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ANNOTATIONS AND SUMMARIES OF DECISIONS OF THE
SWISS FEDERAL SUPREME COURT ISSUED IN 2011 AND 2012
CONCERNING INTERNATIONAL ARBITRATION

İSVİÇRE FEDERAL MAHKEMESİNNİN MILLETLERARASI TAHKİME
İLİŞKİÇİ 2011 VE 2012 YILLARINDA VERDİĞİ KARARLARIN
ÖZETLERİ VE YORUMU

Av./Atty. Frank SPOORENBERG*
Av./Atty. Isabelle FELLRATH**
Tavernier Tschanz Attorneys-at-Law Geneva
Tavernier Tschanz Hukuk Bürosu Cenevre

I.
INTRODUCTION
Switzerland has a long-standing reputation as a pro-arbitration fo-
rum, mostly attributable to its international arbitration law (the Private
International Law Act Chapter XII, the "PIL Act")¹ respectful of the

¹ Of December 18, 1987, Systematic Register for Swiss Federal Legislation ("SR")
291. Chapter XII is available for upload in original official French, Italian and
German languages from http://www.admin.ch, <droit fédéral>, <recueil
systématique> and an unofficial English translation from https://www.

* Mr. Frank Spooenberg is a practicing attorney acting both as counsel and arbitrator
in numerous proceedings (ICC, Swiss Rules, UNCITRAL, ad hoc); he co-heads the
arbitration and litigation group at Tavernier Tschanz Attorneys-at-law, in Geneva.
He holds an LLM from the College of Europe (1993).

** Dr. Isabelle Fellrath is a practicing attorney. She teaches energy law at the Law
Faculty of the University of Lausanne and at the Lausanne Federal Institute of
Technology. She holds an LLM (1994) and a Ph.D in law (1998) from the
University of Nottingham.
parties' contractual freedom and the non-intrusive application thereof by the Swiss Federal Supreme Court (the "Supreme Court"). This note presents some of the most salient decisions issued by the Supreme Court in the past eighteen months, in connection with international commercial arbitration awards and, to the extent relevant beyond the specificities of their subject matter, related to sport arbitration, in application of the PIL Act.

International arbitration awards issued in Switzerland, whether partial or final, can be challenged, within thirty days upon notification to the parties, on limited exhaustive grounds in a sui generis annulment proceeding before the Supreme Court, Switzerland's highest judicial authority, subject to the parties' unequivocal express waiver. In average, the Supreme Court's final decision is issued within six months as from the filing of the challenge.

Pursuant to its constant practice, the Supreme Court applies restrictively the conditions of admissibility of challenges against international arbitration awards, and examines with restraint the merits of such challenges. The Supreme Court is cautious neither to interfere with the parties' contractual autonomy nor to substitute its own factual and legal appreciation to that of the arbitral tribunal. Revision proceeding against international arbitration awards issued in Switzerland can also be filed with the Supreme Court, under the same general conditions as for civil judgements.

This review of the Supreme Court's decisions examines successively developments related to the arbitral objection (infra II), the capacity to arbitrate (infra III) the arbitration agreement, including multi-tier arbitration clauses (infra IV), the constitution of the arbitral

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2 Cases until October 2012 (publication date) have been taken into consideration.
4 Exclusive of any apppellatory grounds; Registrar of Swiss Supreme Court's decisions (ATF) volume 133 part II page 396 ground 3. The Court will only make exception to such principle when faced with jurisdiction -or regular constitution- based challenges; ATF 117 II 94 ground 4; 128 III 50; 127 III 279 ground 1b; 117 II 94 ground 4.
tribunal (V), public policy and the parties' right to be heard (VI), and to post award mechanisms (VII). The full, but anonymised, texts of all decisions are available in their original (French, German, or Italian) language on the Supreme Court's official website. All English quotes in the sections below are attributable to the authors' only.

II. THE ARBITRAL OBJECTION
SWISS SUPREME COURT
August 6, 2012
X AG v/ Y (4A_119/2012)

International arbitration. – Commercial arbitration. – Arbitral tribunal seated in Switzerland. – Swiss law. – Arbitration objection. – Existence of a prima facie valid arbitration agreement. – Interpretation. – Jurisdiction of the domestic court. – Jurisdiction of the arbitral tribunal. – Art. 7 lit. B Pil Act. – Art. 1 Pil Act. – Art. 178 par. 2 Pil Act – Art. 190 par. 2 lit. b Pil Act

In order to decide an arbitration-based jurisdiction objection, the domestic court before which the action is brought must ascertain the existence of the parties' valid and binding consent to arbitrate. When the arbitration clause refers to foreign arbitration, the domestic court must proceed to a comprehensive examination of the parties' consent. Conversely, when the arbitration clause refers to an arbitral tribunal seated in Switzerland, the Swiss domestic court must confined its assessment to the prima facie determination an arbitration agreement within the purview of PIL Act Article 178.

Observations. – 1. A German client had entrusted an assets manager with the responsibility of setting up a Panama foundation to manage certain funds deposited in Swiss banks; the underlying contract contained an arbitration clause with seat in Zurich. Following the unauthorized liquidation of the foundation and substantial losses related to the assets management, the client initiated judicial proceedings against the manager before the commercial court in Zurich. The manager

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raised an objection based on the above-mentioned arbitration clause. The court upheld in part the objection. It considered, however, that the dissolution-based claims were beyond the scope of the arbitration clause and thus fell within its jurisdiction. The Supreme Court annulled such finding.

2. PIL Act Article 7 let. b provides that "If the parties have concluded an arbitration agreement with respect to an arbitrable dispute, the Swiss court before which the action is brought shall decline its jurisdiction unless: b. The court finds that the arbitration agreement is null and void, inoperative or incapable of being performed". Pursuant to the Supreme Court's constant practice, the scope of the local court's assessment differs depending on the seat of arbitration. When the arbitration seat is located in Switzerland, the local court will have to proceed to a mere *prima facie* assessment of the arbitration clause, it being also subject to the review of the Supreme Court in annulment proceeding. Conversely, when the arbitration seat is located abroad, the local court will have to proceed to a full review of its jurisdiction (hence of the validity and scope of the alleged arbitration clause) prior to entering the merits of the case. In line with its constant practice, the Supreme Court considered that, in the case at hand, the Zurich court should have limited its assessment to a *prima facie* examination of the existence and validity of the arbitration clause within the purview of PIL Act Article 7 let. b, without entering the merits of the discussion as regards the scope of the *prima facie* existing arbitration clause. Such discussion on the merits would lie within the exclusive jurisdiction of the arbitral tribunal.

