THE ARBITRAL PROCEDURE IN SWITZERLAND

Gerhard WALTER
Christoph BRUNNER

1.1. *Which are the rules regulating arbitration in your country?*

1.1.1. *International Arbitration*

In Switzerland, international arbitration is governed by Chapter 12 of the Federal Statute on Private International Law of 18 December 1987 ("PILS"; articles 176-194 PILS). In addition, Switzerland has ratified a number of international treaties on international arbitration: The New York Convention of 1958 on the Recognition and Enforcement of Foreign Arbitral Awards ("NYC"; for Switzerland in force since 30 August 1965), the Geneva Protocol on Arbitration Clauses of 24 September 1923 and the Geneva Convention on the Execution of Foreign Arbitral Awards of 26 June 1927. Switzerland has also ratified several bilateral treaties on the mutual recognition and enforcement of judicial decisions and arbitral awards, especially the treaty with Germany of 2 November 1929, with Belgium of 29 April 1959, with the Principality of Liechtenstein of 25 April 1968, as well as with Sweden of 15 January 1936.

1.1.2. *Domestic Arbitration*

Cases involving two (or more) Swiss parties are not covered by the scope of application of Chapter 12 PILS (article 176[1] PILS) and are governed by an inter-cantonal arbitration convention, the Concordat on arbitration of 27 March 1969 (the "Concordat"). The Concordat is by far not as arbitration-friendly as Chapter 12 PILS. On the one hand, it contains numerous mandatory provisions (approximately two thirds of the Concordat's 46 articles) and therefore adheres to a much smaller degree to

the principle of autonomy of the parties and the arbitrators than Chapter 12 PILS does. On the other hand, under the Concordat, an award is to be annulled if "the award is arbitrary in that it is based on findings which are manifestly contrary to the facts appearing on the file, or in that it constitutes a clear violation of law or equity" (article 36 lit. f Concordat). When the Swiss Parliament enacted the PILS, it limited these shortcomings of the Concordat for the domain of international arbitration.

2.1. *In your country, does mandatory arbitration, besides voluntary arbitration, exist (i. e. imposed by mandatory rules of law)?*

As a result of the consensual nature of arbitration, disputes are only submitted to arbitration in the event of an arbitration agreement entered into by the parties. Occasionally, statutory provisions or international treaties provide for arbitration regardless of a voluntary agreement by the parties to this effect.

In domestic arbitration, mandatory arbitration may for instance be found in the field of labour law. The Swiss federal law regarding employees of the Swiss Confederation provides that the Swiss Post and the Swiss Federal Railways shall enter into a collective employment agreement with the trade unions which must provide for arbitration in certain cases. As a matter of compulsory law, the arbitral tribunal is competent for disputes regarding adjustments of wages due to inflation and regarding social compensation plans. Also, agreements concluded between trade unions and employers' associations in particular branches of industry may also provide for dispute settlement by way of arbitration.

Furthermore, some Swiss federal social insurance laws provide for mandatory arbitration in particular cases. For instance, according to the Swiss federal laws on health and accident insurance, disputes between insurance companies and service providers such as physicians and hospitals are to be submitted to arbitration. The arbitration panel must be composed of an umpire (*i. e.*, a neutral chairman) and one or several representative(s) of the insurance companies and of the service provider in question in equal number. The applicable procedure is to be determined by the Swiss cantons (state law). The cantons may also provide that the cantonal administrative court assumes the task of the arbitral tribunal in those matters.

As regards international arbitration, reference should be made to the Bilateral Investment Treaties (BITs) concluded by Switzerland (and also

other countries to the extent that the seat of the arbitral tribunal is in Switzerland). In BITs concluded by Switzerland with other countries, four types of arbitration are generally contemplated: ICSID, ICSID Additional Facility, *ad hoc* (generally Uncitral), and ICC. To be sure, Swiss arbitration law may only govern the arbitration pursuant to a particular BIT if it is not conducted under the ICSID, and if the place of arbitration is in Switzerland. Explicit state consent to arbitration in BITs where Switzerland is a party is not yet a common practice, but such consent is found more frequently in recent BITs.

2.2. *In case of negative answer: What prevents the introduction of mandatory arbitration?*

The idea that arbitration is an instrument which is based on a voluntarily taken decision of private parties to derogate from state adjudication, and —instead— submit their current or future dispute to a decision made by private persons. In other words, in the absence of the parties' consent to submit to arbitration, there are generally no sufficient policy reasons to compel private parties to have their dispute decided by a private tribunal.

3. *How are arbitrators appointed?*

The parties are basically free to choose the arbitrators. Under article 179 PILS, "[t]he arbitrators shall be appointed, removed or replaced in accordance with the agreement of the parties". In the absence of such an agreement, the matter may be referred to the court at the place where the arbitral tribunal has its seat, which will apply the relevant provisions of cantonal law. Pursuant to article 10 of the Concordat, the arbitral tribunal shall consist of three members unless the parties have not provided for another odd number of arbitrators, for instance for the selection of a sole arbitrator. The parties may, however, also provide for an even number of arbitrators.

