# Case Notes on International Arbitration

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The purpose of these Case Notes on International Arbitration is to report and comment on a selection of decisions on international arbitration made by the Swiss Federal Supreme Court in 2019. During that year, the Court made a total of 60 decisions relating to arbitration, among which 37 concerned international arbitration matters (as opposed to domestic cases) and 19 concerned sports matters. Eight landmark decisions are covered here. The decisions relating to investment arbitration (IV. below) are co-authored by Dr. Hanno Wehland.

Table of Contents



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# I. Awards set aside

## A. *A. AG v. State of Palestine and B. Company,* 4A_462/2018, 4 July 2019

(Original in German)

Binding effect of Federal Supreme Court's remand decisions – SCAI award set aside

After the Federal Supreme Court upheld an application to set aside, the arbitral tribunal to which the matter is remitted shall base its new decision on the legal reasoning contained in the remand decision.

Relevant provision:
Art. 190(2)(d) PILA

Comment:
– Rev. arb. 2019, 1185, note Pierre-Yves Tschanz & Frank Spoorenberg

*Facts:* In 1996, A., the State of Palestine and B. Company entered into a contract for the construction and operation of a hotel and casino in the West Bank («Agreement»). In 2002, the State of Palestine made gambling a criminal offence. After the second Intifada, a decree was issued which closed the access to the territory where the hotel and casino were located. As a result the casino closed. Thereafter, the parties entered into two other contracts by which they agreed *inter alia* to extend the licence term for the operation of the casino and amend the term of all other licences set by the Agreement («Contracts»).

In 2012, A. requested the issuance of new licences and explained that the non-issuance would constitute a breach of the Contracts.

Since A. did not obtain the new licences, it initiated arbitration proceedings under the Swiss Rules of International Arbitration of the Swiss Chambers' Arbitration Institution (SCAI). A. requested among others that the arbitral tribunal order the State of Palestine (i) to deliver a casino licence valid until 13 September 2028 which designates A. as the sole and exclusive operator of the casino and (ii) to amend the term until 13 September 2028 of all other licences necessary in order to operate the hotel and casino as set forth in the Contracts. In an award made in 2016, the arbitral tribunal, sitting in Zurich, dismissed A.'s claim. According to the arbitral tribunal, the criminal offence on gambling precluded A. from obtaining the requested licences. Relying on Art. 190(2)(d) of the Federal Private International Act («PILA»), A. sought to have the award set aside by the Federal Supreme Court. The Court up-

held the application to set aside and the matter was remitted to the arbitral tribunal for a new decision.[1]

In a new award made in 2018, the arbitral tribunal decided that the A.'s relief did not include the issuance of a separate hotel licence. A. sought to have the new award set aside by the Court, which for the second time allowed the application and set aside the SCAI award.

*Reasons:* The petitioner submits that the arbitral tribunal disregarded the Court's remand decision by not examining the claim for the issuance of a hotel licence, such that, once again, the arbitral tribunal breached its right to be heard. The Court had decided that the petitioner's right to be heard had been breached with regard to the obligation for the State of Palestine to issue licences for the operation of the hotel until 13 September 2028. The Court had ruled that the arbitral tribunal should examine whether «it exists a claim for the issuance of licences for the operation of the hotel until 13 September 2028 and whether this claim is at least partially well-founded». However, in breach of the Court's remand decision, the arbitral tribunal declared that it would not examine the issuance of the hotel licence because, based on a narrow interpretation of the relief (ii), the petitioner had not requested the issuance of a separate hotel licence until 13 September 2028 (i.e. irrespective of the casino licence).

If a matter is remitted to a lower court, the issue in dispute may not be extended or decided on a new legal basis. The lower court must base its new decision on the legal reasoning set out in the Court's remand decision. Given that this binds the lower court, apart from any admissible *nova,* the lower court and the parties are prevented from assessing the dispute based on facts which have not already been established or from examining the case from a legal point of view which was expressly dismissed or not taken into consideration in the remand decision. The binding nature of the reasoning contained in a remand decision is a procedural principle which applies to all remand decisions of the Court, including in arbitration. The grievance that the arbitral tribunal disregarded the binding effect of the Court's remand decision and once again breached the petitioner's right to be heard is well-founded.

After the Court's remand decision, the only issue to be addressed by the arbitral tribunal was whether, irrespective of the criminal prohibition of gambling, the petitioner had the right to obtain licences for the operation of the hotel until 13 September 2028.

By leaving open the question whether the alleged right to obtain a separate hotel licence existed, and justifying this on the ground that such a licence had not been requested pursuant to the relief (ii) and that this claim was thus not covered by the

1 *A. AG v. State of Palestine and B. Company,* decision by the Federal Supreme Court No. 4A_532/2016, 30 May 2017.

arbitration, the arbitral tribunal disregarded the Court's remand decision by examining the matter from a legal reasoning which had been expressly dismissed in the remand decision. For this reason, the award shall be set aside and the matter shall be remitted to the arbitral tribunal in order to safeguard the right to be heard. It is not necessary to consider the further grievances raised by the petitioner.

*Note:* In practice, it is exceptional that a matter be remitted twice to the arbitral tribunal. When the Court sets aside an award and remits the matter to the arbitral tribunal for a new decision, typically to cure a flaw which affected the petitioner's right to be heard, the arbitral tribunal shall follow the legal reasoning on which the remand decision was based. The new award usually complies with these requirements, such that there is no new application to set aside or the application is dismissed. By contrast, the present case illustrates that the arbitral tribunal may again breach a party's right to be heard and have its second award set aside if it does not strictly comply with the Court's ruling. This will be a lesson for arbitral tribunals in those situations as they should take very seriously what the Court held and should properly hear the parties about the consequences of the first setting aside decision. There is in principle no limit: as long as an award is flawed, it may be sought to be set aside and the Court will assess, and possibly set aside, each new award in light of its prior findings and whether they have been complied with.

## B. *A. Ltd v. B. A.S. and C. A.S.,* 4A_294/2019 and *B. A.S. and C. A.S. v. A. Ltd,* 4A_296/2019, 13 November 2019

(Original in German)

*Extra petita* – ICC award partially set aside

The arbitral tribunal decided *extra petita* when declaring that the parties were jointly and severally liable to pay damages, while the parties had sought declarations of liability without requesting performance (payment of sums of money).

Relevant provision:
Art. 190(2)(c) PILA

*Facts:* In 2015, B. and C., two Turkish companies, and A., an Israeli company, entered into an agreement whereby A. was to design, manufacture and supply armored vehicles. This replaced prior contractual relationships whereby C., which had a tender contract with a Turkish public entity, had subcontracted with B., which in turn had subcontracted with A.

In 2017, A. initiated ICC arbitration proceedings against B. and C., requesting *inter alia* that the arbitral tribunal declare B. and C. «severally and jointly liable to compensate» A. for damages resulting from B.' and C.'s alleged breaches of contract (relief 3 and 4; with no quantum mentioned). B. and C. asserted a counterclaim by which they requested *inter alia* that the arbitral tribunal order A. to compensate them for damages amounting to approximately USD 8,5 million (relief 806.10).

In an award made in 2019, the arbitral tribunal, sitting in Zurich, declared that B. and C. were «jointly and severally liable to compensate» A. in the amount of approximately USD 1,6 million for damages incurred as a result of B.' and C.'s breaches of contract (operative part of the award a. ii). The arbitral tribunal further declared that A. was liable to compensate B. and C. for damages as a result of A.'s breaches of contract, but that claim was extinguished by set-off declared by A. and B., and B. and C. were held liable to compensate A. in an amount of approximately USD 1,2 million (operative part of the award a. xiii and xiv). Since A.'s claim was entirely paid by way of set-off declared by A. and B., the arbitral tribunal ultimately ordered A. to pay B. and C. a net amount of approximately USD 3,7 million (operative part of the award b. xviii).