3. The Supreme Court's decision will no doubt revive the long standing debate about the opportunity of a differentiated review of the validity of an arbitration clause by the courts based on the sole criterion of the arbitration seat, and indeed more generally the wider discussion on the necessity to amend PIL Act Article 7 along the line of the equivalent provision addressed to arbitrators seated in Switzerland.

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7 ATF 122 III 139, ground 2b. Also: ATF 121 III 38 ground 3b; 127 III 279 ground (Fomento); decision 4A_436/2007, January 9, 2008, ground 3; non numbered decision, May 19 2003, ground 3, excerpts in RSDIE, 2003, 569; decision 4P.114/2004, September 13, 2004, ground 7.3.

8 ATF 121 III 38 ground 3b.

9 PIL Act Article 186 par. 1bis provides: "[The arbitral tribunal] shall decide on its jurisdiction notwithstanding an action on the same matter between the same parties"
whereby the Swiss judge would have to stay litigation pending the arbitrators' determination on jurisdiction. A 2008 parliamentary motion to modify Article 7 has been substituted for a wider project to "modernize" the entire Swiss Arbitration Act.

III
THE CAPACITY TO ARBITRATE
SWISS SUPREME COURT
October 16, 2012
X Lta v. Ltd Y (4A_50/2012)


Foreign law restrictions which do not affect the parties legal capacity are not relevant to determine the parties' legal capacity to proceed in an arbitration in Switzerland. This is in particular the case for the Portuguese Bankruptcy Law provision affecting the material validity of the arbitration clause towards the bankrupt party without undermining that party's legal capacity.

Observations. – 1. The case arose from a dispute between a Chinese company and a Portuguese company in relation to a sales and purchase agreement. The Chinese company started an ICC arbitration, seat in Geneva. The Portuguese company, which had filed for

already pending before a state court or another arbitral tribunal, unless there are serious reasons to stay the proceedings."

10 See, De l’opportunité de modifier l’art. 7 LDIP, ASA Bulletin, 2010, 478-484.

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bankruptcy before the start of the arbitration, objected to the arbitral tribunal's jurisdiction relying on a provision in Portuguese Bankruptcy Law whereby "[...] the efficacy of arbitral agreements relating to disputes that may potentially affect the value of the insolvency estate and to which the insolvent is party shall be suspended. Procedures that are pending at the moment of the declaration of insolvency shall continue, without prejudice to the provisions set forth in Article 85 par. 3 and of the Article 128 par. 3 if applicable." The arbitral tribunal dismissed the objection by way of an interim award. Confirming the arbitral tribunal's finding, the Supreme Court held that the parties' subjective capacity to arbitrate relates to the legal capacity of the parties,\(^{13}\) which is governed by the law designated by the relevant general conflict of law provisions,\(^{14}\) namely, pursuant to the Swiss conflict of law provisions pertaining to legal capacity (PIL Act, Art. 154 and 155c), the law of the place of incorporation of this entity.

2. The Supreme Court made it clear, however, that the law thus designated (Portuguese law in the case at hand) would only be considered to determine the parties' legal capacity, exclusive of any other "incapacity to arbitrate" that could result from other provisions of that law.\(^{15}\) Hence, any limitations to the capacity to arbitrate that would not affect the legal capacity of a party would bear no significance to an international arbitration in Switzerland.\(^{16}\) In the case at hand, the Supreme Court found that the Portuguese Bankruptcy Law provision would constitute no bar to the jurisdiction of an international arbitral tribunal seated in Switzerland insofar as it merely limited the bankrupt party's capacity to arbitrate without affecting its legal capacity which is preserved thereunder until the completion of the bankruptcy proceeding.\(^{17}\)

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\(^{13}\) Decision 4A_50/2012, October 16, 2012, ground 3.3.1. In doing so, the Court confirmed the decision it rendered in a previous case (the Vivendi case; decision 4A_428/2008, March 31, 2009).

\(^{14}\) Decision 4A_50/2012, ground 3.3.2. The Court further considered that the provision which defines the law applicable to the merits of the dispute (i.e. PIL Act, Art. 187 par. 1) is not tailored to the determination of the parties' legal capacity; decision 4A_50/2012, ground 3.3.2.

\(^{15}\) Decision 4A_50/2012, ground 3.4.2.

\(^{16}\) Decision 4A_50/2012, ground 3.3.4. See for exemple Tschanz in Commentaire Romand, Loi sur le droit international privé – Convention de Lugano, 2011, Article 178 LDIP N.62-63.

\(^{17}\) Decision 4A_50/2012, ground 3.3.2.
IV
THE ARBITRATION AGREEMENT
SWISS SUPREME COURT
April 19, 2011
X v. BX (4A_44/2011)

International arbitration. – Commercial arbitration. – Swiss law. – Arbitration agreement. – Written consent to arbitrate. – Initial consent to arbitrate. – Scope in case of perfect third-party undertaking. – Accessory rights. – Art. 178 par. 1 PIL Act. – Art. 190 par. 2 lit. b PIL Act. – Art. 112 par. 2 Swiss Code of Obligations.

In the case of perfect third-party undertakings, absent the parties' agreement to the contrary, "the beneficiary [...] is vested, as debtor (or obligee), with a claim to all the right of prevalence and accessory rights related thereto, including the arbitration clause" (ground 2.4.1, last part). A party to the main contract in relation to which the third-party undertaking is granted may not, in good faith, object to the beneficiary of such contractual commitment enforcing its rights through the same dispute resolution mechanism that was agreed upon by the main parties to the contract.

Observations. – 1. With respect to arbitration agreements, the Supreme Court has been consistent in its restrictive application of the formal requirement for a written consent to arbitrate under PIL Act, Article 178 par. 1. However, and subject to such formal requirement being satisfied for the initial consent to arbitrate, the Supreme Court tends to favour an extensive construction of the scope of the arbitration agreement. Hence in the context of a complex restructuring scheme, the Supreme Court upheld the extension of the arbitration agreement to one of the companies benefitting from the restructuring although it was formally neither a party to, nor signatory of, the applicable set of agreements including the arbitration clause.