In practice, the parties' arbitration agreement often provides (directly or indirectly, by reference to institutional arbitration rules) for a three-member arbitration panel, whereby each party appoints an arbitrator, and the two party appointed arbitrators select the chairperson.

Chapter 12 PILS does not stipulate particular qualifications for arbitrators; it only provides that an arbitrator may be challenged if he or she does not meet the qualifications agreed upon by the parties, including those contained in arbitration rules on which the parties have agreed (article 180[1][a], [b] PILS). Every natural person may be selected as arbitrator. If

a legal person is designated as arbitrator, it is generally to be assumed that such designation includes the natural person representing the relevant legal person. The nationality of arbitrators is irrelevant. Contrary to the Concordat which provides that an arbitrator may be challenged if he or she has served a sentence due to a "disreputable" criminal offence, Chapter 12 of the PILS leaves it to the parties to agree on such a reservation. It only requires that arbitrators be independent and impartial. The sole statutory ground for challenge is that an arbitrator may be challenged if circumstances exist that give rise to justifiable doubts as to his or her independence.

3.1. *With reference to voluntary arbitration, are there limitations as to the appointment of arbitrators?*

Article 30(1) of the revised Swiss Federal Constitution (article 58 of the former Constitution) and article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) entitle all parties to an impartial judge. This guarantee not only applies within the framework of state jurisdiction but also to domestic and international arbitration. Accordingly, neither the party or —in case of a legal person— representatives of the party itself (*e. g.*, directors of a company, members of the board of an association) or otherwise related persons (*e. g.*, a member of the law office representing the interests of that party) may serve as arbitrator.

3.2. *With reference to mandatory arbitration, has the parties' will any influence on the appointment of arbitrators?*

In general it may be said that in the cases of mandatory arbitration referred to above, either party may usually appoint a co-arbitrator if the arbitral tribunal consists of three arbitrators unless the law providing for domestic arbitration delegates the tasks of the arbitral tribunal to an administrative court.

3.3. *How is the arbitrators' impartiality guaranteed?*

As already noted *supra* (3.), article 180(1)(c) PILS provides that an arbitrator may be challenged if circumstances exist that give rise to justifiable doubts as to his independence. The term "independence" also embraces the notion of "impartiality"; both concepts form a synthesis. As from their appointment till the end of the arbitral proceedings, arbitrators must promptly inform the parties and their co-arbitrators of any fact that might give rise to justifiable doubts as to their independence.

Whereas in domestic arbitrations the state court at the seat of the arbitral tribunal must always rule on a challenge, article 180 PILS grants for the domain of international arbitration priority to the parties' agreement or to the arbitration rules chosen by them with regard to the challenge procedure. Thus if the parties have for instance provided for the application of the ICC Rules of Arbitration of the International Chamber of Commerce ("ICC Rules"), the challenge procedure is governed by article 11 of the ICC Rules. The decision of the International Court of Arbitration of the ICC on the challenge may not directly be appealed before a state court; however, it may indirectly be reviewed in connection with a motion to set aside the (interim or final) award rendered by the arbitral tribunal before the Swiss Federal Court.

If the challenge procedure is neither covered by a specific agreement of the parties nor by a reference to arbitration rules, the final decision with regard to the challenge of an arbitrator rests with the court that has jurisdiction at the seat of the arbitral tribunal (article 180[3] PILS). The Swiss Federal Court has recently held that a decision by a cantonal court on a challenge is definitive and final and can neither directly nor indirectly be appealed before the Swiss Federal Court. In other words, the cantonal decision can not directly be appealed before the Swiss Federal Court, nor will the latter review the grounds for challenge considered by the cantonal court within the framework of setting aside proceedings against the award.

In any case, the challenging party must object and inform the arbitral tribunal and the opposing party of the grounds for challenge without delay upon learning about a ground for challenge.

3.4. *Is arbitration with more than two parties regulated by a specific set of rules?*

Swiss arbitration law does not contain any rules on multiparty arbitration, *i. e*. disputes concerning the same issue involving multiple parties, either as claimant or as respondent. However, the issue is addressed in the institutional arbitration rules of the Geneva Chamber of Commerce and Industry and the Zurich Chamber of Commerce.

3.4.1. *Geneva Chamber of Commerce and Industry Arbitration Rules of 1 May 2000 ("Geneva Rules")*

The Geneva Rules on multiparty arbitration read as follows.

17. Multiparty Arbitration in General

17.1 In arbitration proceedings comprising more than two parties, including in case of participation of a third party within the meaning of article 18, the number of arbitrators shall be determined in accordance with article 11.

17.2 The parties may agree on a method of selection of the coarbitrators. In the absence of such an agreement, the coarbitrators shall be appointed by the CCIG, which shall take into account any proposals by the parties.

