171

110. By a decision of 21st June, 1995172 the FT dealt with the question as to whether an incomprehensible award is absolutely void and therefore subject to review at any time and ex officio. The supreme Court after having remembered that an incomprehensible award is not necessarily absurd and must, as far as possible be clarified and interpreted,173 ruled that absolute voidness must be confined to the exceptional cases in which the award is absurd or contradictory to such an extent that it could not be executed. 174

111. To sum up, it seems quite clear that the prerequisite in order to challenge the award for the grounds here in hand, is that the aggrieved party must have previously applied to the arbitral tribunal for an explanation and for the rectification of the award. 174 If the award, after having been interpreted or rectified, remains incomprehensible, it may be attacked for breach of

171 This issue has, in fact, similar features to the solution provided by the Concordat, which in Art. 36 lit. h) explicitly lays down the grounds for attack that the order is unintelligible or contradictory. By contrast, the question of contradiction between the tenor and the reasoning, and a fortiori among the reasonings themselves, is ruled at lit f). In fact, albeit the tenor of the award is in itself unintelligible or contradictory, the ground of annulment of lit. h) is not fulfilled, if the reasonings of the award permit comprehension of its sense or refusal of a contradiction (JOLIDON, op. cit., Art. 36, N. 11 (523); RÜDE/HADENFELD, op. cit., 348).

172 DFT of 21.6.1994 (4P.267/1994) cons. 3a

173 The same is valid under German law: see SCHWAB/WALTER, op. cit., Kap. 24, 264 N. 42

174 DFT 126 II 524 with further ref.; BERTI/SCHNYDER, op. cit., Art. 190 N. 97
public policy and, if it remains so absurd of being incapable of execution, it is absolutely void.

3.5 Negative function of public policy

112. According to consistent case-law both the substantive and procedural public policy by virtue of Art. 190 para. 2 lit. e) PIL represent a simple defense of incompatibility and, therefore, have merely a protective and negative function (negative public policy), and do not have any normative effect (positive or normative public policy) on the legal relations in dispute. Accordingly, the grounds for setting aside provided by this provision are uniform, that is to say they have no correlation with the substantive law applicable on its merits.\(^\text{175}\)

This is the technical explanation of the mechanisms explained at §§ 39-40. This lack of a positive effect of public policy means that the FT does not examine whether the arbitrators have applied or not interventionist norms of the \emph{lex causae}, or of a third State connected with the facts in dispute. But the FT may evaluate the result of application, or not, of such interventionist norms by the arbitrators (only) in light of negative public policy, and may set aside the award (only) if it ascertains that this result is violating it. It is only in these terms that the FT will take into account interventionist norms of the \emph{lex causae}, or of a third entity.\(^\text{176}\)

113. The Federal tribunal made this function plain in the Westland decision, when it made two specific applications of this principle.


First of all, by cons. 6b) ccc), which concerns the application of the principle of contractual faithfulness. Here, the FT ruled that is not contrary to fundamental principles of the international judicial order to admit that a contractual relationship may be created without reference to any subjective intentions of one of the parties, provided that the corresponding parties have concluded the relationship in good faith.

Having stated this principle, the FT noticed that the arbitral tribunal had referred specifically to it, in the conception of the award made. It concluded that: knowing whether this was done correctly, that is in compliance with substantive law applicable on merit, was not relevant in relation to the point of view of negative public policy pursuant to Art. 190 para 2 lit. e) PIL. In fact, the contents of the applicable law did not constitute, in this context, a criterion of evaluation, because of the merely negative and protective function of public policy.

Second, by cons. 6e) of that same decision\textsuperscript{177} the FT ruled that the objections of the aggrieved party, according to which the arbitral tribunal had violated the applicable Swiss law in determining the damages and in fixing the amount of the compensation granted, were based upon a positive conception of public policy and took into account the content of the applicable substantive law. This was averse to public policy pursuant to Art. 190 para. 2 lit. e) PIL, which assigns a mere protective function to it, so that it becomes a sort of safety valve. So much so that under this negative viewpoint, the manifest violation of a clear provision of foreign law does not necessarily harm fundamental principles of our judicial order (respectively of another judicial order or transnational).

In fact, irrespective of a merely terminological assessment, \textsc{Lalive} and \textsc{Berti}\textsuperscript{178} are right to mention that public policy by virtue of Art. 190 PIL is something more then a simple safety valve, and that it has also some "positive" implications.

\textsuperscript{177} Non published in the official report but in Bull ASA 1994, 404 (424).

\textsuperscript{178} \textsc{lalive} op. cit., in Revue de droit Suisse. 1978, p. 546; \textsc{berti}, op. cit., in Festschrift für Anton Heini, Zurich, 1995, 7-8
Particularly, it imposes - positively - the respect of minimum standards, for instance the compliance with a so fundamental principle as good faith or *pacta sunt servanda*. On the other hand, it also operates (as seen above) as a quality control for awards, which has nothing to do with a mere negative function, but is evidently a positive one.

4. **Public policy and European Convention on Human Rights**

115. Art. 6 of the European Convention on Human Rights (EHRC) guarantees that every person is entitled to be tried by an independent and impartial tribunal established by law,\(^\text{179}\) but with the latitude to abdicate this right by entering into an arbitration agreement. Thus, the central question is, naturally, the meaning, if any, of the procedural guarantees of the Art. 6 Conv. in arbitral procedure (4.1.) but also, what can and should be the contribution of the human rights, codified in the Convention (or in other articles of law) for the definition of public policy according to the Art. 190 para. 2 lit. e) PIL (4.2).

4.1 **Art. 6 of the Convention and procedural public policy**

116. Regarding the pertinence of art 6 EHRC to arbitral proceedings, legal writings and case law exclude as a rule its direct application to willing arbitral proceedings, that is to the arbitral disputes based upon an arbitral agreement underwritten

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\(^{179}\) Art. 6 § 1: "In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgement shall be pronounced publicly by the press and public may be excluded from all or part of the trial in the interest of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice".
by the parties themselves (i.e. not under compulsion). By
contrast, in the event of an imposed arbitration, in the sense that
the arbitration is mandatorily laid down by the law, the parties
have no room to take their dispute away from the decision of an
arbitral panel. Accordingly, in this second case the procedural
warranties of Art. 6 of the Convention are perfectly applic-
able.181

117. To sum up and as precisely ruled by the Federal Tribunal,182
in the light of Art. 6 EHRC, the parties in arbitration are not
entitled to claim that they have not benefited from all the
procedural guarantees that they could have derived from this
provision if the dispute had been subject to State jurisdiction. In
fact, provided that the choice of arbitral jurisdiction was

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180 See recently DFT of 11.6.2001, in DFT 127 III 429 and in Bull ASA
2001, 566 but with the exception, from a formal point of view, of the
reference in Art. 6 EHRC to an independent and impartial court, which
applies not only to State courts, but also to arbitral tribunals (DFT 118 II
359 cons. 3c); PETER/FREYMOND, in International Arbitration in
Switzerland, 2000, Art. 180, N. 19, with further ref.; WALDER, op. cit.,
Bull ASA 2001, 16). However from a material point of view this
exception is insubstantial, because Art. 6 para. 1 EHRC does not have
significance independent of Art. 58 (old)Const. (now Art. 30) (related to
the right of impartiality and the independence of Tribunals), which is also
applicable to arbitral tribunals (DFT of 9.2.1998 cons. 3a), in Bull ASA
1998, 634 (645). In other words, the EHRC does not grant wider
protection in comparison to what is laid down in the Swiss Federal
Constitution (DFT 116 Ia 135 cons. 2b).

181 DFT 112 Ia 166 cons. 3a (where the FT also states that, by contrast, Art. 6
EHRC is applicable to the proceedings at the appeal stage); MATSCHER,
Schiedsgerichtsbarkeit und EMRK in Festschrift für H. Nagel zum 75.
Geburstag, Münster, 1987, 233-234, 238; JARROSON, L'arbitrage et la
convention européenne des droits de l'homme, in Rev. Arb., 1989, 573,
who makes plain, among other things, an interesting distinction: it is not
the arbitral procedure which is governed by the Convention, but it is the
right to have recourse to arbitration for the resolution of disputes, which
has to comply with the principles laid down by the Convention. The
nuance is significant, because the State is the addressee of the control, as
it permits arbitration, and not the arbitrators, since they carry out a
specific jurisdictional function. See also: supra FN 1.

182 DFT of 9.2.1998 cons. 3a, in Bull ASA 1998, 634 (645)
consistent with the law, the parties must assume the consequences of this choice themselves.

118. Nevertheless, when parties opt in favour of an arbitral tribunal with its seat in Switzerland (Art. 176 PIL), they do not completely waive their basic rights as defined by the procedural guarantees provided by the State. On the contrary. Although it is true that the PIL grants ample autonomy to parties and arbitrators through the definition and the composition of the procedure applicable to the dispute, they also have to comply, in any event, with the mandatory rule of Art. 182 para. 3 PIL (right to be heard and equal treatment of the parties), as well as with the right to challenge the arbitrators (Art. 180 PIL) and, above all, with the procedural guarantees underlying all five grounds for setting aside provided by Art. 190 para. 2 PIL, especially procedural public policy. In synthesis, the Swiss *lex arbitri*, even in the scarcity of its rules concerning procedure, provides adequately so as to guarantee a sufficient minimum standard of fair procedure, even within arbitral proceedings. Having said that, however, it is also fair to say that the corrective intervention of the State is much more restricted in arbitration when compared to State tribunals.\footnote{See in particular Schnei-\footnote{ders, op. cit., Art. 182, N. 1-24; Schwab/\footnote{Walter, op. cit., Kap. 1, 1. One may find the same situation, according\footnote{to Jarrosson (op. cit., 595) in every member State of the New York\footnote{Convention of 10.6.1958. See also DFT 112 Ia 166 cons. 3a) and\footnote{Schwander, op. cit. p. 165, where he proposes a list of possible subject\footnote{matters of due process which, practically, are entirely encompassed by the\footnote{rules of Chapter XII PIL (for subjects pertaining to arbitration). Supra §§\footnote{101-102.}}\footnote{\footnote{184} Matscher, op. cit., 236-237, 240, 243\footnote{183}}}}}}}}

4.2 The Convention and public policy

119. As the Convention is, in principle, not directly applicable to arbitral proceedings, neither in the wording nor in the spirit, it is necessary to ask oneself whether the same could constitute - for an arbitrator or for an authority of appeal - a reliable source of
inspiration regarding the construction of concepts of public policy.
Evidently, the principal subject matter of the Convention was public freedoms and the compliance of the State and its bodies to them. Its nature was markedly referred to questions of a penal (i.e. criminal) nature and, in fact, civil matters were very much of secondary importance. In particular, the context of international arbitration has noting to do with the fundamental rights to life, banning torture and slavery, freedom of movement, of thought, of expression or of assembly, respect of privacy and of correspondence. On the other hand, one must also stress that some principles of Art. 6 ECHR are even contrary to certain features of arbitration, first of all concerning the confidentiality of the proceedings, which prevent the operation of the principle by which a judgement should be publicly pronounced.\textsuperscript{185}

120. Having said this much, thus confirming the conclusion that this Convention was not directly applicable to international arbitration, it must be noted that this outcome is not an obstacle to an \textit{indirect application} of it, in so far as its being a source of inspiration.

The difficulty, of course, resides in knowing in which manner these provisions should be taken into account. Briefly, for our purposes, the question is to determine whether this complex set of rules should be considered as being part of the "general principles of law", i.e. rules of fundamental and universal relevance, regarding both procedural and substantive public policy.

121. Legal writings and case law consider the principles aimed at preventing serious abuse and violation of human rights which are so important that they have become part of a fundamental public policy that is, effectively, an expression of basic

\textsuperscript{185} JARROSSON, op. cit., 592; SCHWAB/WALTER, op. cit., Kap. 16, 179
principles of universal justice and, thus, an integral part of a truly international public policy.\footnote{186}

Even the European Court of Justice (ECJ), in the recent decision of 28th, March 2000\footnote{187} - in respect to Art. 27 para. 1 of the abrogated Brussels Convention - deals with the question as to whether the refusal to hear a defendant's lawyer by the French Foreign Court was an infringement of German public policy and, in view of constitutional rights, common to the contracting states, and of judgements of the European Court of Human Rights, ruled that a court was entitled to hold that a refusal to hear the defense of an accused person, who was not present at the hearing, constituted a manifest breach of a fundamental right and subsequently, on those grounds, to refuse recognition under Art. 27 (1).

122. This approach should be asserted. By the assessment of an eventual breach of public policy and, naturally, procedural public policy, the appellate jurisdiction and the arbitrators should not omit to take into account the EHRC, United Nations Agreements on Human Rights, UN Convention on the elimination of discrimination against women, the UN Convention on the rights of the child, or the UNESCO Convention on the means of prohibiting and preventing the illicit import, export and transfer of ownership of cultural property.\footnote{188}

To be more precise: through analysis concerning the violation of procedural public policy based anyway on federal and Cantonal statutes of procedure (\textit{supra § 101.}), one must put a special stress and pay special attention to the basic principles derived from these conventions. In fact, these can act as credible guidelines as to whether the minimum procedural guarantees,
that one may rightly expect from arbitral justice, are, in fact, actually given or not.¹⁸⁹

123. Evidently, beyond this theoretical statement, the court has to assess in every single case the concrete relevance of every single norm (of these Conventions) invoked by the party and its consistence with the arbitral proceedings. Of such a pragmatic approach there is a trace in a decision rendered by the FT the 11th, June 2001,¹⁹⁰ regarding an appeal brought against a Court of Sport-related Arbitration (CAS) award ruling the suspension for six month of a football player from all UEFA competition matches. Before the FT, the aggrieved party invoked both Art. 3 of the EHRC (prohibition of torture) and Art. 8 of the same (respect of economic necessity). For both provisions the FT got to the heart of the matter and after a (very) brief examination of the case denied any infringement of the award with public policy, in the light of these two provisions.

5. The penetration of public policy into other grounds for setting aside of Art. 190 para. 2 PIL

5.1 General aspects

124. The Swiss legislator has deliberately reduced the grounds for setting aside international awards. There are three main consequences ruled by the case law:

(a) The grounds specified in Art. 190 para. 2 PIL are exhaustive.¹⁹¹

(b) Re-examination, on the merits of an arbitral award, is limited to the question as to whether public policy is violated

¹⁸⁹ See also JARROSSON, op. cit. 605, 607
¹⁹¹ DFT of 11.6.2001, in DFT 127 III 429 and in Bull ASA 2001, 566; DFT of 2.3.2001 cons. 3b in Bull ASA 2001, 531; DFT 127 III 279 cons. 1a; DFT 126 III 524 cons. 1a; DFT 119 II 380 cons. 3c; DFT 115 II 102 cons. 3a.
(lit. e). For the rest of Art. 190 para. 2 PIL (lit. a-d), the relative grounds are based on questions of procedure.

(c) Procedural public policy (lit. e) protects fundamental procedural values that cannot be directly inferred from lit. a) and d) of Art. 190 PIL, from being violated. Thus, the breach of procedural rules agreed upon by the parties may lead to the annulment of the award, only if at least one of the grounds for setting aside of lit. d) or lit. e) is contextually fulfilled. This means, in synthesis, that not all the rules of procedure adopted by the parties - either directly or with reference to a national legislation or to a set of rules tied to an arbitration institution - deserve the protection provided by Art. 182 and 190 PIL.

In particular, the grounds for setting aside by virtue of Art. 190 lit. d) PIL sanction only the mandatory principles laid down by Art. 182 para. 3 PIL, i.e. equal treatment of the parties and the right to be heard. Thus, one must deduce, a contrario, that the infringement of other procedural rules of minor importance does not concern the regularity and effectiveness of the award, at least until it does not harm parity between the parties, the right to be heard in contradictory procedure, or public policy by virtue of Art. 190 para. 2 lit. e) PIL.

5.2 Interrelation with the right to be heard (lit. d)

5.2.1. General aspects

125. We have already emphasised that the grounds for attack, laid down by Art. 190 lit. d) PIL only sanction the mandatory principles provided by Art. 182 para. 3 PIL and, for instance, can confer to each party in dispute, the right to express themselves before any decision to their detriment can be taken;

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192 DFT of 24.3.1997 cons. 1a in Bull ASA 1997, 316 (320); DFT 126 III 249 cons. 3a; JERMINI, op. cit., 318, N. 645
194 DFT of 11.5.1992 cons. 5 in Bull ASA 1992, 381 (396); DFT 117 II 346
to produce appropriate evidence on relevant statements of fact (i.e. facts disputed and capable of influence on the decision); to participate at hearings and at evidentiary procedure; to have all evidence available, as well as the right to comment and express an opinion on the results of such evidence; and, finally, to attendance or representation before the arbitrators. On the other hand, from Art. 190 lit. d) PIL, for instance, one may not derive any rights to express opinions verbally before the court.

126. The case law has given concrete form, in application of these principles, to three main situations of interrelation with the public policy clause of lit. e), and the limits that this clause may presuppose.

5.2.2 Formal denial of justice vs. material denial of justice

127. As already specified, the examination of the award on the substance is confined to its compliance with public policy by virtue of lit e). Beyond this hypothesis, grounds for attacking the arbitral award, based upon manifestly wrong statements of fact, or statements contrary to the facts that result from the dossier, are only admissible if there is a formal denial of justice. This was the case, in particular, up to a recent decision of September 10th, 2001 (infra § 130.), when submissions, arguments, evidence, or offers of evidence, presented by a party - and that could be significant concerning the decision - have been badly

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195 DFT of 22.2.1999 cons. 3b) in Bull ASA 1999, 537; DFT of 28.1.1997 cons. 1c) in Bull ASA 1998, 118; DFT of 11.5.1992 cons. 5b) in Bull ASA 1992, 381 (396). However, violation of the right to be heard has to be objected to, without delay, before the arbitral tribunal and not only at the appeal stage, i.e. before the FT (DFT 25.4.2002 cons. 2a) (case 4P.17/2002); DFT of 10.6.1996, in Bull ASA 2000, 764; DFT 119 II 386 cons. 1a) with further ref.; DFT 116 II 639 cons. 4).

196 DFT of 24.3.1997 cons 2a in Bull ASA 1997, 316 in which the FT has even specified that it is not very important if such a rule is laid down by the set of rules tied to an arbitration institution adopted by the parties. In any case this does not necessary involve a rule of mandatory procedure by virtue of art. 182 para. 3 PIL.
misunderstood, or inadvertently omitted by the arbitral court. In this case the challenged award may be set aside independently of the chances of winning on the merits.197

128. In synthesis, it is necessary to distinguish two situations:

(a) A manifestly erroneous assessment of the pleadings, of factual allegations submitted by the parties, or of evidence, is each not sufficient in itself, because a review on the merits by the FT is limited to cases in which the result provided by the arbitral award is incompatible with public policy. Accordingly, the leeway for re-examination in the case of material denial of justice is actually quite limited.

(b) On the other hand, if a formal denial of justice is hidden in this manifestly wrong assessment of the relative case file, such a violation of the formal right of a party to be heard can lead to the annulment of the award.198

129. The risk brought about, in particular, by the enormous latitude allowed by the definition of formal denial of justice proposed by the above mentioned case-law, naturally enough, was that parties under the pretext of formal denial of justice could object to the appraisal of evidence made by the arbitral tribunal and, more generally, they can also object to on any omission or misunderstanding of which they feel themselves victim.199 Finally, the FT in a decision of September 10th, 2001,200 set certain limits: arguing that a violation of the right to

197 DFT of 10.11.2000 cons. 3 in Bull ASA 2001, 102 in which it is specified that the new Art. 29 para. 2 Const. is identical to the old Art. 4 Const.; DFT of 22.2.1999 cons. 3c) in Bull ASA 1999, 537; DFT of 9.2.1998 cons. 4 in Bull ASA 1998, 634; DFT of 28.1.1997 cons. 1c+d) in Bull ASA 1998, 118; DFT 121 III 331 cons. 3
198 DFT of 24.3.1997 cons 3a) in Bull ASA, 1997 316 (327), in which the FT ruled that an interpretation of the law that differs with respect of the point of view of a party, does not constitute formal denial of justice.
199 KNÖPFER/SCHWEIZER, in SZIER 1999, 593 (N. 7)
200 DFT 127 III 576 cons. 2, when the FT again took the opportunity to explain the concrete difference between material denial of justice (conscious and arbitrary appraisal of evidence) and formal denial of justice
be heard must be admitted restrictively, and limited to cases in which the arbitrator had blatantly ignored what had actually been explained to him and, thus, had actually decided on another issue, and not on the one submitted to him. On the other hand, in cases where arbitrators have taken into consideration similar explanations, which they had then misunderstood, this is to be considered only as a false appraisal of evidence, and as such impugnable (contestable) solely on grounds of violation of public policy.

To sum up, the FT is completely right in the conclusion of this admirable decision, in which it asserts that not every error constitutes a violation of the right to be heard, and which does not confer any right for parties to obtain an award which, in itself, is impeccable on the merits.

5.2.3 The particular case of rights to proof

130. The right to be heard, in lit. d), guarantees among other things the right that the arbitral tribunal administers all evidence that is appropriate, concrete, and offered in due form and time. In particular, the parties have, under certain conditions, the right to expert appraisal on technical issues. Evidently, the expert's report (as for any other evidence) must solely concern relevant (and disputed) facts. But, raising the question of the relevance of facts to be proved on condition of rights to proof, means that it is then deprived of its purely formal characteristics, which is - conversely - intrinsic to the right to be heard.

In other words, the violation of this particular right cannot be valued in respect with itself, but only in connection with the specific solution brought to the dispute. Therefore, the judge faced with a request for the setting aside of an award, for reason

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201 This means that its violation involves the setting aside of the challenged award independently from the possibilities of success of the appeal on the merits. This is the reason why these grounds are usually examined in priority (DFT of 7.4.1993 cons. 2 in Bull ASA 1993, 525 with further ref. and footnote).
of a refusal to accept the expert's evidence, must examine whether the administration of this means of evidence, would have possibly lead to substantially different results. Thus, this judge must concern himself with the questions relative to both estimation and substance.

The contradiction is evident. By virtue of Art. 190 para. 2 lit. e) PIL, State judges cannot review the arbitration tribunal's assessment of evidence, the application of law and, finally, the solution brought to the dispute, except from the restricted point of view of public policy. Accordingly, they will not be able to frequently exercise anything more than a quite restricted control, regarding violation of rights to proof, despite the wording of the law, that makes it a grounds for setting aside "a par entière".  

131. To sum up, in this context of rights to proof, the aggrieved party may not limit himself to the plea of being the victim of an infringement of his formal right to be heard, but he will have to allege and prove that the refusal by the arbitral tribunal to accept a regularly offered means of evidence, had lead the tribunal to render an award which was not only mistaken or arbitrary, but also contrary to public policy in its tenor.  

5.2.4 Surprising application of a rule or of a principle of law

132. A party has, in principle, neither the right to comment on legal appreciation of the facts nor, more generally, to comment on legal reasoning to be considered. As an exception, this right

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202 DFT of 25.7.2000 (4P/212/1999/rnd) with a note by KNÖPFLER/SCHWEIZER in SZIER 2001, 508; DFT of 10.6.1996 in Bull ASA 2000, 764; DFT of 11.5.1992 cons. 5b) in Bull ASA 1992, 381 (397); DFT of 6.9.1996 cons. 3b) in Bull ASA 1997, 291 with further ref., in which the FT specifies, once again, that in the context of a motion for constitutional review, based on the violation of the right to be heard and guaranteed by Art. 4 (old)Const. (now Art. 29 para. 2 Const.), its latitude of examination is confined to arbitrariness, as far as the anticipated estimation of the proofs by the lower jurisdiction is concerned. There is no reasons to extend such latitude of examination against an arbitral award.

203 KNÖPFLER/SCHWEIZER, in SZIER 1998, 566-567
must be recognised and respected when the judge intends to base his decision on a rule or on a legal reason which the parties have neither taken into consideration in their submissions, nor could have reasonably considered as pertinent to the case in hand.\footnote{204}

This is, once again, a fairly wide definition pertaining to "judicial transparency", derived from the right of equal treatment and fair hearing in contradictory proceedings pursuant to Art. 182 para. 3 PIL.\footnote{205} Thus, this ample latitude can be abused, in order to evade the important obstacles of lit e). It is not surprising, therefore, that the FT ruled - in a recent decision of December 19th, 2001 - the requirement for a restrictive interpretation of this exception,\footnote{206} in order to avoid the risk that the argument regarding "surprise" might be raised simply to obtain a material re-examination of the award.

5.3 Objective arbitrability of the claim (lit. b)

Art. 177 PIL determines objective arbitrability, that is to say which claims may be subjected to arbitration. It is a substantive rule of private international law, and it refers exclusively to the \textit{lex arbitri}, without taking into account the \textit{lex causae}, national law of the parties or third possible legislatures.\footnote{207}

Query: at which stage does public policy intervene in this context?