2. The case arose from the reorganisation of a family-owned group of companies into two separate entities following a dispute between family members. The reorganisation was carried out in part through

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18 For a recent reminder of the prevailing practice: decision 4A_128/2008, August 19, 2008; such written form, under Swiss law, does not require the parties' signature.
shares and equity reallocation, and in part through share capital increase and reduction. The various transfers occurred either directly at partner level or indirectly at the level of the companies controlled by them. The reorganization was governed by two main agreements concluded exclusively between the partners – namely, a memorandum of agreement and a memorandum of replication – both of them contained a similar arbitration clause. A dispute occurred when one of the partners, AX, declined to take part in the implementation of the agreements following an adverse arbitral ruling in a prior dispute between him and the other partners. In particular, AX refused to consent to the increase in the share capital of VX BV – one of the companies controlled by the partners – and to release his own shares in VX BV under the terms of the agreements. Consequently, the other partners and VX BV filed for arbitration, relying on the arbitration clause contained in the agreements, seeking an arbitral award to force AX to consent to the increase in the share capital of VX BV and to release his own shares in the same company. The arbitral tribunal confirmed its jurisdiction and VX BV's right to proceed in arbitration, and granted the relief sought. AX challenged the award before the Supreme Court on the grounds of lack of arbitral jurisdiction on VX BV's claim (PIL Act Art. 190 par. 2 lit. b), among other grounds.

3. The Supreme Court reserved its judgment on the admissibility of the challenge for lack of jurisdiction. It considered that the questions as to whether prayers for relief may be taken in favour of a third-party beneficiary were not merely a matter of jurisdiction of the arbitral tribunal, but rather pertained to the merits of the case. Even assuming with AX that VX BV's involvement in the arbitration proceeding had so fundamentally biased the whole process that it justified the annulment of the final award, the Supreme Court upheld the arbitral tribunal's view that the agreements provided VX BV with rights which the latter was entitled to enforce (i.e. so-called "perfect third-party beneficiary undertakings" under Article 112 par. 2 of the Swiss Code of Obligations). The Supreme Court stated that, "one fails to see on which ground the appellant, who signed the agreements containing the arbitration clause, could question the right of the third-party beneficiary to claim the prerogative derived from the agreements following the same procedural mechanism as that agreed upon by itself and the other

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19 Decision 4A_44/2011, April 19, 2011, ground 2.3.
contracting parties to resolve the disputes that might arise therefrom, namely arbitration." The challenge was thus dismissed and the award confirmed.

4. This case resolves only part of the question regarding the extension of the arbitration clause contained in a third-party beneficiary contract to the beneficiary: this extension should be allowed when the third-party beneficiary invokes (and hence expresses its consent to) the arbitration clause to enforce whole or part of the undertaking in favour of the third party. However, the wider question of the automatic extension of the arbitration clause, regardless of the third party's express consent thereto, remains controversial: some commentators endorse the theory that the clause extends automatically, while others consider that the third party's further consent is required. A third category of commentators questions whether an arbitration clause can be the object of a third-party undertaking at all. The Supreme Court's decision in X v BX leaves these questions unanswered.

SWISS SUPREME COURT
November 7, 2011
X v Y Sàrl (4A_246/2011)

International arbitration. — Sport arbitration. — Swiss Law. — Pathological or ambiguous arbitration clauses. — Constructive interpretation. — Consent to arbitrate. — Validity. — Essential elements of

20 Ground 2.4.1 medium part.
22 See, for example, Fouchard/Gaillard/Goldman, Traité de l'arbitrage commercial international, 1996, N.498; Wenger/Müller, in Basler Kommentar, Internationales Privatrecht, 2nd ed. 2007, Article 178 IPRG, N.66; concurring Kaufmann-Kohler/Riguzzi, Arbitrage international, 2nd ed. 2010, p. 146 note 172; references in decision 4A_44/2011, ground 2.4.1.
24 Decision 4A_44/2011, ground 2.4.1, first part.

Written consent to arbitrate necessarily requires the parties' unambiguous consent to submit their legal dispute to an arbitral tribunal in lieu of the domestic courts for a binding determination, the identification or reasonable possibility to identify the dispute to be submitted to arbitration, and the identification or reasonable possibility to identify the parties consenting to arbitration. No consent is required on other non-essential elements of arbitration, typically the type, place and language of arbitration, the number of arbitrators, the composition of the arbitral tribunal and the applicable procedural rules. A lack of agreement on any of these secondary issues would not, in principle, affect the validity of the parties' primary consent to arbitrate. Rather, the arbitration agreement should be supplemented on the basis of the parties' hypothetical intent.

Observations. – 1. The Supreme Court confirmed its practice of constructive interpretation of pathological or ambiguous arbitration clauses.25 A football club and a football agency had entered into an agreement regarding the transfer of a footballer. The parties agreed that the transfer costs would be shared between them. The agreement contained the following dispute-resolution clause: "The competent instance in case of a dispute concerning this agreement is the FIFA Commission, or the UEFA Commission, which will have to decide the dispute that could arise between the club and the agent." A dispute arose between the parties in connection with the transfer fee payment, which the agency deferred to FIFA Players' Status Committee. The Committee denied its jurisdiction to hear the claim due to the agency's lack of standing. The Court of Arbitration for Sport ("CAS") Appeals Arbitration Division upheld the committee's jurisdictional decision in January 2009.26 The agency attempted to bring the case before a judicially appointed sole arbitrator who specialised in sport law. The

26 CAS rules in the 2004 version, R-47 et s.
sole arbitrator also denied jurisdiction stating that the parties had meant to refer the dispute to an institution specialising in sport law. The agency then filed for arbitration with the CAS.

2. The CAS, acting this time as the arbitral authority, dismissed the agency's claims, denied jurisdiction on the club's counterclaim and decided on the arbitration costs. The club challenged the award before the Supreme Court on the grounds of the CAS's lack of jurisdiction. The club argued that no consent to arbitrate could reasonably be inferred from the dispute-resolution clause, and that the said clause was invalid because it referred to two institutions which, based on their own internal regulations, had no jurisdiction to hear the case.

3. The Supreme Court upheld its award. It pointed out that, while the primary written consent to arbitrate had imperatively to reflect the parties' converging agreement on all key elements of arbitration, it did not necessarily need to include other non-essential points. In the case at hand, the Supreme Court acknowledged the existence of the parties' converging agreement on all key elements of arbitration. It considered that, although no reference to arbitration was made in the dispute-resolution clause, the wording of the clause clearly reflected the parties' intent to subject their case to an authority specialising in sport disputes. The Supreme Court further considered that the reference to institutions that could not hear the claim based on their own internal regulations should not affect the validity of the arbitration clause, but should be remedied on the basis of the parties' hypothetical intent had they been aware of the impossibility of their chosen option. The Supreme Court upheld the CAS's jurisdiction based on the parties' clear intent to refer their dispute to an institution specialising in sport (in particular, football).