Relying on Art. 190(2)(c) PILA, A. (in case 4A_294/2019) and B.-C. (in case 4A_296/2019), respectively, sought to have the award partially set aside (specific paragraphs of the operative part) by the Federal Supreme Court. The Court consolidated both proceedings and partially upheld the applications to set aside of each side. Certain paragraphs of the operative part of the award were annulled and the matter was remitted to the arbitral tribunal for a new decision.

*Reasons:* Art. 190(2)(c) PILA allows challenging an award when the arbitral tribunal has decided beyond the claims, in awarding more or something else than what had been requested (*ultra* or *extra petita*). According to the decided cases, there is no violation of the principle *ne eat iudex ultra petita partium* if the claim asserted is analysed differently (wholly or in part) from the reasons given by the parties, provided that it is covered by the relief sought. The arbitral tribunal is bound by the subject-matter and scope of the relief sought, in particular when a party characterises or limits its claims in the prayer for relief. While the Court held that the principle *ne eat iudex ultra petita partium* was breached when the arbitral tribunal not only dismissed a claim for negative declaratory relief but also awarded the disputed claim, the Court dismissed the ground for setting aside under Art. 190(2)(c) PILA in a case where the arbitral tribunal had not limited itself to dismiss the claim for negative declaratory relief but had found that the disputed legal relationship existed.

*4A_294/2019:* Instead of deciding on the relief sought by A. (declaration that B. and C. were severally and jointly liable for damages arising from their contractual breaches), the arbitral tribunal held that B. and C. were jointly and severally liable to compensate A. for damages amounting to approximately USD 1,6 million (operative

part of the award a. ii). A. rightly submits that the arbitral tribunal reached a decision in that section of the operative part of the award that A. had never requested. B. and C. agree with this argument in their answer. The ground based on Art. 190(2)(c) PILA is well-founded. The arbitral tribunal shall render a new award on A.'s declaratory relief 3.

A. further submits that it had requested (relief 4) that the arbitral tribunal declare B. and C. severally and jointly liable for damages resulting from B.' and C.'s use of A.'s know-how. The arbitral tribunal shared A.'s view that B. and C. were not allowed to use that know-how and it found that B. and C. had breached IP rights under the agreement. Instead of stopping the analysis at this juncture, the arbitral tribunal examined whether damage had been incurred. A. argues that, here too, the arbitral tribunal went too far by deciding on a claim for damages that A. had not raised and which the arbitral tribunal dismissed on the ground that no damage had been proven. A.'s grievance is unfounded. It is not apparent to what extent the arbitral tribunal departed from the declaratory relief sought by A. in declaring that B. and C. are not liable to compensate A. for infringement of IP rights and know-how. A. does not assert that the arbitral tribunal was not entitled to make a negative declaration. Rather, A. challenges the reasoning of the award by arguing that no further requirements other than the breach of contract should have been examined for the declaratory relief requested. By doing so, A. does not demonstrate a breach of the principle *ne eat iudex ultra petita partium* but rather challenges in an inadmissible manner the application of the substantive law by the arbitral tribunal.

A.'s further ground for setting aside (breach of substantive public policy in relation to a penalty allegedly incompatible with Art. 163(2) of the Swiss Code of Obligations, «CO») was dismissed by the Court and need not be addressed in the present case note.

*4A_296/2019:* As to B.' and C.'s request that the arbitral tribunal order A. to compensate them for damages amounting to approximately USD 8,5 million (prayer for relief 806.10), the arbitral tribunal decided that A. is liable to compensate B. and C. for damages, such damages being however extinguished by set-off (operative part of the award a. xiii). Contrary to what B. and C. submit, it was not necessary for A. to claim damages for deciding that a claim has been extinguished as a result of set-off; this arose out of B.' and C.'s claim for damages pursuant to relief 806.10. The arbitral tribunal has not ruled *extra petita* when it found that this claim has ceased to exist by virtue of set-off.

However, when assessing B.' and C.'s claim for damages under relief 806.10, the arbitral award did not only take into account that their claim for damages had been extinguished as a result of the set-off, it also found that A. was entitled to an additional amount of approximately USD 1,2 million after set-off, it ordered B. and C. to pay this amount in the operative part of the award a. xiv and it also took this amount into account when summarising the mutual payment obligations in the operative

part of the award b. xviii. As B. and C. rightly submit, A. has not sought such relief. Thus, the arbitral tribunal decided *extra petita*. The grievance that Art. 190(2)(c) PILA was breached is well-founded.

*Note:* Art. 190(2)(c) PILA is a ground for setting aside rarely invoked, and thus rarely applied. Arbitral tribunals usually carefully check that the operative part of their award exactly corresponds to the relief sought by the parties. Arbitration institutions also recall this, and in ICC arbitration the Court might well make comments to the arbitrators in case issues are spotted upon scrutiny of the draft award. This was apparently missed in the present case.

Straightforward situations may be a breach of Art. 190(2)(c) PILA when an arbitral tribunal omits to decide on certain claims *(infra petita)* or allows more than what was sought *(ultra petita)*. The case at hand is interesting in that the arbitral tribunal decided *extra petita* on certain claims, that is it awarded something else than what was sought by the parties, which led the Court to partially set aside the award. The distinction between declaratory relief and requests for payment of sums of money is both subtle and important, it should be carefully considered in each instance. Most often, arbitral tribunals want to do the right thing, their intention is to decide efficiently and in the parties' interest, the decision in the operative part of the award is thus well thought after and does not result from an oversight. However, an arbitral tribunal has not this discretion, it cannot «help» the parties, it is only asked to decide on what the parties have specifically requested and is bound by this relief. The sound advice is thus not to add figures, such as for damages, in a decision when a claim was only for a declaration of liability without quantum. Some arbitrators also like to order set-off *ex officio* so that only a net amount is due by one party to the other. This is risky when set-off has not been invoked and such initiative should be considered by an arbitral tribunal only when the law on arbitration and the law applicable on the merits so allow. In the present case set-off was as such not an issue since it had been invoked by the parties concerned.

A difficult situation for an arbitral tribunal is when a party's relief is unclear, for instance because of the ambiguous language used or because of inconsistencies between the reasons and the specific prayer for relief. When confronted with this, an arbitral tribunal should not second-guess, or even correct, the parties' respective relief and decide on what it believes is appropriate to resolve the dispute, typically in adjudicating on sums of money when it is unclear why a party only requested declaratory relief instead of payment. The arbitral tribunal should seek clarification from the parties, so that ultimately the decisions made exactly match what has been sought by the parties. As the case may be, the arbitral tribunal should also be briefed as to how declaratory relief is articulated with the orders sought, as one notes a trend for long and complex requests for declaration in addition to requests for payments.

# II. Commercial Arbitration

## A. *A. AG v. B. Limited,* 4A_292/2019, 16 October 2019

(Original in German)

Proper constitution of the arbitral tribunal – *Ex parte* communication – Ad hoc award upheld

The independence and impartiality of an arbitrator are to be assessed on an objective basis, without taking into account a party's subjective perception. *Ex parte* contacts between co-arbitrators and nominating parties are acceptable when in connection with the chairperson's appointment. They are no longer appropriate after that appointment.

Relevant provision:
Art. 190(2)(a) PILA

*Facts:* In February 2012, A., a Swiss company, and B., a Turkish company, entered into a sales contract, which contained an arbitration clause providing for ad hoc arbitration with seat in Wollerau (Switzerland). In November 2018, following B.'s application, the Höfe District Court confirmed the nomination of Michael Lazopoulos as arbitrator for the Claimant B. and appointed Nadja Erk as arbitrator for the Respondent A. The two co-arbitrators then nominated Marco Stacher as chairman. At some stage A. sought to challenge Messrs Lazopoulos and Stacher. The Höfe District Court dismissed the challenge application. It later emerged that, after the confirmation of his appointment, Mr Lazopoulos had had a telephone conversation with B.'s counsel. The arbitral tribunal explained that the telephone conversation between Mr Lazopoulos and B.'s counsel aimed at enabling the two co-arbitrators to select a suitable chairman. In an award made in May 2019, the arbitral tribunal ordered A. to pay B. USD 66 000 plus interest. Relying on Art. 190(2)(a) PILA, A. sought to have the award set aside by the Federal Supreme Court, which dismissed the application.