17.3 The chairperson or the sole arbitrator shall be appointed in accordance with article 12.

3.4.2. *International Arbitration Rules of Zurich Chamber of Commerce of 1 January 1989 ("Zurich Rules")*

> Article 10 (3) of the Zurich Rules states that if the parties have not expressly agreed on the number of arbitrators, in case of multi-party arbitration, a three-person Arbitral Tribunal is appointed.
>
> Moreover, the Zurich Rules encompass the following specific provision on multiparty arbitration:
>
> Article 13. Multi-Party Arbitration
>
> If there are several claimants or several respondents, or if the respondent, within the deadline for the answer, files a claim with the Zurich Chamber of Commerce, against a third party based on an arbitration clause valid according to article 2 subs. 2 an identical three-men Arbitral Tribunal is appointed according to article 12 subs. 3 for the first and all other arbitrations.
>
> The Arbitral Tribunal may conduct the arbitrations separately, or consolidate them, partly or altogether.

3.5. *Are there specific rules on the contractual relation between the parties and the arbitrators?*

Swiss arbitration law does not include rules on the contractual relationship between the parties and the arbitrators. The contract binding the parties with each arbitrator (*receptum arbitri*) contains both substantive law elements and procedural elements. This characterization recognizes that the rights and duties resulting from the *receptum arbitri* have substantive law effects (including especially the remuneration of the arbitrators) and procedural effects, in particular the duty to conduct the arbitral proceedings in compliance with the applicable procedural rules. This includes the

obligation to render an enforceable award if the parties fail to reach an amicable settlement.

Furthermore, under the *receptum arbitri*, each arbitrator is under an obligation to discharge his or her duties as an arbitrator and to stay in office until the final award is rendered or until the arbitration is otherwise terminated. An arbitrator may only be considered to be released from the latter obligation if there are compelling reasons, *i. e*. more than "valid" (or good) reasons. In practical terms, this means that an arbitrator should generally only be allowed to resign from his duty on the basis of his or her state of health, that is in case of serious illness.

4. *How is the relation between arbitrators and judges regulated?*

4.1. *Is there a form of arbitration within the context of a trial whose carrying out is imposed on the parties by the judge they addressed to?*

No.

4.2. *Are the rules regarding competence and* lis pendens *[applicable to state courts also applied [in the context of arbitration]?*

4.2.1. *Competence (jurisdiction)*

The conditions under which a state court must proceed on the merits of a claim brought before it although the defendant raises the objection that the dispute is to be referred to arbitration are explicitly set out in article 7 PILS regarding international disputes.

> Section 2: Jurisdiction
> (…)
> VI. *Arbitration agreement*
> Article 7. 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:
> a. The defendant proceeded to the merits without contesting jurisdiction;
> b. The court finds that the arbitration agreement is null and void, inoperative or incapable of being performed; or
> c. The arbitral tribunal cannot be constituted for reasons for which the defendant in the arbitration proceeding is manifestly responsible.

The defendant party must raise the objection of an arbitration agreement before the state court, *i. e.*, the state court will not examine this question on its own motion. Article 7(b) PILS is based on article II(3) NYC. According to the case law of the Swiss Federal Court, the relationship between the two provisions is as follows: If the arbitration agreement provides that the place of arbitration is in Switzerland, the Swiss state court has to apply article 7(b) PILS in order to examine whether the objection regarding the existence of an arbitration agreement is well-founded, that is whether it has jurisdiction or not. However, the state court may limit itself to a summary review of the elements laid down in article 7(b) PILS (*prima facie* review). According to the Swiss Federal Court, the limited scope of review is justified because if the seat of the arbitral tribunal is in Switzerland, the arbitral tribunal's decision on its own jurisdiction will be subject to an unrestricted review by the competent state court (usually the Federal Court itself) in setting aside proceedings against the award. On the other hand, if the place of arbitration is outside Switzerland, the competent Swiss state court must examine the objection regarding the valid existence of an arbitration agreement in the light of article II(3) NYC. Insofar, its scope of review is unrestricted, it will freely examine whether any of the elements referred to in article II(3) affect the validity or effectiveness of the arbitration agreement.

As regards domestic disputes, the issue is still governed by the various cantonal codes of civil procedure, but it is envisaged to model the relevant provision in the future Federal Code of Civil Procedure in accordance with article 7(b) PILS.