(a) Public policy constitutes the only barrier against ineffectiveness (or at least operational "claudication"), within the framework of international arbitration, of mandatory forum and restriction on prorogation agreements, provided in the PIL and in the Civil Code.

\footnote{204} DFT 25.4.2002 cons. 2b) (4P.17/2002); DFT of 2.3.2001 cons. 6 c) in Bull ASA 2001, 531; \textsc{Berti/Schnyder}, op. cit., Art. 190, N. 57
\footnote{205} \textsc{Schneider}, op. cit., Art. 182, N. 60
\footnote{206} DFT of 19.12.2001 (4P.114/2001) cons. 4a)
\footnote{207} See \textsc{Briner}, in \textit{International Arbitration in Switzerland}, 2000, Art. 177 N. 2-8
135. For instance, by a decision of 23rd June, 1992 the question arose whether a dispute - capable of being arbitrated under Swiss law (Art. 177 PIL) - might become unarbitrable because of the UN-Embargo concerning the Republic of Iraq. In other words, does a UN embargo imply the inaccessibility to arbitration of certain commercial contracts, irrespective of Art. 177 PIL, because such contracts could be in violation of relevant public policy?

The answer of the Court is that, in principle, the arbitral tribunal does not have to directly take into account restrictions and prohibitions of foreign laws, with respect to the arbitrábility of a dispute. But, on the other hand it is true that, according to the opinion voiced by a certain legal writings, an international arbitral tribunal seated in Switzerland would lack the necessary jurisdiction to adjudicate a patrimonial dispute, in cases where granting this arbitrability is held to be irreconcilable with public policy.

136. Accordingly, the crucial question is: to what extent does public policy intervene with respect to questions concerning the objective arbitrability of the claim?

In the case in point, the FT ruled that public policy operates in order to define the arbitrability of a claim only to the extent that it imposes mandatorily that the dispute be subordinated to the exclusive jurisdiction of State Courts. Thus, the mere fact that

208 BRINER, op. cit., Art. 177 N. 12-13 with further ref.

209 DFT 118 II 353

210 See also WENGER, II. Art. 177 IPRG; Schiedsfähigkeit, in Bull ASA 1992, 14; BUCHER, op. cit., N. 99. This question obviously has another side to it, i.e.: the question of what happens if the dispute is simultaneously pending before a foreign State court which pretends to assert exclusive jurisdiction over it (according to its lex fori) and an arbitral tribunal seating in Switzerland? This situation would be no longer a problem of public policy but of jurisdiction (lis pendens) (Art. 190 para. 2 lit. b) PIL and Art. 9 para. 1 PIL). In this respect, by a decision of 14.5.2001 (DFT 127 III 279), the FT ruled on a question regarding exactly the applicability of art. 9 PIL to arbitral proceedings. First, it
the contract entered into by the parties raises certain other
questions, even if they pertain to public policy (that is to say the
UN Embargo), is insufficient to exclude the capability of the
dispute to be arbitrated.
In the end the Court denied this in the case in point, ruling that
there are no fundamental legal principles capable of setting up a
monopoly of State courts, in order to rule disputes arising over
civil claims influenced by rules of international public law. In
such cases, it is only the substantive existence of the claim in
dispute that has to be discussed and not its arbitrability (see also: infra § 166).

137. Knöpfler & Schweizer\textsuperscript{211} infer from this decision an
analogous application of Art. 19 PIL, that is to say they infer an
exception should be made by the Court in favour of a foreign
mandatory law (inapplicable to the dispute), if such law
provides that exclusively State authorities (Swiss or foreign)
does, in effect, actually have jurisdiction in order to decide the
dispute.
By contrast Briner voices a different opinion, namely that an
analogous or direct application of Art. 19 PIL is unnecessary,
and that it is sufficient to apply public policy defence as defined
in Art. 190 par. 2 lit. e). In other words, in order that a Swiss
arbitrator can conclude that the dispute is not arbitrable, the
foreign rule which provides that a certain dispute must be
decided by a foreign State authority, must be of such a nature
that refusal to apply that rule would amount to a violation of

\footnotesize{pointed out that staying the procedure because of \textit{lis pendens} is a matter
of jurisdiction and not a simple rule of procedure. The violation of \textit{lis
pendens}, thus, may accordingly be relied upon within the framework of
Art. 190 para. 2 lit. b) PIL. Subsequently the FT confirmed that Art. 9 PIL
is the law even for arbitral tribunals with seat in Switzerland, since it is
contrary to public policy within a specific legal order, that two judicial
decisions contradict each other in the same action and between the same
parties, both of them being equally and simultaneously enforceable. See,
on this decision, the note by Knöpfler/Schweizer, Szier 2001, 554-565 (esp. at page 563).
\textsuperscript{211} Szier 1994, 115-116}
fundamental principles of law and, therefore, fundamentally offend the relative sense of justice and equity concerned.\textsuperscript{212}

The opinion voiced by Briner seems to me fairly convincing, because a direct application of Art. 19 PIL: a) is in contrast with case law and with the negative function of Art. 190 para. 2 lit. c) PIL, which excludes a normative effect, on which Art. 19 PIL is itself based; b) is contrary to the wording of this decision itself. In this particular case the Federal tribunal once again proposed the classical two-fold examination, that is to say:

(a) first: do these foreign provisions apply directly? The answer is, no. In principle, the arbitral tribunal must not take into account restrictions or prohibitions of foreign laws, with regard to the arbitrability of a dispute.

(b) second: do these provisions have to be taken into account in light of public policy? The answer is, in principle, yes. But, there is no infringement of public policy in this particular case.

5.4 Lack of jurisdiction (lit. b)

Having taken an appeal concerning matters of jurisdiction, the FT then examines with unfettered jurisdiction whether the arbitral tribunal rightly or wrongly took jurisdiction. Accordingly, the FT must not confine itself to mere review in light of public policy. This unfettered examination is also extended to prejudicial questions regarding material law that necessarily must be answered in order to decide the question of jurisdiction. This same rule is also valid for statements of fact, but only: a) on condition that the aggrieved party has invoked another head of Art. 190 para. 2 PIL against these findings or, b) when facts or new means of evidence are exceptionally taken in consideration

\textsuperscript{212} Briner, op. cit. Art. 177, N. 18. In the same sense: Lalive/Poudret/Reymond, op. cit., Art. 177, 308, N. 5.
into the motion for constitutional review (Art. 95 Statute on the Organisation of the Federal Judiciary). Such prejudicial questions may pertain to Art. 177 and 178 PIL, that is to say: if the dispute in itself is arbitrable; if the arbitral agreement is effective, concerning the form and merit; if the dispute is part of the field of application of that agreement; and if the parties should have the capacity and powers to conclude the same. But, on the other hand, the problem of jurisdiction might be closely connected with the substance of the dispute. For instance, it may depend on the effectiveness of the underlying contract, according to the applicable substantive law.

139. This unfettered examination\textsuperscript{216} gave the FT the opportunity to raise the question of possible evasion of the limits provided by lit. e), by invoking grounds of lit. a) of Art. 190 para. 2 PIL.

In fact, by a decision of September 6th, 1996\textsuperscript{217} - where the aggrieved party raised objections concerning the capacity of the defendant to conclude an arbitration agreement - the FT took the opportunity to state how doubtful it is: a) that such unfettered power of examination, concerning matters of jurisdiction, can be understood as conferring to the FT the leeway to freely revise the statements of fact made by an arbitral tribunal, as it would be

\textsuperscript{213} DFT of 19.12.2001 (4P.114/2001) cons. 2b; DFT of 7.8.2001 cons. 2b in ASA 2002, 88 (91); DFT 119 II 380 cons. 3c; DFT 118 II 193 cons. 5a; DFT 117 II 94 cons. 5a) in which the FT, in order to decide whether the arbitration agreement had, or not, been transferred to the claimant, interpreted the underlying contract (contrarily to every principle of the lit. e) of Art. 190 PIL).

\textsuperscript{214} DFT of 6.9.1996 cons. 1c) aa) in Bull ASA 1997, 291 (299) with further ref.

\textsuperscript{215} ARFAZADEH, op. cit., 251

\textsuperscript{216} It is important, here, not to become confused. The Federal tribunal has unfettered power of examination for all grounds of attack provided by art. 190 para. 2 PIL. In simple terms, the grounds of lit. e) are extremely limited by their intrinsic character of public policy defence, while these limits do not exist for the examination on the merits, pertaining, here, to lit. b) (KAUFMANN-KOHLER, Articles 190 et 191 LDIP: Les recours contre les sentences arbitrales, in Bull ASA 1992, 71 and the relative comments of POUDRET, 81).

\textsuperscript{217} DFT of 6.9.1996 cons. 1 in Bull ASA 1997, 291
made by a jurisdiction of appeal; b) that its unfettered examination could go beyond what might be necessary in order to adjudicate on issues related to the capacity of being a party to the arbitration agreement.

The FT also added that, if that were not the case, it would have been sufficient to allege the transfer of a contract involving an arbitral agreement, so as to evade the principle laid down by Art. 190 para. 2 let. e) PIL and thus allow an examination on the merits, which would then not be limited to ascertaining the consistence of the award with public policy.218

This is actually the reason why the FT consistently holds that, in order to avoid such an outcome, the unfettered jurisdiction to examine a complaint alleging violation of rules on jurisdiction does not mean that the FT reviews the statements of fact on the basis of which the award has been drawn up, as would have been done by a jurisdiction of appeal. On the contrary, as emphasised above, the FT is bound to statements of fact made by the arbitral tribunal, and the leeway of the FT to review such assessments is solely confined either to certain particular situations concerning violation of procedural guarantees (lit. d) or of public policy (lit. e).219

218 In order to understand this example proposed by the FT, it is necessary to remember that the arbitration agreement is of an ancillary nature: that is, it must follow the fate of the principal relationship, unless the arbitration agreement was concluded in view of the personal relationship between the parties or of personal qualities of one of the parties. Therefore a person can be bound by such an agreement as cessionary, heir or acceptor. Because it is a question of jurisdiction, the FT examines, with unfettered limits, the validity of the transfer (CORBOZ, op. cit., 19, with further ref.; HEINI, op. cit., Art. 190 N. 24b). See also with regard to this terrifying risk, ruled by the FT, the comment by KNÖPFLER/SCHWEIZER in SZIER 1998, 565-566.

219 See amongst others DFT of 20.9.2000 cons. 4b+c) in Bull ASA 2001, 487 (494) quoting DFT 120 II 155 cons. 6a) and DFT 119 II 380 cons. 3c). The reasoning of the Federal tribunal is perfectly coherent in its subject matter, but it is less coherent with respect to specific aspects of chronology. In fact, on September 6th, 1996, the FT had already ruled that the unfettered examination extended to statement of facts, unless these could be reviewed under another head of Art. 190 para 2 PIL (see
I. Setting aside a clause of the underlying contract

140. In a decision of 19th February, 1990 the FT examined the issue as to whether an arbitral tribunal, sought for ruling about a particular dispute *ex aequo et bono*, violates public policy if it voluntarily omits to apply a provision contractually agreed upon by the parties.

In the specific case the subject matter was the following: according to a clause of the contract in dispute, in the case of failed conclusion of the work within the term specified, the contractor would be obliged to pay the customer compensation in one lump-sum, i.e. a sum equal to 0.5% of the price for every week of delay, to a maximum of 3.5% of the price. The arbitral court simply rejected this clause, because it considered it manifestly unfair and ridiculous, and substituted the principle of complete compensation.

The FT, endorsing the qualification given by the arbitral tribunal to this clause, (that is of being a stipulated penalty), rejected the objection of violation of public policy, arguing that Swiss (Art. 161 para 2 CO), French (Art. 1152 Code Civil français) and Anglo-Saxon law, as well as equivalent socialist systems, would have sustained such action by the arbitral tribunal, even if the latter had not been empowered to adjudicate in terms of equity.

With reference to this decision two spontaneous questions arise: the first regarding the relationship between an award *ex aequo et bono* and public policy (1), and the second relative to the importance of the underlying contract (2).

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220 the note by KNÖPFLE/SCHWEIZER, in SZIER 1998, 566 and the surprise showed by these authors).

221 Apart from the above examples one must not forget the contrast of the award with the *bonos mores* that represents, in principle, a special case of violation of public policy, as shown in § 13., 34., 167. and FN 260.

221 DFT of 19.2.1990 in Bull ASA 1990, 173
1. **Award ex aequo et bono and negative public policy**

141. Arbitrators, empowered to adjudicate in equity, enjoy wide freedom. For instance, they are released by the parties from the application of specific articles of laws, even of mandatory nature. However, they must apply the principles of international public policy of the relevant country and, if it is the case, even those of transnational public policy. In short, this freedom has its limit in public policy.\(^{222}\) On the other hand, the choice of arbitration proceedings and awards *ex aequo et bono* does not involve a waive of the right to appeal, pursuant to Art. 192 PIL. On the contrary, a similar award can be challenged without specific limits, especially for violation of public policy. This is what the sentence quoted at the beginning of this section clearly demonstrates.\(^{223}\)

2. **The importance of the underlying contract**

142. The question of the relationship between arbitration proceedings and the underlying contract is, from the point of view of public policy, much more delicate. First, it is interesting to note that, in the decision mentioned above, the FT got to the heart of the question as to whether the award was irreconcilable, or not, with public policy. This means, therefore, that the application of reasonings based on equity to a

\(^{222}\) To which, according to German legal writings (*Schwab/Walter*, op. cit., Kap. 20 N. 14) the *bonos mores* also have to be added.

\(^{223}\) See also: *DFT* of 19.12.2001 (4P.114/2001) cons. 2e)bb)aaa); *Lalive/Poudret/Reymond*, op. cit., Art. 187, N. 21, 25; *Karrer*, op. cit., Art. 187, N. 203; *Broggini*, Réflexions sur l’Equité dans l’arbitrage international, in Bull ASA 1991, 109; *DFT* 107 Ib 63 cons. 2b), in which the FT confirms, among other things, that the power given to arbitrators to judge *ex aequo et bono* is also extended to mandatory provisions. This is not only because the delimitation, between mandatory and non-mandatory rules, can be uncertain, but also because the application of mandatory rules (for example in matter of statute of limitation) can, under given circumstances, lead to a concretely inequitable result.
contractual clause, and even the substitution of the former for the latter, is capable as such to be reviewed by the FT in the light of Art. 190 para. 2 lit. e) PIL. In concrete terms, the problem was promptly resolved, as it was a stipulated penalty. But what would the solution have been in the hypothetical situation in which a clause were itself perfectly valid, but simply considered inequitable by the arbitrator?

143. Evidently the solution would depend on each individual case, in the light of the aforementioned definition of public policy. However, it is plain that the contract underlying the dispute represents the first normative source for arbitrators, and this is the reason why BLESSING asserts that "le contrat fait foi entre le parties", regardless of whether the arbitration proceeding is based on law or on equity. Furthermore, in the majority of cases, the arbitral tribunal would endeavour to adjudicate the dispute, not by applying rules of law, but by interpreting the contract within the framework of its spirit.\textsuperscript{224} As further proof of this vicinity between arbitral proceedings and the underlying contract, one has to stress, that the most important set of rules tied to an arbitration institution explicitly lays down the provision for which, in any case, the arbitrator takes into consideration the provisions of the contract and the usage of trade applicable to the contract.\textsuperscript{225} Evidently, this

\textsuperscript{224} BLESSING, The predominant Features of Chapter Twelve, in International Arbitration in Switzerland, N. 547; LALIVE, op. cit., Rev. Arb. 1986, N. 69-71

\textsuperscript{225} See, for instance, Art. 17 of the Rules of Arbitration of the International Chamber of Commerce: "1.: The parties shall be free to agree upon the rules of law to be applied by the Arbitral Tribunal to the merits of the dispute. In the absence of any such agreement, the Arbitral Tribunal shall apply the rules of law, which it determines to be appropriate. 2: In all cases the Arbitral Tribunal shall take account of the provisions of the contract and the relevant trade usages"; and Art. 33 of UNCTITAL Arbitration Rules: "1.: The arbitral tribunal shall apply the law designated by the parties as applicable to the substance of the dispute. Failing such designation by the parties, the arbitral tribunal shall apply the law determined by the conflict of laws rules, which it considers applicable. 2.: The arbitral tribunal shall decide as amiable compositeur or ex aequo et bono only if the parties have expressly authorised the arbitral tribunal to
reference to the underlying contract still assumes greater weight in the arbitration awards \textit{ex aequo et bono}, in which arbitrators are released from the application of the law and have to search case by case the solution that seems to them more equal in the specific case.\textsuperscript{226}

144. With this premise, Knöpfler/Schweizer\textsuperscript{227} are certainly right when they assert, that it is unsatisfactory that an arbitral court can, with impunity, ignore consideration of perfectly clear contractual provisions, for reasons of their unequal character. Certainly, by interpreting a contract within the framework of its spirit, arbitrators have very wide discretion. But, one the other hand, one has to bear in mind that a contract is - first of all - the result of bargaining power of the parties and, therefore, is not unusual to encounter some clauses, which might be considered inequitable,\textsuperscript{228} but nonetheless consistent with the will of the parties and which, as a rule, must be respected by the arbitrator.

\begin{flushleft}
\textsuperscript{226} Karrer, op. cit., Art. 187, N. 202 and the comments of Blessing (132) and of Brogini (141) published in Bull ASA 1991.
\textsuperscript{227} Szier 1991, 349
\textsuperscript{228} Schneider, in Bull ASA 1991, 140
\end{flushleft}
II. Setting aside the law chosen by the parties on grounds of rules of equity

145. In a decision of 14th, November 1990 the Federal Tribunal faced a possible violation of public policy by an arbitral tribunal, that only apparently would have based its decision on the Swiss law chosen by the parties, while in fact it based it on considerations of equity. Quoting Lalive/Poudret/Reymond, the FT excluded that a similar proceeding violates public policy, when the result is not considerably different, with respect to the one which the arbitral tribunal would have reached by applying the law chosen by the parties. This is an obvious consequence of the principle according to which it is insufficient that reasonings of the award violate public policy; it is, in fact, even more necessary that its tenor leads to a result which infringes public policy.

146. Evidently, the problem arises in the converse hypothesis, i.e. when the result of this reasoning in equity is considerably different, with respect of an hypothetical outcome based on law, without being in itself (as such) contrary to public policy. In fact, as repeatedly stated here above, public policy is very narrow grounds of defence. Therefore it is quite inappropriate to conclude that the simple plea, "considerably different result", might, in itself, be sufficient to activate the negative public policy defence. On the contrary, it would be necessary - in addition - that this result violated at least one of the parameters of public policy. For example, it is so abstruse that it does not reach that minimum of quality that is required from international

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229 DFT 116 II 634 cons. 4a
230 Lalive/Poudret/Reymond, op. cit., Art. 190, 431, N. 6. See also the pertinent criticism of Jermini, op. cit., 270, N. 544
231 Notice that, according to federal Justice Walder, op. cit., Bull ASA 2001, 17, when the arbitral tribunal decides ex aequo et bono without having been empowered by the parties, this might be a failure of jurisdiction according to lit. b) of Art. 190 para. 2 PIL.
Swiss arbitral awards. Moreover, this is valid because a rigid and mechanical application of the underlying legal system is extraneous to the idea of international arbitration which - as said – takes into account, first of all, the will of the parties and the underlying contract, and above has a priority to avoid ready made solutions.\textsuperscript{232}

147. According to the majority of legal writings these principles apply in every situation in which the arbitral tribunal determined, in a false way, the applicable law (for example applies erroneously a conflict of law rule), and even in cases of miscompliance to a specific choice of law made by the parties in dispute, through either a decision \textit{ex aequo et bono} (as above mentioned), or the application of another law.\textsuperscript{233}

\textbf{III. Interpretation of the underlying contract}

148. The interpretation of the underlying contract is, in fact, the crucial point in international arbitration. The indicated priority of the contract, as well as the often quite complicated nature of the contract which ties the parties, means that the final result is often more influenced by the contract itself, than by the applicable law\textsuperscript{234} and, naturally, by the content that the arbitral tribunal has given to it by means of its interpretation.

By simply applying general principles, it is obvious that the FT has no jurisdiction to examine whether, or not, the arbitrator interpreted a contractual clause correctly, including the assessment of the real or hypothetical will of the parties. It only has

\textsuperscript{232} Blessing, op. cit., in International Arbitration in Switzerland, NN. 548-553

\textsuperscript{233} Karrer, op.cit., Art. 187, N. 184. See also, for further ref. Jermini, op. cit., 270, 543, who voices the interesting criticism that, \textit{de lege lata}, one should ask oneself whether this approach were not infringing the principle of the autonomy of the parties, the breach of which - according to Jermini - should be qualified as a violation of public policy.

\textsuperscript{234} Karrer, op. cit., Art. 187, N. 47
latitude to decide whether the result of that interpretation (i.e. the content of the contract as stated by the arbitral tribunal), is compatible with material public policy.\textsuperscript{235} For instance, merely false application of the law, on the basis of which the contract had been interpreted by the arbitrators, does not involve any violation of public policy by virtue of Art. 190 para. 2 lit. e) PIL.\textsuperscript{236}

149. In a decision of November 5th, 1991\textsuperscript{237} the FT, in order to answer to this question, applied a certain German doctrine and reached the following result: the interpretation of a contract by the arbitral tribunal is not irreconcilable with public policy, when it can be admitted that a contract of the same content would be valid according to domestic law; but with the possibility to take into account a more severe supranational or foreign system of values, if the peculiarities of the case at stake demand it. In this specific case, the FT found that the content of the contract, as stated in the award, violated neither Swiss law nor the autonomous will of the parties, and that it was not even void \textit{ex} Art. 19 and 20 CO. Consequently, no violation of public policy could be assumed.

This German doctrine was not used for long in the case law of the FT. Indeed it was consistent with the jurisprudential uncertainty \textit{prior} to UEFA decision. In fact this theory, although based on domestic Swiss law, left the door open for considerations of even non-Swiss sources of law. Indeed, although consistent, it was not even confirmed by successive case-law,\textsuperscript{238} maybe because the Swiss flavour was too emphasised or, more simply, because the FT did not feel the need to have recourse to it. By contrast, what is now clear are the difficulties arising


\textsuperscript{236} DFT of 10.11.2000 cons. 3b)(c) in Bull ASA 2001, 102 (109); \textit{supra} § 65.

\textsuperscript{237} DFT 117 II 604 cons. 4, also published in Bull ASA 1993, 55

\textsuperscript{238} In particular, this is not mentioned in the recent decision of the FT of 17.2.2000 in Bull ASA 2001, 787 any more. See also: \textit{supra} §§ 71.-77.
concerning its possible compatibility with UEFA case law, which focuses entirely on the viewpoint of the Swiss judicial system and does not bear direct application of foreign sources of law (see supra §§ 90.-98.).

IV. Pacta sunt servanda

1. The positive aspect, that is the principle of contractual faithfulness

150. The prerequisites for admitting a violation of the principle of contractual faithfulness are exclusively provided by case law and can be reduced to any four situations in which the judge:

(a) admits the existence of a contract, but he refuses to order the performance of it, basing himself on irrelevant considerations, or on inapplicable legal texts;

(b) denies the existence of a contract but, even so, admits the existence of a contractual obligation;

(c) states that a condition bound to the execution of a performance has materialised, but refuses to order the execution of that performance;

(d) denies that such a condition has materialised but, even so, orders the execution of the performance.

To sum up, in order to violate the above principle it is necessary that the arbitral tribunal confers, or refuses, a contractual protection by putting itself in contradiction with the result of its own interpretation, regarding the existence or the content of a legal act, of which one of the parties prevails.

On the other hand, the interpretation-process of the contract, in itself, and the legal consequences that are the logical outcome of this process, are not supported by the principle pacta sunt servanda. Thus, as above mentioned, the mere question of
"interpretation" is not enough to support grounds of attack based on violation of public policy.\textsuperscript{239}

151. Evidently, \textit{pacta sunt servanda} is much more than this in domestic law, and may be summarised under the very ample German maxim: "ein Mann ein Wort".\textsuperscript{240} Obviously the risk was to so much increase the means of appeal, that the FT felt the need of ruling very rigid boundaries. So much so, that the FT itself admits that nearly all of the matters at issue, i.e. resulting from the violation of the underlying contract, are excluded from grounds of protection by \textit{pacta sunt servanda}, which must be examined only in the light of the relevant public policy by virtue of Art. 190 para. 2 lit. e) PIL.\textsuperscript{241}

152. There is a clear example of this approach in the "Reteitalia" decision,\textsuperscript{242} in which the FT ruled that it has no jurisdiction to examine whether arbitrators have applied erroneously, even arbitrarily, the relevant rules of law, in order to reach the conclusion that a certain contract is void; nor that it must examine whether that conclusion is the result of an indefensible interpretation of that contract. Thus, the principle \textit{pacta sunt servanda} is not violated in the event in which the arbitral court excludes the validity of a certain agreement, for whatever reason, and \textit{consequently} refuses to give execution to that contract, that in its eyes is void. In fact, it would be lacking the necessary element of contradiction required by case-law.