*Reasons:* The petitioner submits that the arbitral tribunal's composition was improper because the arbitrator Lazopoulos was not independent and impartial: he had worked three years (2007-2009) in the same law firm as counsel for B., in addition to the telephone conversation both of them had after the arbitrator's appointment. For the petitioner, the mere fact that a telephone conversation took place between an arbitrator and B.'s counsel, during which material aspects of the case were discussed, raises significant doubts as to the arbitrator's independence. The petitioner does not

accept the arbitral tribunal's justification for the call and contends that a 20-minute conversation is an objective circumstance of appearance of bias.

The principles applicable to state courts pursuant to Art. 30(1) of the Federal Constitution and Art. 6(1) of the European Convention on Human Rights («ECHR») are also used to assess the independence and impartiality of an arbitrator. The factual and procedural circumstances establishing the perception of a bias or the risk of partiality have to be based on objective and not subjective considerations. As long as a perception of bias objectively exists, a judge (or arbitrator) can be removed without a requirement that he/she is actually biased. The petitioner rejects the classification of the case at hand as falling within the «Green List» of the International Bar Association Guidelines on Conflicts of Interest in International Arbitration («IBA Guidelines»). It submits that the example given in the IBA Guidelines in relation to acceptable contacts between an arbitrator and a party or its counsel is for situations prior to the appointment of the arbitrator and not after. However, as emphasised in the decided cases, it is generally accepted that two co-arbitrators may be in contact with the nominating parties with a view to selecting the chairperson, the time of appointment of the co-arbitrator himself being not decisive in this respect. By contrast, such unilateral contacts are no longer acceptable when the chairperson has been appointed. Here, the reasons of the telephone conversation are understandable as no indications on the choice of law, which was bound to impact the selection of the chairperson, had been given by the Höfe District Court in its appointment decision. The actual duration of the conversation (only 12 minutes) does not support the suspicions expressed by the petitioner in its application to set aside. According to an objective view, there are no circumstances giving rise to an appearance of conflict of interest or risk of bias.

*Note:* Beyond the specific circumstances at stake (date on which a party-nominated arbitrator spoke with counsel, duration of the telephone conversation, etc.), this case raises the question of what issues may be discussed between an arbitrator and counsel without the presence of other members of the arbitral tribunal and the other party. A settled point is that party-appointed arbitrators may confer with counsel, on both sides, to discuss profiles and names of prospective chairpersons. This is standard good practice. For the sake of good order, this should be discussed at the outset with all participants, so that there is no surprise if such talks take place. Beyond that topic, further discussions become very sensitive. Before the constitution of the arbitral tribunal, it should be acceptable that, to the extent required (in particular if a prospective chairperson asks), a party-appointed arbitrator may touch upon with counsel what the dispute is about, including whether certain issues remain to be decided (e.g. applicable law as in this case) as these may be material when assessing the availability and suitability of the prospective arbitrator. However, a party-appointed arbitrator should not discuss with, or be briefed by, counsel as to how these issues should be

decided. After the constitution of the arbitral tribunal, topics for discussion should be addressed with all arbitrators, there are in principle no justifications for *ex parte* talks.

Independence and impartiality are often raised in setting aside applications, mainly due to the very limited grounds to challenge an award, but also due to the subjective impressions (sometimes influenced by cultural backgrounds) that a party may have about the arbitral tribunal or certain arbitrators after receiving an adverse award. The Court has a strict approach, imposing a high threshold in order for a challenge to be successful. For instance, as rightly held, common past experience of a counsel and an arbitrator in the same law firm is not *per se* evidence of objective bias.

In another case decided in 2019 in an appeal against a cantonal judgment allowing the recognition and enforcement of two ICC awards,[2] the Court dismissed the appeal and the argument that the recognition and enforcement was contrary to public policy within the meaning of Art. V(2)(b) of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards («NYC»). The appellant had submitted that the president of the arbitral tribunal (David Rivkin), a partner with a large international law firm (Debevoise), lacked impartiality because of his firm's involvement in legal services to companies belonging to the same group as the respondent. The Court emphasised the reality of international arbitration and the increasing involvement of large law firms. There should be more concrete circumstances evidencing the bias, all the more so when the basis invoked is public policy, the scope of which must be narrowly and restrictively construed. This pragmatic view of the Court is reassuring for arbitration practitioners as, here again, a mere appearance of some ties, resulting for example from a «one entity» approach to members of the same law firm, is deemed insufficient to affect an arbitrator's independence/impartiality. Absent a blatant lack of independence/impartiality, the award may be recognised and enforced in Switzerland.

## III. Sports Arbitration

### A. *Jérôme Valcke v. Fédération Internationale de Football Association (FIFA),* BGE/ATF 145 III 266, 4A_540/2018, 7 May 2019

(Original in French)

CAS Order of Procedure – Validity of an opting out of Part 3 of the CCP in favour of Chapter 12 PILA – Time limit to opt out – Right to be heard – CAS award upheld

2 *A. v. B. Holding AG,* decision by the Federal Supreme Court No. 4A_663/2018, 27 May 2019.

A valid opting out under Art. 353(2) CCP and Art. 176(2) PILA does not require an express reference to Part 3 of the CCP or to Chapter 12 PILA, respectively. It is sufficient that the language used by the parties clearly shows their intention to exclude the application of the provisions of one law in favour of the other. In CAS arbitration where the choice of law clause is suggested to the parties by the CAS in the Order of Procedure, an opting out may be validly entered into until the award is made.

Relevant provisions:
Arts. 353, 354, 393 CCP
Arts. 176(2), 177, 190(2), 192 PILA
FIFA Code of Ethics

Comment:
– Rev. arb. 2019, 935, note Marc Peltier

*Facts:* Jérôme Valcke is a former Secretary General of FIFA. He was appointed to this position by the FIFA Executive Committee in 2007 and was suspended from office in September 2015. In January 2016, his employment contract was terminated with immediate effect. The present case concerns various breaches of the FIFA Code of Ethics («FCE») alleged by FIFA that gave rise to disciplinary proceedings against Jérôme Valcke. In February 2016, the Adjudicatory Chamber of the FIFA Ethics Committee imposed on Jérôme Valcke a twelve-year ban from any football-related activity and a fine of CHF 100 000, on the ground that Jérôme Valcke had breached Arts. 13, 15, 16, 18, 19, 20 and 41 FCE. The FIFA Appeal Committee essentially upheld the decision of the Adjudicatory Chamber, while reducing the ban from twelve to ten years. Jérôme Valcke appealed before the CAS. In July 2017, the parties signed without reservation an Order of Procedure sent to them by the CAS and containing the following provision: «In accordance with the terms of the present Order of Procedure, the parties agree to refer the present dispute to the Court of Arbitration for Sport (CAS) subject to the Code of Sports-related Arbitration (2017 edition) (the ‹Code›). Furthermore, the provisions of Chapter 12 of the Swiss Private International Law Statute (PILS) shall apply, to the exclusion of any other procedural law». By an award made in July 2018, the CAS Panel dismissed the appeal. Jérôme Valcke sought to have the CAS award set aside by the Federal Supreme Court, which dismissed the application.

*Reasons:* The question of the domestic or international nature of the arbitration is of great importance, as the admissible grounds for setting aside are considerably more restrictive in international arbitration than in domestic arbitration. Art. 190(2) PILA does not allow to set aside an international award based on a ground of arbitrariness.

It is undisputed that the CAS arbitration was domestic. The only question is whether the parties have validly agreed on a choice of law in favour of Chapter 12 PILA by signing the CAS Order of Procedure submitted to them.

According to Art. 353(2) of the Swiss Code of Civil Procedure («CCP»), the parties may, by an express declaration in the arbitration agreement or in a subsequent agreement, opt out of Part 3 of the CCP and agree that the provisions of Chapter 12 PILA are applicable («opting out»). Art. 176(2) PILA gives the parties the opposite possibility when the arbitration is international, namely to opt out of Chapter 12 PILA in favour of Art. 353 *et seq.* CCP.