4. This decision is in line with the Supreme Court's general pro-arbitration stance, subject to clear evidence of the parties' primary consent to arbitrate. This case confirms that parties should rely on the model arbitration clause proposed by the top tier arbitral institutions or arbitration rules since they provide for mechanisms to fill the gaps of the clause to all possible extent and thereby allow the process to continue without excessive delay.

27 Ordinary arbitration division, CAS Rules in the 2004 version, R-38 et s.
28 CO Art. 20 par. 1.
29 PIL Act Art. 178 par. 1.
SWISS SUPREME COURT
May 16, 2011
X GmbH v Y Sàrl (4A_46/2011)


Pre-arbitration conciliation duties must be invoked in good faith with a fair prospect of a positive outcome. It is not unreasonable to dismiss a pre-conciliation objection based on the finding that the relationship has deteriorated to such an extent that there was no other alternative but resort to arbitration. Non-compliance with a pre-arbitration conciliation requirement might have, cumulatively, procedural (inadmissibility due to lack of jurisdiction or stay of the proceeding pending conciliation) and material implications (liability for damage incurred). The most appropriate procedural penalties should be determined on a case-by-case basis.

Observations. – 1. The Supreme Court had already set out in a 2007 decision a number of benchmarks regarding pre-arbitration conciliation duties. Firstly, pre-arbitration conciliation clauses must be sufficiently specific as to the truly mandatory character of conciliation to be considered as a mandatory preliminary step prior to arbitration (time limit for conciliation would be a fair indication of such mandatory nature). Secondly, pre-arbitration conciliation obligations are to be invoked in good faith with a fair prospect of a positive outcome. Thirdly, pre-arbitration conciliation arguments relate to the jurisdiction ratione temporis of the arbitral tribunal and must be invoked following the same principles as any other jurisdiction-based arguments. Without prejudice to this latter qualification, however, the Supreme Court had left open the disputed question of whether non-compliance with a contractual pre-arbitration conciliation requirement should affect the arbitral tribunal's

jurisdiction as such, temporarily (stay) or permanently (lack of jurisdiction), or whether it should result in liability, then suggesting that these should be alternative and not cumulative.

3. In this new case, the Supreme Court did not exclude that penalties could be cumulatively procedural (lack of arbitral tribunal's jurisdiction or stay of the proceedings) and material (liability for damage incurred): "it is indeed not certain that these two types of sanction could not be combined."\(^{31}\) With regard to procedural penalties, the Supreme Court indicated no preference towards either inadmissibility due to lack of jurisdiction or stay of the proceeding pending conciliation. Rather, the Supreme Court suggested that the issue might best be resolved on a case-by-case basis, stating that, "there is no point deciding the disputed issue here, assuming it could have an answer adapted to all instances, which we may reasonably doubt."\(^{32}\)

V
THE CONSTITUTION OF THE ARBITRAL TRIBUNAL
SWISS SUPREME COURT
May 2, 2012
X GmbH v Y Sàrl (4A_14/2012, ATF 138 III 270)


The regularity of the constitution of the tribunal that has been judicially reviewed in a final and binding decision in ancillary proceeding should not be reviewed by the Supreme Court in the challenge against the final award (Article 180, Paragraph 3). Constitution-based challenges are only admitted when "the decision on the challenge of the tribunal is issued by a private body to which the

\(^{31}\) Id., ground 3.4.
\(^{32}\) Ibid.
Swiss legal order cannot surrender the responsibility to secure compliance with such fundamental rights as the independence and impartiality of the members of the arbitral tribunal.

Observations. – 1. The guarantee to an independent and impartial tribunal is a fundamental tenet of justice (e.g. Art. 6 par. 1 of the European Convention on Human Rights). In the context of arbitration, it requires that national law allow the regularity of the constitution of the arbitral tribunal to be reviewed by a judicial authority. Under Swiss law, this review occurs at a different stage of the proceedings. If the initial determination on the constitution of the tribunal is made by a judicial authority in an ancillary proceeding, there will be no further judicial review in this respect – not even against the final award. If this initial determination is made by a private body (as is usually the case for institutional arbitration (e.g. the ICC International Court of Arbitration or the CAS)), the judicial review will be part of the challenge against the award. The Supreme Court confirmed this practice in this decision. It declined to hear, in a challenge against the final award, arguments related to the constitution of an ad hoc arbitral tribunal that had already been heard by the lower cantonal court in an ancillary proceeding. In the same decision, the Supreme Court made it clear that when an award is set aside, there is nothing to prevent the case from being decided by the same arbitrators, as long as the grounds for annulment are not the tribunal's irregular constitution or lack of jurisdiction.

2. In the case at hand, an ad hoc arbitral tribunal issued a final award in a commercial dispute between two parties. The Supreme Court vacated this award in part, on the grounds that it failed to address – even implicitly – the absolute statute of limitations objection raised by the defendant, which could have led to a different outcome on the merits. Thereafter, the arbitral tribunal reconvened on its own motion and invited the parties to file their additional submissions on the statute of limitations argument. The defendant objected first, on the grounds of lack of jurisdiction of the arbitral tribunal after the issuance of the previous but cancelled final award, failing any express reference to the arbitral tribunal's jurisdiction in the Supreme Court's decision; and second, on the ground of the arbitral tribunal's lack of impartiality to decide the matter.

3. The arbitral tribunal dismissed both objections, and the defendant challenged the entire arbitral tribunal (PIL Act Art. 180 par. 2 lit. c)\textsuperscript{34} with the lower cantonal court in an ancillary proceeding (PIL Act Art. 180 par. 3).\textsuperscript{35} The lower court dismissed the challenge and (erroneously) reserved the right for the parties to seek annulment of the future award before the Supreme Court on the same grounds. Thereafter, the arbitral tribunal heard the parties' arguments on the statute of limitations, declared the proceeding closed and issued a second final award dismissing explicitly the statute of limitations argument. The defendant sought the annulment of this second award before the Supreme Court, invoking, among other things, the irregular constitution of the tribunal (PIL Act, Art. 190 par. 2 lit. a),\textsuperscript{36} subsidiarily its lack of jurisdiction (PIL Act, Art. 190 par. 2 lit. b).\textsuperscript{37}

4. The Supreme Court considered that the lower cantonal court had already issued a final and binding determination on the constitution of the tribunal and had thus satisfied the judicial review requirement. In that respect, and in line with the majority of legal scholars,\textsuperscript{38} the Supreme Court denied any inconsistency between its refusal in the case at hand to assess tribunal-constitution-based grounds whereas it would assess such grounds if the parties had agreed that the determination on the constitution of the arbitral tribunal would be made by a private body (typically an arbitral tribunal institution such as the ICC). In the former case, the regularity of the constitution of the tribunal has been judicially reviewed in a final and binding decision that should not be reviewed by the Supreme Court. The Supreme Court expressly dismissed the view supported by certain scholars whereby Swiss law (i.e. PIL Act, Art. 180

\textsuperscript{34} "An arbitrator may be challenged if circumstances exist that give rise to justifiable doubts as to his/her independence."