\textsuperscript{239} DFT of 30.1.2002 (4P.222/2001) cons. 4; DFT of 14.6.2000 cons. 4a)+b) in Bull ASA 2000, 582 (599-601); DFT of 6.9.1996 cons. 2b) in Bull ASA 1997, 291; DFT of 11.5.1992 cons. 6 b) in Bull ASA 1992, 381; DFT of 10.6.1996 cons 3b in Bull ASA 2000, 764 (775), in which the Federal tribunal specifies that the principle \textit{pacta sunt servanda} does not imply any duty to the arbitrator to grant the request of a party, that is based on unproven elements of fact, even if the arbitrator has admitted the existence of the invoked credit for support of that request.

\textsuperscript{240} GUHL, Das Schweizerische Obligationenrecht, 2000, 96

\textsuperscript{241} DTF of 14.6.2000 cons. 4a)cc) in Bull ASA 2000, 582 (600); DFT of 26.5.1999 cons. 1a)bb) in Bull ASA 2000, 331

\textsuperscript{242} DFT of 26.5.1999 in the matter Reteitalia SpA (Italy) vs. Lagardère SCA (France) in Bull ASA 2000, 331. For a description of the facts of the case see: supra § 36.
To sum up, the appeal brought by Reteitalia would have been granted only if the arbitral tribunal had declared the contract lawful and possible but, in spite of everything, it had dismissed the request of Reteitalia, by evoking - in perfect contradiction to itself - precisely those very same grounds.

153. Finally, coherently with this quite restrictive definition, the Supreme Court - in a very recent decision of January 30th, 2002\textsuperscript{243} - upheld the arbitral decision admitting contractual termination of a certain contract and recognising the end of the mutual duties of the parties, for the reason that in similar reasoning no contradiction had been suspected.

2. The negative aspect: i.e. the relativity of contractual commitments (*pacta tertiiis nec prosunt nec nocent*)

154. This principle constitutes the negative pendant of *pacta sunt servanda* and the FT applied it in a famous decision of April 19th, 1994.\textsuperscript{244} In 1975 Egypt, Saudi Arabia, Qatar and the United Arab Emirates signed a treaty in view of establishing a supranational organism with judicial capabilities called "The Arab Organisation for Industrialisation" (AOI). This organisation subsequently entered into a join venture contract with Westland Helicopters Limited (WHL). In the proceedings brought by WHL against AOI for compensation of damages, the arbitral court sentenced the compensation to be paid principally by AOI, but also, subordinately, by the member States of AOI. The FT upheld the award, arguing that the acknowledgement of a subordinate responsibility of the States in question did not contradict any judicial or moral fundamental principle of Swiss or transnational system of values. In fact, exactly the principle of transparency (Durchgriff\textsuperscript{245}) allows - under certain conditions

\textsuperscript{243} DFT of 30.1.2002 (4P.222/2001) cons. 4
\textsuperscript{244} DFT 120 II 155 cons 6b) cc)
\textsuperscript{245} Regarding the "Durchgriff", see also: DFT of 9.2.1998 cons. 4 in Bull ASA 1998, 634 (650); DFT of 29.1.1996 cons. 6 in Bull ASA 1996, 496 (503)
- the omission of any consideration of the independence of moral persons towards its members. Thus, the so-called theory of the "émanation d'Etat" - that allows States to be made responsible for the commitments assumed by legally independent undertakings entirely controlled by the State itself - should be considered in compliance with negative public policy.

155. In a second quite complicated decision (regarding a corporation dispute, within a group of companies) adjudicated on February 9th, 1998, the FT confirmed that the principle of relativity of contractual commitments constitutes the negative element of *pacta sunt servanda* and that it is, therefore, a part of public policy.

In concrete terms, the aggrieved party reproached the arbitral tribunal, by declaring that the tribunal had ascribed to it the procedural behaviour of other entities of the group, but the objection was rejected by the FT, arguing that the arbitral court had neither prevented it from the execution of duly ascertained contractual obligations, nor imposed the performance of obligations, which it knew that the defendant was not bound. This was, essentially, the application of the usual "common or garden" assumptions regarding contradictory behaviour.

V. **Good faith and abuse of law**

1. **General aspects**

156. The *principle of good faith* pertains to public policy and requires that the parties mutually behave faithfully to each other, each of them having to abstain from whatever attitudes that could deceive the other party, and having to avoid obtaining advantage from the consequences of an error, or of an insufficiency on the part of the latter.

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246 DFT of 9.2.1998 cons. 4b) in Bull ASA 1998, 634 (651)
Its principal expression is, indeed, the prohibition of abuse of law. For example, the FT in a decision of February 21st, 2000,248 defined the limitation period objection as being abusive (ex Art. 2 para. 2 CC), when it contrasts confidence held in that party, in particular when the debtor had behaved in such a way as to induce the creditor to omit the necessary legal steps for avoidance of limitation, so that, even from an objective point of view, the delay of the latter became completely comprehensible. But, actually, abuse of law goes quite beyond this, and also covers other cases in which a legal institution has digressed from its scope; when the disputing party tends to obtain an exorbitant advantage; when the exercise of a certain right does not correspond to any interest or even, under certain conditions, when a person adopts a contradictory behaviour: so as to become contra factum proprium.249

157. Once again the prospective application field of these principles might be very ample, and this is obviously irreconcilable with the very narrow grounds of defence through public policy. Therefore, it seems quite clear that the prohibition of the abuse of law and the principle of good faith, in the international contest at stake, do not have the same impact as they have in domestic law. Thus, there is no reason to doubt that the FT will not easily examine whether the behaviour of a party was abusive or contrary to the principle of the good faith,250 nor it is conceivable that through these principles, the estimation of evidence or the application of law by the arbitrators could be reviewed.251

248 DFT of 21.2.2000 (4C.36/2000/otd) cons. 2a, with further ref.
249 DFT of 18.9.2001 (4P.143/2001) cons. 3c)aa)
250 KNÖPFLER/SCHWEIZER, in SZIER 1999, 623, N. 8
2. **Right to terminate a long-term contract and clausola rebus sic stantibus (hardship)**

2.1 **Right to terminate a long-term contract**

158. The principle of good faith encompasses the rule wherein a long-term contract may be terminated at any time on just grounds, that is when its execution cannot be reasonably demanded by one party.\(^{252}\)

In the case submitted to the judgement of the FT\(^{253}\) the arbitral tribunal held the appellant responsible for a breach of contract because it had prematurely terminated a long-term contract. On the other hand, the aggrieved party alleged that the solution of the award was such as to impose on him the execution of a long-term contract, but under completely different conditions with respect to those initially operating: and that this was contrary to the aforesaid principle and to Swiss law.

159. The Federal tribunal, however, after having pointed out that this right of termination for just grounds pertains to public policy, found that the arbitral court, itself, did not disregard this principle. It was - conversely - the same aggrieved party that was absolutely against accepting the proposals of the adverse party and, in fact, actually striving to adapt the contract to the new circumstances. Consequently, by deciding in this way, the arbitral tribunal assessed (at least implicitly) the possibility of a reasonable adaptation of the contract, which was reasonably to be accepted by the appellant and that, therefore, there was no violation of the principle of the good faith.

2.2 **Hardship**

160. The case-law\(^{254}\) inferred from the principle of good faith that a long-term bilateral contract can be terminated in the case of a conjuncture reversal, by virtue of the *clausula rebus sic

\(^{252}\) DFT 122 III 262 cons. 2a(aa) with further ref.

\(^{253}\) DFT of 17.2.2000 cons. 5d) in Bull ASA 2001, 787

\(^{254}\) DFT of 22.2.1999 cons 2d) in Bull ASA 1999, 537
stantibus. However, the prerequisite is an extraordinary and unpredictable modification of the circumstances. This implies such an imbalance between performance and counter-performance, that granting the creditor's claim would lead to an usurious exploitation of this lack of balance between the parties, and would constitute therefore an abuse of law.\textsuperscript{255}

161. In concrete terms, the FT acknowledged that the arbitrators had examined the issue specifically under this profile, and they came to the conclusion that the prerequisites of the hardship had not been realised. Consequently, the FT found that the allegations of the appellant were striving merely to criticise and to cast doubt on the conditions of the clausula rebus sic stantibus in the case in point, which was considered inadmissible.

162. To sum up, we may learn the following from these two decisions: the FT confines itself to setting the question as to whether the arbitral tribunal took these principles into account. In the event of an affirmative answer (as was the case here), there is no further examination as to whether the arbitral tribunal applied correctly these principles of law. This is the logical outcome of the very narrow means of defence of public policy, which precludes the FT from reviewing the accuracy of the findings of law or facts made by the arbitral tribunal.

Finally, the approach given by the FT is perfectly correct, although one must not forget that public policy also sanctions an award which is seriously self-contradictory. For instance, such contradiction is conceivable with respect of the prohibition of abuse of law, if the arbitral tribunal had judged abusive the attitude of the petitioner, that persists in claiming the performance of a contract without proving any interest for that and, despite, sentences having been given to the respondent to perform what was demanded by the claimant.\textsuperscript{256}

\textsuperscript{255} DFT 122 III 97 cons. 3a); ZELLER, Basler Kommentar, 1992, Art. 18, N. 71-72

\textsuperscript{256} KNÖPFLER/SCHWEIZER, in SZIER 1999, 623, N. 8; supra §§ 108.-112.
3. Pre-contractual liability

163. Finally, the principle of good faith also encompasses that of *culpa in contrahendo* (i.e. pre-contractual liability).\(^{257}\) Violations of the so-called *culpa in contrahendo* can exist when in course of negotiations in view of the conclusion of the contract, one party conceals from the other party facts, which are essential for the formation of their contractual will and that this second party either did not know, or could not have known.\(^{258}\)

VI. Corruption and traffic of influence

164. We have already briefly broached the subject here at hand, in order to show the narrow interrelation between negative and positive aspects of public policy. Therefore, we must confine ourselves to reporting here briefly a few of the FT decisions regarding these subjects, which should be read - if possible - in parallel to the comments in §§ 29., 39.

1. Corruption

165. In a case adjudicated on 2nd September 1993,\(^{259}\) the FT was confronted with the grievance according to which the contracts, that were the basis of the dispute, would be void as far as they were the result of acts of corruption and payments of bribes to a third person (the former Philippines' president Marcos). First, the Supreme court stated that, according to Swiss law, promises to pay a bribe are illicit and void by virtue of the Art. 19 CO and they also contravene international public policy.\(^{260}\) However, in

\(^{257}\) DFT of 17.2.2000 in Bull ASA 2001, 787, in which this has been denied by the FT, after a short survey of the arbitral award on this point.

\(^{258}\) DFT of 30.1.2002 (4P.222/2001) cons. 3b); DFT 121 III 350 cons. 6c, with further ref. and DFT 105 II 75 cons. 2a)

\(^{259}\) DFT 119 II 380 cons. 4b)\(^{+c}\)

\(^{260}\) In this identical sense, see also the decision of the Cour d'appel de Paris of 30.9.1993 in Bull ASA 1994, 105 (with a note by Adel Nassar), which adds that a similar contract is also contrary to the ethics of international
spite of this vice, they do not lose their capability of being subjected to arbitration. Second, the FT dismissed the appeal arguing that, in the case in point, there had been no "contract of bribe", but simply a contract for the conclusion of which, bribes were paid to a third person and that this - always according to a Swiss legal point of view – did not involve voidness of the contract in itself pursuant to Art. 19 CO. 261

This approach, based exclusively on the Swiss perspective, seems to me perfectly in line with the (successive) UEFA case law and therefore perfectly correct, from the narrow viewpoint of public policy.

2. Traffic of influence

166. In a dispute (governed by French law) adjudicated through a decision of January 28th, 1997 262, the aggrieved party alleged the voidness of the underlying contract, arguing that it was unlawful by virtue of the abrogated Art. 178 of the French Penal code (in force at the moment of the facts), which referred to an influence of such a nature as to allow to obtain favour or a favourable decision from an authority. In the case at stake, the supply by the appellant (Thomson C.S.F., Paris) of 16 frigates to the Republic of Taiwan had provoked the hostility of China, with the consequent revocation of the export licence granted by French government. Hostility that could only decline after the

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261 This principle was repeated in a DFT of 30.12.1994 cons. 2d, in Praxis 1995, N. 204 and Bull ASA 1995, 217, in which the party got lost in an unsuccessful grievance concerning the estimation of evidence undertaken by the arbitral tribunal, which had excluded the existence of bribes.

intervention in China (through the ELF Aquitaine company) of a certain Mr. M. Kwan.

The FT dismissed the motion, not suspecting any violation of public policy in the reasoning of the arbitrators, according to whom there was no evidence regarding an act of traffic of influences or of corruption and that, in any case, the scope of the contract was to obtain the withdrawal of the objections formulated by a third country not introduced into the contract: any favour would have been demanded of a French authority or of an authority of Taiwan. Finally, the infringement of Art. 178 French (old)PC regarding the lack of any "decision" on the part of the Chinese authorities that involve legal effects, were such that, in the end, the actions in point could not in fact have become true.

167. Two important points of this decision must be considered:

(a) both the arbitral tribunal and the FT got to the heart of the question, as to whether there had been a supposed traffic of influences exercised on foreign authorities, by applying (this time) an effectively international, public policy.

(b) the FT did not pronounce on the question of knowledge of whether inconsistency with public policy would be conceivable for acts of corruption towards both the authorities of the State which is the contracting party, and towards those of third States. In fact, to say the least, it would be curious to deal with these two realities differently, since the finality is the same, and equally immoral: that is to say that obtaining such favours, so as influence the conclusion or the effectiveness of the contract (i.e. without the opposition of third parties).\textsuperscript{263}

\textsuperscript{263} In this sense, see: KNÖPFER/SCHWEIZER, in SZIER 1998, 573
VII. Competition rules of the European Community (EC)

168. We have already mentioned (supra § 32.) that the FT, by a decision of November 13th, 1998, expressed its scepticism regarding the fact that the infringement of provisions of national or European law may be considered in breach of public policy.

169. This doubt still remained unchanged even after the famous decision rendered by the European court of justice the 1st, June 1999. That case was about a licensing contract operating on the territory of the European Community, which provided for an arbitral agreement, according to which the appointed arbitrators were to apply Dutch Law. The grounds for setting aside, raised by the losing party before the State Court (applying for annulment), was that the award was contrary to public policy by virtue of the voidness of that licensing contract under Art. 81 (2) ECT. The fact, that this contract was not notified to the Commission and was not covered by a block exemption, also went unchallenged.

According to the applicable Dutch law, the simple circumstances that a prohibition, laid down in the domestic competition law, was not applied by an arbitral tribunal, is not generally considered as being contrary to public policy. The question, referred to the ECJ, was in synthesis to knowledge of whether the solution would be the same, when the award is contrary to a provision of the EC Competition Law.

170. The answer given by the ECJ was negative. It stated that Art. 81 ECT constituted a fundamental provision, which was essential for the accomplishment of the tasks entrusted to EU law, particularly for the operation of the internal market. The importance of this norm may be inferred, incidentally,

264 DFT of 13.11.1998 cons. 1b) bb) in Bull ASA 1999, 529
265 DECJ of 1.6.1999 in the matter Eco Swiss China Time Ltd vs. Benetton International NV in Bull ASA 1999, 414
even from the sanction of nullity laid down in its paragraph (2). This is, essentially, the so-called public policy of the European Community.

Thus, national Courts (of EU member States) must accept the mandatory examination of the compliance of the award with the rule laid down by Art. 81 ECT, as further grounds for setting aside an arbitration award, founded on the failure to observe national rules of public policy. In other words, whether or not a national legislation sanctions the violation of a rule of public policy, this sanction must also apply in the event of a violation of Art. 81 (1) ECT.  

171. Both in the decision of the ECJ and in the decision of the FT (of 1998), Art. 81 ECT, although relevant to the case, was not applied by the arbitrators (because he was not petitioned in this sense). On the other hand, in the Benetton case, the European Community legislation was directly applicable (because Holland is member State of the EC), while in the case adjudicated by the FT, Swiss law was applicable. Accordingly, the application of Art. 81 ECT could have, in this latter case, only two aspects: as a "loi d'application immédiate", or as breach of public policy, for reason of its non-application. It is, in fact, obvious that the duty of setting aside an award, which is infringing Art. 81 ECT, is only imposed to member States and not to Courts outside the European Community.  

Essentially, the solution of the ECJ is clear: Art. 81 ECT is part of public policy and it must be applied ex officio; while according to the FT this is certainly not the case, which is perfectly in line with the relative case law in general and, especially, with the very narrow boundaries of public policy.

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266 ZEKOS, Eco Swiss China Time Ltd v Benetton International NV, Courts' Involvement, in JIarb, 2000, 93

267 IDOT, in Rev. Arb. 1999, N. 8. In short, it is now very clear, after the Benetton decision, that an award rendered in violation of Art. 81 ECT by an arbitral tribunal seating in a EU member State, is in breach of public policy and should be anulled on appeal.

268 IDOT, in Rev. Arb. 1999, N. 16
It is, in fact, absolutely evident that the Federal tribunal is not an instrument of integration within the EC, and cannot even ensure a uniform interpretation or application of EC law.

172. This tendency of case-law gives rise to an important question: in an event, in which the arbitral tribunal effectively applied Art. 81 ECT, how far can the FT go in an examination by virtue of lit. e), without introducing what is, actually, a review on the merits? The solution within the European community seems to be controversial while, on the other hand, in Switzerland there is no reason to digress from the usual limits, that characterise the examination of violation of public policy and, especially, from the principle according to which there is no such violation, even when the arbitrator applies the provision at issue in a manifestly false way. Therefore, it is surely not through the means of Art. 190 lit. e) PIL, that the goal of the uniform application of European law can be achieved; an aim which is always present in the case law of the ECJ and, in particular, in the sentence in point.

173. In fact, as we have already emphasised (supra § 38), responsibility practically always falls on the shoulder of the arbitrator. As a rule, whether or not he has omitted to apply Art. 81 ECT; has applied it very badly, has finally applied it on his own motion or not: his decision will be protected under public policy defence by virtue of Art. 190 par. 2 lit. e) PIL. To tell the truth, this creates some anxiety because the solutions to disputes could be diametrically at odds, depending of the choice of the arbitrator and of the philosophy that he pursues (supra FN 42).

269 KNÖPFLE/SCHWEIZER, SZIER 2000, 572, N. 4
270 IDOT, in Rev. Arb. 1999, N. 19
271 See also Rigozzi, op. cit., Bull ASA 1999, 474
VIII. Doping (sport)

174. In a decision of March 15th, 1994 the FT ruled the principle by which, the fact that the relevant rules, issued by the Olympic committee or the international equestrian federation, are characterised by great strictness (presumption of doping) is, itself, not contrary to public policy, even if they also prohibit some products (or qualified amounts of products) that in any case would not be able to modify the performances of the athlete (or of the horse).

In fact, whether these rules are appropriate or not, or even arbitrary, is really not relevant from our point of view, because, in any case, they are unable to question the fundamental principles of Swiss judicial order. In particular, there is no violation of public policy only because the regulations relative to the doping would be incompatible with certain statutory or legal dispositions. Nevertheless, this strictness must have, as a corollary, an equal strictness in the scrupulous application of the procedure of control of the doping, as defined by the regulations.  

175. In this latter decision (the famous Andreea Raducan case), after having stated this principle (i.e. of the scrupulous implementation of the relevant procedure), the FT was unfortunately unable to apply it in practice.

Andreea Raducan, the Rumanian gymnast, participated in the Olympic Games of Sydney. On September 20th, 2000, she took a pill of "Nurofen Cold and Flu". The following day she won the finals of the female competition of gymnastics and, shortly before this test - during the heating - she assumed a second pill of that medicine. After the test she took an anti-doping control and she supplied 62 millilitres of urine in total, analysed by the "Australian Sports Drug Testing Laboratory" which found a prohibited concentration of pseudo-ephedrine both in the urine.

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272 DFT of 15.3.1993 in DFT 119 II 271 cons. 8b) and in Bull ASA 1993, 398 (409)
sample A (that contained 80 millilitres of urine) and in the sample B (that contained 20 millilitres).

176. It is evident that, in the case at hand, the procedure followed by the Olympic anti-doping authorities was false, since Raducan supplied 62 millilitres of urine, whilst 100 ml. arrived at the laboratory. But the FT does not care about that, arguing that the decision of the TAS (tribunal arbitral du sport) was also based upon the unchallenged fact - i.e. admitted by Raducan - that the athlete took a medicine that had been proscribed, the sanction of which is laid down in the Olympic Movement anti-doping Code (1.1.2000). In fact, Art. 2 (2) of this code qualifies as doping not only the presence in the athlete's body of a prohibited substance, but also evidence of the use thereof. Furthermore, Appendix A also mentions pseudo-ephedrine, within the classes of prohibited substances, that are not allowed in concentrations in urine greater than 25 micrograms per millilitre. Proof that, in the case in hand, was accordingly admitted to be valid by the FT, because the athlete had, herself, publicly confessed to having taken the pill.

177. Evidently the problems resides precisely in this threshold of 25 micrograms. If, as voiced by Knöpfler/Schweizer\(^{274}\) the FT sets aside this threshold, in case of evidence of the use of forbidden substances, the solution would be unacceptably unequal with respect to the other mean of evidence, that is the presence of that substance in the athlete's body. By contrast, if the FT took this fact into account, and this is our belief (because the award is based on a report by a certain Dr. Day, according to whom the concentration of pseudo-ephedrine founded in samples A and B is consistent with the assumption of the "Cold and Flu" pill) then it is perfectly right to deny a breach of public policy, being merely a question of estimation of evidence (in fact never invoked by the claimant).

\(^{274}\) SziER 2001, 544-545
IX. Prohibition of discriminatory and deprived measures

178. This signifies a *discriminating* act, a measure or a decision, that illicitly offends the rights of the personality of the addressee, because adopted only in consideration of his sex, race, state of health, sexual, religious preferences, nationalities or political opinions. In particular, the German legislation that distinguished from the point of view of the race between "Jewish" and "Arian", has been considered of being in contrast to public policy.275

179. *Depriving measures*, contrary to public policy, are considered as follows: seizures, expropriations or nationalisation taken without indemnity.276

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275 In this sense see also the famous case Oppenheimer vs. Cattermole, House of Lords, in All England Rep., 1975, I, 538, where Lord Justice Cross ruled that "to my mind a law of this sort constitutes so grave an infringement of human rights, that the courts of this country ought to refuse to recognise it as a law at all". Legal writings have come to the same conclusion, for instance, in the context of enforcement of foreign adjudications of bankruptcy, quoting in terms of examples of violation of public policy, that allow the dismissal of an application for enforcement, the case where the State, in which the bankruptcy was adjudicated, created, between the creditors, unfounded discriminations based on their nationality or their domicile; or the case, in which the foreign adjudication of bankruptcy would only be the pretext for the seizure of patrimonial rights of a person gone bankrupt in Switzerland (BRACONI/COLOBARA, La reconnaissance et l'exécution des décisions de faillite étrangères en Suisse, in: Le juriste suisse face au droit et aux jugements étrangers, 1988, page 161 cons., in particular page 172; STAEHLIN Anerkennung ausländischer Konkurse und Nachlassverträge in der Schweiz (Art. 166 et seq. IPRG), 1989, page 57 et seq; DFT 126 III 101 cons. 3b). *Supra* § 40.

276 DFT of 14.6.2000 cons. 5b)aa) in Bull ASA 2000, 582 (602) with further ref. In concrete terms, the existence of these elements has been denied: the arbitral court having simply interpreted, and put into effect the contractual dispositions underwritten by the appellant. In this same decision the FT examined another censure, that is the violation of Art. 27 CC by certain contractual rules underwritten by the parties. The FT recognised that, according to some authors, the
X. Limitation period

180. The limitation period does not constitute, in private law, a fundamental principle of the Swiss legal order, or an essential value of law, that every decision has to respect. In fact, regardless of whether the limitation of credits is in the public interest or not, it is certain that public interest would, in any case, be absolute.277

181. Thus, because of this strictness in case law, it seems clear that the issue of the limitation period is part of the exclusive responsibility of the arbitrators, but with one reservation: the protection against serious contradictions, which has already been mentioned. For instance, such protection could become valid if the arbitral tribunal had stated that the statute of limitation had become effective and sentenced, despite this, that the defendant was obliged to pay just the same.278

182. These same principles are also applied in French legislation, where a consistent case-law rules that neither the length of a term nor its extreme brevity offends public policy, and that even a rule of domestic law, that lays down the stay of limitation period by seizing a judge without jurisdiction, does not infringe French conception of international public policy.279

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violation of Art. 27 CC could sometimes constitute a violation of public policy, but only in cases of serious and evident violation of fundamental rights. Finally, the FT rejected - once more - the censure of the appellant, arguing that it did not prove that its economic existence was put in danger by the application of the quarrelsome contractual dispositions.

278 See also SCHWEIZER, in SZIER 1994, 107 who, in a fairly unconvincing way, also applies this prohibition of contradiction to the question, as to whether an arbitral tribunal can, with impunity, declare a claim non-subjectable to limitation periods, when - by contrast - there are two well defined and different realities. For this aspect of the prohibition of contradiction, that control of minimal quality many times mentioned above (§ 107-112) enters into consideration.