Consistent with the decided cases, an opting out must satisfy three conditions in order to be valid: 1) the application of Part 3 of the CCP is expressly excluded, 2) the exclusive application of the provisions of Chapter 12 PILA is agreed, and 3) this express declaration of the parties is in writing. Accordingly, an agreement of the parties to apply exclusively the provisions on international arbitration is not in itself sufficient. It is mandatory that the parties expressly exclude the application of the provisions on domestic arbitration.

In a recent decision,[3] the Court held, *obiter,* that an opting out under Art. 353(2) CCP cannot be validly concluded in order to escape the rules on arbitrability set out in the CCP (the employee may not waive claims arising from a purely Swiss employment relationship). Despite an opting out in favour of Chapter 12 PILA, arbitrability of a domestic dispute will still be governed by Art. 354 CCP and not by Art. 177 PILA.

The petitioner submits that the parties did not validly conclude an opting out.

Firstly, the petitioner relies on his alleged vitiated consent and surprising contractual terms. The petitioner cannot be followed when he claims that the opting out is not valid because he did not want to submit the dispute to the provisions on international arbitration. His argument is in essence based on the hypothesis of a clerical error by the CAS that went unnoticed when the Order of Procedure was signed. A party, in particular when it is assisted by counsel, cannot sign a procedural order containing a choice of law clause and, subsequently, submit that it is not bound by it. Holding otherwise would run counter to the principle of *pacta sunt servanda*. Moreover, the petitioner wrongly considers that it was the responsibility of the CAS to clearly highlight the opting out clause because of its unusual nature in this case. He seems to refer to the *règle de l'insolite/Ungewöhnlichkeitsregel,* according to which unusual clauses, when the contracting party's attention has not been specifically drawn to their existence, are excluded from the supposedly global adherence to general terms. This rule based on the *principe de la confiance/Vertrauensprinzip* is intended to protect the party who consents to the general terms governing a contractual relationship. It is not clear how it should apply to a procedural order signed by

3 *FC A. v. B.,* BGE/ATF 144 III 235, 18 April 2018, paragraph 2.3.3.

two experienced parties assisted by counsel in an arbitration. The use by an arbitral tribunal of templates or standard documents does not in any way exempt the parties from carefully reading the provisions suggested by the tribunal. Thus, and without having to rule on whether or not the clause in question is unusual *(insolite),* the petitioner cannot be followed on this point. The same is true of his arguments – which are difficult to understand – regarding the rules of good faith and the prohibition of the abuse of right. Contrary to what the petitioner seems to argue, the CAS in no way «imposed» on the parties an international arbitration, it merely suggested a procedural order containing an opting out clause that the parties accepted without reservation. The petitioner's lack of diligence cannot be attributed to the CAS as nothing indicates that it would have breached Art. 2 CC.

Secondly, the petitioner considers that the provision contained in the Order of Procedure does not constitute a valid choice of law under Art. 353(2) CCP as it does not expressly exclude the application of Part 3 of the CCP.

In order to give shape to the requirements for an opting out, it is useful to draw inspiration from the decided cases on the waiver of setting aside proceedings under Art. 192 PILA[4], which also requires an «express declaration» by the parties. According to the decided cases, a direct waiver need not contain a reference to Art. 190 and/or Art. 192 PILA. It suffices that the parties have clearly and unambiguously expressed their intention to exclude setting aside proceedings. Holding otherwise would be tantamount to unjustified formalism and would have the effect of disregarding the intention of the parties for a purely formal reason. The consequences of a waiver under Art. 192 PILA are more far-reaching than those of an opting out under Art. 353(2) CCP. While the choice of law in favour of Chapter 12 PILA has the effect of replacing the grounds for setting aside set out in Art. 393 CCP by the more restrictive ones in Art. 190 PILA, a waiver under Art. 192 PILA deprives a petitioner of all the grounds listed in Art. 190(2) PILA, unless the parties have narrowed the scope of their waiver to one or several of these grounds. It would be unjustified to set stricter requirements for an opting out agreement than for a waiver of setting aside proceedings.

A valid opting out under Art. 353(2) CCP and Art. 176(2) PILA does not require an express reference to Part 3 of the CCP or to Chapter 12 PILA, respectively. Although it is advisable for the parties – and institutions formulating opting out clauses for them – to refer expressly to the aforementioned provisions in order to avoid any uncertainty, the validity of a choice of law does not depend on it. It is sufficient that the language used by the parties clearly shows their intention to exclude the application of these provisions.

4 Among others, *République X. v. Z. Plc,* BGE/ATF 143 III 589, 17 October 2017, paragraph 2.2.1, commented in 28 Swiss Rev. Int'l & Eur. L (2018), 448; *X. Inc. v. Z. Corporation,* BGE/ATF 143 III 55, 18 January 2017, paragraph 3.1, commented in 28 Swiss Rev. Int'l & Eur. L (2018), 425.

In the present case, the parties not only agreed to the exclusive application of Chapter 12 PILA but also specified that this choice of law should be «to the exclusion of any other procedural law». The language in the procedural order is unambiguous. Although it would have been desirable for the parties to explicitly mention Part 3 of the CCP, the categorical wording of the clause («any») leaves no doubt that these provisions should not apply to the dispute in question. Moreover, in view of Switzerland's dual arbitration system, it is clear that a clause providing for the application of Chapter 12 PILA as *lex arbitri* in lieu of any other procedural law is primarily intended to exclude alternative provisions of the CCP governing domestic arbitration, which should be particularly clear for two parties having their registered office or domicile in Switzerland and being assisted by counsel at the time of signing the procedural order. The parties' intention to exclude the application of the CCP's provisions on domestic arbitration is clear from the language used in the Order of Procedure. Regardless of what the petitioner may say, the disputed clause constitutes a valid opting out within the meaning of Art. 353(2) CCP.

Thirdly, the petitioner doubts that the parties may validly agree on a choice of law after the arbitration proceedings have been commenced, let alone after the filing of briefs that do not deny the domestic nature of the arbitration.

According to Art. 353(2) CCP and Art. 176(2) PILA, an opting out may be concluded «in the arbitration agreement or in a subsequent agreement». The majority of commentators takes the view that an opting out may be entered into at any time, even in the course of the arbitration. However, some of these scholars point out that, when the arbitral tribunal has been constituted, it must also agree to the opting out. The practical importance of the issue is limited. Given the few differences between Part 3 of the CCP and Chapter 12 PILA, a change of *lex arbitri* – even during the arbitration – should usually not have consequences for the proceedings before the arbitral tribunal, as held by the CAS Panel. An opting out is consensual by nature. Any inconvenience that it may cause to parties during the arbitration, such as slowing down the proceedings, is therefore only the consequence of the parties' own choice. It is thus not advisable to change the *lex arbitri* during the arbitration, but it is not prohibited.

The real problem of the time limit to opt out lies in the relationship between the parties and the arbitrators. Allowing a change of the applicable legal framework at any stage of the arbitration without the agreement of the arbitrators would amount to force them to arbitrate a dispute under another *lex arbitri* than the one that applied when the arbitral tribunal was constituted. The question of the last moment when the parties can validly agree to opt out without the arbitrators' agreement need not be decided in the present case. In CAS arbitration where, as in the case at hand, the choice of law clause is suggested to the parties by the CAS in the Order of Procedure (i.e. without any question of a choice of law lacking the arbitral tribunal's consent), an opting out may be validly entered into until the award is made.

In light of this, the parties' agreement aimed at submitting the dispute to the provisions of Chapter 12 PILA complies with the requirements set out in Art. 353(2) CCP. Therefore, only the grounds for setting aside provided for in Art. 190(2) PILA are admissible against the CAS award. As Art. 190(2) PILA does not contemplate arbitrariness as an admissible ground for setting aside, the petitioner's claims relating to the alleged arbitrary violation of mandatory provisions of Swiss employment law and other rules must be held inadmissible.

