Rédacteurs en chef • Editors in Chief
Charles Kaplan ■ Philippe Pinsolle

Les Cahiers de l'Arbitrage

The Paris Journal of International Arbitration

2012 1

L.G.D.J
lextenso éditions

Administration / Management

Les Cahiers de l'Arbitrage • The Paris Journal of International Arbitration
Revue éditée par Lextenso éditions
SA au capital de 713 076 €
Principal associé : Petites Affiches SA
33, rue du Mail, 75081 Paris Cedex 02
Tél. : 01 56 54 16 00 – Fax : 01 56 54 16 49
Président : Lionel Guérin
Directeur général – Directeur de la publication : Emmanuelle Filiberti
Directeur des rédactions : Frédéric Fortin
CPPAP : 0612 T 90484 – ISSN : 2107-5387
Revue trimestrielle – Mars 2012

Abonnement / Subscription
Tél. : 01 56 54 42 10 – Fax : 01 56 54 42 11
abonnements@lextenso-editions.fr
Tarif France 2012 : 309,36 €
Tarif Étranger 2011 : 348 €
Prix au numéro France : 97 €
Prix au numéro Étranger : 109 €

When is a "Swiss" "award" appealable?

Dr. Charles PONCET *
Docteur en droit, avocat, ZPG Genève

RÉSUMÉ

De nombreux arbitrages internationaux se tiennent en Suisse, ce qui confère au Tribunal Fédéral, qui est la Cour suprême Suisse, la compétence de connaître de recours tendant à l'annulation de sentences internationales émanant de tribunaux arbitraux siégeant en Suisse. L'auteur montre combien les praticiens internationaux devraient être conscients du fait qu'il peut être difficile de déterminer si une décision constitue une « sentence » devant faire l'objet d'un recours immédiat sous peine de forclusion.

ABSTRACT

Many international arbitrations are conducted in Switzerland. This gives jurisdiction to the Swiss Federal Tribunal, which is Switzerland's Supreme Court, as to annulment proceedings initiated against international awards emanating from arbitral tribunals sitting in Switzerland. The author shows how international practitioners should be aware that sometimes it will be quite arduous to determine whether or not a decision qualifies as an "award", which should be appealed immediately under penalty of forfeiting the right to any subsequent set aside proceedings.

1. International arbitral awards issued in Switzerland are "Swiss" only to the extent that they may be appealed to the Swiss Federal Tribunal ("FT"). That is their main connection with the Swiss legal system, yet an important one because ultimately Swiss judges will decide whether the award is annulled or upheld by the courts of the "seat" of arbitration. If annulled, the award will not be enforceable abroad, except in jurisdictions which recognize an award otherwise annulled by the courts of the seat. [1] How tenuous

* charles.poncet@praetor.ch
The author is a former Member of the Swiss Parliament and a partner in the Geneva law firm ZPG.

1. See Omnium de Traitement et de Valorisation v. Hilmarton (June 10, 1997) 1997 Rev. arb. 376 and note Fouchard, and 22 Y.B. Com. Arb. 696 (1997); P.T. PutrabaliAdyamulia v. Rena Holding (June 29, 2007) 2007 Rev. arb. 507; Rosneft/Yukos, Netherlands Supreme Court, June 25, 2010 (LJN: BM1679). The decisions have been the object of many comments and the issues involved are well summarized by Bernard Hanotiau, *International Arbitration in a Global Economy: The Challenges of the Future* in (ed.) 2011 Journal of International Arbitration 89 – 103.

and even artificial the connection between the "seat" of the arbitration and the national courts is will be clear already from the fact that most arbitrations conducted in Switzerland involve foreign parties and more and more frequently, foreign arbitrators and foreign counsel with hardly any Swiss interest of any kind involved. The connection is also very questionable from a scholarly point of view, as has been authoritatively demonstrated [2] although some legal writing [3]still considers it appropriate. The same applies to other venues of international arbitrations but Switzerland is probably the most remarkable example in view of its small size and the number of arbitrations held in that country. [4]

2. Yet the fact remains: a "Swiss" award will be subject to scrutiny by the Swiss judiciary, albeit of a limited nature, but only to the extent that it qualifies as an "award" pursuant to the *lex fori* and depending upon its nature, it may be appealable on two grounds only instead of five, or not at all. The purpose of this article is therefore to help foreign readers ascertain which "awards" issued by an international arbitral tribunal sitting in Switzerland should be appealed immediately, as opposed to other decisions. These may or may not qualify as "awards" for Swiss purposes and they may be subject to judicial review immediately, or only with the final award or on more limited grounds, or not all. The issue is of great practical importance as will be seen hereunder and it requires at first a general understanding of the functioning of the Swiss judiciary.

3. The FT is Switzerland's highest court. It consists of 38 full time judges, 11 of whom are women, with 19 alternate judges who sit occasionally. The judges are elected by the Swiss parliament after a screening process by a special committee of 17 MPs of both chambers and the candidates are expected to be at least loosely affiliated with one of the political parties in parliament, a somewhat questionable practice in terms of judicial independence; they are elected for a four year term, renewable – or not... – and the compulsory retirement age is 68. The FT – like the rest of the Swiss judiciary – is immaculately clean and judicial corruption is unknown in Switzerland.

4. The FT is divided into seven sections, dealing with various types of appeals, a detailed review of which would go beyond the scope of this article. Suffice it to say that whilst Swiss judges do *not* have the power to declare federal legislation unconstitutional – which makes the FT hardly "supreme" as a court compared to other federal systems – they certainly can annul international arbitral awards and they do so occasionally. Yet their law is not "judge made" to the extent that the grounds for appeal are contained in federal

2. See Emmanuel Gaillard, *Aspects philosophiques du droit de l'arbitrage international*, 2008, p. 55-60 and 188-207.

3. See J.-F. Poudret et Sébastien Besson, *Droit comparé de l'arbitrage international*, 2002, p. 86-91.

4. In 2009, 630 ICC arbitrations were conducted in 53 countries. Switzerland (1.88% of the countries) was host to 119 arbitrations (18.9% of the total) ahead of the UK (73), the USA (36) and even France (113). Also, out of a population of fewer than 8 million, Swiss arbitrators (1.73% of 73 countries concerned) represented 202 appointments out of 1,305 or 15%, ahead of the UK (196), Germany (104) the USA (99) and France (96). Whilst limited to ICC arbitrations, these figures clearly show that the role of the country in international arbitrations is out of proportion to its size or political importance. The figures for 2010 show more arbitrations taking place in France (124 out of a total of 591) than in Switzerland (86) but still about 15% of *all* ICC arbitrations and therefore considerably more than what Switzerland's population or geopolitical importance would suggest. However, Swiss arbitrators (180) were still 13.52% of the total more than the UK (177), France (120) and the USA (100). See 21 ICC International Court of Arbitration Bulletin 5 – 17 (2010). In 2010, see 22 ICC International Court of Arbitration Bulletin 7 – 14 (2011).

legislation [5]: the FT may interpret them but it does not have the power to create new ones. Appeals against international awards are adjudicated by the First Civil Court, which comprises five judges. There is no "chief justice" for, true to the Swiss tradition of reticence towards personal power of any kind, the FT has a rotating presidency lasting two years. In turn, each court has a presiding judge on a rotating basis. The current presiding judge of the First Civil Court is judge Kathrin Klett. The Court is trilingual and handles appeals in German, French and Italian. Materials in English – arbitral awards for instance – are frequently allowed without translations.

5. All legislative attempts to introduce a sort of *certiorari* system allowing the FT to hear fewer cases have basically failed in the past [6] although the creation of a Federal Criminal Court and a Federal Administrative Court in 2003 and 2005 [7] has eased the burden of the FT as appeals against their decisions are somewhat limited. However the number of cases decided by the FT remains staggering: the Court handles close to 7,500 appeals per year. The First Civil Court alone deals with more than 800 cases, arithmetically giving each judge the insurmountable burden of being in charge of about 160 opinions per year in addition to reviewing the others. Whilst a team of competent clerks help with the drafting of opinions and legal research – and a lot of appeals are quite simple – the volume remains excessive and it affects the quality of the work of the Court. Fortunately the number of international arbitration awards appealed remains modest at about 40 to 50 a year [8]. The recent trend shows a majority of appeals directed at awards issued by the Court of Arbitration for Sports ("CAS") in Lausanne, some of which are quite simple or even should not have been appealed at all and are consequently rejected out of hand [9]. In other words, when an award raises significant and important legal issues it will probably receive the thorough review it deserves [10]. By the standards of the English speaking world, Swiss appeals are somewhat peculiar: hearings are almost unknown and in any event if oral arguments are allowed – a rarity – the draft court opinion is likely to be prepared *before* oral arguments, rendering the exercise somewhat futile. Most cases are thus disposed of by a three judge panel with opinions circulated among them. Five judge

5. They are set forth in Chapter 12 of the Federal Law on Private International law of December 18, 1987 ("PILA"). PILA is the most commonly used English abbreviation.