279 Cour de Cassation of 30.6.1998 in Rev. Arb. 1999, 80 et seq., with a note by NIBOYET, who starts in a most lapidary manner, by asserting that: "Il
Chapter III
Case Record of Procedural Public Policy 280

I. Estimation of evidence

183. Simple objections that regard the estimation of evidence by arbitrators, especially whether the incriminated statements are, or not, based on pertinent means of evidence, are not admissible because the FT is not an appellate jurisdiction. In fact, the Supreme Court may review the estimation of evidence, the application of the law and the solution to the dispute ruled by arbitrators, only from the very narrow point of view of violation of public policy. Therefore, regarding statements of fact (included the facts originated from the estimation of evidence) and application of law, in order to violate public policy it is not sufficient that evidence must manifestly have been badly estimated.281

280 According to legal writings (KNÖPFER/SCHWEIZER, in SZIER 1996, 549; SCHWAB/WALTER, op. cit., Kap. 24, 268, N. 51), retrial also pertains to procedural public policy. For our purposes it is enough to refer the reader to the relative case-law and legal writings (especially DFT 122 III 492; DFT 118 II 199; BERTI/SCHNYDER, op. cit., Art. 190 N. 93-96; RIGOZZI/SCHÖLL, Die Revision von Schiedssprüchen nach dem 12. Kapitel des IPRG, Bibliothek zur Zeitschrift für Schweizerisches Recht, Beiheft 37, 2002).

281 DFT 127 III 429 cons. 2d; DFT of 26.5.1999 cons. 1a) in Bull ASA 2000, 331; DFT 121 III 331 cons. 3a; DFT of 19.2.1990 Bull ASA 1990, 171; SJ 1991 12 (14); DFT of 13.2.2002 (4P.161/2001) cons. 3a, in which the FT reassumes the principle, according to which, there is arbitrariness in the estimation of evidence and statements of fact, when the tribunal does not consider, without any serious reason, means of evidence capable of influencing the decision; when a manifest error is made concerning its sense and impact or, further more, when based on the collected elements, expressed in indefensible terms.
Case law has always applied these principles in a quite coherent way and is scattered with interesting examples. In particular:

(a) The question as to whether lack of proof related to a specific performance has been asserted rightly or wrongly by the arbitral tribunal, is a problem that cannot be censured before the FT, except from the limited point of view of public policy, or if the relative statements of fact have been put into effect in contrast to legal procedural guarantees, i.e. those of Art. 190 para. 2 lit. d) PIL in relation to Art. 182 para. 3 PIL.\(^{282}\)

(b) Furthermore, in a decision of March 15th, 1993\(^{283}\) the appellant intentionally wanted to cast doubts on the evidentiary proceedings, by censuring the modalities of the anti-doping controls and the estimation of the result of those controls. This was all in vain, in the event, since the FT explained that this subject matter had nothing to do with public policy, but rather with the burden of proof and the estimation of evidence, that cannot be governed in civil law in the light of the principles that apply in criminal law, such as the presumption of innocence and the principle \textit{in dubio pro reo} or corresponding guarantees, that are laid down in the European Convention on human rights.

(c) In a decision of January 28, 1997\(^{284}\) the FT confirmed that the reproach made to the arbitral tribunal, i.e. that it had based its decision on non-existent proof, constituted a mere criticism of the estimation of evidence and, as such, it was completely out of context relative to the problem of its consistence with the procedural public policy.

(d) Finally, in a decision of July 25th, 1997\(^{285}\) the FT adjudicated that an arbitrator could not be held responsible for the non-appearance of a witness who had been duly summoned before the arbitral court. The crucial question was, conversely,

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\(^{283}\) DFT of 15.3.1993 in DFT 119 II 271 cons. 8 and in Bull ASA 1993, 398 (409)
\(^{284}\) DFT of 28.1.1997 cons. 2c)aa) in Bull ASA 1998, 118 (130)
\(^{285}\) DFT of 25.7.1997 cons. 2 in Bull ASA 2000, 96
knowing as to whether the arbitral tribunal would have had to
sanction the non-appearance of the witnesses, i.e. the managers
of the company in dispute, to the detriment of that party.
Firstly, the FT made plain that this was not a question related to
the right to be heard but rather a criticism of the estimation of
evidence undertaken by the arbitral tribunal: in fact, the conse-
quence that the arbitrators had to draw from declarations and
procedural behaviour of a party or of a witness - respectively
from the silence or from the absence of the latter - pertains to the
case in hand, could have been heard only within the narrow boundaries of Art. 190 para. 2 lit. e) PIL. But
here the FT dismissed the appeal, ruling that such a violation
had not come into effect, because by virtue of Art. 184 para. 2
PIL the aggrieved party could have demanded the judicial
assistance of State courts at the seat of the arbitral tribunal. 286

II. Disregard of procedural provisions chosen by the
parties

1. General aspects

185. We have already mentioned that under the PIL regime,
parties to an arbitration are almost free to arrange the procedure
for their own needs. It is very common that parties have
recourse to procedural rules proposed by the principal arbitral
institutions, especially the ICC Rules of arbitration (in force as
from January 1st, 1998) the LCIA Rules, or the UNCITRAL
Arbitration Rules. The relative question arising is of whether
every disregard of the procedural agreement taken by the parties

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286 This radical position does not seem to be shared in legal writings, which
tend to limit the request of judicial assistance in the taking of evidence,
only if it is absolutely necessary. If a party refuses to produce documents
or to be examined, its conduct can be assessed according to the principle
of obstruction of evidence without judicial assistance being required
(SCHNEIDER, in International Arbitration in Switzerland, Art. 184 N. 57
with further ref.).
and even minimal deviations, may be grounds for setting aside the award. The answer is no. The FT ruled, consistently with the general principles applicable to public policy, that a false and even an arbitrary application of law (i.e. of procedural and substantive law) has no relevance according to Art. 190 para 2. lit. e) PIL. That means, essentially, that the FT eliminated a great portion of procedural defeats, and that a breach of parties' procedural agreement justifies the setting aside of an award, only if the particular procedural act, itself, constitutes a violation of public policy by virtue of Art. 190 para 2 lit. e) PIL, or of the right to be heard under lit. d) of this provision.287

186. This prudent solution of the FT is perfectly in line with custom and practice in international arbitration. In fact, contrary to State courts, arbitrators are not bound - in an inelastic way - to the underlying procedure and must not endorse unnecessary procedural formalism, and so harm the substantive truth. Accordingly, it is frequent to grant arbitrators ample discretion, especially in extending deadlines, accepting late submissions, widely interpreting procedural agreements between the parties etc.288

187. The FT gave concrete form to this principle by a decision of December 30th, 1994,289 regarding the amendment of the action through conclusive pleadings. Essentially, in these latter pleadings, the petitioner varied the legal formulation given to the action without, however, varying the underlying statements of fact; thus, the circumstances of fact on the basis of the action remained identical. The arbitral tribunal admitted the amendment of the action, while the appellant alleged the violation of procedural public policy, because such a amendment would not have been admiss-

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287 DFT of 24.3.1997 cons. 1b)aa) in Bull ASA 1997, 316 (323); POUDRET, op. cit., in Bull ASA 1988, 58; supra § 125. (c )

288 KREINDLER/KAUTZ, op. cit., in Bull ASA 1997, 590-591; SCHNEIDER, op. cit., Art. 182, N. 3 who underlines that arbitrators have once again a special responsibility to the parties, as well as the duty to create clarity in a timely manner as to the procedural process.

sible according to the arbitral procedure (ICC) chosen by the parties. The FT dismissed the appeal, arguing that the greater majority of Swiss cantonal statutes of procedure permits the plaintiff to amend the action if the initial statements of fact are not modified. Consequently, the arbitral tribunal did not violate any fundamental principle of law, as it had not opposed to such an amendment.

2. Interpretation of the underlying procedural rules

188. In a case of March 24, 1997, the parties agreed by the ICC terms of reference (TOR) on specific deadlines, with the latitude to apply to the Chairman for extensions of time limits with a copy of the application to each arbitrator. Subsequently the Chair should give a ruling on the application, after consulting with the co-arbitrators. The claimant then applied for such an extension of the deadline, which was granted by the chairman, without consultation with the co-arbitrators before ruling on it. This extension had been successively confirmed by the arbitral tribunal, which relied on a particular interpretation of the TOR. The respondent challenged the final award for violation of due process and public policy (among other grounds). The FT dismissed the appeal ruling that in the specific case, the dispute over permissibility of an extension of the agreed deadline was an argument about how to interpret some provisions of the "terms of reference". Thus, it was not admissible in the light of Art. 190 lit. e) PIL, because differences in interpretation between the aggrieved party and the arbitral tribunal, did not constitute violation of public policy.

189. The question arising at this stage is the following: what if this interpretation of the procedural agreement by the arbitral tribunal leads to an infringement of due process, that is, of very fundamental procedural principles? In other words, may an arbitral tribunal do whatever it likes as long it gives one plausi-

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290 DFT of 24.3.1997 cons. 1b)aa) in Bull ASA 1997, 316 (323)
ble justification of its action, by interpreting the underlying procedural agreement?
We do not agree, and we do not think that the Federal Tribunal would have agreed, either. In fact, what the Supreme Court did in this decision, was to review in the light of public policy, the interpretation given by the arbitrators to the TOR itself, by stating that there was no infringement at all. 291

190. There is, in this same decision (cons. 5), a second peripheral example of these principles. This was the case where sessions of the arbitral tribunal were held at a place other than that of the seat of arbitration. The FT ruled that this fact does not violate public policy. With the choice of the seat in Switzerland, the parties intended to subject their legal relationships, in case of dispute, to Swiss lex arbitri and not to stipulate a specific location for the deliberations. 292

III. Procedural good faith and abuse of process

1. Principle of due process

1.1 General aspects

191. We have already mentioned that the right of due process pertains to procedural public policy. 293 But what is the subject matter of this notion of "due process"?

291 KREINDLER/KAUTZ (op. cit., in Bull ASA 1997, 587-590) seem to be surprised by the low standards set by the FT, concerning the exclusion of violations of procedural public policy. In fact, the ruling of the FT in the case at stake, is not so surprising, and is perfectly consistent with the general rules governing procedural public policy. In fact, the decisions, issued by the arbitral tribunal, were in themselves not infringing any fundamental procedural principles, as conceived in Switzerland.

292 See in the same sense: LALIVE/POUDRET/REYMOND, op. cit., Art. 176, N. 8

293 DFT of 11.6.2001 in DFT 127 III 429 and Bull ASA 2001, 566, quoting DFT 126 III 327 (A foreign decision can be incompatible with the Swiss judicial order not only because of its substantive content, but also because of the procedure it is issued from (art. 27 para 2 PIL). In
Surely due process implies, that the parties have an equal opportunity to be heard (Art. 190 para. 2 lit. d) PIL) and to be tried by impartial arbitrators (Art. 180 PIL),294 but it is most certainly conceivable that fundamental rules of due process are violated in cases, that are not laid down in Art. 190 para. 2 lit. a-d) or Art. 180 PIL.

192. The case-law regarding Art. V para. 1 lit. b) of the New York Convention is very plentiful and there are no reasons which could prevent a similar application - mutatis mutandis - of these principles in the framework of Art. 190 para. 2 lit e) PIL. The same is valid for case-law based upon Art. 27 para. 2 lit. b) PIL295 and Art. 27 para. 1 of the former Brussels Convention (now Art. 34 para. 1 of the Reg. 44/2001) and the Lugano Convention.296 Finally one has also to take into account the aforementioned international Conventions (supra § 122).

For example, there could be cases where the names of the arbitrators are not communicated to the parties; or if an important letter, submitted by one party, was not forwarded by the arbitrators to the other party.297 Under certain circumstances, inadmissibility can also result from evidence obtained illegally, or when the good faith principle also imposes parties to co-operate in the proceedings.298 Finally, the right of parties to comment on an expert's report is also an integral part of the right to a fair trial.299

this respect, Swiss public policy requires the observance of fundamental procedural rules derived from the Constitution, in particular those, such as the right to a fair trial and the right to be heard. (DFT 126 III 101 cons. 3b; DFT 122 III 344 cons. 4a) (348-349) with further ref.).

293 DONZALLAZ, op. cit., 424-425; 436
294 See recently: DEJC of 28.3.2000 in the matter Krombach v Bamberski (Case C-7/98), N. 38-42 with further ref. and the comment of SCHWANDER op. cit., 153 et seq., who examines the interesting question as to whether the ECJ may set limits to the notion of procedural public policy laid down by member States, and http:// www.curia.eu.int/ common/recdoc/convention/en/ index.htm?5
296 SCHNEIDER, op. cit., Art. 184, N. 9-14, 18, 54
297 SCHNEIDER, op. cit., Art. 184, N. 41
A question: is everything, which is in breach of "due process" according to the aforementioned case-law, automatically in breach of procedural public policy by virtue of Art. 190 para. 2 lit. e) PIL? The answer is: no. It is obviously necessary that the prerequisites pertaining to that concept be fulfilled, that is to say: firstly, the aggrieved party must object the procedural flaw immediately within the arbitral proceedings. Secondly, in order to avoid to upsetting the entire system, the grounds of breach of due process has to be construed narrowly. One has to bear in mind that both substantive and procedural public policy intervene only in very exceptional cases, i.e. in case of breach of fundamental and generally-accepted procedural principles recognised in a democratic State.

Furthermore, there is a specific example of application of due process in the context of Art. 190 para. 2 lit e) PIL, which is a decision rendered on 23rd September, 1999 by the Section for arbitral proceedings of the Cantonal Tribunal in Neuchâtel pursuant to Art. 191 para 2 PIL. For the first time (according to our knowledge), a State Court admitted an infringement of public policy (in its procedural shape). In that case the defendant proposed taking complementary evidence, mainly of expert opinion. The arbitral tribunal accepted the same, specifying to the defendant, that it had to submit proposal of expert names and the questions. Both claimant and defendant did what was asked of them, but all their offers of complementary means of evidence were rejected, because they were considered by the arbitrators as being irrelevant and dilatory. The Cantonal Tribunal in Neuchâtel ruled that once the permission to assume complementary means of evidence had been granted, the arbitrators could not go back on their decision.

301 Bull ASA 1999, 565, with a note by KNÖPFER/SCHWEIZER in SZIER 2000, 610 et seq.
without infringing the principle of procedural good faith, that is imposed not only to parties but also to judges and arbitrators, and that may be understood both as a consequence of the maxim *pacta sunt servanda* and/or of due process according to Art. 190 lit d) PIL.

In any case the arbitrators, at least preliminarily, should have invited the parties to express their position as to a possible waiver of the taking of these new means of evidence, which had been previously admitted by the arbitrators.

195. It is evident that procedural good faith is also imposed on judges and arbitrators, much less evident is that the *pacta sunt servanda* principle may, itself, constitute a source of such good faith. In fact, the procedural breach committed here by the arbitrators concerns more the violation of the right to be heard (in a form - that of being allowed to express himself before the decision is rendered to the detriment of the party - covered by Art. 190 para. 2 lit. d), than of public policy. In fact, in the case in hand, it is essentially quite difficult to understand where the "procedural agreement" between parties and arbitrators was, and what agreement (i.e. *pactum*) should have been respected. More interesting would have been the situation, in which the procedural behaviour in hand would have been the subject matter of an agreement signed by the parties and the arbitrators: for instance, an agreed deadline for a certain submission, laid down in the ICC Terms of References (TOR). Is this a multilateral contract between arbitrators and parties, implying the application of the principle *pacta sunt servanda*?

196. The implied answer given by the FT in a decision 24th March, 1997, was: no, ruling that the challenge in hand was founded on the correct interpretation of the TOR and that an interpretation of the TOR by the arbitral tribunal which differs from that of the parties, was not an infringement of public

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302 LALIVE/POUDRET/REYMOND, op. cit., Art. 182, 344, N. 12, with some examples; FRANK op. cit., § 50 N. 8-12a
policy. In fact, it is evidently inconsistent with the contractual idea, that a party (i.e. the arbitral tribunal), unilaterally re-interprets its own contractual obligations, but - on the other hand - it is surely the only reasonable solution. Indeed, the parties themselves are the real masters of procedural choice, which is not subjected to the approval by the arbitral tribunal. But, on the other hand, arbitrators must remain quite free in the application of these procedural rules, in order to favour substantive truth and this, even at the expense (if necessary) of an application of the procedure that is perfectly coherent and deprived of contradictions. This is valid, above all, for questions which pertain to aspects of minor importance and that do not regard essential principles of procedure.

The solution would have been different if the arbitral tribunal had violated due process in a form not covered by lit. d) (for instance the refusal to grant an hearing or to award an extension of time limits or more to be guilty of over formalism). Then the examination would have been fulfilled under lit. e), not so much per violation of the principle pacta sunt servanda but rather of procedural public policy in its expression of "due process". In this case, the solution would have depended on the existence of the above mentioned prerequisites and, above all, on the importance of the committed infraction.

1.2 Non-reasoned awards

Contrary to Art. 36 lit. h), in relation with Art. 33 para. 1 lit. e) of the Concordat, but in accordance with the principles of the NYC, Art. 190 para. 2 PIL does not subsume the plea of lack

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304 Schwab/Walter, op. cit., Kap. 15, 155. Thus, it is difficult the enter in a "contractual logic", even if the arbitral tribunal contributed to the conclusion of this procedural agreement and the arbitrators subscribed the final product.
of reasons of the award. This approach seems coherent with the legislator's will to reduce grounds for attack with respect to the Concordat. Accordingly, lack of reasoning cannot even be derived from lit. d) of Art. 190 para. 2 PIL, because this is not already included from a literal point of view.306

Regarding the possible violation of public policy, the FT held that lack of reasons was not in itself sufficient to constitute a violation of public policy, quoting a precedent of 12.12.1975,307 which referred to Swiss public policy in the context of the enforcement in Switzerland of a non-reasoned arbitral award rendered in England. At the same time, the FT left open the question as to whether a non-reasoned award might be set aside under Art. 190 para 2. lit. e) PIL for violation of procedural public policy. This means that a motion for setting aside, based solely on lack of reason of the award, would not be upheld: what is relevant is that the result of the award be in contrast with public policy. Thus, setting aside will be avoided, if one may infer from the records on file (or from the evidence taken at the appeal stage) that this non-reasoned award does not lead to such a result, or that it is not the product of an undue and unfair decision-making process.308

199. What would be the solution in the inverse situation? The reasons given for decisions are part of the Swiss judicial tradition, and this duty is laid down in all Cantonal statutes of procedure.309 The FT justified this duty, with the need to safeguard the right of each party to take the decision on to appeal. It also defined this duty as an essential rule, because the aggrieved party would be unable to correctly attack a decision, without knowing its underlying reasoning.310 Contrary to Anglo-Saxon judicial traditions, even Art. 189 para. 2 PIL, imposes the

307 DFT 101 Ia 521 cons. 4
308 LALIVE/POUDRET/REYMOND, Art. 190, 426, N. 5d); WIRTH, op. cit, Art. 189, N. 32
309 VOGEL, Grundriss des Zivilprozessrecht, Kap. 7, N. 107-108
310 DFT 107 Ia 246 cons. 3a
duty to support the award by reasons on arbitrators. Thus, by simply applying the principles ruled in the aforementioned decision, it seems clear that in cases where lack of reasoning led to the situation in which the tribunal, confronted with a motion based on lit. e), would be completely incapable of determining whether the award on the merits violates public policy - it would be difficult to deny - a priori - a possible violation of lit. e).\textsuperscript{311}

In this sense, public policy must be granted the right to protect itself,\textsuperscript{312} and this is - \textit{mutatis mutandis} - the solution stated in French case law, where it is admitted that such an infringement might arise in the event, in which the absence of clear expression of an award, disguises a solution on substance which, itself, is also irreconcilable with public policy.\textsuperscript{313}

2. Abuse of process

200. The abuse of law, as defined in § 157, is also valid - \textit{mutatis mutandis} - in the context of procedure. In fact, the Federal tribunal, in the decision of September 18th, 2000, refused to enter into the heart of a certain objection raised by the aggrieved party and based on Art. 190 para 2 lit. c) PIL, because it proceeded from an abusive attitude of this same party, who wanted to obtain an exorbitant advantage by these means, and who manifested thereby an evident \textit{venire contra factum proprium}.\textsuperscript{314}

It is therefore quite interesting to find that the absence of such an abuse constitutes a real and proper additional prerequisite, so

\textsuperscript{311} In this sense: HEINI, op. cit. Art. 189 N. 12; WIRTH, op. cit., Art. 189 N. 31
\textsuperscript{312} JERMINI, op. cit., 305 et seq., N. 615-618
\textsuperscript{313} LÖRCHER, op. cit., 93, quoting a decision of the 18.3.1980 of the French Court de Cassation
\textsuperscript{314} DFT of 18.9.2001 cons. 3c)bb) (4P.143/2001). But one reservation must be specified (which, really, is of very reduced impact in international arbitration), for those situations which pertain to public order (such as marriage) and for which the abuse of law does not enter in consideration (DFT 114 II 1 cons. 3 and 4).
much so that the FT is actually allowed to examine each of the grounds for setting aside laid down by Art. 190 para. 2 PIL, when this prerequisite exists.

3. Fraud committed by a party within the arbitral proceedings

201. The subject matter of a decision of September 30th, 1993 of the Paris Court of Appeals was the following. In a dispute related to a question of payment of commissions, resulting from a mandate contract, the mandatory asserted that he would incur substantial expenses in order to fulfil the mandate, for instance the payment of members of his staff and of general expenses. He also attached a relative statement sustaining this allegation. Basing their decision on this statement (among other factors), the arbitral tribunal sentenced the mandator to pay certain commissions. At the stage of appellate jurisdiction, the mandator attached new documents and statements that disavowed the evidence offered by the mandatory. The crucial point was, indeed, that of possible breach of public policy through this award, due to the facts that its execution would have lead to allowing a fraud committed by a party within the arbitral proceedings.

The Paris Court of Appeals set aside the award, ruling that, by applying the general principle of law according to which "la fraude fait exception à toutes les règles", the award was harming French international public policy and, therefore, must be set aside.

202. What would be the result in Switzerland?

First, the Federal tribunal is not an appellate jurisdiction and therefore new facts and new means of evidence are only exceptionally taken in consideration in the motion for constitutional review (Art. 95 Statute on the Organisation of the Federal Judiciary). There is of course a second conceivable way:

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315 Cour d'appel de Paris of 30.9.1993 in Bull ASA 1994, 105. This decision is consistent with French case law and is still current (see RACINE in Rev. Arb. 2000, 490, with further ref.).
to file a motion for retrial. So, the first option would be very unlikely to be successful, because this new means of evidence could have been produced within the arbitral proceedings and the same is also valid for the second grounds of retrial provided by Art. 137 Statute on the Organisation of the Federal Judiciary (i.e. the applicant subsequently discovers new relevant facts or cogent means of evidence which he was unable to plead or to adduce in the earlier proceedings).

There remains a second possibility of grounds, that is that the award was influenced by criminal acts to the detriment of the applicant, which is, evidently, not very easy to prove although, in the case at hand, the crime of forgery of documents (Art. 251 PC), or of false statement of a party in trial (Art. 309 PC) might have been conceivable.316

IV. Stay of arbitral proceedings

The aggrieved party argued before the arbitral tribunal that the agency contracts violated bonos mores and were therefore void, because the agreed commissions were bound to pay some bribes. In order to sustain this allegation, he objected the simultaneous pendency of certain criminal proceedings that had been brought forward in Italy, and then applied for a stay of the arbitral proceedings until these penal proceedings would have been concluded. The arbitral tribunal dismissed the claim and the FT likewise. Without any success, the appellant invoked the maxim for which "le pénal tient le civil en l'état". This principle, which derives from the French conception of law, was to be sustained on appeal, but only in cases in which it was actually part of public policy. According to the FT, however, this would never be the case, because, in fact, it would never be possible to assert,

316 Rigozzi/Schöll, op. cit., 33 et. seq.
without doubt, that this maxim could be part of the fundamental principles of the Swiss judicial order.\footnote{DFT 119 II 386 cons. 1c)}

V. **Res iudicata (ne bis in idem)**

204. Finally, in a first decision of February 19th, 1990\footnote{DFT of 19.2.1990 cons. 2a) in Bull ASA 1990, 171} the FT did not examine whether the principle *ne bis in idem* is part of the concept of public policy according to Art. 190 para 2 lit. e) PIL, because in concrete terms this principle was not violated by the arbitral tribunal. Subsequently, in a second decision of September 20th, 2000,\footnote{DFT of 20.9.2000 cons. 3b) in Bull ASA 2001, 487 with a note by KNOPFLER/SCHWEIZER, in SZIER 2001, 515} quoting BERTI, the FT made plain that the breach of the *ne bis in idem* principle did not pertain to the question of jurisdiction (lit. b), but to public policy (lit. e).
Conclusions

205. The main conclusion, which may be drawn from the above, is the need to distinguish very carefully between public policy of the arbitrators - that is at the adjudication stage - and public policy at the appeal stage. They are distinguished, not only for their quite different relevance towards positive public policy and, especially, of the "lois d'application immédiate" but, more generally speaking, from the point of view of their juridical approach. Thus it becomes clear, that the approach of the Federal tribunal with respect to Art. 190 para. 2 lit. e) PIL is inherently Swiss, irrespective of the (substantive or procedural) law applied by the arbitrator, while that is not necessarily the case for the arbitrator himself. In fact, arbitrators are neither a body nor an emanation of the State, to which they do not have to have any specific obedience, and, furthermore, arbitrators are often not of Swiss legal origin. Therefore, if it is clear that their examination of public policy will have a departure point, which often, but not necessarily, may not always be a Swiss one.