Further, the petitioner infers from the absence of a decision on the international or domestic nature of the arbitration a breach of his right to be heard. Contrary to what the petitioner contends, the question whether the arbitration was governed by the provisions of Part 3 of the CCP or Chapter 12 PILA was irrelevant to the proceedings before the arbitral tribunal, which the CAS Panel expressly stated in its award. An arbitral tribunal, unlike a cantonal authority whose decision is subject to setting aside proceedings by the Court (see Art. 238(f) CCP, Art. 112(d) of the Federal Supreme Court Act), is not required to indicate in its award the legal remedies against the award. Moreover, the Court examines its jurisdiction *ex officio*. Had the CAS Panel ruled on the question of the international or domestic nature of the arbitration, this would not have prevented the Court from setting aside the arbitral tribunal's decision.

The petitioner's further grounds for setting aside (breach of procedural public policy due to a violation of Art. 6(1) ECHR and Art. 14 of the International Covenant on Civil and Political Rights and breach of substantive public policy due to the excessive harm to his personality rights caused by the sanction) were held inadmissible and ill-founded, respectively, by the Court and need not be addressed in the present case note.

*Note:* The saga of the former FIFA executives continues. After Michel Platini, whose setting aside application against a CAS award was dismissed,[5] the former FIFA Secretary General, Jérôme Valcke, also sought to have an adverse CAS award set aside, unsuccessfully. While most readers will be interested in the outcome of the disciplinary sanctions decided by the FIFA Ethics Committee resisting all challenges, as well as in the parallel criminal proceedings,[6] the cases brought by Michel Platini and Jérôme Valcke have one common feature: they raised the issue of the extent to which a CAS arbitration involving FIFA is or may be a domestic arbitration as opposed to an international arbitration. The test in Art. 176(1) PILA is that an arbitration is international and Chapter 12 PILA applies when at least one of the parties had his domicile or habitual residence outside Switzerland when the arbitration agreement

5 *Michel Platini v. Fédération Internationale de Football Association (FIFA),* decision by the Federal Supreme Court No. 4A_600/2016, 29 June 2017, commented in 28 Swiss Rev. Int'l & Eur. L (2018), 429.

6 The trial before the Federal Criminal Court started on 14 September 2020.

was entered into. However, the parties may agree to opt out of Chapter 12 PILA in favour of Art. 353 *et seq.* CCP and make an international arbitration governed by the provisions on domestic arbitration, provided that the strict requirements set out in Art. 176(2) PILA are met, or opt out of Art. 353 *et seq.* CCP in favour of Chapter 12 PILA and make a domestic arbitration governed by the provisions on arbitration international, provided that the strict requirements set out in Art. 353(2) CCP are met. The grounds for setting aside are broader in domestic arbitration than in international arbitration, in particular as a domestic award may be set aside if arbitrary in its result while the test in international arbitration is the incompatibility with public policy, which is a much higher threshold than arbitrariness. Hence, a party seeking to have a CAS award set aside may have a significant interest in having the proceedings considered as domestic.

In the Platini matter, the arbitration was deemed international since Michel Platini had his domicile abroad (France) when the arbitration agreement had been entered into. However, in the CAS proceedings, the arbitration was considered domestic by the parties and the Panel. Applying the principle *venire contra factum proprium,* the Court held that FIFA could then not validly argue in the setting aside proceedings that the arbitration was international and invoke the inadmissibility of an application to set aside based on a ground of arbitrariness only available in domestic arbitration. In the Valcke matter, the CAS Panel had surprisingly considered that the question of whether the arbitration was international or domestic was irrelevant and it had left the question undecided. Assuming nevertheless that Jérôme Valcke's domicile was in Switzerland and the arbitration domestic (thus allowing for a ground of arbitrariness of the CAS award in setting aside proceedings), the question was whether this could be affected by the standard CAS Order of Procedure, signed by the parties and the arbitrators and which provided that Chapter 12 PILA shall apply.

When reviewing whether the signed CAS Order of Procedure was a valid opting out in favour of Art. 176 *et seq.* PILA if the arbitration was in the first place domestic and governed by Art. 353 *et seq.* CCP, the Court rightly disregarded Jérôme Valcke's arguments based on vitiated consent or surprising contractual terms, the application of which seems unpersuasive indeed when a party duly represented by counsel has signed the procedural order. The Court also rightly held that the language in the procedural order was unambiguous and intended to exclude any procedural law other than Chapter 12 PILA. The only remaining question was until when an opting out could be validly entered into. Upon a thorough review of the opinions of commentators, the Court refrained from deciding in the case at hand on the last moment when the parties can validly agree to opt out without the arbitrators' agreement. In CAS arbitration where the arbitrators are involved in the choice of law set out in the CAS Order of Procedure, the Court favours the liberal approach according to which an opting out may validly be concluded as late as until the award is made. One understands from the Court's reasons that if the Court had to decide on the principle as to

whether there is no time limit to opt out, the only obstacle would be the arbitrators: the Court seems to consider that a tribunal cannot be forced to have the *lex arbitri* changed by the parties after its constitution. This position is unpersuasive: under Swiss law, the application of Chapter 12 PILA or Art. 353 *et seq.* CCP only depends on the parties, whether due to their domicile or agreement to opt out; importing the arbitrators' consent into the test and limiting the time period within which opting out is possible is in our view without foundation. The solution for any arbitrator who would not accept a change of legal framework during the arbitration would be to resign.

In the present case, the decision that the opting out in favour of Chapter 12 PILA was valid had the effect of preventing Jérôme Valcke from relying on a ground only available in domestic arbitration (arbitrariness of the award). However, showing flexibility, the Court accepted that the other grievances, though built to fit Art. 393 CCP, could be examined under Art. 190 PILA. Guidance as to whether the arbitration was truly governed by Chapter 12 PILA or Art. 353 *et seq.* CCP, if not addressed by the arbitral tribunal, is not an issue of a party's right to be heard being breached.

While the possibilities to opt out under Art. 176(2) PILA and under Art. 353(2) CCP, respectively, seem unlimited, in that a law is replaced by another one as per the parties' agreement, the Court confirms its restrictive interpretation that, in domestic arbitration and despite an opting out in favour of Chapter 12 PILA, arbitrability will still be governed by the narrow rule in Art. 354 CCP and not by Art. 177 PILA. It is doubtful that the legislature contemplated that limitation in opting out. Although it is supported by commentators,[7] this position of the Court appears to lack a solid legal basis and be justified only by reason of protecting a party against being too easily brought into an arbitration in domestic matters (prevention of possible abuses in opting out in favour of Chapter 12 PILA when a dispute is not arbitrable in domestic arbitration).

## B. *A. v. Agence Mondiale Antidopage (AMA) and Fédération Internationale de Natation (FINA),* 4A_413/2019, 28 October 2019

(Original in French)

Capacity to act as counsel for a party – Time limit to appeal to the CAS – Jurisdiction and admissibility in CAS arbitration – CAS award upheld

7 See e.g. Sébastien Besson, «L'arbitrage interne et international en Suisse: le nouveau CPC à l'aune du Concordat et du chapitre 12 de la LDIP», in: Andrea Bonomi & David Bochatay (eds.), Arbitrage interne et international, Genève 2010, 15–33, at 20.

The time limit to appeal to the CAS, as well as the capacity of counsel to act for a party in the arbitration, are issues pertaining to admissibility rather than jurisdiction.