6. An attempt made in 1989 was rejected by the Swiss voters on April 1st, 1990. See 1989 FF II 741.

7. Both courts were accepted by the Swiss voters on March 12, 2000. The Federal Criminal Court came into force on April 1st, 2003 and the Federal Administrative Court on September 1st, 2005.

8. See in this respect Felix Dasser, "International Arbitration and Setting Aside Proceedings in Switzerland: a Statistical Analysis", 25 ASA Bulletin 444-472 (2007) and the update *ibidem* 82-100 (2010).

9. For a recent example see Azerbaijan Wrestling Federation ("AWF") *v.* the World Anti-Doping Agency ("WADA") and the International Federation of Associated Wrestling Styles ("FILA") 4A-416/2008 Judgment of March 17, 2009, 2010 ASA Bulletin 367; full English translation at http://www.praetor.ch/arbitrage/cas-jurisdiction-on-a-doping-case-confirmed-no-procedural-violat/; also see 2009 Swiss Int'l Arb.L Rep 219.

10. To give but two examples, see the "famous" Tensacciai Judgment of March 8, 2006, holding that EU competition law is not part of public policy for the purposes of art. 190 (2) (e) PILA, ATF 132 III 389, 2006 ASA Bulletin 363; full English translation at http://www.praetor.ch/arbitrage/violation-of-public-policy-notion-of-public-policy-exclusion-of-/. For a detailed criticism of the decision see Andreas Bucher, *op. cit.* hereunder at note 19, p.1702-1704, nr.124-128. Another example is the equally famous annulment of the 1996 *Thales* award in revision proceedings in 2009, 4A-596/2008 Judgment of October 6, 2009, 2010 ASA Bulletin 318; full English translation at http://www.praetor.ch/arbitrage/revision-of-award-accepted-arbitral-tribunal-misled-by-evidence-/. See Charles Poncet, "Obtaining Revision of 'Swiss' International Arbitral Awards: Whence After Thalès?", 2009 Stockholm International Arbitration Review, vol. 2, 39-53 (2011).

panels deal only with cases raising an issue of principle or upon request by one of the judges, or in certain specific cases [11]. On the other hand, in some cases [12], a five judge panel still deliberates in open court as opposed to *in camera*. This is a very interesting practice, which used to be ubiquitous until the number of appeals made it practically impossible. It remains applicable in cases the importance of which requires debate in open court. The judge in charge of the case reads or summarizes his/her draft opinion and submits a proposal. Then each of the four other judges opines and it is by no means certain that the proposal will meet the agreement of a majority. The draft opinion is then either rewritten or supplemented with the comments and suggestions made during the deliberation. Since Swiss FT judges often have scholarly interests and publish articles in law journals [13] or write commentaries, these open court deliberations can be quite interesting. On the other hand, FT judges are not allowed to dissent and the opinion is supposed to reflect the majority view without any opportunity for the minority to make its point. This sometimes produces the frustrating result that a lively discussion may be reduced to a few fuzzy compromise paragraphs in the written opinion. Since 2000 the opinions of the FT are all available on the Court's web site [14], generally with the names of the parties blanked out on privacy grounds, with some exceptions. Civil law systems do not (in principle) recognize the rule of *stare decisis* but a number of the FT opinions are published in the Federal Court Reporter, albeit not necessarily in their entirety and they do constitute a body of precedents to be followed by all courts of the land.

The appeal

6. Unless the parties have opted out of appeals, which they may do in part or completely pursuant to art. 192 PILA if they are not Swiss or domiciled or resident in Switzerland, international awards issued in Switzerland are subject to an appeal to the FT directly. Originally, the parties could – but rarely did – confer appeal jurisdiction to a cantonal court pursuant to the arbitration clause or (even more unlikely) in a separate agreement. This has been abolished by the new federal law organizing the FT of June 17, 2005 ("LFT") which came into force as of January 1st, 2007. An interesting feature of the new law since January 1st, 2011 is that its article 77(3) now specifically exempts international arbitration from the provisions of art. 91, 92 and 93 LFT pursuant to which a preliminary or interlocutory decision of a lower court may be appealed under certain circumstances. This had been a source of difficulties under the previous regime and the

11. See article 20 of the Federal Law on the Federal Tribunal of June 17, 2005 ("LFT"), which came into force as of January 1st, 2007. Appeals against cantonal laws subject to a referendum or in matters of cantonal ballot initiatives are also adjudicated by a five judge panel.

12. See art. 58 LFT.

13. A good example is federal judge Bernard Corboz, whose scholarly interests have led him to many publications. Among those related to our topic, see his commentary of Article 77 LFT in *Commentaire de la loi sur le Tribunal fédéral* (Bernard Corboz et al. eds., 2009); also see « Introduction à la nouvelle loi sur le Tribunal fédéral », 2006 Sem. jud. 321-325 and « Le recours au Tribunal fédéral en matière d'arbitrage international », 2002, Sem. jud. 1-32.

14. www.bger.ch.

situation has now been clarified: PILA and not the LFT sets forth the grounds on which an international award issued in Switzerland may be set aside [15].

Grounds for appeal

7. The grounds for appeal are spelled out at art. 190 PILA *exclusively*, which starts with a statement that the award is enforceable ("final") from its notification. In line with international instruments [16] they are very limited and make an annulment possible only in the following cases:

– 190(2)(a): irregular appointment of an arbitrator or irregular composition of the arbitral tribunal;

– 190(2)(b): jurisdiction incorrectly denied or accepted;

– 190(2)(c): awarding more than the submissions (*ultra petita*) or refusing to issue a decision on some of them (*infra petita*);

– 190(2)(d): violating due process (*"the right to be heard in contradictory proceedings"*) or denying a party equal treatment with the other;

– 190(2)(e): incompatibility of the award with public policy.

Appealable decisions: a deceptively "simple" system

8. The concept of "award" is defined at art. 188 and 189 PILA. Art.188 empowers the arbitral tribunal to issue partial awards unless the parties agreed to the contrary. A "partial" award is therefore not final but as we will see it may or may not be a Vorentscheid (preliminary award) or even an "award" as "defined" by art. 189, which merely provides that the award is (i) issued according to the procedure and in the format agreed by the parties and (ii) in the absence of an agreement by a majority, by the chairperson in writing, with a date and a signature [17]. The chairperson's signature suffices. As most arbitrations tend to be institutional nowadays, the arbitration rules of the specific institution involved will generally contain additional provisions clarifying the required contents of an "award" and sometimes more [18]. Even in *ad hoc* arbitrations the *longa consuetudo* of most

15. Although art. 77 (3) LFT specifically states that the FT will review only the grievances (i) specifically raised in the appeal brief and (ii) properly argued by the Appellant. In other words, the Court performs no *ex officio* judicial review.

16. See art. 34 of the 1985 – UNCITRAL Model Law on International Commercial Arbitration, with 2006 amendments and Art V of the 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention).

17. Simil ar to art. 31 of the UNCITRAL Model Law.

18. Thus Art. 2 (iii) of the ICC Rules includes "partial" "interim" and "final" in the concept of an ICC "award". Art. 25 states that an award should be unanimous, or issued by a majority of arbitrators and if there is no majority, by the chairperson. Reasons need to be stated. Furthermore the ICC Secretariat sends guidelines to ICC arbitrators and draft awards are reviewed ("scrutinized") by the ICC Court of Arbitration, frequently resulting in useful suggestions. The same applies to other institutions such as the Court of Arbitration for Sports in Lausanne ("CAS") whose Secretary General is entitled not only to make formal modifications to draft awards but also to draw the Panel's attention on fundamental issues of principle that the arbitrator(s) may have overlooked or misconstrued (art. R46 of the Code).

arbitrators and counsel makes it unlikely that any serious disagreement could arise as to what an award should contain: it is a decision as to one or several issues, notified to the parties in writing with at least some reasons in support (unless otherwise agreed by the parties, which they almost never do in commercial arbitration, let alone in investment matters).