\textsuperscript{35} "To the extent that the parties have not made provisions for this challenge procedure, the judge at the seat of the arbitral tribunal shall make the final decision."

\textsuperscript{36} "The award may be annulled only if the sole arbitrator was not properly appointed or if the arbitral tribunal was not properly constituted."

\textsuperscript{37} "The award may be annulled only if the arbitral tribunal wrongly accepted or declined jurisdiction."

\textsuperscript{38} See, for example, Tschanz, supra n. 16, Article 180 LDIP N.62; Leemann, Challenging international arbitration awards, Switzerland on the ground of lack of independence and impartiality of an arbitrator, \textit{ASA Bulletin}, 2011, 10, at 16, Berger/Kellerhals, supra n. 23, N.839a in fine; and numerous other references in ground 2.2.1.
par. 3) would rule out only an immediate judicial challenge against the lower court's decision, but allows the same constitution-based ground in the challenge against the final award. In the latter case, the challenge against the arbitrators is heard in first instance by a private body. The decision of this body is not subject to immediate judicial review under Swiss law. It is subject to the Supreme Court’s review, provided that the challenging party had made an objection against the private body’s decision forthwith. The Supreme Court considered this dual approach to be in line with the general non-intrusive spirit of Swiss international arbitration law, "the purpose of which [...] is to confine as much as possible the challenge possibilities in this [arbitration] proceeding," as well as with the necessity that constitution and jurisdiction challenge be raised and finally decided at the earliest possible stage in the arbitration proceeding.

5. The Supreme Court further confirmed the revived jurisdiction of the same arbitral tribunal that issued the vacated award upon the Supreme Court's annulment decision. A successful challenge of the award before the Supreme Court would, to the extent of such annulment, both reverse any res judicata authority of the award and revive the authority of the arbitral tribunal to decide on the vacated issues. Therefore, according to the Supreme Court, there is no objection to the same arbitrators' jurisdiction upon the annulment of their final award "subject of course to the ground of such annulment not lying in the irregular constitution of the tribunal [...] or their lack of jurisdiction [...] and subject to their not having been successfully removed in the meantime."

40 See, for example, decision 4A_644/2009, April 13, 2010, ground 1, and decision 4P.226/2004, March 9, 2005, ground 3.1.
41 Ground 2.2.1.
42 Ibid.
43 Ground 3.1.1.
VI
THE PARTIES' RIGHT TO BE HEARD AND PUBLIC POLICY
SWISS SUPREME COURT
March 17, 2011
Federation X v Federation A (4A_600/2010)

International Arbitration. – Sport arbitration. – Swiss Law. –
Arbitration costs and expenses. – allocation, advance and security. –
Parties' right to be heard. – Art. 190 par. 2 lit. d PIL Act.

Arbitrators operating in Switzerland would probably not be
requested, under the parties' right to be heard, to invite the parties to
make their determination specifically on the amount and apportionment
of arbitration costs and expenses prior to any decision. It is sufficient in
that respect that the parties be given the opportunity to express their
views on costs in the various submissions filed in the proceedings.
However, when the arbitral tribunal had requested the parties'
submission on the issue of costs and expenses, or had expressly provided
for such submission, the arbitrators may not make their final
determination based on its sole discretion before such a submission has
been filed.

Observations. – 1. Most arbitration rules and laws are silent on the
procedure in determining the amount, allocation, advance and security of
arbitration costs and expenses. More often than not, such issues are
uncontroversial: the parties pay their advances (including value-added
tax advances) when so requested, the arbitral institution (or the
arbitration tribunal where applicable) sets the final costs and expenses of
the arbitration process; and the arbitral tribunal apportions these between
the parties based on the success of the respective claims, relying on the
parties' final submissions on costs. But what if no such submission on
costs is filed?

2. In the case at hand, the parties had expressly requested the
opportunity to file a submission on costs, and the CAS panel had
expressly invited the parties to file such a submission before a given
deadline. The panel eventually issued the final award, including a
section on arbitration costs, before that deadline had passed. Only the
respondent in the arbitration proceeding challenged the final award on
this point. The Supreme Court found that, although Swiss law would not
as such request the parties' to be heard specifically on the amount and
apportionment of arbitration costs and expenses prior to any tribunal's decision, when the arbitral tribunal had requested the parties' submission on the issue of costs and expenses, or had expressly provided for such submission, the arbitrators may not make their final determination based on its sole discretion before such a submission has been filed. Such practice would be contrary to the parties' right to be heard and thereby justify the annulment of the dispositive part on arbitration costs and expenses, regardless of the chances of success of the disregarded arguments. The Supreme Court thus upheld the challenge and annulled the part of the award on costs.

SWISS SUPREME COURT
March 27, 2012
Francelino da Silva Matuzalem v FIFA (4A_558/2011, ATF 138 III 322)

International Arbitration. – Sport arbitration. – Swiss Law. – Unlimited ban on any football-related activity. – Serious personality right infringement. – Material public policy. – Preservation of the fundamental aspects of economic freedom (yes). – Art. 190 par. 2 lit. e PIL Act. – Art. 190 par. 2 lit. d PIL Act – FIFA Regulations on the Status and Transfer of Players Art. 14 and 15. – FIFA Disciplinary Code Art. 64.

A substantive determination violates public policy "when it disregards some fundamental legal principles and thus is wholly inconsistent with the essential, generally recognized values, which should be the foundation of any legal order according to the prevailing view in Switzerland" (ground 4.1). Such principles typically include the principle of pacta sunt servanda, the prohibition of misuse of rights, the principle of good faith, as well as the prohibition of expropriation without compensation, discrimination, corruption and forced labour. The Supreme Court acknowledged that such prime values also encompass core privacy and personality rights. Such rights include the preservation of the fundamental aspects of economic freedom (e.g. the right to freely choose, access and perform an occupation) from unnecessary and/or disproportionate public and private interference (ground 4.3.1). Contractual curtailment of a party's economic freedom is deemed excessive "when the obligee is exposed to the mercy of a third party, or surrenders or restrains his economic freedom so as to
jeopardize his economic existence" (ground 4.3.2). Measures taken by sports federations, which seriously harm the economic development of professional sportspeople, are proportionate only "when the overriding interests of the federation justify the infringement of privacy" (ground 4.3.3).