Furthermore, the question whether an action for a positive or negative declaration regarding the validity of the arbitration agreement before the state court is permissible is disputed by legal writers. The Swiss Federal Court has only held that article II(3) NYC does not address this issue, *i. e.* that it neither excludes nor prescribes this option and thus leaves it to the relevant state court whether it finds it appropriate to let first the arbitral tribunal decide on its own jurisdiction or not. The first draft of a Federal Code of Civil Procedure now suggests to adopt a middle way: Accordingly, an action for a positive or negative declaration before the state court would only be admissible until the constitution of the arbitral tribunal. Once the arbitral tribunal is constituted, and regardless of whether an action for a positive or negative declaration regarding the validity and enforceability of the arbitration agreement previously filed with the state court is still pending, the objection that the arbitral tribunal lacks jurisdiction may

only be risen before the arbitral tribunal. It may be expected that this rule would also be applied by the Federal Court in international arbitrations. To this (limited) extent, the arbitral tribunal is granted a priority right to rule on its own jurisdiction (*cfr*. the principle of "Kompetenz-Kompetenz" or "compétence de la compétence"). In connection with "ordinary" actions filed before state courts whose scope is not limited to a declaratory judgement with regard to the validity and enforceability of the arbitration agreement, the principle of lis pendens is applicable (see hereafter).

4.2.2. *Lis pendens*

The recognition of prior lis pendens in a foreign court in relation to an action brought before a Swiss state court is dealt with both in international treaties (especially article 21 of the Lugano Convention) and in article 9 PILS. By contrast, the recognition of prior lis pendens in a foreign court or before a foreign arbitral tribunal in relation to a claim brought before an arbitral tribunal having its seat in Switzerland is neither explicitly covered by the New York Convention nor by Chapter 12 PILS. Thus the question which arises is whether article 9 PILS on lis pendens regarding actions brought before Swiss state courts is also to be applied —by analogy— to arbitral tribunals sitting in Switzerland.

In Buenaventura v. BRGM-Pérou ("Buenaventura") and Fomento v. Colon ("Fomento"), the Swiss Federal Court had recently the opportunity to address the above issue, at least with regard to the situation where an arbitral tribunal having its seat in Switzerland is seized after a suit has been brought before a foreign state court. Whereas the Federal Court held that article 9 PILS is to be applied to this situation as well, some particularities related to the specific domain of international arbitration are to be taken into account.

In a nutshell, according to the article 9 PILS, the requirements according to which an arbitral tribunal sitting in Switzerland must stay the arbitral proceedings are as follows:

(i) The foreign state court must be seized first; and
(ii) the actions brought before the arbitral tribunal and the foreign state court must oppose the same parties and have the same subject-matter; and
(iii) it is to be expected that the foreign court will render a decision which will be recognizable (enforceable) in Switzerland;

(iv) it is to be expected that such decision will be issued within a reasonable time frame.

If these conditions are met, any Swiss proceedings will be stayed. The most important and also most controversial requirement involves the arbitral tribunal's assessment as to whether a future decision of the foreign state court will be recognizable and enforceable in Switzerland.

Under Swiss private international law, a foreign decision may only be recognized if the foreign court had, among others, so-called indirect international jurisdiction (article 25 lit. a PILS). According to a well-recognized principle of private international law, indirect international jurisdiction is to be determined by the law of the court where recognition or enforcement is sought, and not by the law of the foreign court. Under Swiss law, such indirect international jurisdiction may either result from article 26 PILS which contains an affirmative list of indirect jurisdictions, or any relevant provisions of international treaties. As the Federal Court held in the Buenaventura case, in the field of international arbitration, the 1958 New York Convention on the recognition and enforcement of foreign arbitral awards must be considered since international treaties take precedence over Swiss federal law. Article II(3) NYC excludes a state court's jurisdiction if the parties have made an arbitration agreement since, at the request of either party, the state court shall refer the parties to arbitration, "unless it finds that the said agreement is null and void, inoperative or incapable of being performed". If these negative prerequisites are missing, article II(3) NYC prohibits state courts to proceed on the merits of the case. The state court's jurisdiction is derogated, it lacks direct jurisdiction. Moreover, according to the Federal Court, a state court which affirms its jurisdiction even though the (negative) requirements of article II(3) NYC are not met lacks also indirect international jurisdiction so that its judgment cannot be recognized and enforced in Switzerland according to article 25 lit. a PILS.

Hence the applicable rule regarding direct jurisdiction of the foreign state court (*i. e*., article II[3] NYC) is identical with the rule governing the indirect jurisdiction of that court according to the Swiss *lex fori*. As a result of this convergence between the rules applicable to direct and indirect jurisdiction, there is an unrestricted double or second review of the foreign state court's jurisdiction in the light of the validity and effectiveness of the arbitration agreement.

Some legal commentators have criticized the case law of the Federal Court by arguing that the law of an arbitration-unfriendly country, especially regarding the question whether the subject-matter of the controversy can be referred to arbitration (arbitrability), would become relevant in considering whether the Swiss arbitral tribunal has to stay proceedings under the lis pendens rule. As a result, Switzerland's reputation as an arbitration-friendly country might by at stake. However, in the present writers' view this concern is unwarranted since it is based on the (misguided) understanding that a Swiss arbitral tribunal would have to examine the foreign state court's indirect jurisdiction, particularly the arbitrability of the dispute, under the *lex fori* (including the arbitration law) of the foreign state court.