206. It is clear that the imposition, by the FT, of a Swiss perception of public policy to facts relative to a dispute which has little or nothing to do with our Swiss judicial order, could seem illogical and, academically speaking, perhaps it is. But in a pragmatic approach, it represents a solution of intellectual honesty and does not lead to tangible problems. In fact, Switzerland is a "civilised" nation which proposes values and fundamental principles of law common to democratic Nations on the whole and, furthermore - and this has been recently repeated by federal Justice Walter\(^\text{320}\) - State control of arbitral jurisdiction is reduced to the bare necessities.

207. Finally, the increased responsibility of arbitrators is perfectly consistent with the idea that the dispute must be solved at trial level (i.e. at arbitral tribunal level) and not at appellate stage. But, on the other hand, the immense power of arbitrators gives rise to some concern regarding the substance of the dispute and,

\(^{320}\) WALDER, op. cit., Bull ASA 2001, 6
especially, with respect to the "lois the police" of third States and the different existing philosophies which may be more, or less, interventionalist in nature. We do not think that arbitrators should be tempted to render awards that are academically perfect, but rather should maintain a marked adherence to the will of the parties, which seems to be - in the end - the best guarantee of the effectiveness of the award.
Lugano-Übereinkommen und Schiedsgerichtsbarkeit
Ausgewählte Fragen

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EWGV Vertrag zur Gründung der Europäischen Wirtschaftsgemeinschaft vom 25. März 1957

f. folgende
ff. fortfolgende
Hrsg. Herausgeber
ibid. ibidem
IPR Internationales Privatrecht
IPRG Bundesgesetz vom 18. Dezember 1987 über das internationale Privatrecht

J. Arb. int. Journal of International Arbitration

lit. litera
LugÜ Lugano-Übereinkommen vom 16. September 1988 über die Gerichtliche Zuständigkeit und die Vollstreckung gerichtlicher Entscheidungen in Zivil- und Handelssachen (SR 0.275.11)

New York-Übereinkommen Übereinkommen vom 10. Juni 1958 über die Anerkennung und Vollstreckung ausländischer Schiedssprüche (SR 0.277.12)

Nr. Nummer
Riv. dir. int. priv. proc. Rivista di diritto internazionale privato e processuale

Rs. Rechtssache
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I. Vorbemerkung

Im Titel dieser Arbeit sind das "Lugano-Übereinkommen" und die "Schiedsgerichtsbarkeit" verbunden. Die Beziehung zwischen beiden erscheint allerdings konträr, denn die Schiedsgerichtsbarkeit ist aus dem Anwendungsbereich des Lugano Übereinkommens ausdrücklich ausgeschlossen.

Diese Tatsache bedeutet indessen nicht, dass das Übereinkommen für die Schiedsgerichtsbarkeit irrelevant wäre. Zwar bewirkt eine gültige Schiedsklausel den Ausschluss der Zuständigkeit der staatlichen Gerichte. Die Schiedsgerichte sind aber auf die Mitwirkung eines staatlichen Gerichts vor allem dann angewiesen, wenn eine Partei sich der zuvor freiwillig anerkannten Zuständigkeit des Schiedsgerichts entzieht und ausserdem, wenn es um die Durchsetzung der Entscheidungen des Schiedsgerichts geht. Die Entscheidung über die Anerkennung und Vollstreckung von internationalen Schiedssprüchen auf einem bestimmten Territorium steht ebenfalls den staatlichen Gerichten aufgrund bilateraler Abkommen oder ihres eigenen nationalen Rechts zu.

Spannungsverhältnisse können auch entstehen, sobald die Gültigkeit einer Schiedsklausel in Frage gestellt wird. Dann kann sich die Zuständigkeit des Schiedsgerichts mit derjenigen der staatlichen Gerichte überschneiden, die aufgrund der Bestimmungen des Lugano-Übereinkommens gegeben ist. Die Anwendung von einander verschiedener und sich ausschliessender Rechtsschriften führt zu Kollisionen, die widerspruchliche Entscheidungen zur Folge haben können.

Nach einem Überblick über das Lugano-Übereinkommen und einem Hinweis auf die Internationale Schiedsgerichtsbarkeit (II) wird der Stand der Diskussion zum Ausschluss der Schiedsgerichtsbarkeit anhand der Materialien und der Rechtsprechung des EuGH dargestellt (III). Sodann werden einerseits ausgewählte Fragen im Zusammenhang mit dem Ausschluss der
Schiedsgerichtsbarkeit angesprochen (IV) und andererseits, mit Hinblick auf das Lugano-Übereinkommen, die Anerkennung und Vollstreckung der Schiedssprüche, Fragen zur Anordnung von einstweiligen Massnahmen, Probleme aus laufenden parallelen Schieds- und Gerichtsverfahren sowie Folgen der Nichtbeachtung einer gültigen Schiedsabrede seitens staatlicher Gerichte behandelt.

II. ÜBERBLICK ZUM LUGANO ÜBEREINKOMMEN

1. Entstehung, Ausgestaltung, Fortentwicklung


Das Lugano-Übereinkommen ist als Parallelübereinkommen zum EU internen Brüsseler-Übereinkommen vom 27. September 1968 über die gerichtliche Zuständigkeit und die Vollstreckung gerichtlicher Entscheidungen in Zivil und Handelssachen (EuGVÜ oder Brüsseler Übereinkommen), in den revidierten Fassun-

2 SR 0.275.11.
gen von 1978 und 1982 ausgestaltet. Das heisst, dass es sich
sachlich und inhaltlich an das Brüsseler-Übereinkommen eng
anlehnt. Umgekehrt wurde das EuGVÜ anlässlich des Beitritts-
übereinkommens für Spanien und Portugal vom 26. Mai 1989
an das LugÜ angegliedert. Seitdem herrschte zwischen den bei-
den Parallelübereinkommen weitgehend Identität, geringe Un-
terschiede ausgenommen.

Ferner stellt das Lugano-Übereinkommen (wie auch das Brüs-
seler-Übereinkommen) eine sog. "convention double" dar, was
bedeutet, dass neben den direkten gerichtlichen Zuständigkeiten
auch die indirekte Zuständigkeit geregelt ist. Schliesslich sind
Regelungen betreffend die Anerkennung und Vollstreckung
ausländischer Entscheidungen enthalten.

Trotz der Parallelität mit dem Brüsseler-Übereinkommen stellt
das LugÜ ein eigenständiges Normenwerk dar. Die Beziehun-
gen zwischen den beiden Übereinkommen sind im Art. 54b Lu-
gÜ geregelt. Danach gilt zwischen den EU Staaten immer das
Brüsseler-Übereinkommen. Dem Lugano-Übereinkommen wird
aber Vorrang eingeräumt in allen Fällen, wo ein relevantes Be-
zugsselement über den Kreis der EU Staaten hinausführt und auf
den "Nur-Lugano-Staat" weist.

Was die Fortentwicklung der beiden Übereinkommen anbelangt,
is zunächst darauf hinzuweisen, dass in der EU seit dem 1.
März 2002 das Brüsseler-Übereinkommen durch die sog. Brüs-
sel-I-Verordnung abgelöst worden ist. Die Parallelität mit dem
LugÜ ist seither nicht mehr aufrechterhalten. Mit dem Betritt

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4 Botschaft, BBl 1990 II 270.
5 Vgl. dazu KROPHOLLER, EZPR, Einleitung, Rz 60 ff.
6 Das heisst die Zuständigkeit des Gerichtes, dessen Entscheid in einem an-
deren Vertragsstaat anerkannt und vollstreckt werden soll.
7 Botschaft, BBl 1990 II 330; KROPHOLLER, EZPR, Einleitung, Rz 67ff.
8 Verordnung über die gerichtliche Zuständigkeit und die Anerkennung und
Vollstreckung von Entscheidungen in Zivil- und Handelssachen vom 22.
9 Zur Revision des LugÜ vgl. MARKUS, Schwerpunkte, S. 35 ff.
von einigen EFTA Staaten zur EU (Österreich, Schweden und Finnland) hat das Lugano-Übereinkommen an Ausdehnung verloren. Das Übereinkommen wird aber weiterhin für die Beziehungen der Schweiz mit den Lugano-Vertragsstaaten von Bedeutung sein. Ausserdem wird seine Aktualität, im Zusammenhang mit seiner Anwendung in osteuropäischen Staaten weiterbestehen 10.

2. **Auslegung des Lugano-Übereinkommens**


Für die Auslegung des Brüsseler-Übereinkommens haben die EU Mitgliedsstaaten ein Vorlageverfahren vereinbart13. Danach untersteht das EuGVÜ der Vorabentscheidungsbefugnis des EuGH.

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10 Ausser die EFTA-Staaten ist dem LugÜ ab 1. Februar 2000 auch Polen beigetreten; vgl. auch KROPHOLLER, EZPR, Einleitung; Rz 50.
11 JENARD/MÖLLER, Bericht, Nr. 110 ff.
12 KROPHOLLER, EZPR, Einleitung, Rz 41 ff.; WALTER, S. 162 ff.
Hingegen besteht für das Lugano-Übereinkommen keine einheitliche Auslegungszuständigkeit. Insbesondere kennt das LugÜ die Auslegungsbefugnis des EuGH nicht, da für die EFTA-Staaten die Auslegung eines Organs der EU nicht annehmbar ist. Darüber hinaus ist es den Gerichten der EU Mitgliedstaaten verwehrt, dem EuGH Fragen zur Auslegung des Lugano-Übereinkommens vorzulegen.\textsuperscript{14}

Bezüglich des Wunsches der Vertragsstaaten, eine möglichst einheitliche Auslegung des Übereinkommens sicherzustellen, verweist das Protokoll Nr. 2 zum LugÜ über die einheitliche Auslegung des Übereinkommens ausdrücklich auf die Praxis zum Brüsseler-Übereinkommen.\textsuperscript{16} Daraus ergibt sich, dass die Urteile des EuGH die bis zur Unterzeichnung des Übereinkommens ergangen sind, für dessen Auslegung massgebend sind.\textsuperscript{17} Das Bundesgericht hat bereits mehrmals festgehalten, dass die vor dem Abschluss des LugÜ ergangenen Entscheide des EuGH zum EuGVÜ als verbindliche Entscheidungsgrundlagen zu rücksichtigen sind.\textsuperscript{18}

Die neueren Urteile des EuGH zum Brüsseler-Übereinkommen sind gemäß Art. 1 des Protokolls Nr. 2 zum LugÜ "insofern von Bedeutung, als es die Vertragsstaaten des LugÜ für angezeigt halten, dass ihre Gerichte bei der Auslegung des LugÜ den Grundsätzen gebührend Rechnung tragen, die sich aus der Rechtsprechung des EuGH zum EuGVÜ ergeben."\textsuperscript{19}

\textsuperscript{14} KROPHOLLER, EZPR, Einleitung, Rz 72.
\textsuperscript{15} LugÜ, Präambel, Satz 6.
\textsuperscript{16} Protokoll Nr. 2 zum LugÜ, Präambel, 3 und 4 Satz, das nach Art. 65 LugÜ Bestandteil des Übereinkommens ist.
\textsuperscript{17} JENARD/MÖLLER, Bericht, Nr. 112; KROPHOLLER, EZPR, Einleitung, Rz 75.
\textsuperscript{18} BGE 124 III 436 (S. 439 f.) mit weiteren Hinweisen.
\textsuperscript{19} ibidem; BGE 125 III 108 (S. 110 c)): "La Convention de Lugano de 1988 dépend étroitement de la Convention de Bruxelles de 1968 qui lui a servi de modèle. Les décisions rendues par la Cour de justice des Communautés européennes (ci-après: CJCE) au sujet des dispositions de la Convention de Bruxelles, reproduites en substance dans la Convention de Lugano, peuvent donc être en principe utilisées dans l'interprétation de cette

3. Regelungsbereich des Lugano-Übereinkommens

3.1 Anwendungsbereich

a) Sachlicher Anwendungsbereich

Das Lugano-Übereinkommen ist sachlich "in Zivil- und Handelssachen anzuwenden, ohne dass es auf die Art der Gerichtsbarkeit ankommt" (Art. 1 Abs. 1 LugÜ). Diesbezüglich geht der EuGH von einem autonomen Begriff der Zivil- und Handelssachen aus, der sich nicht nach dem Landesrecht eines beteiligten Staates auslegen lässt, sondern sich nach den Zielsetzungen und dem System des Übereinkommens sowie nach den allgemeinen Grundsätzen richtet, die sich aus der Gesamtheit der nationalen Rechtsordnungen ableiten lassen. Das bedeutet zum einen, dass eine Streitigkeit nicht zur zivil- oder handelsrechtlichen wird, weil ein Zivilgericht darüber entscheidet. Zum andern, dass sie die zivil- oder handelsrechtlichen Eigenschaft nicht
verliert, wenn sie vor einem Straf- oder Verwaltungsgericht geltend gemacht wird.\textsuperscript{22} Sofern die Bestimmungen des Lugano-Übereinkommens anwendbar sind, treten sie anstelle derjenigen des IPRG\textsuperscript{23} und oder Staatsverträge, die sich mit Rechtsgebieten befassen, die in den Anwendungsbereich des Übereinkommens fallen.

\textit{b) Ausgeschlossene Bereiche}

Nicht vom sachlichen Bereich gemäß Art. 1 Abs. 1 LugÜ erfasst sind die Steuer- und Zollsachen sowie die verwaltungsrechtlichen Angelegenheiten, d.h. Sachen, die im Zusammenhang mit der Ausübung hoheitlicher Befugnisse stehen.

Art. 1 Abs. 2 LugÜ schliesst ausdrücklich vier Sachgebiete aus dem sachlichen Anwendungsbereich aus, auch wenn diese vom Begriff Zivil- und Handelssachen erfasst sein könnten. Es handelt sich um:

1. den Personenstand, die Rechts- und Handlungsfähigkeit sowie die gesetzliche Vertretung von natürlichen Personen, die ehelichen Güterstände, das Gebiet des Erbrechts einschliesslich des Testamentsrechts;
2. Konkurse, Vergleiche und ähnliche Verfahren;
3. die soziale Sicherheit
4. die Schiedsgerichtsbarkeit.

Zu beachten ist, dass die im Abs. 2 genannten Rechtsgebiete immer dann von der Anwendung des Übereinkommens ausgeschlossen sind, wenn sie den Gegenstand des Rechtsstreites selbst bilden\textsuperscript{24}. Massgebend ist also der Streitgegenstand. Wenn dieser vom Anwendungsbereich ausgeschlossen ist, dann sind

\textsuperscript{22} Botschaft, BBl 1990 II 283; JAMETTI-GREINER, ZBJV 128 (1992), S. 47.
\textsuperscript{23} SR 291.
\textsuperscript{24} KROPHOLLER, EZPR, Rz 17 ad Art. 1 EuGVÖ.
auch Vorfragen im Zusammenhang mit dem Streitgegenstand ausgeschlossen. Fällt er in den Bereich des Übereinkommens, so ist dieses auch anwendbar auf Vorfragen, selbst wenn sie aus einem Gebiet stammen, das an sich vom Übereinkommen ausgeschlossen ist. Vorfragen teilen daher dass Schicksal des Streitgegenstandes.\textsuperscript{25}

c) Persönlicher, räumlicher, zeitlicher Anwendungsbereich

In \textit{persönlicher} und \textit{räumlicher} Hinsicht unterscheidet das Übereinkommen nicht nach der Staatsangehörigkeit. Im Rahmen der Zuständigkeitsvorschriften reicht es, wenn der Beklagte seinen Wohnsitz in einem Vertragsstaat hat (Art. 2 LugÜ). Bezüglich der Anerkennung und Vollstreckung kommt es nicht auf Personen oder auf Wohnsitz, sondern allein auf die Herkunft der Entscheidungen an: nur Urteile aus einem Vertragsstaat, die sachlich unter das LugÜ fallen, sind in den anderen Vertragsstaaten vollstreckbar.


3.2 Zuständigkeit

Das Lugano-Übereinkommen regelt zunächst die gerichtliche Zuständigkeit (Art. 2-24 LugÜ). Es handelt sich um eine einheitliche und abschliessende Regelung der internationalen Zuständigkeit für die vertragsschlüssenden Staaten, welche unmittelbar anwendbar ist. Wenn eine Klage in den Anwendungs-
bereich des Übereinkommens fällt, dann bestimmt sich die gerichtliche Zuständigkeit nach dessen Vorschriften. Geregelt ist teilweise auch die örtliche internationale Zuständigkeit\(^\text{26}\).


Die Zuständigkeitsregelungen sind sowohl für den Richter des Entscheidungsstaates als auch für den Richter des Anerkennungsstaates verbindlich. Das bedeutet, dass die Überprüfung der indirekten Zuständigkeit\(^\text{27}\) im Rahmen des Lugano-Übereinkommens sehr beschränkt ist.

### 3.3 Anerkennung und Vollstreckung

Darüber hinaus regelt das Lugano-Übereinkommen die Voraussetzungen für die Anerkennung und die Vollstreckung gerichtlicher Entscheidungen aus einem anderen Vertragsstaat und schafft insoweit ein einheitliches Anerkennungsregime für die Vertragsstaaten (Art. 25-45 LugÜ).


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\(^{26}\) WALTER, S. 161; VOGEL, § 4, Rz 44c ff.;

\(^{27}\) Von Bedeutung ist die indirekte Zuständigkeit insbesondere im Rahmen der Anerkennung gemäss Art. 25 lit. a IPRG.
andere Nebenentscheidungen handelt, sofern die Hauptentscheidung unter das Lugano-Übereinkommen fällt. Schiedsentscheide sind hiervon ausgeschlossen.\(^{28}\)

Die Anerkennung kann nur aus den in den Art. 27 (Verfahrensmängel) und 28 LugÜ (Zuständigkeit) genannten Fällen verweigert werden. Wie bereits bemerkt, ist die indirekte Zuständigkeit für das Lugano-Übereinkommen im Gegensatz zum IPRG (Art. 25 und 26 IPRG) grundsätzlich keine Voraussetzung für die Anerkennung und Vollstreckung.

Die Trennung zwischen Erkenntnisverfahren, welches auf den verbindlichen Zuständigkeiten des Übereinkommens beruht, und der festgelegten Anerkennungsordnung, erlaubt die Vollstreckung der Entscheide im Rahmen des Übereinkommens unabhangig vom Territorial Prinzip der Vertragsstaaten.\(^{29}\)

Die Vollstreckung setzt die Vollstreckbarkeit im Ursprungsstaat voraus (Art. 31 Abs. 1 LugÜ). Auch ausländische vorsorgliche Massnahmen werden nach den Vorschriften des Lugano-Übereinkommens in den Vertragsstaaten wie Entscheidungen anerkannt und vollstreckt, wenn dem Schuldner rechtliches Gehör gewährt wurde.\(^{30}\)

4. **Excursus: Die internationale Schiedsgerichtsbarkeit**


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\(^{28}\) KROPHOLLER, EZPR, Rz 8 ff., Rz 12 ad Art. 32 EuGVÖ; JAMETTI-GEINER, Begriff der Entscheidung, S. 286.  
\(^{29}\) GRUNDMANN, S. 118; GERHARD, S. 118.  
\(^{30}\) KROPHOLLER, EZPR, Rz 20 ad Art. 31 EuGVÖ.

Die Parteien sind bei der Gestaltung des Schiedsverfahrens weitgehend frei: Sie können sowohl das Verfahren (Art. 182 IPRG) als auch das anwendbare Recht bestimmen (Art. 187 IPRG).  


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31 Konkordat über die Schiedsgerichtsbarkeit (SR 279), Art. 44: "Auf Ge- such einer Partei bescheinigt die in Artikel 3 vorgesehene richterliche Be- hörde, dass ein Schiedsspruch, der Art. 5 nicht widerspricht, gleich einem gerichtlichen Urteil vollstreckbar ist, [...]."; Art. 193 IPRG.
32 SR 0.277.12.
Das New Yorker Übereinkommen verpflichtet die Vertragsstaaten, die Schiedssprüche anzuerkennen und zu vollstrecken, wenn diese in den Anwendungsbereich des Übereinkommens fallen, bestimmte verfahrensmässige Voraussetzungen erfüllt sind und kein Versagungsgrund gemäss Art. V vorliegt. Das Verfahren zur Vollstreckung ist von jedem Vertragsstaat selbst zu bestimmen. Zu beachten ist, dass das New Yorker-Übereinkommen bestimmte Versagungsgründe der Anerkennung vorsieht, die gegen ein ausländisches Schiedsurteil geltend gemacht werden können.33

### III. Der Ausschluss der Schiedsgerichtsbarkeit vom Anwendungsbereich des Lugano-Übereinkommens

Nachstehend werden die Hintergründe gemäss den Materialien zum Ausschluss der Schiedsgerichtsbarkeit kurz dargestellt. Hierzu dienen die zwei Fälle aus der Rechtsprechung des EuGH zum Thema des Ausschlusses. Da die Texte des Lugano- und des Brüsseler-Übereinkommens übereinstimmten, sind sowohl die Materialien, als auch die Literatur sowie die Rechtsprechung des EuGH zum EuGVÜ auch für das Lugano-Übereinkommen bestimmend und werden hier berücksichtigt.

#### 1. Die Hintergründe

##### a) Gründe zum Ausschluss der Schiedsgerichtsbarkeit

Die Schiedsgerichtsbarkeit ist im Art. 293 EGV (ex Art. 220 EWG) als EG-politisches Postulat zur Vereinfachung der Formlichkeiten bei der Zirkulation von gerichtlichen Entscheidungen

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33 Vgl. dazu WALTER, S. 530 ff.
innerhalb der Gemeinschaft genannt. Das Brüsseler-Übereinkommen schliesst dann aber die Schiedsgerichtsbarkeit ausdrücklich von ihrem Anwendungsbereich aus, so auch das Lugano-Übereinkommen wo es heisst:

Art. 1 Abs. 2 Ziff. 4 LugÜ:
"[Dieses Übereinkommen] ist nicht anzuwenden auf [1-3] die Schiedsgerichtsbarkeit."

Die Gründe des Ausschlusses vom Brüsseler Übereinkommen, die auch für das Lugano Übereinkommen gelten, sind im Bericht JENARD wiedergegeben34:

"Dieses Rechtsgebiet, das in Artikel 220 des EWG-Vertrags ausdrücklich erwähnt wird, ist bereits in zahlreichen internationalen Abkommen geregelt. Ferner hat der Europarat ein europäisches Übereinkommen ausgearbeitet, das als einheitliches Gesetz ("loi uniforme") in Kraft treten und in einem Zusatzprotokoll die Anerkennung und Vollstreckung von Schiedssprüchen in stärkerem Masse als das New Yorker Übereinkommen erleichtern soll [...]."

Nach der Idee der Gründer sollte also das Übereinkommen mit der internationalen Entwicklung im Rahmen der Schiedsgerichtsbarkeit nicht interferieren35. Die späteren Beitrittsübereinkommen, welche zwischen den Vertragsstaaten und den neuen Mitgliedern der Gemeinschaft ausgehandelt wurden, enthalten denselben Ausschluss der Schiedsgerichtsbarkeit. Zum Beispiel wird im Beitrittsübereinkommen mit Griechenland erwähnt, dass die Schiedsgerichtsbarkeit ausgeschlossen ist, weil auf die-

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35 THOMAS, S. 45.
sem Gebiet bereits zahlreiche multilaterale internationale Übereinkommen bestehen\textsuperscript{36}.

Der Vollständigkeit halber seien die wichtigsten gegenwärtigen internationalen Abkommen über die Schiedsgerichtsbarkeit genannt\textsuperscript{37}:

- New Yorker Übereinkommen vom 10. Juni 1958 über die Anerkennung und Vollstreckung ausländischer Schiedssprüche (SR 0.277.12);
- Genfer Protokoll vom 24. September 1923 über die Schiedsklauseln (SR 0.277.11);
- Genfer Abkommen vom 26. September 1927 zur Vollstreckung ausländischer Schiedssprüche (SR 0.277.111).


\textit{b) Zur Tragweite des Ausschließes}

Zur Tragweite des Ausschließes bemerkt der Bericht JENARD\textsuperscript{38}:

"Die genannten Sachgebiete sind aber nur dann von der Anwendung des Übereinkommens ausgeschlossen, wenn sie den Gegenstand des Rechtsstreites selbst bilden. Die Ausnahme gilt jedoch dann nicht, wenn der Richter über eine Frage aus diesen nur incidenter zu entscheiden hat."