Relevant provisions:
Arts. 190(2)(b), 190(2)(d), 190(3) PILA
Art. R49 CAS Code

Comment:
– ASA Bull. 2020, 55, note Marco Stacher (Jurisdiction and Admissibility under Swiss Arbitration Law – the Relevance of the Distinction and a New Hope)

*Facts:* Sun Yang is a professional swimmer. The World Anti-Doping Agency (WADA) is a foundation governed by Swiss law which promotes the fight against doping in sport at international level. The International Swimming Federation (FINA) is an association governed by Swiss law and the governing body for swimming worldwide. Sun Yang was accused of an anti-doping rule violation due to an unsuccessful attempt to take blood and urine samples during an unannounced doping control at his home in September 2018. He was cleared by the FINA Anti-Doping Commission in January 2019. In February 2019, WADA filed a statement of appeal with the CAS, signed by counsel B. and C., in which it requested the suspension of Sun Yang for 8 years. FINA was later added as a second Respondent. Sun Yang invited counsel B. to immediately cease acting due to a conflict of interest, since he had been a member of the FINA Legal Commission. WADA's counsel denied the existence of a conflict of interest and refused to withdraw from the case. In April 2019, counsel B. and C. filed the appeal brief on behalf of their client. In the course of the proceedings, Sun Yang and FINA raised a plea of inadmissibility submitting that the appeal brief had been filed belatedly. The CAS Panel dismissed this objection in May 2019.[8] In May 2019, Sun Yang raised the conflict of interest of counsel B. in a petition entitled «Request for bifurcation» and then in another submission in which he requested that counsel B. and C. be prohibited from representing WADA in the CAS proceedings, that the statement of appeal and the appeal brief be declared inadmissible because of the lack of capacity to act of the abovementioned counsel, resulting in the lack of jurisdiction *ratione temporis* of the CAS to settle the dispute. By a decision rendered in July 2019, the CAS Panel dismissed Sun Yang's requests. It held that WADA's counsel were not in a situation of conflict of interest, that the participation of those counsel in the

8 Sun Yang sought to have this CAS decision set aside by the Federal Supreme Court in separate proceedings (4A_287/2019). Sun Yang's application to set aside was declared inadmissible on the ground that the letter by which the CAS Panel had denied the objection to the admissibility of WADA's appeal brief while informing the parties that the reasons supporting that decision would be communicated in the final award is not subject to setting aside proceedings.

proceedings did not affect the admissibility of the submissions filed on behalf of WADA nor the jurisdiction of the CAS to decide on the case. Sun Yang sought to have that decision set aside by the Federal Supreme Court, which held that the application was inadmissible.

*Reasons:* A final or partial award may be sought to be set aside for the grounds set out in Art. 190(2) PILA. However, according to Art. 190(3) PILA, an interim award may be sought to be set aside only for reasons of irregular composition (Art. 190(2)(a) PILA) or lack of jurisdiction (Art. 190(2)(b) PILA) of the arbitral tribunal. The grounds in Art. 190(2)(c-e) PILA may also be invoked against interim decisions, but only to the extent that they are strictly limited to matters directly related to the composition or jurisdiction of the arbitral tribunal.

Relying on Art. 190(2)(b) PILA, the petitioner submits that the CAS Panel wrongly upheld its jurisdiction to hear WADA's appeal. The petitioner argues that the counsel's incapacity to represent WADA would cause the appeal to be inadmissible. Further, since the statement of appeal and the appeal brief were not validly filed in time, the CAS would not have jurisdiction *ratione temporis* to decide on the appeal.

As presented, the petitioner's ground for setting aside is inadmissible.

The decision on the capacity to act as a party's counsel is *an interim decision that does not pertain to jurisdiction*. The capacity to act is merely a condition of admissibility of the action. As the challenged decision does not concern the composition of the arbitral tribunal in any way and is not a decision on jurisdiction, the petitioner, despite his reliance on Art. 190(2)(b) PILA, cannot seek to have such interim decision on the capacity to act for a party set aside immediately, because of the limits set out in Art. 190(3) PILA.

Had the alleged incapacity of WADA's counsel to represent their client been established, one may wonder whether this would have entailed the inadmissibility of the statement of appeal and the appeal brief as argued by the petitioner. In two decisions, the Court examined the question whether the late filing of the appeal entailed the lack of jurisdiction of the CAS or merely the inadmissibility (or dismissal) of the appeal. Even though it finally left the question open, the Court set out the reasons in favor of the second hypothesis. It noted that an arbitral tribunal's failure to comply with the period of validity of the arbitration agreement or a mandatory pre-arbitration conciliation or mediation relates to the conditions for exercising jurisdiction, more precisely jurisdiction *ratione temporis,* and as such, this falls under Art. 190(2)(b) PILA. However, this position in jurisprudence mainly concerns typical, standard arbitration. It is doubtful that it is also applicable to atypical arbitration, such as sports arbitration. Whether a party is entitled to challenge a decision taken by a body of a sports federation on the basis of the statutory rules and applicable legal provisions does not concern the jurisdiction of the arbitral tribunal, but is a question of standing. It is thus a procedural point to be resolved according to the relevant rules, the

application of which is not subject to the Court's review in setting aside proceedings against an international arbitral award.

Following the view of legal scholars, the failure to comply with the time limit to appeal to the CAS does not entail the lack of jurisdiction of the arbitral tribunal in favor of state courts. If it were sufficient for a party to wait for the expiry of the time limit to appeal as set out in Art. R49 of the CAS Code in order to act before the Swiss state courts, this party would be able to bypass the jurisdiction of the arbitral tribunal by its inaction alone. Compliance with the time limit to file an appeal with the CAS is a condition of admissibility and not an issue of jurisdiction. Accordingly, the ground based on Art. 190(2)(b) PILA is inadmissible.

As to the violation of his right to be heard raised by the petitioner as an additional ground to set aside under Art. 190(2)(d) PILA, an exception to the inadmissibility of the grounds provided for in Art. 190(2)(c–e) PILA when the application to set aside relates to an interim decision (Art. 190(3) PILA *a contrario)* can only be made insofar as the grievances based on these grounds are strictly limited to matters relating to the composition or the jurisdiction of the arbitral tribunal. In the present case, the petitioner's ground of lack of jurisdiction is inadmissible, since the CAS interim decision does not settle the question of the jurisdiction of the arbitral tribunal. Therefore, the grievance based on Art. 190(2)(d) PILA is also inadmissible.

With his last ground, the petitioner, raising the irregular composition of the arbitral tribunal, seeks to challenge the arbitrator Romano Subiotto. However, this issue is not the subject of the CAS decision presently sought to be set aside. As the challenge lodged by the petitioner was rejected by the Challenge Commission of the International Council of Arbitration for Sport after the CAS decision, the challenge of the arbitrator does not fall within the scope of these setting aside proceedings.

*Note:* When a party is unhappy with an arbitral award, only five grounds to set aside are available and, among them, none allows reviewing the merits of the award. When a party must comply with a certain time limit to file an action, failing which that party will be precluded from acting, the legal characterisation of the duty to act in time is usually that of admissibility/inadmissibility *(recevabilité)* of the action. This should apply to the appeal before the CAS against a decision made by a sports federation. An appeal belatedly filed is inadmissible and cannot be heard by a CAS panel, regardless of its merit. Yet, the question remaining to be clarified by the Court was whether admissibility may be classified as a jurisdictional issue.

In the present case, Sun Yang considered that WADA's appeal brief had been filed belatedly. The CAS Panel disagreed, it found the appeal admissible. Sun Yang was facing two difficulties: first, the decision hardly appeared as an award, both as to its form and substance; second, admissibility is not as such a ground to set aside. However, assuming for the sake of argument that the CAS decision was open to challenge, failure to seek to have that decision set aside by a proper application filed with the

Court within 30 days would have precluded the athlete from challenging that decision at a later stage. This typically happens when the interim decision pertains to jurisdiction: not challenging that decision within 30 days means that the arbitral tribunal's jurisdiction is deemed accepted and cannot be subsequently challenged.

In such circumstances, Sun Yang opted for challenging the CAS interim decision, without waiting until the final award. However, this required that the alleged inadmissibility of the appeal be presented as an issue of jurisdiction. The Court unambiguously held – for the first time – that this is inaccurate, and rightly so: whether a CAS appeal has been lodged in time is exclusively a matter of admissibility and does not pertain to jurisdiction. When the dispute is subject to CAS arbitration, one expects the CAS panel to have jurisdiction to decide on the admissibility and merit of the appeal. The CAS panel's jurisdiction is not limited *ratione temporis* and there is no way to refer the matter to the state courts instead.