Observations. – 1. In this decision, the Supreme Court vacated an international arbitration award on material public policy grounds under the PIL Act Article 190 par. 2 lit. e. Since the enactment of the Arbitration Act (PIL Act Chapter 12) in 1987, this decision is only the second instance of annulment on the grounds of public policy. The first case also involved an award issued by the CAS and was vacated due to a fundamental disregard of generally recognized mandatory procedural principles (res judicata effect of a prior judicial decision).^{44}

2. In 2004 Brazilian-born footballer Mutualem concluded a five-year employment contract with a Ukrainian club. Three years into the contract, the footballer terminated it with immediate effect for just cause, or alternatively for sporting just cause (Art. 14 and 15 of the Regulations on the Status and Transfer of Players). A few days later, Mutualem concluded a three-year contract with the Spanish club Saragossa. The Spanish club signed a hold-harmless provision whereby it committed to compensate the player for any damage he might incur as a result of his premature termination of the 2004 contract. Two years into his new contract, Mutualem was transferred to Italian club Lazio for a transfer fee of € 5.1 million. The FIFA Dispute Resolution Chamber ordered the player to pay € 6.8 million in damages to the Ukrainian club for unjustified premature termination of the 2004 contract. Mutualem and the Spanish club were held jointly and severally liable for twice that amount on appeal by the CAS. That first CAS award was upheld by the Supreme Court. The Supreme Court then considered that the amount of damages awarded was not incompatible with the public order, considering in particular the substantial benefits derived from the transfer by the club and the player.^{45} Mutualem and the Spanish club failed to pay any substantial part of the damages, among allegations of the club's serious financial difficulties. As a result, the FIFA Disciplinary


Committee initiated disciplinary proceedings against Matuzalem and the club for failure to respect a FIFA decision (Art. 64 of the FIFA Disciplinary Code). It sanctioned them an additional Sfr 30,000 penalty and gave them a 90-day deadline to pay the original fine in full, failing which: "the creditor may demand in writing from FIFA that a ban on taking part in any football related activity be imposed on the player Matuzalem Francelino da Silva and/or six (6) points be deducted from the first team of the Club Real Zaragoza SAD in the domestic league championship." The CAS upheld the decision on appeal. In the meantime, bankruptcy proceedings were initiated against the Spanish club. Matuzalem challenged the second CAS award before the Supreme Court on public policy grounds. The player argued, among other things, that as a professional football player, and in the face of his financial inability to pay the € 11 million fine, the sanction amounted to an indeterminate worldwide working ban upon the sole request of the Ukrainian club. Such a ban seriously infringed Matuzalem's personality rights in a way that was inconsistent with the most fundamental values as recognised in Switzerland.

3. The Supreme Court upheld the player's challenge and vacated the second award. The Supreme Court found that the sanction imposed by FIFA was neither necessary nor proportionate. It was not necessary insofar since the Ukrainian club could enforce the first award against the player and the Spanish club through the facilitated mechanism of the widely ratified 1958 New York Convention on the Recognition and Enforcement of Arbitral Awards. The unlimited ban on any football-related activity was also out of proportion with FIFA's goal of securing strict compliance with its decisions. The Supreme Court thus concluded that, "In the event of non payment, the challenged arbitral award would result in the applicant being left at the mercy of his former employer and would restrict his economic freedom to such an extent that it would imperil his economic livelihood without any overriding interest of the Football Association and its members. In view of the corresponding threat, the CAS arbitral award of June 29, 2011 contains a clear and serious personality right infringement and is contrary to public policy (Art[icle] 190 par. 2 lit. e of the [PIL] Act)."\footnote{46}

4. The main interest of the case is that it is the first vacation of an international arbitration award on substantive public policy grounds by

\footnote{46 Ground 4.3.5.}
the Supreme Court since the PIL Act was enacted in 1987. The violation was obvious and thus the annulment of the award is no indication that the Supreme Court intends to be more intrusive into arbitrators’ decisions and reasoning, as a court of appeal would be. With respect to arbitration, the Supreme Court's review is confined to strict and limited grounds for challenge and the Supreme Court remains remarkably constant in its scrutiny of international awards, in both procedural and substantive matters. 47

VII
POST AWARD MECHANISMS
SWISS SUPREME COURT
January 4, 2012
X v Z SA (4A_238/2011)

International Arbitration. – Commercial arbitration. – Swiss Law.
– Conventional waiver of judicial challenges against the award. –
Validity. – Restrictive practice. – Requirement of clear and unequivocal
joint declaration of exclusion all ordinary and extraordinary challenges.
– Art. 192 PIL Act. – Art. 6. – Art. 6 par. 1 European Convention on
Human Rights.

The arbitration clause at stake was "neither party shall be entitled
to commence or maintain any action in a court of law upon any matter
in dispute arising from or concerning this Agreement or a breach
therof except for the enforcement of any award rendered pursuant to
arbitration under this Agreement. The decision of the arbitration shall
be final and binding and neither party shall have any right to appeal
such decision to any court of law." For the Supreme Court, this clause
constituted a sufficiently clear and unequivocal joint declaration by the
parties to exclude the setting aside proceeding against the award within
the purview of Article 192 PIL Act. It cannot be inferred from such
clause that the parties had merely intended to exclude ordinary means of
appeal by opposition to extraordinary means of appeal. Article 192 PIL
Act is consistent with Article 6 of the European Convention on Human

47 Out of 32 challenge proceedings against international arbitration awards decided between November 2010 and November 2011, only two have been partly successful; figures are fairly similar between November 2011 and November 2012 (49 challenges, for only three challenges upheld by the Court).
Rights. A conventional waiver of rights is also admissible under Article 6 of the convention, subject to the condition that such waiver be expressed in an unequivocal manner and not run counter to any important public interest. The wording of Article 192 and the restrictive practice developed thereunder were consistent with these requirements.

Observations. – 1. PIL Act Article 192 allows the parties to waive all or part of the legal grounds for challenge against international awards issued in Switzerland, as long as they are not domiciled in Switzerland, are not seated in Switzerland, and have no business establishment in Switzerland. The Supreme Court has followed a restrictive practice whereby it has admitted the validity of such waivers only subject to a clear and unequivocal joint declaration by the parties to exclude all ordinary and extraordinary judicial challenges against the award. However, express reference to the relevant legal provision or to the waived remedy was not required. The Supreme Court has hence deemed insufficient a mere statement that an award will be final and binding on all parties upon its issuance; reference to arbitration rules stipulating that an award will be final and binding on all parties upon its issuance. In a this decision the Supreme Court held that Article 192 is consistent with Article 6 of the European Convention on Human Rights.