"[…] Das Übereinkommen gilt somit weder für die Anerkennung und Vollstreckung von Schiedssprüchen (vgl. auch die Begriffsbestimmung in Artikel 25) noch für die

\textsuperscript{36} HASCHER, Recognition, S.34, mit Hinweis auf den Bericht EVRIGE-NIS.
\textsuperscript{37} Vgl. WALTER, S. 512.
\textsuperscript{38} Vgl. JENARD, Bericht, S.10 und 13, auch zitiert in THOMAS, S. 48.
Bestimmung der Zuständigkeit bei Streitigkeiten, die sich auf einen Schiedsspruch beziehen (z.B. bei Klagen auf Nichtigerklärung eines Schiedsspruchs); ebensowe- nig gilt es für die Anerkennung von Entscheidungen, die aufgrund solcher Klagen ergangen sind."

Es handelt sich also nicht um einen indiskriminierenden Auschluss der Schiedsgerichtsbarkeit. Diese soll von dem Übereinkommen nur dann ausgeschlossen sein, wenn sie den Hauptgegenstand des Streites darstellt, nicht hingegen, wenn die Schiedsgerichtsbarkeit als Folgeerscheinung zu einem anderen Streitgegenstand auftritt.


Die Anwendbarkeit des Übereinkommens hängt also davon ab, ob der Hauptgegenstand des Streites ein ausgeschlossenes Gebiet nach Art. 1 LugÜ betrifft.


39 HASCHER, Recognition, S. 34 f.
lehnen können, wenn eine nach dem Recht des Anerkennungsstaates gültige Schiedsabrede vorliegt\textsuperscript{40}.

Demgegenüber vertraten die Gründungsmitglieder der EG die Ansicht, dass unter "Schiedsgerichtsbarkeit" nur \textit{schiedsrichterliches Verfahren} zu verstehen sei und nicht jeder Streit der von einem Schiedsvertrag erfasst werde. Ausserdem sei der Richter des Anerkennungsstaates nicht frei, die Zuständigkeit des Gerichts des Entscheidungsstaates nachzuprüfen\textsuperscript{41}.

Die Frage blieb offen. Immerhin führt der zu diesem Anlass erstattete Sachverständigenbericht von SCHLOSSER aus, dass das Übereinkommen weder für Schiedsgerichte noch für gerichtliche Verfahren gelte, die einem Schiedsverfahren dienen\textsuperscript{42}.

"61. Das V.K. erbat zur Tragweise des Ausschlusses "der Schiedsgerichtsbarkeit" vom Anwendungsbereich des EuGVÜ Auskünfte, die im Jenard-Bericht nicht gegeben werden. Die Verhandlungen ergaben zur Auslegung der diesbezüglichen Vorschriften in Artikel 1 Absatz 2 Nr. 4 zwei verschiedene Grundstandpunkte, die nicht überbrückt werden konnten. Nach der einen Position, die vor allem vom V.K. vertreten wurde, meint diese Bestimmung alle Streitigkeiten, zu deren Entscheidung die Zuständigkeit eines Schiedsgerichts in einer noch wirksamen Weise vereinbart wurde – einschliesslich aller sich auf das vorgesehene Schiedsverfahren beziehenden Nebenstreitigkeiten. Die andere Ansicht, welche die Gründungsmitglieder der EWG verteidigten, betrachtet als Teil der "Schiedsgerichtsbarkeit" Verfahren vor staatlichen Gerichten nur dann, wenn sie sich auf Schiedsverfahren beziehen, auf abgeschlossene, auf lau-

\textsuperscript{40} BERTI, Ausschluss, S.343; BESSON, S. 332; HASCHER, ibidem; VAN HAERSOLTE-VAN HOF, S. 35.
\textsuperscript{41} KROPHOLLER, EZPR, Rz 46 ad Art. 1 EuGVÖ; BERTI, Ausschluss, 343.
\textsuperscript{42} Vgl. SCHLOSSER, Bericht Nr. 61 und 64, S. 92, 93 auch in THOMAS, S. 49 wiedergegeben.
fende wie auf künftige. Man war sich indes einig, dass eine förmliche Textänderung unterbleiben sollte. Die neuen Mitgliedstaaten können in ihrer Einführungsge-setzgebung die gekennzeichnete Auslegungsunsicherheit in Kauf nehmen. [...]"

"64(b) Das EuGVÜ bezieht sich nicht auf gerichtliche Verfahren, die einem Schiedsverfahren dienen sollen, wie etwa Verfahren zur Ernennung oder Abberufung von Schiedsrichtern, zur Festlegung des Schiedsorts, zur Verlängerung der für die Fällung des Spruches bestehenden Frist oder auch zur Vorabentscheidung materieller Fragen, wie sie das englische Recht in Gestalt des "statement of special case" (sec. 21 Arbitration Act 1950) kennt. Auch eine Gerichtsentscheidung, welche die Wirksamkeit oder Unwirksamkeit eines Schiedsvertrags feststellt oder wegen seiner Unwirksamkeit die Parteien anhält, ein Schiedsverfahren nicht weiter zu betreiben, ist nicht am EuGVÜ zu messen."

c) **Zur Bedeutung des Ausschlusses**

Im Rahmen der Beziehungen zum Lugano- bzw. Brüsseler-Übereinkommen bedeutet der Ausschluss der Schiedsgerichtsbarkeit, dass die Regelungen des Übereinkommens sowohl betreffend die Zuständigkeit als auch die Anerkennung und Vollstreckung keine Anwendung finden, wenn ein Gericht über Fragen, die sich in der Hauptsache auf die Schiedsgerichtsbarkeit beziehen, statuieren muss. In einem solchen Verfahren kann sich also eine Partei weder auf einen Gerichtsstand des Übereinkommens berufen noch von den Anerkennungs- und Vollstreckungserleichterungen des LugÜ profitieren. Es sind hingegen die Normen von allfälligen Staatsverträgen oder das jeweilige nationale Rechts anzuwenden, die voneinander verschiedene Lösungen vorsehen können.
2. **Die Rechtsprechung des EuGH**

Der EuGH hat in zwei Fällen spezifisch zum Art. 1 Abs. 2 Ziff 4 EuGVÜ Stellung genommen und damit erheblich zur Klärung der Tragweite des Ausschlusses beigetragen.

2.1 **Marc Rich**

Der Entscheid Marc Rich\(^{43}\) ist der erste Entscheid, bei dem der EuGH sich unmittelbar mit dem Ausschluss der Schiedsgerichtsbarkeit auseinandergesetzt hat. Dabei ging es um das Gesuch um die Ungültigerklärung einer Schiedsabrede während eines Gerichtsverfahrens im Rahmen eines Schiedsverfahrens.

\(a)\) **Sachverhalt**


S.I.Impianti beantragte die Aufhebung der Verfügung. Sie machte geltend, dass mangels ihrer Zustimmung keine gültige Schiedsabrede angenommen werden könne. Der Streit zwischen den Parteien sei nicht von dem Ausschluss der Schiedsgerichtsbarkeit gemäß Art. 1 Ab. 2 Ziff. 4 EuGVÜ erfasst, sondern liege im Anwendungsbereich des Übereinkommens. Folglich habe das Verfahren zur Ermittlung des Schiedsrichters vor einem Gericht in Italien (Wohnsitz des Beklagten nach Art. 2 EuGVÜ) und nicht in London stattzufinden.

Diese Behauptung wurde vom High Court zurückgewiesen, welcher erkannte, dass das Brüsseler-Übereinkommen nicht anwendbar sei.

Auf Berufung hin setzte der Court of Appeal das Verfahren aus und legte an den EuGH die folgenden Fragen zur Auslegung vor:

"1. Ist die Ausnahme von Art. 1 Ziff. 4 des Übereinkommens auszudehnen auf:
   a) jede Streitsache oder Urteil und wenn ja
   b) auf Streitsache oder Urteil bei denen der Bestand eines Schiedsvertrages in Frage gestellt ist?

2. Sofern der gegenwärtige Streit unter das Abkommen fällt und nicht unter die Ausnahme des Abkommens, kann der Käufer trotzdem den Gerichtsstand in England beanspruchen gemäß:
   a) Art. 5 Ziff. 1 des Abkommens und / oder
   b) Art. 17 des Abkommens

3. Sofern der Käufer anderweitig den Gerichtsstand in England beranspruchen kann, unter Ziff. 2 hiervor:
a) muss das Gericht den Gerichtsstand bestätigen oder müsste die Einstellung des Verfahrens auf Art. 21 des Übereinkommens oder,
b) müsste das Gericht das Verfahren gemäss Art. 22 der Konvention einstellen auf Grund des Umstandes, dass das Italienische Gericht zuerst angerufen wurde.\(^{44}\)

In seinem Urteil vom 25. Juli 1991 hat der EuGH entschieden, dass Art. 1 Ziff. 4 des Übereinkommens so zu interpretieren ist, das der Ausschluss auf hängige Streitsachen auszudehnen ist, die vor einem nationalen Gericht betreffend Bestellung eines Schiedsrichters angebracht sind und zwar auch wenn der Bestand oder die Gültigkeit einer Schiedsklausel eine Vorfrage in dieser Streitsache ist.

Die andere Fragen liess des EuGH als gegenstandslos unbeantwortet.\(^{45}\)

b) **Bemerkungen**

In diesem Entscheid der EuGH wurde die in den Berichten SCHLOSSER und JENARD vertretene Auffassung bestätigt, dass die Bestellung eines Schiedsrichters durch ein staatliches Gericht eine staatliche Massnahme darstellt, die der Ingangsetzung eines Schiedsverfahrens dient. Als solche beruht sie auf der Schiedsgerichtsbarkeit und untersteht dem Ausschluss des Art. 1 Abs. 2 Ziff. 4 des Übereinkommens.\(^{46}\)

Der EUGH führte zudem aus, dass die Frage, ob ein Streit innerhalb des Ausschlusses fälle, einzig anhand des Hauptgegenstandes des Streits beurteilt werden müsse. Das heisst, dass

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\(^{44}\) Marc Rich, § 9.  
\(^{45}\) Marc Rich, § 30.  
\(^{46}\) Marc Rich, § 19.  
wenn der Hauptgegenstand des Streites der Schiedsgerichtsbarkeit unterliegt, dann ist er ausgeschlossen. Sonst nicht.

Diese Unterscheidung führt dazu, dass wenn der Hauptgegenstand des Streites sich nicht auf die Schiedsgerichtsbarkeit bezieht, die Vorschriften des Übereinkommens anwendbar sind, auch wenn das Gericht vorfrageweise eine Schiedsfrage zu beurteilen hat.\(^{48}\)

Obwohl im Urteil Marc Rich die Normen des Übereinkommens nicht zum Zuge kommen, besteht ein Anwendungsfeld desselben trotzdem dort, wo der Hauptgegenstand des Streites sich nicht auf die Schiedsgerichtsbarkeit bezieht, aber sich unter den Zivil- und Handelssachen einordnen lässt. Dieses Ergebnis stösst auf die Kritik derjenige Autoren, die einen absoluten Ausschluss der Schiedsgerichtsbarkeit von dem Übereinkommen verfechten.\(^{49}\)

2.2 Van Uden

Der Entscheid Van Uden\(^{50}\) handelt von vorsorglichen Maßnahmen im Hinblick auf ein Schiedsverfahren.

a) Sachverhalt

Die niederländische Firma Van Uden Maritime BV, Rotterdam, hatte der deutschen Firma Deco-Line, Hamburg auf ihren Schiffen, die die Strecke zwischen Nord- /Westeuropa und Westafrika abdeckten, Laderaum zur Verfügung gestellt. Dafür hatte die

\(^{48}\) Marc Rich, § 26; AUDIT, S. 7, spricht von "the principal / incidental-question approach".


Deco-Line die vereinbarten Tarife zu bezahlen. Für den Streitfall hatten die Parteien eine Schiedsklausel in den Niederlanden vorgesehen.


In diesem Verfahren des vorläufigen Rechtsschutzes rügte die Deco-Line zunächst die Unzuständigkeit des niederländischen Gerichts und machte geltend, dass sie für ein solches Begehren nur an ihrem deutschen Sitz vor einem deutschen Gericht verklagt werden könne.


Van Uden zog der Fall in dritter Instanz vor den Hoge Raad der Niederlanden. Dieser setzte das Verfahren aus und legte dem EuGH acht Fragen zur Auslegung der Kompetenzen im Verfahren des vorläufigen Rechtsschutzes vor, die der EuGH wie folgt reformulierte51:

"18. Die Fragen betreffen die Zuständigkeit des Gerichts des vorläufigen Rechtsschutzes nach dem Übereinkommen. Das nationale Gericht will wissen, ob sich eine solche Zuständigkeit zum einen aus Artikel 5 Nummer 1 (Fragen 1 bis 3), zum andern aus Artikel 24 der Übereinkommens (Fragen 4 bis 8) ergeben kann. In beiden Fällen fragt das vorlegende Gericht:

- zunächst, wie sich die Tatsache auswirkt, dass der bei ihm anhängige Rechtsstreit nach dem Vertrag der Schiedsgerichtsbarkeit unterliegt,
- sodann, ob die Zuständigkeit des Gerichts des vorläufigen Rechtsschutzes von der Voraussetzung abhängt, dass sich die beantragte Anordnung in dem betreffenden Gerichtsstaat auswirken (können) muss, insbesondere dass sie dort vollstreckt werden kann, und ob es

51 Van Uden, § 18.
erforderlich ist, dass diese Voraussetzung bei der Stellung des Antrags erfüllt ist,
- und schliesslich, wie sich die Tatsache auswirkt, dass die Rechtssache einen Antrag auf vorläufige Erbringung einer vertraglichen Hauptleistung betrifft."

Der EuGH hat zunächst bestätigt, dass das in der Hauptsache zuständige Gericht auch für die Anordnung einstweiliger oder sichernder Massnahmen nach Art. 24 EuGVÜ (LugÜ) zuständig ist, ohne dass diese Zuständigkeit von weiteren Voraussetzungen abhängt52. In Anbetracht dessen, dass die Parteien eine Schiedsklausel abgeschlossen hatten, stellte der EuGH fest, dass es kein Gericht gibt, das im Sinne des Übereinkommens zur Hauptsache zuständig ist, und dass daher für die Parteien keine Möglichkeit besteht, die Anordnung solcher Massnahmen bei einem solchen Gericht zu beantragen53. Folglich anerkannte der EuGH, dass in diesen Fällen sich die Zuständigkeit des anerufenen staatlichen Gerichts zur Anordnung von einstweiligen oder sichernden Massnahmen nur auf Art. 24 EuGVÜ stützen kann54.

Bezüglich dem Vorliegen eines Schiedsverfahrens hat der EuGH unterschieden, ob die einstweiligen Massnahmen auf die Durchführung eines Schiedsverfahrens gerichtet sind (ancillary to arbitration proceedings) oder ob sie parallel zu einem solchen Verfahren zu dessen Unterstützung angeordnet werden (parallel to such proceedings)55. Wenn der Gegenstand der einstweiligen Massnahmen nicht die Schiedsgerichtsbarkeit als Rechtsgebiet, sondern die Sicherung von verschiedenartigsten Ansprüchen ist, bestimmt sich die Zugehörigkeit zum Anwendungsbereich des Übereinkommens nach der Natur der gesicherten Ansprüche56. Dazu muss der Gegenstand der Massnahmen eine Zivil- und Handelssache in Sinne vom Art. 1 EuGVÜ sein.

52 Van Uden, § 22; VOLKEN, Szier 1999, S. 486.
53 Van Uden, § 24.
54 Van Uden, § 25.
55 Van Uden, § 33.
56 Ibidem.
Der EuGH hat also festgestellt, dass ein Gericht aufgrund von Art. 24 zum Erlass von vorläufigen Massnahmen, die in den Anwendungsbereich des Übereinkommens fallen (also in Zivil- und Handelssachen) zuständig sein kann, auch wenn ein Hauptverfahren bereits eingeleitet wurde, oder eingeleitet werden kann, und dies selbst dann, wenn dieses Verfahren vor einem Schiedsgericht stattfinden müsste.\footnote{Van Uden, Urteilsdispositiv Nr. 3;}

Allerdings untersteht die Anwendung von Art. 24 drei Einschränkungen:\footnote{Van Uden, §47, 48, Urteilsdispositiv Nr. 4 und 5; VOLKEN, SZIER 1999, S. 487.}:

- erstens muss zwischen dem Gegenstand der Massnahme und dem angerufenen Gericht eine reelle Anknüpfung bestehen;
- zweitens, damit die Massnahme eine Massnahme nach Art. 24 darstellt, muss die Rückzahlung des angesprochenen Betrages an den Antragsgegner im Falle ihres Obsiegens im Prozesse gewährleistet sein;
- drittens, die beantragte Massnahme darf nur bestimmte Vermögensgegenstände des Antragsgegners betreffen, die sich im örtlichen Zuständigkeitsbereich des angerufenen Gerichts befinden.

\subsubsection{Bemerkungen}

Die praktische Tragweite des Van Uden Entscheids ist also die, dass der Ausschluss der Schiedsgerichtsbarkeit aus dem Anwendungsbereich des Übereinkommens ohne Wirkung ist im Hinblick auf die Möglichkeit, von staatlichen Gerichten einstweilige oder sichernde Massnahmen aufgrund von Art. 24 EuGVÜ oder art. 24 LugÜ zu erwirken.

Auch wurde die Unterscheidung zwischen Verfahren auf Durchführung eines Schiedsverfahren gerichtet (ancillary to arbitration) und Parallelverfahren zu einem Schiedsverfahren (parallel to such proceedings) kritisiert. Nach VAN HAERSOLTE-VAN HOF lässt diese Unterscheidung keine klare Abgrenzung zwischen Massnahmen "ancillary to" und "support of" zu. Zudem hätte der Ausschluss weit ausgelegt werden sollen und, damit alle solchen Massnahmen aus dem Anwendungsbereich des Übereinkommens fallen, zugunsten der Gerichtsstände des Sitzes des Schiedsgerichtes oder des Wohnsitzes des Beklagten entschieden werden müssen⁶⁰.

Diese Auffassungen bewegen sich in der Richtung eines absoluten Ausschlusses vom Anwendungsbereich des Übereinkommens von allem, was mit Schiedsgerichtsbarkeit zu tun hat, gemäss dem Postulat, das Grossbritannien anlässlich des Beitrittsübereinkommens von 1978 anstrebte⁶¹. Die unmittelbare Folge eines absoluten Ausschlusses ist, dass der Anerkennungsstaat auch die Entscheidungen des Gerichts eines Vertragsstaates auf-

⁵⁹ GAUDEMET-TALLON, S. 157 f.
⁶⁰ VAN HAERSOLTE-VAN HOF, S. 29 ff.
⁶¹ Vgl. oben Punkt 1. b).
grund der nationalen Normen nachprüfen\textsuperscript{62} kann, was hingegen unter dem Übereinkommen nur aufgrund der Art. 27 und 28 LuGÜ möglich wäre. Auf jeden Fall verfolgt der EuGH im Entscheid Van Uden kohärent die Meinung, dass die Anwendung des Übereinkommens nur dann auszuschliessen ist, wenn der Streitgegenstand unmittelbar einem ausgeschlossenen Gebiet entstammt\textsuperscript{63}.

3. \textbf{Zusammenfassung zur Tragweite des Ausschlusses}

Aus den Materialien und der Rechtsprechung der EuGH im Bereich des Ausschlusses der Schiedsgerichtsbarkeit ist festzuhalten:

1. Die Anwendbarkeit des Übereinkommens hängt davon ab, ob der Hauptgegenstand des Streites ein ausgeschlossenes Gebiet nach Art. 1 LugÜ ist oder nicht.

2. Die Schiedsgerichtsbarkeit soll von dem Übereinkommen nur dann ausgeschlossen sein, wenn sie den Hauptgegenstand des Streites darstellt (Marc Rich), nicht hingegen, wenn sie als Folgeerscheinung zu einem anderen Streitgegenstand auftritt (Van Uden).


\textsuperscript{62} Zum Beispiel könnte die indirekte Zuständigkeit wie im Art. 25 lit. a IPRG nachgeprüft werden.
\textsuperscript{63} WALTER, S. 167; KROPHOLLER, EZPR, Rz 17 ad Art. 1 EuGVÖ; vgl. oben II.3.1a).
4. Folgende Tatbestände beziehen sich auf ein schiedsgerichtliches Verfahren und fallen daher unter den Ausschluss⁶⁴:

- Verfahren zur Ernennung oder Abberufung von Schiedsrichtern;
- Verfahren zur Festlegung des Schiedsortes;
- Verfahren zur Verlängerung der für die Fällung des Schiedsspruches bestehenden Frist;
- Verfahren zur Vorabentscheidung materieller Fragen;
- Verfahren zur Feststellung der Wirksamkeit oder Unwirksamkeit des Schiedsvertrages;
- die Klagen der Schiedsrichters auf Zahlung des Honorars;
- die Entscheidungen über Anträge auf Aufhebung, Änderung, Anerkennung oder Vollstreckung von Schiedssprüchen;
- staatliche Gerichtsentscheidungen, die Schiedssprüche in sich inkorporieren.


IV. **BESONDERE FRAGEN IM RAHMEN DES VERHÄLTNISSES ZWISCHEN LUGANO-ÜBEREINKOMMEN UND SCHIEDSGERICHTSBARKEIT**

Das Lugano-Übereinkommen beschneidet keineswegs die Befugnis der Parteien, ihren Streit der Schiedsgerichtsbarkeit zu unterstellen. Die Anwendbarkeit der Bestimmungen des Über-

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⁶⁴ GEIMER/SCHÜTZE, Rz 101 ad Art. 1.
⁶⁵ SCHLOSSE, zitiert in KROPFOLLER, EZPR, Rz 42 ad Art. 1 EuGVÖ. Zu bemerken ist, dass SCHLOSSE anlässlich eines späteren Rechtsgutachten eine abweichende Meinung vertreten hat (vgl. SCHLOSSE, Riv. dir. int. priv. proc. 1989, 545 ff.).
einkommens bei gewissen Fallkonstellationen auf Tatbestände, die der Schiedsgerichtsbarkeit unterliegen, ist aber von mancher Seite als eine ungerechtfertigte Ingerenz kritisiert worden, die faktisch die Autonomie der Schiedsgerichtsbarkeit beschränke.\(^6^6\)


1. Lugano-Übereinkommen und endgültige Schiedssprüche

1.1. Anerkennung und Vollstreckung eines endgültigen Schiedsspruches

a) Im Allgemeinen

Die Wirkung eines endgültigen Schiedsspruches hängt von der Rechtsordnung ab, in welcher der Schiedsspruch ergangen ist.\(^6^7\)

In der Schweiz kommen endgültigen Schiedssprüchen sowohl Rechtsskraft als auch Vollstreckbarkeit zu. Insbesondere entfaltet die Rechtsskraft für den Schiedsspruch sowohl positive (res iudicis...


\(^6^7\) POUDRET, Concluding Remarks, S. 163.
cata) als auch negative (ne bis in idem) Wirkung, die ein spätere
res angerufenes staatliches Gericht oder Schiedsgericht bindet. Innerhalb desselben Staatsgebietes entfaltet ein endgültiger Schiedsspruch die Wirkungen eines gerichtlichen rechtskräftigen Urteils.


b) Nach dem Lugano-Übereinkommen


BERTI/SCHNYDER, IPRG, Rz 7 ff. ad Art. 190 IPRG.
SCHLOSSER, Arbitral Tribunals, S. 16 f. und 20 f., mit Hinweis auf die ähnliche Regelung in Deutschland, Frankreich und in den Common Law Staaten; Poudret, Concluding Remarks, S. 157.
SCHLOSSER, Bericht, § 65 c).


c) Entscheidungen, die Schiedssprüche bestätigen oder aufheben

Wo Schiedssprüche durch eine staatliche Instanz nachgeprüft werden können (wie zum Beispiel in der Schweiz nach Art. 190 IPRG), stellt sich die Frage, ob der darauffolgende Entscheid aufgrund des Lugano-Übereinkommens in einem anderen Vertragsstaat anerkannt werden kann.

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72 BERTI, Ausschluss, S. 346 mit weiteren Hinweisen; JAMETTI-GREINER, Begriff der Entscheidung, S. 287 f. mit weiteren Hinweisen; KROPHOLLER, EZPR, Rz 12 ad Art. 32 EuGVÖ.
75 BERTI, ibidem.
76 HASCHER, Rev. Arb. 1991 704; BERTI, IPRG, Rz 10 ad Art. 193 IPRG.
Nach dem Bericht SCHLOSSER und nach der überwiegenden Meinung von Experten\textsuperscript{77} ist das Lugano-Übereinkommen weder auf die Zuständigkeit des Gerichts im Nachprüfungsverfahren noch auf dessen Entscheidung anwendbar. Folglich muss die Anerkennung und Vollstreckung eines Bestätigungs- oder Aufhebungsentscheides nach Massgabe von Staatsverträgen\textsuperscript{78} oder nach dem nationalen Recht erfolgen.