9. Legal writers [19] have analyzed the legal provisions with a view to creating a systematic picture that can enable litigants to determine when an "award" that is not final must or can be appealed. It will be seen hereunder that case law of the FT has also made several helpful attempts at clarifying the situation. In this writer's opinion however, it is far from assured that things have become clear enough and an overhaul of art. 190 PILA is probably overdue.

"Final"

10. When there is one award only in the arbitration and it disposes of all the issues before the arbitral tribunal – fortunately not too rare an occurrence even in the ever more litigious climate of the age – the situation is simple: the parties have thirty days to appeal the award on all the grounds spelled out at art. 190 PILA. Some tautology is unavoidable

19. In the vast literature on this subject, I am particularly indebted to Andreas Bucher's very recent and masterful commentary on Articles 187 to 194 PILA, particularly Art.190 of course. See Andreas Bucher, *Loi sur le droit international privé – Convention de Lugano, in* Commentaire Romand 1639-1767 (2011); also of great interest for the issues addressed hereunder, see Gabrielle-Kaufmann-Kohler & Antonio Rigozzi, *Arbitrage international Droit et pratique à la lumière de la LDIP*, 449-570 (2010) ("Kaufmann-Kohler/Rigozzi"); in English, see Elliott Geisinger and Viviane Frossard, *Challenge and Revision of the Award in,* Gabrielle-Kaufmann-Kohler & BlaiseStucki, *International Arbitration in Switzerland, A Handbook for Pratctitioners* 135-165 (2004); Bernhard Berger/Franz Kellerhals, *International and Domestic Arbitration in Switzerland* 438-494 (2010) ("Berger/Kellerhals") contains a good presentation in English; Christoph Müller, *Swiss Case Law in International Arbitration* 225-319 (2010) provides a clear and systematic outline in English of Swiss case law concerning art. 190 PILA. Also see Stephe V. Berti and Anton K. Schnyder, *International Arbitration in Switzerland* 569-587(2000). With no pretension to being exhaustive, I have also consulted and relied on Bernard Corboz *et al.Commentaire de la loi sur le Tribunal fédéral* 607-656; by the same author, *Le recours au Tribunal fédéral en matière d'arbitrage international* 2002 Sem. Jud 1-32; of further interest is Cesare Jermini's *Phd.* thesis, *Die Anfechtung von Schiedssprüchen im internationalen Privatrecht* (Zürich, 1997); Bernhard Berger, *Appeals in International Arbitration Under the New Swiss Federal Tribunal Statute* 155-163, *in New Developments in International Commercial Arbitration* (2007); Sébastien Besson, Le recours contre la sentence arbitrale internationale selon la nouvelle LTF, (aspects procéduraux) 2007, ASA Bulletin 2-35; Myriam Gehri, *Die Anfechtung internationaler Schiedssprüche nach IPRG* 71-116 in *Internationales Zivilprozess-und Verfahrensrecht IV* (2005); Yves Donzallaz, *Loi sur le Tribunal fédéral* 921-935 (2008); Philipp Gelzer, *Zum Anfechtungsobjekt der Vorentscheide gemäss Art. 190 Abs. 3 IPRG* 2000 ASA Bulletin 487-500; Jean-François Poudret, *Les recours au Tribunal fédéral Suisse en matière d'arbitrage international* 2007 ASA Bulletin 669-703; by the same author and in English, *Challenge and Enforcement of Arbitral Awards in Switzerland,* 1988 Arbitration International 278-299; Philippe Schweizer, L'ordre public de l'art. 2 lit.e LDIP: le caméléon court toujours, 271-285 *in Mélanges Bernard Dutoit* (2002); Bernard Dutoit, *Commentaire de la loi fédérale du 18 décembre 1987,* 664-680, 2005; Erich Tagwerger, *Zur Anfechtung schiedsgerichtlicher Vor-und Zwischentscheiden ach Art. 190 IPRG* (2009). Finally, in a comparative perspective, I was helped by Fouchard/Gaillard/Goldman, *International Commercial Arbitration,* 888-960, (1999); Gary B. Born, *International Commercial Arbitration,* 2551-2699, 2009; Julian D.M. Lew/Loukas, A. Mistelis /Stefan M. Kröll, *Comparative International Commercial Arbitration,* 663-686, 2003; The Review of International Arbitral Awards, IAI Series No 6 (2010), particularly the articles on France by Dominique Hascher at 97-111 and England by Jonhatan Mance 119-143. The introductory report by Bernard Hanotiau and Olivier Caprasse at 7-97 is also quite useful.

to define a "final" award: that which puts an end to the arbitration. It may do so by disposing of all the issues at hand or by incorporating a settlement between the parties into the decision of the arbitral tribunal. Yet an award is also final when it refuses to address the issues on procedural or other grounds (lack of jurisdiction for instance). Other grounds are conceivable (lack of standing to sue or defend, failure to pay the deposit) but as Andreas Bucher rightly points out [20], the most likely situation in which an arbitration will terminate without a decision on the merits or a settlement is a finding that the arbitral tribunal has no jurisdiction at all or as to some parties only.

11. Whilst appeals against awards granting jurisdiction are relatively frequent and sometimes lead to annulment [21], there are few recent [22] examples of a final award appealed after *denying* jurisdiction and they involved *partial* denials of jurisdiction only. In a decision of February 29, 2008 [23] the FT reviewed a case involving a German and a Russian company bound by two agreements for the delivery of certain metals, governed by Swiss law with arbitration in Zurich. Five further agreements were concluded with Russian law governing and arbitration in Moscow. Then came an *addendum* providing for arbitration in Zurich under the Swiss Rules. When a dispute arose, the arbitrators [24] accepted jurisdiction on one of the claims but not the other and the FT stated the following on appeal: *"In granting the Respondent's partial objection on jurisdiction the Arbitral Tribunal found that it had jurisdiction on one part of the claim and not on the other. The award is appealed only to the extent that the Arbitral Tribunal denied jurisdiction. An award in which an arbitral tribunal denies jurisdiction is a final award* [25]*."*

12. In the case of *Vivendi et al v. Deutsche Telekom et al* [26] there was a contract providing for ICC arbitration in Zurich. One of the parties was a Polish company, which went bankrupt after the arbitration had commenced. The Polish Bankruptcy Act automatically cancelled any arbitration agreements and/or proceedings entered into by the bankrupt. The arbitrators [27] held that the standing to act in a Swiss arbitration was

20. *Op. cit.* 1673, nr. 12.

21. Among recent decisions see 4A–456/2009a judgment of May 3, 2010, 2010 ASA Bulletin 786; full English translation at http://www.praetor.ch/arbitrage/arbitration-clause-interpretation-of-declarations-based-on-the-p/. The case involves a long-distance runner that the International Association of Athletics Federations ("IAAF") banned from late April 25, 2006 until early December 2008 for doping. The athlete appealed the decision of the Disciplinary Committee of the IAAF to the Court of Arbitration for Sport ("CAS"). In an award issued on July 24, 2009, the CAS upheld the appeal and annulled the decision. Its award was annulled by the FT for lack of jurisdiction. For another example, see the much commented judgment in the case of Busch v. WADA of 4A–358/2009 of November 6, 2009, 2011 ASA Bulletin 166; full English translation at http://www.praetor.ch/arbitrage/lack-of-jurisdiction-of-the-cas-arbitration-clause-by-reference/; also see 2009 Swiss Int'l Arb.L.Rep 495. A hockey player signed a registration form for the Ice Hockey World Championship, from which WADA sought to deduce blanket consent to CAS jurisdiction as to other issues – illicit substances – only remotely related to the event the player was signing up for.

22. Unless absolutely necessary to illustrate a specific point, the cases quoted hereunder were decided in 2008 or later, thus making reference possible to the full *English* translation of the opinion.

23. 4A–452/2007–Judgement of February 29, 2008, 2008 ASA Bulletin 376; full English translation at http://www.praetor.ch/arbitrage/interpretation-of-an-arbitration-clause/. Also see 2008 Swiss Int'l Arb.L.Rep 169.

24. Pierre A. Karrer, Daniel Girsberger, arbitrators and Daniel Wehrli, chairman.

25. 1.2 of the English version p. 4.

26. Judgment 4A–428/2008 of March 31, 2009, 2010 ASA Bulletin 104; full English translation at http://www.praetor.ch/arbitrage/effect-of-foreign-bankruptcy-on-icc-arbitration-in-switzerland-c/; also see 2009 Swiss Int'l Arb.L. Rep 241.