2. Tunisian businessman X, and his three sons concluded four contracts, including an option agreement, with French firm Z. Under the agreement, Z had a call option on all shares in Company A held by X and his sons. The agreement included an arbitration clause which included the following waiver: "Neither Z nor the Grantors [i.e. X and his three sons] shall be entitled to commence or maintain any action in a court of law upon any matter in dispute arising from or concerning this Agreement or a breach thereof except for the enforcement of any award rendered pursuant to arbitration under this Agreement. The decision of the arbitration shall be final and binding and neither party shall have any right to appeal such decision to any court of law." On June 2007, Z exercised its option, but X and his sons refused to comply. On August 2008, Z started an International Chamber of Commerce arbitration against X and his sons, in Geneva. The arbitral tribunal upheld Z's

48 See ATF 131 III 173, ground 4; 134 II 260, ground 3 (admitted).
49 Decision 4A_194/2008, August 21, 2008, ground 2.2 (denied); and decision 4A_224/2008, October 10, 2008, ground 2.6 (denied).
claims and ordered the immediate transfer of the shares as per Z's option. X sought the annulment of the award before the Supreme Court. Z objected to the admissibility of the challenge, relying on the conventional waiver.

3. The Supreme Court reaffirmed the validity of a conventional waiver under Swiss law, subject to a clear and unequivocal joint declaration by the parties to exclude all ordinary and extraordinary judicial challenges against the award.\(^5^0\) In the case at hand, the Supreme Court considered that the waiver met the minimum requirements of Article 192. In particular, the Supreme Court had no sympathy for X's argument that the parties had merely intended to exclude ordinary means of appeal and not extraordinary means of appeal (typically, the annulment proceeding before the Supreme Court). The Supreme Court found support in the fact that the legal systems related to the parties (i.e. US, French and Tunisian law) did not provide for an ordinary appeal against awards rendered in international commercial arbitration, but only for an extraordinary appeal. Thus, the waiver must have been intended to extend to the extraordinary appeal. However, the Supreme Court declined to clarify, once and for all, the scope of the term "appeal" from the perspective of Article 192, and whether it is inclusive or exclusive of the annulment proceeding before the Supreme Court.\(^5^1\) The Supreme Court considered that such determination was best made in light of the concrete circumstances of the case.

4. The case at hand related to the fair trial guarantees as per the European Convention on Human Rights.\(^5^2\) One could be argued that the

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\(^{50}\) See, in particular, decisions 4A.486/2010, March 21, 2011, ATF 131 III 173, ground 4, and ATF 134 II 260, ground 3 (waivers admitted); see decisions 4A_194/2008, August 21, 2008, ground 2.2 and 4A_224/2008, October 10, 2008, ground 2.6 (waivers denied).

\(^{51}\) See, for example, Besson, Chronique de jurisprudence étrangère, Rev. arb., 2005, 1071 and 1082, proposing a standard application of "appeal", which the Court rejected in the present decision.

provisions of Article 6 of this convention are not directly applicable to arbitration proceedings as such, since these proceedings are not directed by a state court or other state adjudicating authorities within the meaning of "human rights instruments." However, it is the state's duty to monitor — through annulment and enforcement proceedings — that arbitration tribunals seated within the jurisdiction conduct arbitration proceedings in a way that is consistent with Article 6. While the parties may choose to waive their right to such control, even under this convention, it is paramount that such waiver not be accepted lightly in law and in practice. With this decision, the Supreme Court stated for the first time that PIL Act Article 192, as construed in practice, offers sufficient guarantees in this respect. Thus, in case of a waiver to the challenge proceedings against the award as per PIL Act Article 192(2), the control of the fair process is being left to the recognition and enforcement judicial authority.

SWISS SUPREME COURT
January 7, 2011
X. SA v. Y. BV (4A_440/2010, ATF 137 III 85)


The arbitral tribunal must apply the law, without being limited to the parties' submissions. Therefore, an arbitral tribunal may rely on legal arguments that were not submitted by the parties. In doing so, the arbitral tribunal gives a different legal characterisation of the factual

Schuler-Zgraggen v Switzerland, European Court of Human Rights, Judgment of 24 June 1993, Series A N.263, p. 19, par. 58: "The Court reiterates that the public character of court hearings constitutes a fundamental principle enshrined in paragraph 1 of Article 6 (art. 6–1). Admittedly, neither the letter nor the spirit of this provision prevents a person from waiving of his own free will, either expressly or tacitly, the entitlement to have his case heard in public, but any such waiver must be made in an unequivocal manner and must not run counter to any important public interest."
background of the case, but does not rule on a new claim or an amended claim. The arbitral tribunal, however remains at all times bound by the subject matter and amount of the prayer for relief – in particular by the limitations or specific legal characterisation in the parties’ prayer for relief. A tribunal awarding interest where such interest was not expressly included in the prayer for relief section of the brief does not decide ultra petita if the prayer for relief, construed in light of the claimant’s entire brief, expressed – at least implicitly, in a manner which could easily be identified – the claimant’s intent to claim for interest to accrue until total payment of the capital.

Observations. – 1. In this decision the Supreme Court confirmed that that it is possible to bring set-aside proceedings against additional awards, including refusals to issue additional awards. The Supreme Court also confirmed that a request for an additional award has no impact on other available post-award mechanisms and provided clarification on the issue of prayers for relief.

2. In an arbitration under the rules of the World Intellectual Property Organisation, a sole arbitrator awarded interest on damages to a party despite the fact that the relevant prayer for relief did not expressly refer to interest. The sole arbitrator thereafter rejected a request for an additional award. Both the award on interest and the refusal to issue an additional award were challenged before the Supreme Court.

3. The Supreme Court provided clarification on several procedural issues that are worth mentioning. First, the Supreme Court declined to resolve the recurring controversy regarding the applicability, to international arbitrations, of the Sfr 30,000 minimum dispute value threshold, which normally applies to challenge proceedings in civil matters before the Supreme Court (Art. 74 par. 1 of the Swiss Supreme Court Act).\(^{54}\) Second, the Supreme Court confirmed that set-aside proceedings are available against additional awards\(^ {55} \) and clarified, for

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\(^{54}\) See decisions 4A_392/2008, December 22, 2008, ground 2.3 and 4A_258/2008, October 7, 2008, ground 3.3. The issue is particularly important in connection with sport-related arbitration, where disputed amounts are not necessarily as important as they tend to be in commercial arbitration.