If the arbitration agreement provides that the place of arbitration is in Switzerland, its validity is to be examined according to the relevant provisions of Chapter 12 PILS, *i. e*. article 178 PILS on formal and substantive validity of the arbitration agreement and article 177 PILS regarding the arbitrability of the dispute, and not the arbitration law applicable in the state of the foreign state court. This position is perfectly in line with the NYC: On the one hand, it is acknowledged that each court applying the NCY is entitled to examine the arbitrability of a dispute (which is not defined in the NYC itself) under its own *lex fori* since article V(2)(a) NYC refers to the *lex fori* of the court in the country where recognition and enforcement of the award is sought. On the other hand, the Federal Court has held that the formal prerequisites of article II(2) NYC are identical to those of article 178(1) PILS. By the same token, as regards the substantive validity of the arbitration agreement (article 178[2] PILS), it may be expected that the Federal Court would construe the NYC so as to reach a similar result.

As the Fomento decision illustrates, there are, however, also certain issues relating to the effectiveness of the arbitration agreement which are governed by the *lex fori* of the foreign state court. Such issues should be limited to those arising from a correct application of the foreign state court's procedural law in connection with an objection to the state court's jurisdiction on the grounds of a binding arbitration agreement. Hence the only conceivable issues governed by the foreign *lex fori* involve a possible waiver of the arbitration agreement by the defendant during the proceedings before the foreign state court, *i. e*. the formal requirements of raising the arbitration defence. In Fomento, the issue was whether the defendant in

the proceedings before the Panamanian state courts accepted the offer by the claimant to renounce the arbitration agreement when the latter brought the action before the Panamanian courts, in particular whether the objection to the jurisdiction of the Panamanian state courts was timely made by the defendant or not. The Federal Court correctly noted: "Deciding whether the arbitration defence was raised timely falls neither within the New York Convention nor the PILS but depends on the *lex fori* (…). Ultimately, the issue is therefore governed by Panamanian law, which the authorities of that country are better placed to know and apply correctly".

To the extent that such an issue governed by the *lex fori* of the foreign state court is controversial, a Swiss arbitral tribunal will in principle have to stay the proceedings pending the decision by the foreign state court unless it finds that the disputed rule of the foreign *lex fori* violates the Swiss public policy so that the foreign decision could not be recognized in Switzerland.

By contrast, any other issues, including the question whether an arbitration agreement has been substituted by the conclusion of another agreement by the parties (*e. g*., a forum selection clause or another arbitration agreement) aside from the proceedings before the foreign state court, should also be reviewed by the Swiss arbitral tribunal second seized with full power to review.

As a result, a Swiss arbitral tribunal will in effect only have to stay its proceedings if the application of any of the formal requirements of raising the arbitration defence under the foreign *lex fori* is controversial, *i. e*. where the foreign state court will actually be in a better position to decide the relevant issue. Hence on closer examination, the conclusion must be reached that the practical consequences of the lis pendens rule as applicable to Swiss arbitral tribunals are quite tiny.

In case of a stay, and depending on how the foreign proceedings develop, the following decisions may have to be taken later on in Switzerland: If a recognizable decision is made abroad, the "Swiss" claim will be rejected pursuant to article 9(3) PILS. On the other hand, if the foreign judgment cannot be recognized, *i. e*. if the positive prognosis for the recognition turns out to be false, or if the foreign court refuses to render judgment for lack of jurisdiction or any other reason, or if the foreign court does not render a judgment within a reasonable time, the Swiss proceedings will be resumed.

4.3. *How is the objection of a binding arbitration agreement characterized? An objection regarding the procedure or the merits?*

The arbitration defence raised before a state court is considered to be a question affecting the jurisdiction of the court. If the defendant's objection that the dispute is to be deferred to arbitration is upheld by the court, the claim is not admissible, and the court will reject the claim for lack of jurisdiction.

4.4. *Can* translatio judicii *(i. e. the shifting) between arbitrators and ordinary judge (and vice versa) be applied?*

There is no automatic deferral of a dispute from a state court to an arbitral tribunal. In other words, if a state court rejects a claim on the grounds of a valid arbitration agreement, the claimant must, if it wants to pursue the claim before an arbitral tribunal, institute arbitral proceedings in accordance with the arbitration agreement.

4.5. *Does lawsuit pendency before the State judge* (lis apud iudicem pendens) *prevent arbitrators from deciding on the controversy?*

If a foreign state court has first been seized with a dispute, the same matter may be brought before an arbitral tribunal which has its seat in Switzerland. The arbitral tribunal must, however, decide whether it must stay its proceedings pending the decision of the foreign state court under article 9 PILS as described above at paragraph 4.2.2.