27. Yves Fortier, chairman, Karl Hempel and Jacques Werner, arbitrators.

determined according to the general Swiss conflict of law rules, which pointed to Polish law and accordingly they denied jurisdiction. The FT upheld the award and stated the following as to the nature of the decision: *"If the arbitral tribunal denies jurisdiction, it issues a final decision, which may be challenged before the Federal Tribunal on all the grounds set forth in Art. 190 (2) PILA. In this case, the Arbitral Tribunal issued a decision in which it denied jurisdiction with respect to Respondent 6. A decision denying jurisdiction in respect of one or several Respondents is an award (Art. 91 (b) BGG [28]), which may be appealed in accordance with Art. 190 (2) PILA in the same way as a final award [29]".*

"Interim" or "preliminary" but "partial"

13. An "interim" or "preliminary" and "partial" award (*"Teilentscheid", "sentence partielle"*) decides *some* of the substantive issues at hand and leaves others to further, subsequent proceedings. It falls squarely within art. 188 PILA, which, however, contains no substantive definition of an "interim" award and there are all sorts of decisions an arbitral tribunal may issue whilst leaving some others for the future. To constitute an "award" for the purposes of art. 190 PILA – thus allowing but also *requiring* an immediate appeal under penalty of forfeiting one's right to appeal – the decision must *really* adjudicate the matter on the merits albeit in part only. Hence the not altogether very clear concept of the interim award *stricto sensu*, as opposed, one may logically surmise, to *lato sensu* where the "interim" award would not be "partial" enough to justify and require immediate appeal for Swiss purposes. In fairness it must be said that the very concept was developed in connection with the previous law organizing the FT [30], which basically required interim decisions – not only arbitral awards but any decisions – to create irretrievable harm in order to be capable of appeal. This generated a pattern of circular definitions that the new law abolished by creating in effect a special category for arbitral awards [31]. In several cases [32], the FT wrestled with the need for a definition of the interim partial "award" that would *also* fit the requirements of the LOJ. In one of the latest attempts in 2002, the Court was faced with a Nigerian corporation and an allegedly Texan counterpart going into a joint venture governed by Nigerian law to gather and recycle oil residues. The arbitration clause provided for Geneva Chamber of Commerce arbitration in Geneva. When a dispute arose, the arbitrators held in an interim award issued in 2000 that the "Texan" entity had *locus standi*. However in a final award rendered in 2001, the arbitral tribunal found that the "Texan" entity was not a validly constituted legal person and accordingly terminated the arbitration. It was argued in the appeal that the contradiction between the 2000 decision and the subsequent final award violated public policy, thus requiring the FT to define the procedural nature of the first award. The FT thus considered that interim Partial awards *stricto sensu* decide part of the issues at hand and are *res judicata* but only with regard to the issues adjudicated. Other "awards"

28. BGG is the German abbreviation for the LFT.
29. 2.2 of the English version p. 5.
30. *Loi fédérale d'organisation judiciaire (« LOJ »)* of December 16, 1943, amended several times.
31. See art. 77 (3) LFT.
32. See in particular ATF 116 II 80 (1990) and ATF 128 III 191 (2002). Both decisions are in French.

(preliminary or interlocutory awards) decide substantive or procedural preliminary issues and they are not *res judicata* but they bind the arbitral tribunal, as opposed to mere procedural orders, which may be rescinded or amended later in the proceedings. The FT added: *Thus, to give but one example, an arbitral tribunal which issued a preliminary award deciding the principle of the Respondent's liability is bound by its decision when, in the final award, it adjudicates the Claimant's monetary claims* [33]". Helpfully – or perhaps not – the Court added: *"Res judicata applies only to the award itself. It does not extend to the reasons. However one sometimes has to resort to the reasons to know the exact meaning, the nature and the precise scope of the award* [34]". The Court then analyzed the two awards and found that by deciding at the end of the arbitration that the "Texan" entity was not a validly constituted legal entity, the arbitral tribunal had not disregarded the binding effect of the previous decision holding that the non-existing entity had standing to sue. In other words future litigants would have to ascertain if the award was interim *and* partial -- in which case it would have to be appealed immediately -- or interim but *not* partial, thus making it incapable of appeal until the final award was pronounced. That making the wrong choice in this respect might entail some very significant costs in large international arbitrations will be clear from the fact that in this case the FT imposed CHF 100,000 of court costs and CHF 400,000 of other party costs on the appellant, *i.e* CHF 2,057 *per line* (the opinion contained 243 lines, title and signatures included) or a still impressive CHF 89.30 *per word.*

14. The approach was not fully persuasive and had to be modified. In 2004 [35] the FT rejected an appeal by a Dutch company against an ICC partial award assessing the value of certain shares and reserving other issues for the subsequent proceedings. The FT stated the following: *"The nexus heretofore established by case law between art. 87 LOJ* [36] *and art. 190 PILA must accordingly be broken once and for all. Consequently, whether or not an interim award lato sensu is capable of a public law appeal shall be examined exclusively under the aegis of the latter provision. As to the partial interim awards within the meaning of art. 188 PILA it follows that they may be appealed under the same conditions as final awards, considering that they too are awards falling within the scope of art. 190 (1) and (2) PILA. To conclude, present case law must be abandoned and it must be admitted with legal writers that three types of awards may be capable of immediate appeal to the Federal Tribunal: firstly, final awards on all the grounds set forth at art. 190 (2) PILA; secondly interim partial awards on the same grounds; thirdly interlocutory awards, yet only on the grounds set forth at art. 190(2) (a) and (b) PILA"* [37].

15. Thus the subsequent formal change in the statutory law [38] that made somewhat redundant "*stricto*" or "*lato sensu*" interim "partial" or merely "interim" awards in 2011 was indeed welcome. Unfortunately we will see that there is still room for doubt.

33. Translation of part of the opinion at p. 194 of ATF 128 III 191 *ff.*
34. *Ibidem.*
35. ATF 130 III 755 (2004) (in French).
36. Article 87 of the *loi fédérale d'organisation judiciaire* ("LOJ") in force at the time read as follows: « *A public law appeal for violation of art. 4 of the Federal Constitution is available only against final decisions; preliminary decisions taken in last instance are capable of appeal only if they cause irretrievable harm to the interest party* ».
37. ATF 130 III at 761 and 762 (in German).
38. Art. 77(2) LFT.

16. The landscape being thus clarified in part, one may follow Andreas Bucher's convincing attempt [39] at a typology of various awards or decisions and point out that partial awards for Swiss purposes are those which decide some but not all the substantive issues in front of the arbitral tribunal: for instance the claim is adjudicated but the counterclaim remains outstanding, as in a case [40] between a French and an Italian company involving several joint venture cooperation agreements, which led to a majority award in which the arbitrators [41] rejected the substantive claims but allowed one of the counterclaims, reserving one or more future awards concerning the decisions still pending as well as the costs of the arbitration. In line with the new case law, the FT stated the following: *"The actual partial award or partial award stricto sensu mentioned at art. 188 PILA is that by which the arbitral tribunal decides some of the claims or one of the various claims in dispute (...). It is distinguished from the interlocutory award, which decides one or several preliminary issues, whether procedural or on the merits (...). According to case law, a partial award may be appealed immediately under the same conditions as a final award because, like the latter, it is an award falling under art. 190 (1) and (2) PILA (...). The award under appeal does not put an end to the proceedings between the parties, since the Arbitral Tribunal must still rule on the amount of the counterclaim it allowed as well as on the costs of the arbitration. However it disposed of the Claimant's submissions. Therefore it is an actual partial award subject to Civil law appeal on all the grounds provided at art. 190 PILA."* [42] Conversely only the counterclaim could have been decided [43] with the fate of the claim differed until later.

17. An award rejecting jurisdiction as we have seen above [44] in the *Vivendi* case is final with regard to the party as to which jurisdiction is denied but partial for those as to which the arbitral tribunal accepts jurisdiction. It is also conceivable that a "partial" award could decide every substantive issue in the case but still leave the costs to a subsequent determination [45].

18. The important point to bear in mind is that if an "interim and partial" award gets it wrong, it *must* be appealed forthwith. Swiss law does not afford a litigant the *choice* of appealing it together with the final award. If it qualifies as an "interim and partial" award – *i.e* disposing of at least one substantive issue in the arbitration – failure to appeal immediately will result in the party's total forfeiture of the right to have the same issues reviewed by the FT *at all*.