\(^{55}\) See decision 4P.117/2004, October 4, 2004, published in ATF 130 III 755 on the complementarities and independence of additional awards or rectification proceedings, and annulment proceedings. In that decision the Court expressly acknowledged that an additional award (or rectification award) could be the object
the first time, that such proceedings are also available against decisions by which arbitral tribunals refuse to issue additional awards. The Supreme Court saw no reason to differentiate such a refusal from a refusal to issue a corrected award, which, according to Supreme Court decisions, may be challenged by way of set aside proceedings.\(^{56}\)

4. With respect to the impact of a request for an additional award on other post-award mechanisms, the Supreme Court confirmed its longstanding position that (a) the submission of a request for an additional award does not suspend the time period for challenging the initial award, (b) the right to challenge the initial award is not subject to the prior filing of a request for an additional award; and (c) that if the initial award may be challenged because the arbitral tribunal did not rule on all prayers for relief, this right to challenge does not prevent the relevant party from seeking an additional award on the omitted prayers. In the later case, the Supreme Court should stay the challenge proceedings until the arbitral tribunal has issued its final decision on the request for an additional award.

5. Third, the arbitral tribunal must apply the law, without being limited to the parties' submissions, within the limit of the subject matter and amount of the prayer for relief – in particular by the limitations or specific legal characterisation in the parties' prayer for relief. In the case at hand, the Supreme Court found that awarding interest where such interest was not expressly included in the prayer for relief section of the brief was not ultra petita, since: (a) the claimant's prayer for relief sought payment of "the 2009 minimum royalty, to be established definitely once the 2009 turnover is submitted – that is, at least € 1,397,883.62"; (b) the claimant clearly stated in its brief that the royalties were subject to 4% interest; and (c) there was no indication of the claimant's intent to stop the interest from accruing at the date of the brief or at the date of the award. Therefore, the Supreme Court found that the abovementioned prayer for relief, duly construed in light of the claimant's entire brief, expressed – at least implicitly, in a manner which could easily be identified – the claimant's intent to claim for interest to

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accrue until total payment of the capital. As a corollary, the Supreme Court endorsed the sole arbitrator's refusal to award interest on the other party's claim because this party's prayer for relief set forth a limited amount only and nowhere in the brief could the Supreme Court find an indication that this party intended to claim for interest.

6. Considering this decision, parties which avail of arbitration will naturally conclude that, whenever they are seeking payment, they should ensure that their prayer for relief on the merits is limited to the amount to be paid, and that this amount be accompanied by "at minimum", "to be further determined in the proceedings" or a similar formula. To all possible extend, they should also refrain from mentioning legal or contractual basis in the prayers for relief.

SWISS SUPREME COURT
July 2, 2012
X SA v Z LLC (5A_754/2011)


In certain circumstances, a party seeking enforcement in Switzerland of an award issued in English may be exempt from producing a certified comprehensive translation of the entire arbitral award into one of the Swiss national languages. "[O]ne may nowadays assume that courts do generally not need a translation of arbitral awards in English and that the purpose of Article IV, Paragraph 2 of the New York Convention can be achieved even in the absence of such a translation"

Observations. – 1. A party seeking enforcement of a foreign award must supply, among other formalities, the authenticated original award or a certified copy thereof (Art. IV par. 1 of the New York Convention). 57 If

57 "To obtain the recognition and enforcement mentioned in the preceding article, the party applying for recognition and enforcement shall, at the time of the application, supply: (a) the duly authenticated original award or a duly certificated copy thereof; (b) the original agreement referred to in article II or a duly certified copy thereof."
the arbitral award is not made in one of the original languages of the
country in which enforcement is sought, the party seeking enforcement
must produce a translation (Art. IV par. 2 of the New York Convention). In
this decision, the Supreme Court ruled, for the first time, on the
mandatory character of Article IV par. 2. Confirming Switzerland's
reputation as an arbitration-friendly forum, the Supreme Court opted for
a flexible and pragmatic interpretation of the New York Convention.

2. A party initiated recognition and enforcement proceedings for
an ICC award before the cantonal court in Switzerland. The party filed a
certified German translation of the dispositive part of the award, together
with a non-certified German translation of the cost section. The party,
however, filed no comprehensive German translation of the award. The
cantonal court held that it had sufficient knowledge of English not to
request a full translation of the award, especially since a German
translation of the decision on costs, which constituted the subject matter
of the dispute, had been produced. It thus dismissed any objection to
enforcement. The cantonal court granted recognition and enforcement of
the award. The cantonal court's decision was challenged before the
Supreme Court on the ground of infringement of the mandatory
requirements of Article IV par. 2. The challenging party further
contended that the examination of its public policy-based objection to
enforcement (Art. V, par. 2 let. b) required careful consideration of the
entire award, which implied a full translation thereof.

3. The Supreme Court dismissed the challenge and considered that
the partial translation produced by the requesting party was sufficient to
comply with the formal requirements of Article IV par. 2. The Supreme
Court noted the lack of uniform judicial practice in Europe, as well as
the absence of a clear converging scholarly view in favour of either a
strict application of Article IV par. 2, or a more pragmatic approach to

58 "If the said award or agreement is not made in an official language of the country in
which the award is relied upon, the party applying for recognition and enforcement
of the award shall produce a translation of these documents into such language. The
translation shall be certified by an official or sworn translator or by a diplomatic or
consular agent."

59 See, for example, the decisions referred to in ground 5.3.

60 See, for example, Bucher, in Commentaire Romand, Loi sur le droit international
privé – Convention de Lugano, 2011, Article 194 LDIP N.11; Berger/Kellerhals,
supra n. 23, N.1881; Kaufmann-Kohler/Rigozzi, supra n. 22, N.871; and numerous
other references in ground 5.2.
the issue.\textsuperscript{61} Considering that the purpose of the New York Convention is to facilitate the recognition and enforcement of foreign arbitral awards, the Supreme Court held that it ought to be applied and construed in an enforcement-friendly manner, following a pragmatic, flexible and non-formalistic approach, including with respect to the formalistic requirements set forth in Article IV par. 2.\textsuperscript{62}

\textsuperscript{61} See, for example, Staehelin, in Basler Kommentar, SchKG I, 2nd ed. 2010, Article 80 SchKG N.95; Kronke/Nacimiento/Otto/Port (eds), Recognition and Enforcement of Foreign Arbitral Awards 2010, 194; and numerous other references in ground 5.2.

\textsuperscript{62} Ground 5.4.3.