4.6. *Does lawsuit pendency before arbitrators* (lis apud arbitros pendens) *prevent the State judge from deciding on the controversy?*

It has been seen that the Swiss Federal Court applies the lis pendens rule of article 9 PILS to situations where a Swiss arbitral tribunal is seized after a foreign state court (see *supra* paragraph 4.2.2.). Even though the Federal Court did not yet have to decide the issue, it may be expected that it would hold that article 9 PILS is also to be applied in the opposite situation in which a foreign arbitral tribunal has been seized first with the same dispute. Accordingly, the Swiss state court would have to examine whether it may be expected that the decision of the foreign arbitral tribunal on its jurisdiction may be recognized in Switzerland. Such examination would especially have to be made in the light of article V NYC. In the event of a positive prognosis for recognition of the foreign award, the Swiss state court would have to stay its proceedings pending that decision. If a recog-

nizable decision is made abroad, the "Swiss" claim will be rejected pursuant to article 9(3) PILS, providing that "[t]he Swiss court rejects the claim, as soon as a foreign judgment is presented to it which can be recognized in Switzerland".

4.7. *Is the suspension of arbitral proceedings taken into consideration while waiting for a decision of a preliminary question by the State judge?*

Aside from the lis pendens rule of article 9 PILS (see paragraph 4.2.2.), an arbitral tribunal must only in exceptional cases stay proceedings pending the judgment of another instance. In principle, a party may only request a stay if the issues dealt with by the other instance are of an essential character for the outcome of the arbitral proceedings, and if the arbitral tribunal is not competent to decide them unless the suspension has been requested by both parties or the legal existence or the standing to sue of a party is at issue. The arbitral tribunal will in principle have discretionary power to decide whether a stay may be granted or not. When taking that decision, it will have to weigh the relevant conflicting interests of the parties, considering that in case of doubt, the general concern to expedite the proceedings should take precedence. The relevant party may then not compel the arbitral tribunal to stay the proceedings by filing a motion to set aside with the Swiss Federal Court against the arbitral tribunal's decision on the grounds of an alleged violation of the right to be heard or the public policy. In particular, the principle "le pénal tient le civil en état" according to which the proceedings before criminal courts take precedence over proceedings before civil courts is not part of the fundamental principles of the Swiss legal system.

4.8. *Is the suspension of proceedings pending before the State judge taken into consideration while waiting for a decision of a preliminary question by arbitrators?*

Apart from the lis pendens rule of article 9, the PILS does not contain a provision stating that court proceedings may be suspended pending the decision by another court in connected proceedings or in proceedings whose outcome is relevant for the respective state court's decision.

As regards domestic disputes, article 36(1) of the Swiss Federal Statute Regarding the Jurisdiction in Civil Matters provides that the court second seized may suspend the proceedings pending the decision by the court first seized in case of connected claims. By the same token, certain cantonal codes of civil procedure provide that a state court has the power to

suspend the proceedings pending the decision by another instance on a preliminary question which is of an essential character for the outcome of the state court proceedings. The reference to a decision by "another instance" also includes arbitral tribunals.

5. *Which are the forms of an arbitration proceedings?*

According to article 182 PILS, the parties are in principle free to determine the arbitral procedure, either directly or indirectly by reference to arbitration rules.

Where the parties have not determined the procedure, the arbitral tribunal will determine it to the extent necessary, either directly or by reference to a law or to arbitration rules. Irrespective of what procedure is chosen, the arbitral tribunal must ensure the equal treatment of the parties and their right to be heard in an adversarial procedure (article 182[3] PILS).

5.1. *With reference to voluntary arbitration, is there an* ad hoc *arbitration in which the parties' will is limited as to the proceedings' regulation?*

Procedural arrangements made by the parties and/ or the arbitral tribunal must in all cases guarantee the two principles of "equal treatment of the parties" and of a "fair hearing in contradictory proceedings" (article 182[3] PILS). This is a binding legal rule the violation of which can be pleaded in support of a motion to set aside under article 190(2)(d) PILS.

5.2. *With reference to mandatory arbitration, has the parties' will any influence on the proceedings' regulation?*

n/a.

5.3. *Which are the arbitrators' powers regarding the collection of evidence?*

The arbitral tribunal itself has the power to conduct the taking of evidence (article 184[1] PILS). The arbitral tribunal can in principle admit any means of evidence which are also admissible before a state court, especially documents, witness or expert testimony and inspection by the arbitral tribunal.

5.4. *Is judicial assistance to arbitrators taken into consideration for purposes of evidence collection?*

Since the arbitral tribunal has no coercive power vis-à-vis the parties and of non-parties (for example witnesses), the assistance of state authorities may be needed for the taking of evidence. The arbitral tribunal, or a party with the consent of the arbitral tribunal, may request the assistance of the court at the seat of the arbitral tribunal. This court will apply its own law (*lex fori*; see article 184[2] PILS).

5.5. *Are intervention and call of third parties admitted and/or regulated in the arbitration proceedings?*

Article 28(1) of the Concordat permits the call of third parties and intervention, provided that the parties concerned are equally parties to the arbitration agreement, and that the arbitral tribunal agrees. The same principle is also applicable under Chapter 12 PILS which does not address this question. It is the necessary consequence of the consensual nature of arbitration, *i. e*. the requirement that all parties to the arbitral procedure must have submitted to it by mutual agreement. As a result, in the absence of an agreement by the parties to this effect (which may also result from the application of a particular set of institutional arbitration rules, see *infra*), a third party may not unilaterally compel its intervention to the arbitration proceedings.