Not "partial" yet appealable as "interim" or "preliminary"?

19. It will be clear to the reader by now that the Cartesian distinction outlined above – whilst perfectly clear and sound in theory – was unlikely to stand the rigorous tests of

39. *Op. cit.* 1674 nr. 14 et 15.
40. See 4A–584/2009 Judgment of March 18, 2010, 2011 ASA Bulletin 426; full English translation at http://www.praetor.ch/arbitrage/alleged-violation-of-due-process-rejected-no-review-of-the-arbit.
41. Bernard Hanotiau, chairman, Piero Bernardini and this writer, arbitrators.
42. 2.2 of the English version p. 5.
43. See 4P–134/2006 Judgment of September 7, 2006, 2007 ASA Bulletin 373.
44. See above note 15.
45. Bucher *op. cit.* at p.1674 nr. 15.

practice: it produces some thoroughly confusing situations in which the only ones who know whether the award is indeed preliminary but partial – or interim and not partial but still appealable on limited grounds – will be the federal judges deciding the case in the end, mainly because their views are final and impermeable to challenge in a higher court. Mere mortals – such as counsel – remain confined to the realm of doubt, wondering as to the nature of the decision on which they are expected to give guidance – is it capable of appeal or not? – and reduced to suggesting an appeal as a "precaution" [46], thereby exposing their clients to very high and perhaps totally superfluous additional costs in pursuit of an unpredictable outcome.

20. There are "preliminary" issues in almost any arbitration. International arbitrators sitting in Switzerland may address them even though they may be outside the scope of the arbitration clause. A good example is a recent case [47] involving basically two sets of agreements, one of which – "the CFA" – was not within the jurisdiction of the arbitrators [48]. The argument was that the arbitral tribunal had really decided pursuant to the CFA when it had jurisdiction only with regard to the other set of agreements. The respondent and the arbitral tribunal took the view that it was necessary to interpret the CFA in order to determine whether or not a portion of the customer base had been appropriated during a certain period and to determine the number of customers transferred from the one to the other, thus leading to an assessment of damages due under the agreement over which the arbitrators had jurisdiction. The FT granted that it was "(...) *clear that the Arbitral tribunal did not have jurisdiction to render a judgment having the force of res judicata on the claims that the Parties to the CFA might have submitted to it regarding the winding-up of this agreement. (....) The Arbitral tribunal itself refused to accept jurisdiction-ratione materiae relating to the winding-up of the CFA.*" Yet the Court added the following: *It is appropriate here to recall that an arbitral tribunal is authorized to decide preliminary issues that are not within the scope of the arbitration clause (...) and that it may clarify points on a preliminary basis that were not eligible for arbitration as such (...). Along the same lines and with regard to the set-off, the tendency is to generalize the principle of 'the judge of the action is the judge of the objection', which suggests, as stated in the language of art. 21 (5) of the Swiss Rules of International Arbitration, that the arbitral tribunal has jurisdiction to hear a set-off defense even when the relationship out of which this defense is said to arise is not within the scope of the arbitration clause or is the object of another arbitration agreement or forum-selection clause (references omitted)*". [49]

21. Such preliminary issues arise "on the way" as Andreas Bucher puts it [50] but they do not cause the award to be interim *and* partial because they are a mere preliminary to the adjudication of the real substantive issue(s) in the arbitration. In the example above – according to this logic – the arbitrators could still reject the claim on other grounds and the decision was therefore "interim" or "preliminary" but not "partial". The same would apply

46. If for no other reason than avoiding professional liability.
47. 4A–482/2010 Judgment of 7 February 2011, 2011 ASA Bulletin 721; full English translation at http://www.praetor.ch/arbitrage/jurisdiction-of-arbitral-tribunal-to-rule-upon-a-preliminary-iss/.
48. Yves Derains, José Perez-Lorca-Rodrigo, arbitrators and Horacio Grigera-Naon, chairman.
49. 4.3 of the English version p. 7.
50. *Op. cit.* 1674 nr. 16.

to a claim which is allegedly time barred: if it is, the award is final; if it is not, the issue is a mere preliminary to the substantive determination of the case and any appeal can (and must) be postponed until the final award. The interim or preliminary decisions within that universe do bind the arbitral tribunal: they may not be rescinded or amended at will, as opposed to procedural orders; yet, somewhat confusingly, they do not constitute *res judicata* for they are only "preliminary" to the award on the merits and, one assumes, if they enjoyed *res judicata* status they would (probably) be "partial" – and therefore appealable – as one hardly sees how *res judicata* could extend to a non-substantive issue.

22. The terminology used in German is somewhat clearer than its English or French counterparts: a "preliminary" or "interim" (but not "partial") award becomes a *"Vorentscheid"* – as stated at art. 190(3) and also at art. 186(3) [51] PILA – literally a "pre-decision" or a "*Zwischenentscheid*", namely an "in-between decision". Both are more precise than the French "*décision incidente*" and do suggest that the decision is either preliminary to a subsequent determination or takes place between several phases in an arbitration. However such decisions are not immune from appeal. They may be appealed – and again they must be under penalty of forfeiting one's right [52] – but only on limited grounds: only those of art. 190 (3) (a) and (b) PILA, namely the irregular appointment or composition of the arbitral tribunal and its inaccurate assumption or rejection of jurisdiction [53]. Cesare Jermini suggests that it might be *either* 190 (3) (a) or 190 (3) (b) [54] but not both, although the literal wording of the provision and other legal writing [55] point in a different direction.

23. Be this as it may, if the arbitral tribunal *accepts* jurisdiction, a *jurisdictional* award is obviously *preliminary* in nature and appealing it on grounds of lack of jurisdiction is a simple proposition. But what if the appellant argues that his right to introduce witnesses in a jurisdictional hearing was not observed? That is within the due process of article 190 (2) (d) PILA, yet the award is capable of appeal only for the purposes of art. 190 (2) (b) PILA, which would not encompass an argument of due process as that is in the realm of art. 190(2)(d) only. This would lead to the illogical result that the same violation of due process would cause the annulment of the award if it took place during the evidentiary hearing on the merits but not for jurisdiction purposes. It could also mean that a violation of due process may be argued in an appeal against an award denying jurisdiction – which would be final for Swiss purposes – but not if the award upheld it. This led several commentators [56] to hold the view that in a jurisdictional appeal the grievance that due

51. Art. 186(3) PILA reads as follows: "*The arbitral tribunal shall, in general, decide on its jurisdiction by a preliminary decision*".

52. Sébastien Besson, La recevabilité du recours au Tribunal Fédéral contre les sentences préjudicielles, incidentes ou partielles rendues en matière d'arbitrage international, 2006, Les Cahiers de l'Arbitrage, p. 187-193; Le recours contre la sentence arbitrale internationale selon la nouvelle LTF (aspect procéduraux), 2007, ASA Bulletin 9, n. 19; Kaufmann-Kohler/Rigozzi, Arbitrage international, n. 720 and the other commentaries quoted p. 309, note 340; Berger/ Kellerhals, *Internationale und interne Schiedsgerichtsbarkeit in der Schweiz*, n. 1530.

53. Note that an award *rejecting* jurisdiction is not «preliminary » but of course final and as such not subject to the limitations in art. 190(3) PILA.

54. *Op. cit.* nr. 150-152.

55. The writers quoted above at note 52 and Andreas Bucher, *op. cit.* 1675.

56. Bucher, *op. cit.* 1675; Jermini, *op. cit.* 250-255; Kaufmann-Kohler/Rigozzi, *op. cit.* 717; Berger/ Kellerhals *op. cit.* 1537.

process was violated is admissible if it is indispensable to assess the soundness of the argument based on art. 190(2)(b).