1.2 Wirkung eines Schiedsspruches auf die Anerkennung eines staatlichen Entscheids nach dem Lugano-Übereinkommen

a) Allgemeines

Die Anerkennung strebt die Gleichstellung eines ausländischen mit einem inländischen Entscheid an. Durch die Anerkennung soll den ausländischen Entscheidungen dieselbe Wirkung zuteil werden, die sie in ihrem Ursprungsstaat entfalten.\textsuperscript{79}

Innerhalb desselben Staates muss gelten, dass sowohl ein staatliches Urteil gegenüber einem späteren Schiedsspruch\textsuperscript{80}, als auch

\textsuperscript{77} SCHLOSSER, Bericht, § 65 c); JENARD, Bericht, S. 13; KROPHOLLER, EZPR, Rz 45 ad Art. 1 EuGVÖ; AUDIT, Arb. Int. 1993, S. 20; HASCHER, Rev. Arb. 1991, S. 705;
\textsuperscript{78} Vgl. New York Übereinkommen, Art. V Abs. 1 lit. e, welches die Anerkennung versagt, wenn der Schiedsspruch für die Parteien noch nicht verbindlich geworden ist oder von einer zuständigen Behörde des Urteilslandes aufgehoben worden ist.
\textsuperscript{79} WALTER, S. 355 f., welcher darauf hinweist, dass zum einen die Wirkungen des Urteils im Anerkennungsland nicht weiter gehen können als im Urteilsstaat und zum andern, dass sie nicht weiter gehen können, als im schweizerischen Recht erlaubt ist.
\textsuperscript{80} BGE 120 II 155 (S. 164): "Il n'en va autrement [...] que lorsque la juridiction ordinaire est saisie en premier d'une action au fond et qu'une exception d'arbitrage est soulevée devant elle. Si elle décline sa compétence, sa décision ne lie pas le tribunal arbitral saisi en second lieu; en revanche, si elle l'admet, elle le lie en raison del'autorité de la chose jugée attachée
ein Schiedsspruch gegenüber einem späteren staatlichen Urteil\textsuperscript{81} die res iudicata-Wirkung äussert.

\begin{itemize}
\item \textit{Wirkung eines Schiedsspruches im Rahmen der Anerkennung nach dem Lugano-Übereinkommen}
\end{itemize}

Im Rahmen des Anerkennungssystems des Lugano-Übereinkommens stellt sich die Frage, ob ein rechtskräftiger Schiedsspruch als \textit{unvereinbare Entscheidung} gemäss Art. 27 Ziff. 3 LugÜ\textsuperscript{82} angesehen werden kann.

Nach dieser Norm besteht Unvereinbarkeit eines internen Entscheids des Anerkennungsstaates mit einem Entscheid eines Vertragsstaates schon dann, wenn die Ergebnisse der beiden Entscheidungen sich einander widersprechen. Innerhalb des sachlichen Anwendungsbereichs des Übereinkommens sollte das Problem kollidierender Entscheidungen aufgrund der Regelungen betreffend der Rechtshängigkeit und der damit im Zusammenhang stehenden Verfahren selten vorkommen (Art. 21 ff. LugÜ). Diese Koordination fehlt aber in Bezug auf Entscheidungen, die aus einem vom Übereinkommen ausgeschlossenen Bereich, wie eben die Schiedsgerichtsbarkeit, stammt\textsuperscript{83}.

Die Frage ist also, ob ein im Anerkennungsstaat rechtskräftiger Schiedsspruch ein Verweigerungsgrund nach Art. 27 Ziff. 3 LugÜ für die Anerkennung eines Entscheids aus einem Vertrags-

\begin{footnotesize}
\begin{enumerate}
\item \textit{à sa décision (...).}”; WENGER, IPRG, Rz 8 ad Art. 186 IPRG; Zustimmend im Ergebnis auch KARRER, IPRG, Rz 38 ad Art. 187 IPRG.
\item BERTI/SCHNYDER, IPRG, Rz 7 ff. ad Art. 190 IPRG.
\item Art. 27 Ziff. 5 LugÜ: "Eine Entscheidung wird nicht anerkannt, […] 3. wenn die Entscheidung mit einer Entscheidung unvereinbar ist, die zwischen denselben Parteien in dem Staat, indem die Anerkennung geltend gemacht wird, ergangen ist”.
\item BBl 1990 II 321 Nr. 3; KROPHOLLER, EZPR, Rz 59 ad Art. 34 EuGVÖ.
\end{enumerate}
\end{footnotesize}
Der frühere ergangene Schiedsspruch, der im Anerkennungsstaat aufgrund eines Staatsvertrages oder aufgrund autonomen Rechts mit oder ohne Exequatur als rechtskräftige Entscheidung anerkannt wird, geht also grundsätzlich der späteren Entscheidung eines ausländischen staatlichen Gerichts vor".

Nach GEIMER/SCHÜTZE89 soll die Anerkennung nach Art. 27 Ziff. 3 LugÜ auch an inländischen Status-, Konkursentscheidungen und Schiedssprüchen scheitern.

84 SCHLOSSER, Arbitral Tribunals, S. 17, unter Hinweis auf BERTI, KROPHOLLER (pro) und DONZALLAZ (contra), nachfolgend zitiert.
85 DONZALLAZ, Rz 3010 ff. und 3028.
86 POU DRET, Concluding Remarks, S. 162 f.
87 BERTI, Ausschluss, S. 349.
88 KROPHOLLER, EZPR, Rz 59 ad Art. 34 EuGVÖ. In diesem Sinne auch JAMETTI-GREINER, Begriff der Entscheidung, S. 275 f.
89 GEIMER/SCHÜTZE, Rz 130 ad Art. 27 und Rz 37 ad Art. 28 EuGVÜ/LugÜ.

2. Lugano-Übereinkommen und Gerichtsverfahren für Hilfsmassnahmen zur Schiedsgerichtsbarkeit

Diese Frage wurde im vorhergehenden Teil angesprochen. An dieser Stelle wird sie zusammenfassend dargelegt.

Mangels eigener Befugnis zur Zwangsvollstreckung ist das Schiedsgericht auf die Mitwirkung des staatlichen Richters angewiesen. Das schweizerische IPRG sieht die Möglichkeit ausdrücklich im Art. 179 Abs. 2 IPRG vor. Anvisiert sind Verfahren und Entscheidungen eines staatlichen Richters (sog. juge d'appui) zur Hilfe und zur Unterstützung eines Schiedsverfahrens mit Sitz in seinem Zuständigkeitsbereich.

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90 Art. 56 Ab. 1 LugÜ: "Die im Art. 55 angeführten Abkommen und Verträge behalten ihre Wirksamkeit für die Rechtsgebiete, auf die dieses Übereinkommen nicht anzuwenden ist."
Art. 57 Abs. 1 LugÜ: "Dieses Übereinkommen lässt Übereinkommen unberührt, denen die Vertragsstaaten angehören oder angehören werden und die für besondere Rechtsgebiete die gerichtliche Zuständigkeit, die Anerkennung oder die Vollstreckung von Entscheidungen regeln."
91 BERTI, Ausschluss, S. 347.
Bereits in den Materialien wurde festgehalten, dass das Übereinkommen sich nicht auf gerichtliche Verfahren bezieht, die einem Schiedsverfahren dienen sollen. Im Urteil Marc Rich hat der EuGH klargestellt, dass die Bestimmungen des Übereinkommens nicht auf die Massnahmen eines staatlichen Richters anwendbar sind, die zur Durchsetzung eines Schiedsverfahrens bestimmt sind. Was alles darunter fallen kann, wurde bereits im vorhergehenden Teil aufgelistet.

Im Urteil Van Uden hat der EuGH ebenfalls auf die Unterscheidung zwischen Massnahmen gerichtet auf die Durchführung eines Schiedsverfahrens (ancillary to arbitration) und Massnahmen parallel zu einem Schiedsverfahren und zu dessen Unterstützung (parallel to such proceedings), Bezug genommen. In der Tat kann die Abgrenzung dieser beiden Begriffe Schwierigkeiten bereiten.

Der EuGH hat aber in beiden Urteilen klar hervorgehoben, dass einzig der Streitgegenstand massgebend ist, um festzustellen, ob eine Streitigkeit in den Anwendungsbereich des Übereinkommens fällt.

Im Urteil Marc Rich war Streitgegenstand die Ernennung eines Schiedsrichters. Deshalb rechtfertigte sich die Nichtanwendbarkeit des Übereinkommens. In Van Uden bezog sich der Streitgegenstand auf die Zulässigkeit von einstweiligen Massnahmen im Rahmen eines Vertragsverhältnisses. Letzteres stellte an sich eine Zivil- und Handelsache dar und war als solche kein ausge-
schlossenes Rechtsgebiet. Das Vorliegen eines parallelen Schiedsverfahrens war für den EuGH hinsichtlich der zu beurteilenden Streitfrage ohne Belang.

Im Ergebnis kann festgehalten werden:

a) ist der Streitgegenstand vom Übereinkommen ausgeschlossen, dann ist das Übereinkommen nicht anwendbar. Die Zuständigkeit des juge d'appui soll nach der Vorschriften des jeweiligen nationalen Rechts bestimmt werden (in der Schweiz gilt Art. 179 Abs. 2 IPRG; es kommt der Richter am Sitz des Schiedsgerichts in Betracht);

b) wenn der Streitgegenstand von dem Übereinkommen nicht ausgeschlossen ist, dann sind die Regeln des Übereinkommens einzuhalten und der zuständige juge d'appui muss am Wohnsitz des Beklagten gemäss Art. 2 ff. LugÜ bestellt werden. In diesem Fall können die Entscheidungen des juge d'appui nach den Vorschriften des Übereinkommen anerkannt und vollstreckt werden.

3. Lugano-Übereinkommen und Gerichtsverfahren über das Bestehen oder die Gültigkeit einer Schiedsabrede

a) Allgemeines

In der Lehre ist häufig erörtert worden, wie die Sachlage zu beurteilen ist, wenn die Gültigkeit bzw. das Bestehen einer Schiedsabrede als Vorfrage im Rahmen eines Hauptverfahrens oder als Hauptfrage geltend gemacht wird.

In einem weiteren Rahmen hängt diese Frage mit derjenigen betreffend die Befugnis eines staatlichen Gerichts zusammen, sich überhaupt mit einer Streitfrage zu befassen, die einem Schiedsverfahren unterstellt werden sollte.

b) Ausgangslage

Es geht um die Situation, wo vor einem staatlichen Gericht die Frage über den Bestand oder die Gültigkeit einer Schiedsklausel gestellt wird. Dies war die Lage im Fall Marc Rich, wo dieser, um das Schiedsverfahren in London einzuleiten zu können, sich an das zuständige dortige Gericht wandte, mit dem Antrag, einen Schiedsrichter für die säumige Partei zu bestellen; bekanntlich widersetzte sich die Beklagte, die S.I. Impianti, diesem Begehren mit der Begründung, es bestehe keine Schiedsklausel.

c) Grundsatz


Zu unterscheiden ist also, ob das Bestehen oder die Gültigkeit der Schiedsabrede im Verfahren als Hauptsache oder als Vorfrage zu entscheiden ist\(^9\).

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\(^9\) In Marc Rich, § 9, wurde die Frage gestellt: "1. Ist die Ausnahme von Art. 1 Ziff. 4 des Übereinkommens auszudehnen auf: a) (...), b) auf Streitsache oder Urteil bei denen der Bestand eines Schiedsvertrages in Frage gestellt ist?"

d) Bestehen oder Gültigkeit einer Schiedsabrede als Hauptfrage (main issue)

Angesichts der Erkenntnisse sowohl des Berichts SCHLOS-SER\(^{100}\) als auch des Urteils Marc Rich \(^{101}\) besteht in der Lehre weitgehend Einigung darüber, dass Streite über den Bestand oder die Gültigkeit einer Schiedsabrede als Hauptfrage, auch in der Form einer Feststellungsklage\(^{102}\), wie auch Urteile, welche in solchen Verfahren gefällt werden, ausserhalb des Bereichs der Brüsseler- und des Lugano-Übereinkommens liegen\(^{103}\).

Folglich muss die Gerichtsbarkeit aufgrund des nationalen Rechts oder von Staatsverträgen beurteilt werden. Dabei können verschiedene und zum Teil konkurrierende Gerichtsstände (z.B. Gerichtstand des Ortes des Schiedsgerichts, oder des Vertrags oder des Beklagten) in Betracht kommen\(^{104}\).

e) Bestehen oder Gültigkeit einer Schiedsabrede als Vorfrage (preliminary issue)

Wenn der Streit über den Bestand oder die Gültigkeit einer Schiedsabrede als Vorfrage zur Entscheidung steht, der Gegenstand der Hauptfrage aber im Anwendungsbereich des Übereinkommens liegt, dann sind die Vorschriften des Übereinkommens anwendbar\(^{105}\).

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\(^{100}\) Zitiert in HASCHER, Recognition, S. 38.
\(^{101}\) Marc Rich, § 19.
\(^{102}\) In der Schweiz ist die Zulässigkeit einer gesonderten Feststellungsklage auf Bestehen oder Nichtbestehen einer Schiedsklausel nicht mit Klarheit entschieden, vgl. BERTI, IPRG, Rz 21 ad Art. 7 IPRG; POUDET, Concluding Remarks, S. 162.
\(^{103}\) HASCHER, Recognition, S. 42; AUDIT, S. 6 ff.; BERAUDO, S. 18 f.; VAN HAERSOLTE-VAN HOF, S. 31 f.
4. Paralleles Bestehen von Gerichts- und Schiedsverfahren

4.1. Problemstellung


4.2 Verhältnis zwischen staatlichem Gericht und Schiedsgericht

a) Zuständigkeit

Im internationalen Bereich regelt die Schweiz im Art. 7 IPRG das Verhältnis zwischen staatlicher und privater Gerichtsbarkeit. Nach dieser Vorschrift hat das angerufene schweizerische Gericht seine Zuständigkeit abzulehnen, wenn die Parteien über eine schiedsfähige Streitsache eine Schiedsvereinbarung getroffen haben, ausser bei besonderen Fällen. Diese Norm

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106 BERTI, IPRG, Rz 1 ad Art. 7 IPRG.
107 Bei vorbehaltloser Einlassung des Beklagten; bei Hinfälligkeit, Unwirksamkeit oder Unerfüllbarkeit der Schiedsklausel; bei Unmöglichkeit der Bestellung des Schiedsgerichts.
widerspiegelt grundsätzlich diejenige in Art. II Ziff. 3 des New Yorker-Übereinkommens.


b) Prüfung der Zuständigkeit durch das staatliche Gericht

Die Prüfung der Schiedsabrede seitens des staatlichen Gerichts erfolgt mit voller Kognition, wenn das Schiedsgericht seinen Sitz ausserhalb der Schweiz hat. Hat hingegen das Schiedsgericht seinen Sitz in der Schweiz, so soll das staatliche Gericht die Prüfung auf die summarische Prüfung beschränken, ob es zuständig wäre, wenn die Schiedsvereinbarung nicht bestünde.

108 Art. II Ziff. 3 NY-Ü: "Wird ein Gericht eines Vertragsstaates wegen eines Streitgegenstandes angerufen, hinsichtlich dessen die Parteien eine Vereinbarung in Sinne dieses Artikels getroffen haben, so hat das Gericht auf Antrag einer der Parteien sie auf das schiedsgerichtliche Verfahren zu verweisen, sofern es nicht feststellt, dass die Vereinbarung hinfällig, unwirksam oder nicht Erfüllbar ist."

109 BGE 121 III 38 (41); BERTI, IPRG, Rz 10 ad Art. 7 IPRG.

110 Unter Kompetenz-Kompetenz ist zum einen die Befugnis des Schiedsrichters, selber über seine eigene Zuständigkeit zu entscheiden (positive Wirkung) zu verstehen, und zum anderen die Pflicht des staatlichen Gerichts abzuwarten, bis das Schiedsgericht entschieden hat (negative Wirkung). Eine solche negative Wirkung kennt z.B. das französische Recht, vgl. GAILLARD, 391.

111 BGE 121 III 38 (S. 42); POUDRET, Concluding Remarks, S. 149.

112 BGE 121 III 38 (S. 41); BERTI, IPRG, Rz 11 ad Art. 7 IPRG; POUDRET, ibidem.
Die Hängigkeit der Frage der Gültigkeit der Schiedsabrede vor dem staatlichen Gericht schliesst die gleichzeitige Zuständigkeitsprüfung durch ein bereits konstituiertes Schiedsgericht nicht aus. Wenn sich aber das Schiedsgericht früher als das staatliche Gericht mit der Frage seiner Zuständigkeit befasst hat, so muss sich dieses auf die summarische Prüfung beschränken, ob es zuständig wäre, wenn die Schiedsabrede nicht bestünde\textsuperscript{113}.

Wenn das staatliche Gericht seine Zuständigkeit ablehnt, dann ist das Schiedsgericht allein zuständig, sowohl über die Streitfrage als auch über die eigene Zuständigkeit zu entscheiden. Wenn es hingegen die Schiedseinrede verwirft, so besteht seine Zuständigkeit und, sofern die staatliche Entscheidung rechtskräftig geworden ist, bindet sie auch das Schiedsgericht\textsuperscript{114}. Bis zum Eintritt der Rechtskraft besteht aber die gleichzeitige Zuständigkeitsbefugnis des Schiedsgerichts weiter.

\textbf{4.3 Die Vorgehensweise des Bundesgerichts}

Nach dem Bundesgericht\textsuperscript{115}

"Il est contraire à l'ordre public qu'il existe dans un ordre juridique déterminé, deux décisions judiciaires contradictoires sur la même action et entre les mêmes parties qui sont également et simultanément exécutoires (...). Pour éviter une telle situation, il existe fondamentalement deux principes: la litispendence et l'autorité de choix jugé."

Diese Prinzipien sind nicht nur auf die internen Verhältnisse anwendbar. Sofern der ausländische Entscheid anerkannter ist, wendet das Bundesgericht die Regelungen der Rechtshängigkeit

\textsuperscript{113} BERTI, IPRG, Rz 10 und 11 ad Art. 7 IPRG.
\textsuperscript{114} BGE 120 II 155 (S. 164); BERTI, IPRG, Rz 19 f. ad Art. 7 IPRG; PER-RET, S. 67 f., mit Hinweisen.
\textsuperscript{115} BGE 127 III 279 (S. 283).
(Art. 9 IPRG) und der Rechtskraft (Art. 27 Abs. 2 lit. c IPRG) auch im internationalen Verhältnis an\textsuperscript{116}.

\textbf{a) Die Prüfung der Anerkennbarkeit}


Das Bundesgericht wies die Beschwerde ab. Es stellte fest, dass das peruanische Gericht seine Zuständigkeit in Verletzung des Art. II Ziff. 3 des New Yorker-Überreinkommens entschieden habe und betrachtete daher das peruanische Urteil wegen mangelnder indirekter Zuständigkeit als nicht anerkennbar in der Schweiz gemäss Art. 25 lit. a IPRG. Da das peruanische Urteil nicht anerkennbar war, liess das Bundesgericht die Frage über die Rechtshängigkeit offen.

\textbf{b) Die Prüfung der Rechtshängigkeit und Rechtskraft}

Im BGE 127 III 279 befasste sich das Bundesgericht auch mit der Frage der Rechtshängigkeit und der Rechtskraft.

Im März 1998 klagte A vor einem panamesischen Gericht. B erhob die Schiedseinrede. Im Juni 1998 stellte das panamesische

\textsuperscript{116} Ibidem.
Gericht fest, dass die Schiedseinrede nicht fristgerecht erhoben worden sei. Im September 1998 leitete B ein Schiedsverfahren in Genf ein. A erhob die Einrede der Unzuständigkeit.

In der Folge hob das panamesische Appellationsgericht die Entscheidung des Erstrichters auf. Darauf erklärte das Schiedsgericht im November 2000 seine Zuständigkeit.

In Januar 2001 hat das Oberste Gericht Panamas den Entscheid des Appellationsgerichts aufgehoben und festgestellt, dass die Einrede der Schiedsgerichtsbarkeit verspätet erhoben worden war.

A focht den Schiedsspruch mit staatsrechtlicher Beschwerde vor dem Bundesgericht an.

Wie bereits oben vermerkt, stellte das Bundesgericht fest, dass die Regeln über die Rechtshängigkeit und die Rechtskraft des Art. 9 IPRG auch im internationalen Verhältnis gelten und, dass auch ein Schiedsgericht mit Sitz in der Schweiz daran gebunden ist

\[117\]

\(c)\) Würdigung

Die Haltung des Bundesgerichts gegenüber der Schiedsgerichtsbarkeit sowie die Ergebnisse dieser methodischen Vorgehensweise des Bundesgerichts, wonach die Anerkennbarkeit, die Rechtshängigkeit und die Rechtskraft eines ausländischen Entscheides überprüft werden müssen, sind von einem Teil der Lehre kritisiert worden\[118\].

\[117\] BGE 127 III 279 (S. 285).
Was das Verhältnis zwischen staatlichem Gericht und Schiedsgericht anbelangt, wird nach dem französischen Modell befürwortet, dass bei Vorliegen einer Schiedsabrede sich das staatliche Gericht der Zuständigkeitsprüfung enthält, bis das Schiedsgericht selber darüber entschieden hat<sup>119</sup>.

Weder aus Art. II Ziff. 3 New Yorker-Übereinkommen noch aus Art. 7 IPRG kann aber zugunsten des Schiedsgerichts eine Entscheidungspriorität gegenüber der staatlichen Gerichtsbarkeit abgeleitet werden<sup>120</sup>. Das Bundesgericht motiviert seine Haltung richtigerweise mit den Anforderungen, die vom dem Grundrecht des Rechtsverweigerungsverbotes gestellt sind, die insbesondere zu berücksichtigen sind, wenn aufgrund der Bestreitung der Schiedsabrede nicht mehr anzunehmen ist, dass die Schiedsabrede den Parteien gültig entgegengehalten werden kann<sup>121</sup>.

Die Befugnisse des staatlichen Gerichts, über das Bestehen oder die Gültigkeit einer Schiedsabrede zu entscheiden, variiert je nach den nationalen Rechtsordnungen. Um so mehr sollten Lösungen getroffen werden, die zu sicheren und praktikablen Ergebnissen führen. Die Aussetzung des staatlichen Gerichts durch Einwendung einer Schiedsabrede kann leicht missbraucht werden, wenn eine Partei sich auf inkonsistente Schiedsabreden stützen könnte, um die staatliche Gerichtsbarkeit auszuschalten<sup>122</sup>.

<sup>119</sup> BGE 120 III 155 (S. 161 ff.); KNOEPFLER, S. 560.
<sup>120</sup> Vgl. oben Anm. 107 und 108; POUDRET, Concluding Remarks, S. 155, 158.
<sup>121</sup> BGE 128 III 50 (S. 58).
<sup>122</sup> POUDRET, S. 155.
d) **Lugano-Übereinkommen**

Das Lugano-Übereinkommen regelt die Rechtshängigkeit im Art. 21\textsuperscript{123}, welcher – ähnlich wie Art. 9 IPRG – einen chronologischen Prioritätsgedanken verkörpert. Der Ausschluss der Schiedsgerichtsbarkeit gemäss Art. 1 Abs. 2 Ziff. 4 LugÜ bewirkt aber, dass diese Norm bei Vorliegen eines Schiedsverfahrens nicht zur Anwendung kommt. Auch kann die Anerkennung eines Schiedsspruches nicht aufgrund von Art. 25 LugÜ erfolgen.

Dem Lugano-Übereinkommen kann aber erhebliche Relevanz zukommen im Rahmen der Prüfung der Anerkennbarkeit eines staatlichen Entscheides, wie es im BGE 124 III 83 durch das Bundesgericht geschehen ist. Dort hatte nämlich das Bundesgericht die Anerkennbarkeit des peruanischen Gerichts aufgrund des Mangels der indirekten Zuständigkeit verneint. Wenn aber der Entscheidungsstaat ein Vertragsstaat des Lugano-Übereinkommens gewesen wäre, hätte das Bundesgericht die indirekte Zuständigkeitskontrolle nach Art. 25 lit. a IPRG nicht vornehmen können. Im Gegenteil, es hätte den Entscheid nach Art. 25 LugÜ anerkennen müssen, ohne dass die Verletzung von Art. II Ziff. 3 New York-Übereinkommen einen Einfluss darauf haben könnte\textsuperscript{124}. In diesem Fall kann die Anerkennung eines solchen

\textsuperscript{123} Die Norm lautet: "Werden bei Gerichten verschiedener Vertragsstaaten Klagen wegen desselben Anspruchs, zwischen denselben Parteien anhängig gemacht, so setzt das später angerufene Gericht das Verfahren von Amtes wegen aus, bis die Zuständigkeit des zuerst angerufenen Gerichts feststeht. Sobald die Zuständigkeit des zuerst angerufenen Gerichts feststeht, erklärt sich das später angerufene Gericht zugunsten dieses Gerichts für unzuständig."