As regards the participation of a third party, article 18 of the Geneva Rules provides as follows:

18.1. If a respondent intends to cause a third party to participate in the arbitration, it shall so state in its answer and shall state the reasons for such participation. The respondent shall deliver to the CCIG an additional copy of its answer.

18.2. The CCIG shall send the answer to the third party whose participation is sought, the provisions of articles 8 and 9 being applicable by analogy.

18.3. Upon receipt of the third party's answer, the CCIG shall decide on the participation of the third party in the already pending proceeding, taking into account all of the circumstances. If the CCIG accepts the participation of the third party, it shall proceed with the formation of the arbitral tribunal in accordance with article 17; if it does not accept the participation, it shall proceed according to article 12.

18.4. The decision of the CCIG regarding the participation of third parties shall not prejudice the decision of the arbitrators on the same subject. Regardless of the decision of the arbitrators on such participation, the formation of the arbitral tribunal cannot be challenged.

5.6. *Can more than one connected arbitration proceedings be unified?*

Since a third party cannot unilaterally request to be joined as a party (*supra* paragraph 5.5.), proceedings can in principle only be consolidated if all parties and the arbitral tribunal agree so. Thus so-called multi-party arbitration is in principle only possible if it is covered by the arbitration agreement concluded by all parties involved.

However, certain institutional arbitration rules contain specific provisions both with regard to multi-party arbitration and the participation of a third party. As regards the nomination of arbitrators in case of multiparty arbitration, see article 17 of the Geneva Rules and article 10(3) and 13 of the Zurich Rules (see *supra* paragraph 3.4.1., 3.4.2.). Article 14 of the Zurich Rules regarding "assignment of further arbitrations" states:

A new dispute between parties which already have an arbitration pending under the International Arbitration Rules may be assigned by the President of the Zurich Chamber of Commerce to the existing Arbitral Tribunal.

The Arbitral Tribunal may conduct the arbitrations separately, or consolidate them, partly or altogether.

6. *Which is the possible content of arbitrators' measures?*

An arbitral award may in principle have the same contents as a judgment rendered by a state court. The arbitral award may therefore provide that the claim is not admissible and hence to be rejected, or that it fails on its merits and must be dismissed. Within the relief sought by the parties, the award may include an order for an affirmative action by the defendant (usually the payment of a sum of money; "Leistungsurteil"), a declaratory judgment ("assessment award"; "Feststellungsurteil") or specific legal consequences may be ordered (*e. g.*, the termination of a contract; "constitutive award"; "Gestaltungsurteil"). Moreover, the defendant may also be ordered to effect performance against simultaneous receipt of the counter-performance, or only after receipt of the counter-performance, or upon the fulfilment of certain preconditions.

6.1. *Can arbitrators render assessment awards and constitutive awards?*

Yes, see *supra* paragraph 6.

6.2. *Can arbitrators deliver summary measures?*

Under article 183 PILS, the arbitral tribunal may order provisional or protective measures (interim relief) at the request of a party, unless the parties have agreed otherwise. If the party so ordered does not comply voluntarily the arbitral tribunal may request the assistance of the competent court, which will apply its own law. The arbitral tribunal or the court may make the granting of interim relief subject to the provision of appropriate security. The following types of interim measures are commonly distinguished:

a) *Protective measures*. Their purpose is to prevent factual changes that would undermine the enforceability of the forthcoming award. For example, they include orders to refrain from disposing of or changing the object of an action in rem, to deposit the object in dispute with an interim custodian or to refrain from drawing down a letter of credit. They may also include orders regarding the conservation of evidence. It is disputed whether a Swiss arbitral tribunal may grant interim relief to prevent a party from removing money kept by that party or placed with a third party for the purpose of securing the payment of a money claim. This should be permissible, with the proviso, however, that to ensure enforceability in Switzerland an arbitral tribunal may order such a freeze only if the requirements provided for by the Swiss Debt Enforcement Act (DEA) are fulfilled.

b) *Interim regulatory or declaratory orders*. Their purpose is not to maintain the status quo but to decree, for the time of the proceedings, the status of a disputed legal relationship. They encompass, among others, orders suspending the effect of a corporate resolution or stating that an individual has for the time being no authority to act for another party or that a party has the right to discontinue contractual works. Such orders are "self-executing", *i. e*. they do not need to be enforced with the assistance of a state court.