As a consequence, the petitioner could not invoke, as an additional ground, a breach of his right to be heard since this ground is only available in connection with a plea of lack of jurisdiction or improper constitution of the arbitral tribunal when challenging an interim award. The additional grievance concerning the independence of an arbitrator of the CAS Panel could not be heard in these proceedings concerning the admissibility of the appeal, it should be addressed in a challenge against the final award.

Finally, as to the capacity of counsel to validly act for a party, the Court here again rightly held that any lack of capacity may at best be an issue of standing, subject to the procedural rules applicable, and not a matter of jurisdiction, such that it does not fall within the grounds for setting aside and cannot be reviewed by the Court.

## IV. Investment Arbitration

### A. *Russische Föderation v. A.,* 4A_244/2019, 12 December 2019 and *Russische Föderation v. A. LLC et al.*[9]*,* 4A_246/2019, 12 December 2019

(Originals in German)

Arbitrability of claims for compensation based on expropriation under a Bilateral Investment Treaty («BIT») – Jurisdiction of the arbitral tribunal (already decided) – UNCITRAL award upheld

9 The defendants were 11 Ukrainian companies: A. LLC, B. LLC, C. LLC, D. LLC, E. LLC, F. LLC, G. LLC, H. LLC, I. LLC, J. LLC, K. LLC.

The fact that an arbitral tribunal may have to address the status of a territory (here: Crimea) under a BIT or public international law in the context of claims for compensation brought by an investor does not make the dispute non-arbitrable or lead to a violation of public policy. The jurisdiction of the arbitral tribunal, about which the Court had already made a final and binding decision, can no longer be questioned when challenging the award on the merits.

Relevant provisions:
Arts. 177, 190(2)(e) PILA

*Facts:* Between 2000 and 2013, the company A. (PJSC Ukrnafa) (claimant in the arbitration subject to the proceeding 4A_244/2019), the company A. LLC (Stabil LLC) and other companies (claimants in the arbitration subject to the proceeding 4A_246/2019) acquired a number of petrol stations and related assets in Crimea, which was at that time part of the territory of Ukraine. In 2014, the Russian Federation incorporated Crimea into its territory. The claimants allege that, in so doing, the Russian Federation expropriated their assets in Crimea, in breach of its obligations under the 1998 Russia-Ukraine BIT. In 2015, the claimants initiated two separate arbitration proceedings, which were conducted concurrently, against the Russian Federation under the UNCITRAL Arbitration Rules, claiming compensation in a total amount of approximately USD 100 million plus interest. The Russian Federation did not participate in the arbitrations. In 2017, the arbitral tribunals, seated in Geneva and identically composed, issued awards on jurisdiction, declaring themselves competent to hear the disputes. In decisions made on 16 October 2018 (4A_396/2017 and 4A_398/2017),[10] the Federal Supreme Court dismissed the applications of the Russian Federation to set aside these awards on jurisdiction. In April 2019, the arbitral tribunals rendered their awards on the merits, finding that the investments of the claimants had been expropriated and awarding them damages in a total amount of approximately USD 85 million plus interest. The Russian Federation again sought to have these awards set aside by the Court, which dismissed the two applications (based on identical reasons).

*Reasons:* Contrary to the assertions of the Russian Federation, the subject-matter of the underlying arbitrations was not the status of Crimea under the 1998 Russia-Ukraine BIT or public international law more generally, but the investors' claims for compensation based on alleged expropriations. Since these constitute pecuniary claims within the meaning of Art. 177 PILA, their arbitrability is not in doubt, and

10 *Russische Föderation v. A.,* BGE/ATF 144 III 559, 16 October 2018 and *Russische Föderation v. A. LLC* et al., decision by the Federal Supreme Court No. 4A_398/2017, 16 October 2018, commented in 29 Swiss Rev. Int'l & Eur. L (2019), 681.

the awards are neither null and void nor susceptible to being set aside. The Russian Federation is in effect attempting to challenge again the issue of the arbitral tribunal's jurisdiction, on which the Court already decided in a final and binding manner by its judgments dated 16 October 2018.

The Russian Federation's applications to declare the arbitral awards null and void or, alternatively, to set them aside for breach of public policy, shall therefore be dismissed.

*Note:* The two decisions (containing the same reasons) are noteworthy mainly for the short shrift given by the Court in a politically charged case to what it saw as an attempt to re-litigate issues of jurisdiction that had already been decided. It is correct that the claims being for compensation (damage and interest) they are arbitrable within the meaning of Art. 177(1) PILA. Using that ground to revisit the sovereign status of Crimea was doomed to fail: the majority (3 versus 2 federal judges) decision of the Court of 2018 on jurisdiction was already sufficiently difficult and sensitive, no one at the Court was willing to reopen this Pandora's box in looking at the issue by another angle.

As to the allegations of corruption, despite the intrinsic seriousness of this topic, the Court will not consider any illegality argument which was not addressed in the arbitration and did not lead to a proper finding of the arbitral tribunal (whether correct or not). In other words, while illegality could be reviewed from the perspective of a party's right to be heard, for instance if an allegation of corruption has been ignored by the arbitral tribunal, by contrast the Court will not itself make fact findings and will not decide by itself on whether public policy has been violated; that ground is not admissible if the underlying issue of illegality has not been raised in the arbitration.

## V. New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards

### A. *A. d.d. v. B. S.A.,* BGE/ATF 145 III 199, 4A_646/2018, 17 April 2019

(Original in German)

Extension of an arbitration agreement to a non-signatory – Extension by conduct (interference with contract performance) – Formal validity under the NYC – Decision of the Commercial Court of Aargau upheld

An arbitration agreement is binding on a third party which intervened in the performance of the main contract (signed by the initial contracting parties) and showed, by

its conduct, its intention to be a party to the agreement. Art. II(2) and II(3) NYC apply and the dispute brought before a court shall be referred to arbitration.

Relevant provisions:
Art. 178(1) PILA
Arts. II(2), II(3) NYC

Comments:
- ASA Bull. 2019, 883, note Simon Gabriel (Congruence of the NYC and Swiss *lex arbitri* regarding extension of arbitral jurisdiction to non-signatories)
- Rev. arb. 2019, 1196, note Pierre-Yves Tschanz & Frank Spoorenberg
- Spain Arbitration Review 2019, 124, note Martin Molina

*Facts:* In 2009, A., a Slovenian company, and B.-X/Y AG, a Swiss company, entered into a distribution agreement, which contained an arbitration clause providing for arbitration under the aegis of the Slovenian Chamber of Commerce, with the seat in Ljubljana, Slovenian law being applicable on the merits. The agreement was signed by C. in his capacity as B.-X/Y AG's board member. C. was also a member of the board of B. S.A., a Swiss import/export company registered in Aargau and a sister company of B.-X/Y AG. In effect, B. S.A. performed the agreement in lieu of B.-X/Y AG.

In 2016, A. claimed payment from B. S.A. in an action commenced before the Commercial Court of Aargau. B. S.A. objected to the jurisdiction of that court on the ground that the parties were bound by the abovementioned arbitration agreement. A. argued that B. S.A. was not bound by the arbitration agreement as it had not signed the distribution agreement. By a decision of November 2018, the Commercial Court of Aargau declined jurisdiction to hear A.'s claims and referred the parties to arbitration pursuant to Art. II(3) NYC. The Commercial Court held that B. S.A. had actively interfered in the performance of the distribution agreement for several years and thus consented to be bound by the arbitration agreement contained therein. A.'s argument that B. S.A. had not signed the distribution agreement and the arbitration agreement was thus invalid as to its form was found to constitute an abuse of right. A. sought to have that cantonal judgment overturned by the Federal Supreme Court, which dismissed the appeal.

*Reasons:* The question whether the arbitration agreement contained in the distribution agreement has been validly entered into as to its form is governed by Art. II(2) NYC. According to Art. II(3) NYC, the court of a Contracting State, when seized of an action in a matter in respect of which the parties have made an agreement within the meaning of this article, shall, at the request of one of the parties, refer the parties to arbitration, unless it finds that the said agreement is null and void, inoperative or incapable of being performed.