\textsuperscript{124} POUDRET, Concluding Remarks, S. 161. Gegen diese Wirkung stützt sich die Kritik von PERRET (S. 74 ff.), nach welcher das Schiedsgericht nicht von einem summarischen staatlichen Gerichtsentcheid über die Gültigkeit einer Schiedsabrede gebunden sein soll, weil einem solchen Entscheid keine Rechtskraft zukomme.
Entscheids nur aufgrund Art. 27 Ziff. 3 LugÜ vermieden werden\textsuperscript{125}.

5. **Anerkennung und Vollstreckung eines Gerichtsentscheides, der in Missachtung einer Schiedsabrede ergangen ist**

Die Frage der Anerkennung eines Gerichtsentscheides, der in Missachtung einer Schiedsabrede ergangen ist, wurde vom Vereinigten Königreich anlässlich seines Beitritts zum Übereinkommen in 1978 gestellt und ist seit her offen geblieben. Sie ist vom EuGH (noch) nicht entschieden worden\textsuperscript{126}. Wie bereits angegeben, ging es darum ob ein Gericht im Anerkennungsstaat eine solche Gerichtsentscheidung nach Massgabe des Übereinkommens hätte anerkennen müssen oder ob eine Nachprüfung des Entscheides in der Anerkennungsphase möglich gewesen wäre\textsuperscript{127}.

Im Kapitel 2 oben wurde die Frage behandelt, ob ein endgültiger Schiedsspruch der Anerkennung eines Entscheids eines Vertragsstaates entgegen stehen konnte. Wenn aber kein Schiedsspruch erhangen ist, stellt sich die Frage, ob das bloße Bestehen einer Schiedsabrede die Anerkennung des ausländischen gerichtlichen Entscheides eines Vertragsstaates blockieren kann.

Wenn man dem Grundsatz folgt, wonach das Übereinkommen anwendbar ist, wenn der Hauptgegenstand des Streites in dessen Anwendungsbereich liegt, so sind auch Gerichtsentscheide, die trotz Bestehens einer Schiedsabrede erhangen sind, nach Art. 25 LugÜ anzuerkennen.

\textsuperscript{125} Vgl. im Ergebnis POUDRET, concluding Remarks, S. 162.

\textsuperscript{126} Vgl. SCHLOSSER, Bericht, § 61; S. 92; BERTI, Ausschluss, S. 343.

\textsuperscript{127} Das englische Recht hat diese Frage gelöst, indem der englische Anerkennungsrichter die Anerkennung wegen Missachtung einer Schiedsabrede nicht versagen kann, wenn die Entscheidung von einem Vertragsstaat stammt (vgl. dazu BESSON, S. 332).
Ein Teil der Lehre versucht diesen Grundsatz zu relativieren, indem der automatischen Anerkennung Schranken gesetzt werden sollen.\textsuperscript{128} Zum einen wird geltend gemacht, dass bei der Anwendung des Lugano bzw. Brüsseler-Übereinkommens dem Art. II Ziff. 3 New York-Übereinkommen Rechnung getragen werden soll, wonach das Gericht die Parteien auf das schiedsrichterliche Verfahren zu verweisen hat. Daraus ergebe sich ein "\textit{conflit de convention}", der dadurch zu lösen sei, dass die Missachtung einer Schiedsklausel die Anerkennung und Vollstreckung gemäss Art. 27 und 34 LugÜ /EuGVÜ aufgrund der Verletzung des \textit{ordre public} verweigert werden müsse\textsuperscript{129}. Zum andern wird die Möglichkeit einer Nachprüfung der ausländischen Entscheidung in der Anerkennungsphase befürwortet, wenn eine Schiedsabrede nicht beachtet worden ist\textsuperscript{130}.


Dieser Meinung entspricht diejenige von KROPHOLLER\textsuperscript{132}, wonach der Schutz gegen die Missachtung einer Schiedsklausel vor den Gerichten des Erststaates zu suchen ist, und nicht erst vor denen des Zweitstaates.

\textsuperscript{128} Vgl. dazu die Gegenüberstellung bei BESSON, S. 333 ff. und die von ihm erbrachte Übersicht der verschiedenen Meinungen.
\textsuperscript{129} So VAN HOUTTE, Parallel Proceedings, S. 52; derselbe, May Court Judgments..., S. 88 ff.; vgl. aber oben Anm. 119.
\textsuperscript{130} HASCHER, Recognition, S. 53 ff.
\textsuperscript{131} BGE 127 III 186 (S. 188).
\textsuperscript{132} KROPHOLLER, EZPR, Rz 46 ad Art. 1 EuGVÖ.
6. Vorsorgliche Massnahmen

6.1 Vorsorgliche Massnahmen im Lugano-Übereinkommen

a) Allgemeines

Im internationalen Prozessrecht gewinnen die vorsorglichen Massnahmen immer mehr an Bedeutung. Als Beispiel sei auf die Entwicklung im englischen Recht (insbesondere mit der Verbreitung der sog. freezing injunctions\(^{133}\)) zur Unterstützung von gerichtlichen und schiedsgerichtlichen ausländischen Verfahren hingewiesen\(^{134}\). In diesem Zusammenhang ist der Leitentscheid Credit Suisse Fides Trust vs. Cuoghi\(^{135}\) zu erwähnen: Im Rahmen eines Betrugsfalles hatte Credit Suisse ein Verfahren in der Schweiz gegen den in England ansässigen Cuoghi eingeleitet. Credit Suisse beantragte gegen ihn eine worldwide 
*Mareva injunction* und eine *ancillary disclosure order*. Der Richter hiess das Begehren gut und stellte unter anderem fest\(^{136}\):

- Ausserhalb der Zuständigkeit des Richters der Hauptsache ist jener Richter zur Anordnung von einstweiligen Verfügung besser gestellt, der in der Lage ist, diese auch zu vollstrecken. Da die Mareva injunction in personam wirkt, ist dies der Richter am Wohnort des Betroffenen;

\(^{133}\) ANDREWS, S. 33: "An English freezing injunction is an in personam order compelling a defendant to refrain from dealing with its assets and imposing collateral restraint upon non-parties, such as the defendant's bank. The function of such an injunction is to preserve assets from dissipation pending final execution against the defendant. (...) A freezing injunction does not give the applicant any proprietary interest in the defendant's assets."

\(^{134}\) Zu dieser Entwicklung vgl. GERHARD, S. 102 ff.

\(^{135}\) Credit Suisse Fides Trust SA v. Cuoghi [1998] QB 818, 825, CA per Millet LJ.

\(^{136}\) Vgl. im einzelnen GERHARD, S. 108 ff.
- Trotzdem der englische Richter eine Massnahme gewährt, die weitergeht als diejenige, die im schweizerischen Recht bekannt ist, handelt er im erlaubten Rahmen des Art. 24 LugÜ. Auf jeden Fall hängt eine extraterritoriale Wirkung der Massnahme von der Anerkennung im Zweitstaat ab.

Dieser Fall zeigt das Potential der Verwendung von vorsorglichen Massnahmen für grenzüberschreitende Streitigkeiten sowohl vor den staatlichen als auch vor den Schiedsgerichten. Der Entscheid des EuGH Van Uden hilft, den Rahmen der Anwendung solcher Massnahmen weiter zu erläutern.

b) Rechtsgrundlage für die vorsorglichen Massnahmen

Das Lugano-Übereinkommen erwähnt im Art. 24 die vorsorglichen Massnahmen ausdrücklich:

Art. 24 LugÜ
"Die in dem Recht eines Vertragsstaats vorgesehenen einstweiligen Massnahmen einschliesslich solcher, die auf eine Sicherung gerichtet sind, können bei den Gerichten dieses Staates auch dann beantragt werden, wenn für die Entscheidung in der Hauptsache das Gericht eines anderen Vertragsstaates aufgrund dieses Übereinkommens zuständig ist."

c) Begriff

Es gibt keinen einheitlichen Begriff der vorsorglichen Massnahme. In den Rechten der Vertragsstaaten existiert im Gegen teil eine Vielfalt von möglichen Massnahmen.

Zitiert oben in Anm. 50.

Zu denken sei an die Massnahmen in personam (die ein bestimmten Verhalten anvisieren) oder in rem (die auf Güter gerichtet sind) und deren unterschiedliches Verständnis in den Ländern der EU.
Auch Art. 24 LugÜ definiert den Begriff der "einstweiligen Massnahmen einschließlich solcher die auf eine Sicherung gerichtet sind", nicht. Nach dem EuGH handelt es sich um Massnahmen auf Rechtsgebieten, die in den Anwendungsbereich des Übereinkommens fallen, die eine Veränderung der Sach- oder der Rechtslage verhindern sollen, um Rechte zu sichern, deren Anerkennung im übrigen bei dem in der Hauptsache zuständigen Gericht beantragt wird\textsuperscript{139}.

Der EuGH hat bislang keine Begrenzung der Vielfalt der in den Mitgliedstaaten existierenden Massnahmen mittels einer autonomen Auslegung von Art. 24 gesetzt und hat den Massnahmen Anerkennung gewährt, abgesehen im Fall, wo dem Betroffenen kein rechtliches Gehör gewährt wurde\textsuperscript{140}. Insbesondere hat der EuGH nicht zum vornherein ausgeschlossen, dass unter gewissen Voraussetzungen auch die Anordnung der vorläufigen Erbringung einer vertraglichen Hauptleistung zur Sicherung der Parteiinteressen gerechtfertigt sein kann\textsuperscript{141}. Jedoch sind die nach dem Recht der Mitgliedstaaten zugelassenen Massnahmen im Rahmen des Übereinkommens nicht unbeschränkt zulässig\textsuperscript{142}.

d) Zuständigkeit

Der EuGH hat in seiner Rechtsprechung bestätigt, dass die Zuständigkeit zum Erlass von vorläufigen Massnahmen zunächst beim Gericht liegt, das nach den Art. 2–18 EuGVÜ/LugÜ für die Entscheidung in der Hauptsache zuständig ist. Zudem sieht Art. 24 eine weitere Zuständigkeitsregel vor, nach welcher ein Gericht einstweilige oder sichernde Massnahmen auch dann an-

\textsuperscript{139} Van Uden, § 37.
\textsuperscript{140} KROPHOLLER, EZPR, Rz 5 und 20 ad Art. 31 EuGVÖ; GERHARD, S. 113.
\textsuperscript{141} Van Uden, § 45 ff.
\textsuperscript{142} Man denke etwa auf Sucharrestmassnahmen, vgl. diesbezüglich GERHARD, S. 109 ff.
ordnen kann, wenn es für die Hauptsache nicht zuständig ist. Das angerufene Gericht kann die nach seinem Recht vorgesehe-nen Massnahmen anordnen.\textsuperscript{143}

Nach Art. 24 LugÜ (wie auch nach IPRG 10) kann also jedes Gericht in einem Vertragsstaat jede vorsorgliche Massnahme erlassen, auch wenn für die Hauptsache ein anderes Gericht zu-ständig ist.\textsuperscript{144}

Der EuGH hat festgehalten, dass das für die Hauptsache zustän-dige Gericht auch zur Anordnung von einstweiligen oder sichernden Massnahmen zuständig ist, ohne dass diese Zuständig-keit von weiteren Voraussetzungen abhängt. Hingegen setzt die Anrufung eines anderen Gerichts zu diesem Zweck das Beste-hen einer realen Anknüpfung zwischen dem angerufenen Ge-richt und dem Gegenstand der beantragten Massnahme vor-aus.\textsuperscript{145}

Im Entscheid Van Uden hat der EuGH die Anknüpfung aufgrund des nationalen Rechts (in casu der Niederlande) als genügend akzeptiert, obwohl es sich um einen exorbitanten Gerichtsstand im Sinne von Art. 3 EuGVÜ handelte. In diesem Zu-sammenhang hat der EuGH klargestellt, dass für die Sonderre-gelung des Art. 24 das Verbot der exorbitanten Gerichtsstände nicht gelte.\textsuperscript{146}

Die Regelung des Art. 24 LugÜ führt zu einer Vielfalt von konkurrierenden Zuständigkeiten. Doch kommen nach einhelliger Ansicht die Regeln über die Litispendenz (Art. 21 LugÜ) für den einstweiligen Rechtsschutz nicht zur Anwendung.\textsuperscript{147}

\begin{itemize}
  \item Van Uden, § 19 und 20.
  \item JAMETTI-GREINER, Der vorsorgliche Rechtsschutz, S. 661.
  \item Van Uden, § 22 und 40.
  \item Van Uden, § 42; vgl. auch KROPHOLLER, EZPR, Rz 15 und 17 ad Art. 31 EuGVÖ und GERHARD, S. 143 ff., die aber auf die fehlende Präzisierung dieses Erfordernisses hinweisen.
  \item KROPHOLLER, EZPR, Rz 19 ad Art. 31 EuGVÖ; GRUNDMANN, S. 113. Art. 24 LugÜ ist geradezu lex specialis zu Art. 21 LugÜ.
\end{itemize}
e) Anerkennung und Vollstreckung

Die einstweiligen Massnahmen sind im Art. 25 LugÜ nicht ausdrücklich erwähnt. Nach überwiegender Auffassung sind sie aber unter dem Entscheidungsbegriff einzuordnen, sofern sie im Herkunftsstaat vorläufig vollstreckbar sind und dem Betroffenen rechtliches Gehör gewährt wurde.\(^{148}\)

Bezüglich der Frage der extraterritorialen Geltung der einstweiligen Massnahmen, ist im allgemeinen anerkannt, dass Anordnungen eines Gerichts der Hauptsachen auch extraterritoriale Wirkung entfalten können, soweit das rechtliche Gehör gewährt wurde.\(^{149}\)

Die Extraterritorialität von Massnahmen eines Gerichts, das aufgrund von Art. 24 LugÜ von einem nationalen Gericht angeordnet worden sind, wird zurückhaltend angenommen.\(^{150}\)

In Bereich einer Leistungsverfügung wird die Extraterritorialität anerkannt, wenn die einstweilige Massnahme die vom EuGH entwickelten Voraussetzungen (Gewährleistung der Rückzahlung und Beschränkung der Massnahme auf Vermögensgegenstände im Zuständigkeitsbereich des angerufenen Gerichts) erfüllt.\(^{151}\)

\(^{148}\) KROPHOLLER, EZPR, Rz 20 ad Art. 31, Rz 20 ad Art. 32 EuGVÖ; GRUNDMANN, S. 115 ff.; JAMETTI-GREINER, Der vorsorgliche Rechtsschutz, S. 662.

\(^{149}\) KROPHOLLER, EZPR, Rz 21 ad Art. 31 EuGVÖ; GERHARD, S. 130 ff., 135.

\(^{150}\) KROPHOLLER, EZPR, Rz 24 ad Art. 31 EuGVÖ.

Das Bundesgericht hat sich an die Rechtsprechung des EuGH im Fall Van Uden angelehnt. Im einem Entscheid vom 17. September 1999 nahm es zur Zuständigkeit für die Anordnung von einstweiligen Massnahmen nach Art. 24 LugÜ und die Zulässigkeit von einstweiligen Leistungsverfügungen Stellung.

Eine schweizerische Firma hatte trotz einer Gerichtstandsvereinbarung zugunsten eines englischen Gerichts das Handelsgericht des Kantons Aarau um die Anordnung vorsorglicher Massnahmen ersucht. Sie beantragte, ihre englische Lieferantin sei zur vorläufigen Lieferung bestimmter Waren zu verpflichten und ferner sei ihr die Weiterverteilung ihre Produkte in der Schweiz zu verbieten.

Bei der Auslegung von Art. 24 LugÜ hielt das Bundesgericht zunächst fest, dass die Gerichtsstandsvereinbarung grundsätzlich auch für den einstweiligen Rechtsschutz gilt. Die Anrufung eines anderen als des prorogierten Gerichts um einstweiligen Rechtsschutz bleibt aber möglich, wenn dieses andere Gericht allein in der Lage ist, eine sofort vollstreckbare Massnahme anzuordnen (BGE 125 III 451 E 3a).

Im Lichte der Rechtsprechung des EuGH anerkannte dann das Bundesgericht als einstweilige Massnahmen nicht nur diejenige auf Sicherung eines gefährdeten Anspruchs, sondern auch jene auf dessen vorläufige Befriedigung in Sinne einer Leistungsmassnahme als zulässig. Letzere aber nur bei Vorliegen bestimmter Voraussetzungen: die Massnahme soll sachlich erforderlich und zeitlich dringend sein; ferner soll das in der Haupt sache zuständige Gericht nicht in der Lage sein, rechtzeitig die vorsorgliche Massnahme anzuordnen; das angerufene Gericht soll auch einen nahen Bezug zum Gegenstand der beantragten Massnahme aufweisen; schliesslich soll der einstweilige Charakter der Massnahme beibehalten werden, indem die Schadlos-

\[^{152}\text{BGE 125 III 451.}\]
haltung des Betroffenen durch Leistung von Sicherheiten gewähr werden muss (BGE 125 III 451 E 3b).

Die Frage, ob die Anordnung der vorläufigen Erfüllung im Rahmen des einstweiligen Rechtsschutzes vom innerstaatlichen Recht zugelassen sei, hat das Bundesgericht grundsätzlich offen gelassen. Es hielt immerhin fest, dass die einstweilige Vollstreckung von Leistungsansprüchen von Bundesrechts wegen nicht zum vornherein generell ausgeschlossen werden darf (BGE 125 III 451 E 3c).

g) Ergebnis

Im Ergebnis ist festzuhalten:


6.2 Vorsorgliche Massnahmen eines Schiedsgerichtes

a) Zuständigkeit

Art. 183 Abs. 1 IPRG räumt dem Schiedsgericht die Kompetenz zur Anordnung von vorsorglichen und sichernden Massnahmen ein, wenn die Parteien diese Befugnis nicht ausgeschlossen haben. Die Befugnis des Schiedsrichters ist aber insoweit beschränkt, als die vorsorgliche und sichernde Massnahme nur umgesetzt werden kann, wenn sich der Betroffene freiwillig unterzogen hat.


b) Anwendbares Recht


153 BERTI, IPRG, Rz 17 ad Art. 183 IPRG.
154 BERTI, IPRG, Rz 5 ad Art. 183 IPRG.
Der um Vollstreckungshilfe ersuchte Richter wendet sein eigenes Recht an (Art. 183 Abs. 2 IPRG)\(^{155}\).

c) **Anerkennung und Vollstreckung**

Die Vorschrift des Art. 183 IPRG wendet sich an schweizerische Gerichte und gewährt Vollstreckungshilfe an die Schiedsgerichte mit Sitz in der Schweiz (Art. 176 IPRG)\(^{156}\). Eine grenzüberschreitende Wirkung vorsorglicher Massnahmen von Schiedsgerichten hängt grundsätzlich von dem nationalen Recht des Anerkennungsstaates ab.

Aus dem New Yorker Übereinkommen ergibt sich keine Verpflichtung zur Anerkennung vorsorglicher Massnahmen von Schiedsgerichten\(^{157}\); diese Problematik fand in den Diskussionen um eine Revision des Übereinkommens bereits Beachtung\(^{158}\).

Das Lugano-Übereinkommen ist, wie bereits ausgeführt, auf die Anerkennung und Vollstreckung von Schiedssprüchen nicht anwendbar. Gleiches gilt für einstweilige Anordnungen von Schiedsgerichten, auch wenn diese in eine staatliche Entscheidung nach Art. 183 IPRG inkorporiert sind oder dadurch verdeckt werden\(^{159}\).

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\(^{155}\) Auf die Frage ob der Schiedsrichter auch Massnahmen anordnen kann, die der schweizerischen Rechtsordnung unbekannt sind, wird im Rahmen dieser Arbeit nicht eingetreten. Das staatliche Gericht wird aber zweifellos nur jene Massnahmen vollstrecken, die nach seinem Recht zugelassen sind.

\(^{156}\) **MERKT**, Nr. 469 f., S. 191 f., welcher aber nicht ausschliesst, dass aufgrund Art. 182 Abs. 2 IPRG die schweizerischen Gerichte verpflichtet sind, auch Schiedsgerichten mit Sitz im Ausland bei der Vollstreckung vorsorglicher Massnahme Hilfe zu leisten (vgl. Nr. 472, S. 193).

\(^{157}\) **MERKT**, Nr. 471, S. 192, mit Bezug auf die herrschende Lehre.

\(^{158}\) **VAN DEN BERG**, S. 139 ff.

\(^{159}\) **BERTI**, Ausschluss, S. 346.
6.3 Vorsorgliche Massnahmen eines staatlichen Gerichtes parallel zu einem Schiedsverfahren

Nach der Rechtsprechung des EuGH ist für die einstweiligen Massnahmen das Rechtsgebiet massgebend, um welches es in der einstweiligen Massnahme selbst geht. Es kommt also nicht auf das Gebiet der Hauptsache an\[160\]. Somit ist das Lugano-Übereinkommen auch auf einstweilige Massnahmen anwendbar, die in den Anwendungsbereich des Übereinkommens fallen, ungeachtet, ob das Hauptverfahren vor einem Schiedsgericht stattfinden muss. Denn Gegenstand der einstweiligen Massnahme ist nicht die Schiedsgerichtsbarkeit als solche, sondern die Sicherung von materiellen Ansprüchen\[161\].

Durch die Vereinbarung eines Schiedsgerichts schliessen die Parteien die Zuständigkeit der staatlichen Gerichte aus. Deswegen besteht für sie, nach dem EuGH, keine Möglichkeit die sichernenden oder einstweiligen Massnahmen durch ein nach dem Übereinkommen für die Hauptsache zuständiges Gericht\[162\] vorzunehmen zu lassen. Daher kann die Zuständigkeit für den Erlass der einstweiligen Massnahmen nur auf Art. 24 in Verbindung mit dem nationalen Recht\[163\] abgestützt werden.

Die Möglichkeit, trotz des Bestehens einer Schiedsklausel oder eines Schiedsverfahrens sich auf die Zuständigkeit des Art. 24 LugÜ zu berufen, um einstweilige Massnahmen zu erlangen, ist nicht zu unterschätzen. Werden die Massnahmen nach Art. 24 LugÜ erlassen, sind sie nach den Regeln des Übereinkommens in den Vertragsstaaten anzuerkennen. Ansonsten können sie nur aufgrund von besonderen bilateralen Staatsverträgen oder nach dem nationalen Recht anerkannt und vollstreckt werden. Es ist aber einzusehen, dass die Rechtsprechung des EuGH die Wir-

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\[161\] KROPHOLLER, EZPR, Rz 4 ad Art. 31 EuGVÖ.
\[162\] Van Uden, § 24.
\[163\] KROPHOLLER, EZPR, Rz 4 und 13 ad Art. 31 EuGVÖ.
kung hat, die Befugnis des Schiedsgerichts zur Anordnung von einstweiligen grenzüberschreitenden Massnahmen zu beschränken\textsuperscript{164}.

\textbf{V. S\textsc{chlussbemerkung}}


Ausserdem hat die Schiedsgerichtsbarkeit eine ganz zentrale Rolle im Rahmen des internationalen Handelsverkehrs gewonnen und ist heute eine Realität, die nicht unterschätzt werden soll.


\textsuperscript{164} Das wäre nach VAN HAERSOLTE-VAN HOF (S. 30) an sich kein grosser Nachteil, da im Regelfall die Parteien die einstweiligen Massnahmen dort beantragen, wo sie zu vollziehen sind.
durchzuführen, obwohl ein paralleles staatliches Verfahren im Gang ist.

Im Hinblick auf den zunehmenden Erfolg sowohl einheitlicher zivilprozessueller Regelungen als auch der Schiedsgerichtsbarkeit, kann man zwei Fragen stellen: Zum einen, wie starr sollen staatliche Verfahrensnormen bleiben; zum anderen, in welchem Rahmen soll das Ermessen des Schiedsrichters gestaltet werden. Denn eine extreme Ermessensfreiheit des Schiedsrichters oder eine allzu strenge staatliche Kompetenzordnung können nur zu einer erhöhten Anzahl von widersprüchlichen Urteilen der beiden Gerichtsbarkeiten führen.

Eine Lösung dieser Kollision existiert bis jetzt nur in begrenzter Form in den nationalen Rechtsordnungen. Es fehlen supranationale Vorschriften, die das Konkurrieren von staatlichen und privaten Gerichtsverfahren regeln. Deshalb sollten, de lege ferenda, Regelungen geschaffen werden, die vor allem die Rechtshängigkeit und die Rechtskraft der Verfahren und der Entscheidungen aus beider Gerichtsbarkeiten koordinieren. In dieser Hinsicht stellen weder der an den Streitgegenstand gebundene Ausschluss der Schiedsgerichtsbarkeit nach Art. 1 Abs. 2 ziff. 4 EuGVÖ/LugÜ noch das Postulat des absoluten Ausschlusses derselben die optimale Lösung dar. In diesem Sinne sollte dem Postulat von Art. 293 (ex 220) EGV vollständig Folge geleistet werden.