24. Whilst emphasizing that an appeal based on art. 190 (2)(a) or (b) PILA should not be used to introduce other grievances – such as a violation of due process – in defiance of the legal provisions limiting the admissible grievances to (i) irregular composition or appointment of the arbitral tribunal and (ii) inappropriate acceptance or denial of jurisdiction, the FT seems to agree. The Court has consistently taken the view that it is bound by the factual findings of the arbitral tribunal and will not address any criticism relating to them unless a properly reasoned grievance is raised and it seems to follow the same rule even though the appeal is limited to jurisdiction. A good example is a recent case [57] in which a company in charge of the DVD rights for the Olympic Games in Beijing signed two "Deal memos" subject to the subsequent execution of two license agreements. Swiss law was applicable with Court of Arbitration for Sport ("CAS") arbitration in Lausanne. A dispute arose and the respondent challenged the jurisdiction of the CAS because the license agreements had allegedly not been validly concluded. The arbitrator [58] rejected the argument and issued a final award. In the appeal it was argued that the arbitrator wrongly found that the license agreements had been entered into but the FT rejected the argument and restated its often expressed view on the binding character of the factual findings of the arbitral tribunal in the following terms: *"Seized of an argument of lack of jurisdiction, the Federal Tribunal freely reviews the legal issues, including the preliminary issues determining jurisdiction or lack of jurisdiction of the Arbitral Tribunal (...). However it reviews the factual findings on which the award under appeal relies only to the extent that one of the grievances mentioned at Art. 190 (2) PILA is raised against them or when some new facts or evidence are exceptionally taken into account within the framework of the Civil law appeal proceedings (...). (...) The Appellant claims in substance that the License Agreements containing the arbitral clause were never concluded because it is not established that it would have received a signed copy before May 20, 2009. According to the Appellant the CAS would have failed to notice that under Swiss law both an offer and its acceptance are subject to being received. The argument relies on an allegation departing from the factual findings of the CAS, yet the Appellant raised none of the aforesaid exceptions".* [59]

25. Admittedly, the award in that case was final – thus escaping the limitation of art. 190(3) PILA – but the same was held with regard to a purely jurisdictional award in the dispute as to Gibraltar's application for membership of the UEFA [60]. When a CAS Panel of three arbitrators [61] accepted jurisdiction, the UEFA appealed and the FT stated the following: *"In jurisdictional matters, the Federal Tribunal freely reviews the legal issues,*

57. 4A–579/2010 Judgment of January 11, 2011, 2011 ASA Bulletin 716; full English translation is at http://www.praetor.ch/arbitrage/claim-of-lack-of-jurisdiction-arbitration-clause-not-signed-no-r/.

58. Brigitte Stern.

59. 2.1 and 2.2 of the English version p. 3.

60. 4A_392/2008 Judgement of December 22, 2008, 2009, ASA Bulletin 547; full English translation at http://www.praetor.ch/arbitrage/review-by-the-federal-tribunal-of-an-award-upholding-jurisdictio/. Also see 2009 Swiss Int'l Arb.L. Rep 1.

61. Peter Leaver, Stephan Netzle, arbitrators and Kaj Hober, chairman.

*including preliminary issues determining jurisdiction or lack of jurisdiction of the arbitral tribunal. However, it reviews the facts on which the award under appeal was based – **even when the issue is jurisdiction*** [62] *– only if one of the grievances mentioned at Art. 190 (2) PILA is raised against the factual findings or when some new facts or evidence (see Art. 99 (1) LFT) are exceptionally taken into account in the framework of the Civil law appeal (...)".* [63]

26. The distinction between a "partial" preliminary or interim award, which must be appealed immediately under penalty of forfeiting the right to any subsequent judicial review of its contents and a preliminary or interim award that may be appealed only on the grounds at art. 190 (2)(a) and (b) has become clearer with case law and the 2011 amendment of the LFT but some doubts remain: if an arbitral tribunal finds that a contract was breached pursuant to a specific submission by one of the parties but leaves the financial consequences of the breach to a subsequent determination, does it issue a partial award or not? A football player entered into a contract with a Greek club. The club had an option to extend the contract after two years and did so but the player refused to stay. The club sued and the FIFA Players Status Committee held that the option was invalid. The club appealed to the CAS and the FIFA decision was reversed: the option clause was indeed valid and the Players Status Committee must now determine the consequences of the breach of contract. Was the CAS award "partial" and therefore to be appealed immediately? Not according to the FT, which held that *"such a decision remanding the case is an interim decision according to case law of the Federal Tribunal (...). In international arbitration proceedings interim or preliminary awards may only be appealed in a public law appeal on the grounds contained at art. 190(2)(a) and (b) PILA (appointment and composition of the arbitral tribunal; jurisdiction or lack thereof). Other grievances are not admissible (...)".* [64]

27. Similarly, a German manufacturer of machines and an English company entered into a commission agreement containing an ICC arbitration clause with a seat in Geneva. A dispute arose and the claimant submitted that certain orders from Nigeria and Malaysia must be included in the litigious statements of commissions (submissions 1 and 2); it also asked for an order that the respondents pay a certain amount with interest (submissions 3 and 4). The arbitrators [65] issued an interlocutory and partial award accepting jurisdiction, finding that the orders placed by Nigeria and Malaysia were to be included in the statements of commissions, yet reserving submission 3 and the costs for a later phase whilst rejecting submission 4. On appeal the FT held the following [66] as to the nature of the award: *"(...) the Arbitral Tribunal found that it had jurisdiction ratione materiae, thus issuing a decision within the meaning of Art. 186 (3) PILA, which could be challenged*

62. Emph asis supplied.
63. 3.2 of the English version p. 10.
64. 4P.298/2006 Judgment of February 14, 2007, 2006 ASA Bulletin 356 (original in German, excerpt translated by this writer). English translation in 2007, Swiss Int'l Arb.L.Rep 31.
65. Philipp Habegger, Rudolf Fiebinger and Hans Patry, chairman.
66. 4A–438/2008, Judgement of November 17, 2008, 2011, ASA Bulletin 379; full English translation at http://www.praetor.ch/arbitrage/distinction-between-interlocutory-and-partial-awards-legal-natur/#_ftn2;also see 2008, Swiss Int'l Arb.L.Rep. 535.

only on the grounds set forth at Art. 190 (2)(a) and (b) PILA (Art. 190 (3) PILA). (...) Whether or not it is capable of appeal is a much more delicate question with regard to paragraphs 2 and 3 of the award under appeal. The arbitrators found there that the orders from Nigeria and Malaysia should be included in the statements of commissions. Such a finding is only preliminary to the admission of Respondent's submission 3, seeking payment of the commissions related to such orders, on which the Arbitral Tribunal will issue a decision later on. Therefore the award under appeal, which must be qualified as an interlocutory award with regard to its paragraphs 2 and 3, could be challenged, with regard to these two items, only on the grounds stated at Art. 190 (2)(a) and (b) PILA (...), to the exclusion of the grievance of a violation of the right to be heard (Art. 190 (2)(d) PILA) raised by the Appellants in that context (...). The matter is therefore not capable of appeal in this respect". Probably sensing that the issue was quite delicate, the Court added: *"It is true that the litigious finding was made on the basis of specific submissions made by the Respondent (...), which the arbitrators found to be acceptable notwithstanding the existence of submissions for the payment of commissions relating to the orders included in the submissions for findings. Be this as it may, notwithstanding the finding made in their respect at paragraphs 2 and 3 of the award under appeal, the litigious monetary claims have not yet been dealt with, even in parte qua, as the award does not provide the Respondent with a decision it could enforce, albeit in part, against the Appellants. In other words, this is a somewhat peculiar case in which a decision was issued on one of the submissions relating to the same monetary claim without an enforceable decision being issued in this respect. Hence, unless (formal) submissions and (mere) claim are to be confused, it must be found that with regard to the commissions relating to the orders from Nigeria and Malaysia, the Arbitral Tribunal did not issue a decision on part of the Respondent's claim but merely found that one of the elements of that claim existed, namely the fact that the litigious orders were placed during the time frame referred to in the Commission Agreement. In doing so, it issued an interlocutory award and not a partial award, against which a violation of the right to be heard could be claimed".* [67]

"Implicitly" "interim" or "preliminary" and therefore appealable on limited grounds?