The principle of *venire contra factum proprium* which prohibits contradictory conducts also applies within the scope of the NYC. The cantonal court incorrectly held that the petitioner committed such an abuse of right in invoking the formal invalidity of the arbitration agreement (as not signed by B. S.A.) after having performed the distribution agreement and considered B. S.A. as a proper party to that agreement.

The question as to which persons are bound by an arbitration agreement is a matter of interpretation. This is not altered by the circumstance that an arbitration agreement is subject to a formal requirement. If A. and B. S.A. agreed that they both wished to be parties to the distribution agreement and if that agreement was signed by an authorised signatory of B. S.A., there would be a valid arbitration agreement between these parties at the outset under Art. II(2) NYC. This should have been examined by the cantonal court. However, considering that B. S.A. instead of B.-X/Y AG had performed the agreement from the beginning, another question is whether A. and B. S.A. are bound by the arbitration agreement even if it had not been initially concluded between them.

According to the decided cases relating to Art. 178 PILA, jurisdiction includes the question of the subjective scope of the arbitration agreement, i.e. what parties are bound by that agreement. Pursuant to the principle of relativity of contractual obligations, an arbitration agreement in a contract is in principle only binding on the contracting parties. However, the Court has consistently held that an arbitration agreement can, under certain conditions, also bind persons who have not signed the main contract and are not mentioned in it, such as in case of assignment of a claim, assumption of debt or transfer of a contract. Further, when a third party interferes in the performance of a contract containing an arbitration clause, that party is deemed to have accepted by conduct to be bound by the arbitration agreement.

Since the formal requirement of Art. II(2) NYC corresponds to that of Art. 178(1) PILA according to the decided cases, the Court's interpretation and construction of Art. 178 PILA as regards the extension of an arbitration agreement to non-signatories who participated in the performance of the main contract is also applicable within the scope of Art. II NYC.

According to the wording of Art. II(2) NYC, «signed by the parties» means that the arbitration agreement must be signed by the original parties at the time when the agreement was entered into (i.e. «signed by the parties at the time of concluding the contract»). If rights and obligations under a contract are transferred to a third party, that third party does not have to comply with any further formal requirements in order to be bound by the arbitration agreement. This is in line with the decided cases according to which the form requirement in Art. 178(1) PILA only applies to declarations of intent of the original parties to the arbitration agreement, while the question whether a third party is bound by the arbitration agreement shall be determined under the applicable substantive law.

The cantonal court correctly held that B. S.A.'s involvement in the performance of the distribution agreement led to the binding effect of the arbitration agreement valid as to its form; the petitioner failed to establish whether such a binding effect would not exist under Slovenian law, which governs the arbitration agreement as to its substance. Consequently, the Commercial Court of Aargau rightly declined jurisdiction, the dispute must be referred to arbitration.

*Note:* This is a leading case as regards the legal requirements in order for an arbitration agreement to extend to non-signatories. The Court was not seized of an arbitral award sought to be set aside. The question remains open whether an arbitral tribunal would uphold its jurisdiction over the non-signatory party; in the present case, this depends on Slovenian law (place of arbitration in Ljubljana, Slovenian law applicable on the merits). The Court's review was limited to the issue whether a Swiss cantonal court correctly referred the dispute to arbitration pursuant to Art. II(3) NYC, which required that a valid arbitration agreement had been entered under Art. II(2) NYC. Two points are to be considered: the formal requirements under the NYC and the role of a third party interfering in the performance of a contract.

In the present case, the underlying distribution agreement had been duly signed by the initial parties to that contract. The Court could thus limit its analysis to the question whether the requirement «signed by the parties» within the meaning of Art. II(2) NYC means that the parties involved in the dispute must have signed the agreement. It is common ground that the defendant in the proceedings had not signed the agreement. Consistent with its position regarding the formal requirement in Art. 178(1) PILA, the Court held that it is sufficient that the formal requirement – here the signature – be met in the first place, with the original parties to the contract. This liberal approach (not shared by the courts of certain countries)[11] is to be approved in its result. By contrast, the frequent assimilation applied by the Court between the form requirements in a treaty like the NYC (which should in principle be interpreted autonomously) and those of Swiss law in Art. 178(1) PILA is less convincing from a methodological point of view,[12] while driven by pragmatic considerations. The rationale in both instruments is that the form requirement (here the signature) is met when the agreement is entered into. This is sufficient, there is no need that the same form requirement be repeated again and again when other parties adhere to the agreement or replace any initial party. The relevant question is rather whether the non-signatory has validly become a party to the agreement. As the Court puts it in sports matters the issue often moves from form to consent, that is whether sufficient

11 See UNCITRAL Secretariat Guide on the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, paragraphs 44–45.

12 In detail: note by Mladen Stojiljkovic, Non-Signatories and Article II of the New York Convention, dRSK, 22 July 2019, paragraphs 19 *et seq.;* note by Simon Gabriel, ASA Bull. 2019, 887–888.

evidence is available to demonstrate that the athlete has validly agreed to enter into the arbitration agreement within the meaning of Art. 178(2) PILA.[13]

As regards the role of a third party interfering in the performance of a contract, this decision is of significant importance as the extension of the arbitration agreement is concretely applied to a non-signatory. In its first precedent of 2003 on the issue,[14] the Court had extended the arbitration agreement to an individual who had constantly interfered in the performance of a construction contract. That contract was however governed by Lebanese law, which is inspired from French law, and this had been material in the arbitral tribunal's findings as to its jurisdiction. Subsequently, the Court more often recalled the principle of the possible extension to a non-signatory interfering in the performance of a contract than it concretely applied it in the case at hand.[15] This notwithstanding, the Court describes in the decision under review its position on the extension for interference in the contract performance as «constant case law».

It was undisputed in the present case that B. S.A. had performed the distribution agreement in lieu of B.-X/Y AG which had signed the agreement. A. could have commenced arbitration proceedings against both B. group companies, relying on the decided cases allowing the extension of the arbitration agreement to a party having significantly interfered with the contract performance. Instead, A. decided to sue B. S.A. before the state court at the place of its registered office in Aargau, thereby disregarding the arbitration clause of the distribution agreement. In most cases, a claimant seeks to have the arbitration agreement extended to third parties, who then object to the arbitral tribunal's jurisdiction. Here, it was the opposite situation: the defendant prayed in aid the extension theory to escape the courts and have the dispute referred to arbitration. Both the cantonal court and the Court rightly followed that position and consistently acknowledged that the third party having performed the contract for years had thereby, by conduct, agreed to be bound by the arbitration agreement at stake. This application of the extension theory within the scope of the NYC is correct and welcome. Another question, exclusively governed by the law applicable on the merits, is whether the party interfering in the contract performance shall be bound by rights and obligations under that contract. A fundamental distinction – often omitted – shall be made between the jurisdiction of an arbitral tribunal

13 See *e.g. A. v. World Anti-Doping Agency (WADA), Fédération Internationale de Football Association (FIFA) and Cyprus Football Association (CFA),* decision by the Federal Supreme Court No. 4A_640/2010, 18 April 2011, commented in 23 Swiss Rev. Int'l & Eur. L. (SZIER/RSDIE) (2013), 329.

14 *X. S.A.L, Y. S.A.L. and A. v. Z. Sàrl and Tribunal arbitral CCI,* BGE/ATF 129 III 727, 16 October 2003.

15 See *e.g. X. Ltd v. Y. and Z S.p.A.,* BGE/ATF 134 III 565, 19 August 2008; *A. Joint Venture, B. A.S. and C. A.S. v. D. and State of Libya,* decision by the Federal Supreme Court No. 4A_636/2018, 24 September 2019; *A. A.S. v. B. Co. Ltd,* decision by the Federal Supreme Court No. 4A_310/2016, 6 October 2016; extension concretely applied: *A. v. B. Ltd.,* decision by the Federal Supreme Court No. 4A_376/2008, 5 December 2008.

to hear claims against or by a non-signatory party to which the arbitration agreement is extended and the issue whether, from a substantive point of view, that party is bound by the underlying contract.