28. On the audacious assumption that the issues addressed so far may have become fully clear to the reader, an additional complication must now be introduced: the contents of a decision may render it "preliminary" but appealable on limited grounds – and therefore require an appeal under penalty of forfeiting one's right pursuant to art. 190(3) PILA – although it appears to be an innocuous procedural order ("P.O."). A preliminary "award" may thus lurk under the disguise of a P.O if the arbitral tribunal, in order to issue the P.O., *implicity* assumes jurisdiction (no arbitrator would *deny* jurisdiction under the pretense of a P.O. of course). It is more difficult to see how an arbitral tribunal could "implicitly" decide that it is properly composed but one could envisage that rejecting a

67. 2.3 of the English version p.6-7.

request by a unanimous decision could perhaps reflect an "implicit" finding that the arbitral tribunal's composition or independence leaves nothing to be desired. Furthermore, the "implicit" preliminary award may not necessarily take the form of an explicit holding in the procedural "order": it might just as well be in the reasons. The "criteria" to decide whether it should be immediately appealed or not lie in the spirit of the document: if it merely organizes the proceedings, it is a P.O. but if it implicitly affirms the jurisdiction of the arbitral tribunal and expresses the intention of the arbitrators to assert jurisdiction or proclaim that the panel is properly composed, then it would have to be appealed immediately. In other words, a decision may have to be appealed when there is no formal disposition of any issues simply because the wording of its reasons makes it a preliminary award for the purposes of art. 190 (3) PILA. The FT's concern in this respect is to avoid creating situations that would cause the parties to run through the entire length of the arbitration and undergo all the expenses entailed only to be told in the end that there is no jurisdiction (or that the panel was not properly composed). The preoccupation is commendable but with all due respect to the Swiss Supreme Court, requiring litigants to *guess* that a decision *implicitly* decided jurisdictional issues – or *implicitly* held that the arbitral tribunal was properly composed – even though the document notified to the parties does not say so and requiring that they immediately appeal it or forfeit their right to do so, is the source of great procedural uncertainty [68], as will be clear from two recent examples.

29. A French football player entered into a contract with a French club in 2003, providing for his training for three years and an obligation to sign his first subsequent employment as a professional with the club. Three years later the player went off to the UK: the French club then sued the English club and the player. The FIFA Dispute Resolution Chamber ("DRC") issued two decisions: the first (November 2, 2004) set a time limit for the two clubs to settle the matter and when they did not, the second (November 26, 2004) rejected the claim on jurisdictional and substantive grounds. The French club appealed to the Court of Arbitration for Sport ("CAS"). The CAS issued a P.O. in May, 2005 finding that it had jurisdiction based on the FIFA Statutes and the Code of Arbitration for Sport and taking notice that the parties agreed to submit their dispute to the CAS. In October 2005 the CAS pronounced a partial "award" reversing the DRC in part and finding a breach of contract, with the parties to be invited to state their position on possible compensation later. In July 2007, a final award was issued, granting financial compensation. The player appealed to the FT, arguing among other things that the CAS lacked jurisdiction to award damages. The FT found that he should have appealed the *October 2005* "partial award" and no longer could submit the jurisdictional issue to the FT. The Court stated: "*Contrary to what he is claiming, the Appellant, assisted by counsel, could not in good faith consider on the basis of the reasons of the* {October 2005} *award that the CAS would deny jurisdiction in its final award as to the claims for damages that the Respondent may raise against the Appellant in its written pleadings to be filed. In other words, nothing allowed the Appellant to consider that the October 27, 2005 award purported to limit the number of potential debtors towards the Respondent who could be*

68. And is rightly criticized by Andreas Bucher, *op. cit.* 1679 nr. 32.

the object of a monetary award in the final award and to exclude the Appellant therefrom. Thus, the Appellant should have immediately appealed the first award (...) under penalty of forfeiting the right to appeal if he meant to deny to the CAS the jurisdiction to order him personally to compensate the Respondent. Having failed to do so, he is no longer allowed to raise the alleged lack of jurisdiction of the Arbitral Tribunal in the framework of his Civil law appeal against the final award of July 17, 2007. The matter is accordingly not capable of appeal to the extent that the Appellant seeks to demonstrate the lack of jurisdiction of the CAS ratione personae, ***since the issue of jurisdiction was already implicitly decided in the award of October 27, 2005*** [69]*".*

30. Conversely in a dispute which developed into two arbitrations based on a license agreement an ICC arbitral tribunal sitting in Geneva issued a partial award in 2007 upholding the claim in principle but differing *quantum* to a later stage. The license agreement was then invalidated and a new, separate arbitration commenced [70]. A stay of the proceedings on *quantum* until determination by the second arbitral tribunal as to the validity of the invalidation of the license agreement was applied for but rejected in a decision entitled "Procedural order nr. 4". A challenge against the first arbitral tribunal was made to the ICC and rejected, then the "Procedural order" was appealed to the FT. The respondent claimed that as a mere procedural order it was not capable of appeal. The FT disagreed in the following terms: *(...) "in order to decide if the matter is capable of appeal, the decisive factor is not the name of the decision under review but its contents. From that point of view, there is no doubt that the Arbitral Tribunal did not limit itself to organizing the rest of the proceedings. (....) as appears from the reasons it stated, if the Arbitral Tribunal refused to stay the arbitral proceedings, it was because it considered that it had jurisdiction to decide the validity of the invalidation of the Second Amendment. By doing so,* ***it issued, at least implicitly, an interlocutory decision relating to its jurisdiction ratione materiae, which is subject to an appeal*** [71] *(....) The same reasoning may be followed with regard to the developments in the decision under appeal in which the Arbitral Tribunal rejected the argument relating to the regularity of its composition in order to decide the issue of the invalidation. Therefore,* ***the nature of the decision under appeal does not cause the matter to be incapable of appeal*** [72] *(see Art. 190 (3) LDIP)* [73]*".*

31. As a matter of principle it should be a rare occurrence for an arbitral tribunal seized of an objection as to jurisdiction or as to the composition of the panel (which, as is well known, would also encompass *any* objection made as to an arbitrator's alleged lack of independence or objectivity) to continue the proceedings without addressing the issue(s) appropriately but experience shows that it may and does happen. Separate

69. 4A–370/2007, Judgment of February 28, 2008, 2008 ASA Bulletin 334; full English translation at http://www.praetor.ch/arbitrage/appeal-against-interlocutory-and-partial-awards-violation-of-pub/. Emphasis supplied. See 4.2 of the English version p.12. Also see 2008 Swiss Int'l Arb.L.Rep. 89.

70. This writer feels bound to disclose that he was on one of the two panels, but not the one whose decision was appealed to the FT and therefore feels free to comment on it.

71. Emphasis supplied.

72. Emphasis supplied.

73. 4A–210/20 08 Judgment of October 29, 2008, 2009 ASA Bulletin 309; full English translation at http://www.praetor.ch/arbitrage/admissibility-of-appeal-against-interlocutory-decision-procedura/. See 2.1 of the English version p. 5.

decisions should therefore be required to do away with the risk of an "implicit" determination in some procedural order addressing other issues. This raises no difficulties at all as it is established beyond any doubt that jurisdictional and other challenges must be raised *immediately* by the allegedly aggrieved party [74].

Decisions on costs: a duck-billed platypus?

32. A bizarre duck-billed creature, *ornithorhynchus anatinus* is a mammal that lays eggs, has a beaver tail but otter feet and a venomous wasp-like sting defying naturalists' classification: the procedural nature of a "Swiss" decision on arbitration costs appears similarly baffling. No one would deny that apportioning costs is a "decision": after all that is how the parties know which one is going to foot the bill of the arbitration, entirely or in part. Even in institutional arbitrations, such as ICC proceedings, where the costs of the proceedings and the fees of the arbitrators are the object of a separate assessment by the institution, the award contains the decision apportioning them. In *ad hoc* arbitration the arbitrators themselves determine both [75]. In a Zurich Chamber of Commerce arbitration initiated in 2008 the arbitrators [76] decided to limit the proceedings to jurisdiction at first and advised the parties as to the deposit according to the applicable Swiss Rules. The deposit was not paid and in June 2010 the arbitral tribunal stayed the proceedings, demanded payment of the deposit again and issued a decision on costs, ordering each of the parties to pay half the arbitration costs incurred so far (there were two claimants and in excess of ten respondents so it was to be "jointly and severally" within both groups). The respondents appealed and the FT found that the matter was *not* capable of appeal. To the extent that the proceedings were stayed no appeal could be made against a procedural decision that could be rescinded at any time and the same applied to the section of the "interim award" demanding payment of the deposit. The Court added that generally speaking an arbitral tribunal has no authority to issue a decision on costs which would entitle the arbitrators to collect from the parties. It is only *between the parties* that the decision on costs is *res judicata* according to the FT, which relied in this respect on legal writing [77] holding the view that Swiss law contains no specific provision that would empower the arbitral tribunal to issue a binding decision as to its own costs in international matters [78]. The Court added the following: "*This is because claims resulting from the relationship between the arbitral tribunal and the parties do not fall within the arbitration clause; also because this would be an unacceptable decision in one's own case (...). The*

74. For a recent example see 4A–258/2009 Judgment of January 11, 2010, 2010 ASA Bulletin 540; full English translation at http://www.praetor.ch/arbitrage/invalid-waiver-of-the-appeal-to-the-federal-tribunal-through-ref1/.

75. And in arbitrations under the Swiss Rules, where the institution (Chamber of Commerce) puts forward its costs only but not the fees of the arbitrators. The final decision is made by the arbitral tribunal in consultation with the institution. See Articles 38 and 40(4) of the Swiss Rules.

76. Richard Kreindler, chairman, Dominique Dreyer and Laurent Killias, arbitrators.

77. Anton Heini, *Zürcher Kommentar zur IPRG ad art. 186 nr. 26*; Berger/Kellerhals, *op. cit. par. 1479*; H.H Inderkum, Der Schiedsrichtervertrag, p. 150.

78. In *national* arbitrations there is a specific provision, namely art. 384 (1)(f) of the Swiss Code of Civil Procedure.

decision on costs in an arbitral award is therefore nothing else ***than a rendering of account which does not bind the parties*** [79] *(...) or a circumscription of the arbitrators' private law claim based on the arbitration agreement on which in case of dispute the* ***state court*** [80] *will have to decide (...) It is only in the relationship between the parties that the indication of the amount of the procedural costs in the arbitral award has the effect of an enforceable judgment, namely to the extent only that it decides on the allocation of and liability for the costs between the parties. (...) Lacking authority of the arbitral tribunal to decide the issue, (...) the 'interim awards' under appeal may not contain decisional orders even if one were to see in them the liquidation of previously incurred costs of the arbitral tribunal and not a request for the payment of a deposit. They are therefore mere presentations of accounts which lack the characteristics of an award subject to appeal (...)* [81]".

33. This (isolated) decision has been rightly criticized by Andreas Bucher [82] who points out among other things that the dichotomy between the impact as to the parties and the alleged "rendering of account" by the arbitrators would lead to the illogical result that the arbitrators could claim their fee pursuant to the *receptum arbitrii* – the "contract" between the arbitrator and the parties – even though the award may have been annulled on public policy grounds because the costs would have been entirely inappropriate. Conversely an award upheld would still not entitle the arbitrator to collect the fee "decided" in the award.

Practical considerations and need for a change

34. The time-limit to appeal a Swiss award is *extremely* short: *thirty days* and unlike otherwise comparable systems a *fully reasoned and argued* brief is expected within that time limit. Any argument raised later – in a reply for instance – will be rejected by the Court if it was not already developed in the original appeal.

35. This makes counsel's task quite arduous: within thirty days a file needs to be mastered, at least as to the facts, testimony and legal arguments germane to the issues to be argued in the appeal. As international arbitrations develop into ever more complex litigations this may be quite a challenge given so little time. The appealing party is unlikely to be able to handle French, German or Italian, thus making English or other translations of the draft brief a necessary, albeit almost impossible requirement because by the time one or several lawyers have (i) become acquainted with the facts and the record of the

79. Emphasis supplied.

80. Emphasis supplied. It would have been interesting for the FT to explain *which* state court would have jurisdiction when the three arbitrators are in different countries – none in Switzerland quite often – and the parties come from five or six other and different jurisdictions. One does not see why the court at the "seat" of the arbitration would have jurisdiction as to this "rendering of account" and it is likely that if seized, a *foreign* court would demur precisely because the arbitration was "Swiss", thus creating a hopeless procedural conundrum.

81. 4A–391/2010 Judgment of November 10, 2010, ATF 136 III 597 (excerpts in German); 2011 ASA Bulletin 110; full English translation at http://www.praetor.ch/arbitrage/procedural-order-of-the-arbitral-tribunal-directing-payment-of-t/See 5.2.1 of the English version p. 7.

82. *Op. cit.* 1681 nr. 37-39.

arbitration (ii) recognized the legal issues to be raised in the appeal (iii) drafted a thorough brief meeting the fairly strict requirements of the LFT and case law, there will be merely a few days – sometimes a few *hours* – left before the filing deadline. Whilst theoretically possible, appeals drafted by foreign counsel only are not advisable in practical terms. It takes a fairly experienced Swiss lawyer to work her way through the pitfalls of admissibility requirements, yet cooperation between foreign and Swiss counsel will be reduced to a minimum by the constraints of time unless one takes the precaution of associating Swiss counsel to one's team well in advance. Whilst undoubtedly helpful to the prosperity of Swiss law firms, this seems to defeat the very purpose of international arbitration, which is to make it possible for a party to appear with counsel it feels comfortable with without resorting to expensive and sometimes hardly useful local assistance.

36. *Last but not least,* as we have seen above [83], the costs involved in Swiss appeal proceedings can be very significant when the amount in dispute is high, which is a very frequent occurrence in modern commercial or investment arbitration. It is hardly advisable for a jurisdiction wishing to remain a favorite venue of international arbitrations to cause litigants to spend hundreds of thousands of dollars to be told merely that the matter is not capable of appeal or that an appeal should have been made earlier.

37. Yet the system is unlikely to change in respect of the time limits because the Swiss Parliament would be most reluctant to extend the deadline to appeal an international award to a more manageable sixty or ninety days, perhaps with a requirement that the appeal be *announced* within thirty days and the appeal brief due sixty days later [84]. Doing so for international arbitral awards only would fall under the suspicion of making appeals by "foreigners" easier than for the average Swiss litigant, a proposition unlikely to be endorsed by any member of the Swiss parliament except one remarkably keen on political suicide. Extending the time limit for *all* appeals would raise some other delicate policy issues and is probably a non-starter either. Any attempts at extending the time limits to appeal to the FT appears therefore doomed for the time being and probably for several years or even decades ahead [85].

38. However, a parliamentary initiative by National Counselor Christian Lüscher [86] to amend art. 7 PILA with a view to anchoring the negative effect of the rule of *Kompetenz-Kompetenz* [87], whilst already adopted by the Swiss Parliament, might evolve towards a

83. Above nr. 17.

84. This would not affect enforcement because the award is immediately enforceable and remains so during the appeal proceedings unless a stay of enforcement is granted by the FT, which often refuses to do so.

85. As a young Swiss MP full of eagerness and illusions, this writer raised that very issue with some colleagues in 1993, only to realize that his fellow legislators saw no wisdom at all in giving it rich lawyers (in their view) additional time and opportunities to obfuscate things and create even more confusion and delays than they already did. Interestingly, several federal judges of the time appeared to share this unquestionably pragmatic view.

86. A Swiss politician, partner of ZPG and the author of a leading commentary of the new Swiss Code of Civil Procedure. See David Hoffmann et Christian Lüscher, *Le Code de procédure civile,* 2009.

87. Individual bill (« Parliamentary initiative ») Lüscher 08.417 of March 20, 2008 – Amendment of article 7 of the Federal Law of December 18, 1987 on International Private Law, adopted by both Chambers of the Swiss Parliament. See the legislative history of the bill at http://www.parlament.ch/f/suche/pages/geschaefte.aspx?gesch-id=20080417.

"brushing up" of the entire chapter 12 of PILA. If this view ultimately prevails in the Swiss Parliament, a closer look at art. 190 may be advisable as well because a redrafting of the provision appears quite necessary in light of the uncertainties described above. A possible way to address the issues the provision raises *sic stante* would be to amend it as follows:

Art. 190 [88]

IX. Finality, appeal

1. General rule

(1) The award shall be final when communicated.

(2) It can be challenged only:

a. If a sole arbitrator was designated irregularly or the arbitral tribunal was constituted irregularly;

b. If the arbitral tribunal erroneously held that it had or did not have jurisdiction;

c. If the arbitral tribunal ruled on matters beyond the claims submitted to it or if it failed to rule on one of the claims;

d. If the equality of the parties or their right to be heard in an adversarial proceeding was not respected;

e. If the award is incompatible with public policy.

(3) (new) ***Decisions as to the allegedly irregular constitution of the arbitral tribunal {art. 190 (2) (a)} and as to jurisdiction {art. 190 (2) (b)} shall be issued in a formal preliminary decision meeting the requirements of art. 186 (3) and 189, appealable immediately pursuant to art. 191.***

(4) (new) ***Other partial awards and preliminary decisions may not be appealed before the final award.***

88. The English translation used here is due to the Zurich law firm of Umbricht and may be found at http://www.umbricht.ch/pdf/SwissPIL.pdf except for art. 190(2)(e) which I have slightly modified in line with the terminology used in this article.