c) *Orders for provisional/ temporary performance*. Their purpose is to provisionally enforce a relief sought so that when the relief is eventually granted in the final award it has not already become without object. Such orders include orders to stop the manufacture and sale of products which are the subject of disputed patent rights or orders to stop using disputed trademarks. Interim payments, *i. e*. orders directed against a defendant to provisionally pay to the claimant the sum in dispute, cannot be issued by an arbitral tribunal sitting in Switzerland if the order has to be enforced within Switzerland since the DEA does not provide for the provisional

enforcement of money claims. However, if the Swiss arbitral tribunal applies a foreign law as *lex causae* and if the place of enforcement is outside Switzerland, it may look at the relevant foreign laws to determine the admissibility of an interim payment order. By doing so, it may also take account of the European Court of Justice's decision in Van Uden Maritime BV v. Deco-Line, where it was held that an interim payment order may only be characterized as an interim order if repayment to the defendant of the sum awarded is guaranteed if the claimant is unsuccessful as regards the substance of his claim.

6.3. *Can arbitrators grant precautionary measures?*
Yes, see *supra* paragraph 6.2.

7. With reference to voluntary arbitration

7.1. *Upon which criteria is the area of controversies which can be submitted to arbitration determined?*

For international arbitrations, article 177(1) PILS provides that any dispute of financial interest may be the subject of an arbitration.

By contrast, for domestic arbitration, article 5 Concordat stipulates that a subject-matter may be submitted to arbitration if the parties are free to dispose of it, unless a state court is exclusively competent according to a provision of the applicable mandatory law.

Thus contrary to the test of article 5 Concordat, under article 177(1) PILS, there is no need to first determine the governing law for the legal relationship in order to determine whether the claim being made is a "freely disposable" claim. Instead, all claims of economic (or financial) interest are arbitrable and are thus objectively arbitrable for any arbitral tribunal having its seat in Switzerland, notwithstanding the fact that such claims may well be considered non-arbitrable under the *lex causae* in question. Moreover, article 177(1) PILS governs objective arbitrability notwithstanding any mandatory provisions of Swiss or foreign law to the contrary, the only barrier being Swiss (or transnational) public policy.

As a result, all disputes in the filed of intellectual property rights are basically arbitrable. Likewise, matters involving Swiss, EU or US competition or antitrust laws are arbitrable in Switzerland, including for example matters regarding the alleged nullity of a contract or a contractual provi-

sion, the alleged illegality of a restraint of trade and the right to invoke an individual or block exemption under article 81(3) EC Treaty. Moreover, based on the wide scope of article 177(1) PILS, certain non-enforceable debts arising, *e. g*., from betting and gambling (*cfr*. article 513 of the Swiss Code of Obligations), or from certain option and futures transactions under German law, are arbitrable. The fact that in such cases an award may not be enforceable by coercive measures does no imply that the dispute is not arbitrable.

As regards claims arising from the field of sport, the Swiss Federal Court has held that only disputes which exclusively deal with the rules of the game ("Spielregeln", "règles de jeu"), the application of which is basically outside the scope of judicial control, are not arbitrable.

7.2. *Is arbitration admitted for controversies whose object consists of rights which cannot be disposed of by the parties?*

As seen above (paragraph 7.1.), the question whether the parties are free to dispose of the rights in dispute is not decisive under the test used by article 177(1) PILS (unlike article 5 of the Concordat). As a result, claims relating to debt enforcement and bankruptcy which would usually not be freely disposable under Swiss law may nevertheless be arbitrable under article 177 PILS.

7.3. *Does the area of controversies which can be submitted to arbitration coincide with the area of disposable rights and/or with the area of controversies which can be transacted?*

In many instances, disputes involving a financial interest will also relate to rights which are freely disposable and which may be settled by the parties. On the other hand, there will also be instances where no such congruence exists (see *supra* paragraph 7.1. and 7.2.).

7.4. *Can the mandatory nature of rules to be applied be a limit to the possibility to submit the controversy to arbitration?*

Within the framework of article 177 PILS, neither domestic nor foreign mandatory rules may limit the arbitrability of the dispute, provided that the Swiss or transnational public policy is not at issue.

Since article 5 Concordat makes a reservation for cases where a state court is exclusively competent according to a provision of mandatory Swiss law, a mandatory provision *e.g*. regarding the jurisdiction of state

courts may negatively affect the arbitrability of the dispute. However, the relevant provision of the first draft of a Federal Code of Civil Procedure now proposes that a provision providing for mandatory jurisdiction of state courts in certain matters does not in and of itself mean that such subject-matters should not be arbitrable. In particular, the policy reasons for preventing the parties from entering into a forum selection clause (and thus derogating the jurisdiction of the competent state court) may not in all cases simply be extended to agreements to arbitrate.

7.5. *Do controversies which can be submitted to arbitration coincide with controversies which may be subject of an arbitration clause?*

The effects of an arbitration agreement entered into in view of a present dispute and an arbitration clause concluded in view of future disputes are the same.

7.6. *What are the subjective limits of validity of arbitration and arbitration clause?*

There are no limits regarding subjective arbitrability except that the arbitration agreement must of course meet the applicable formal and substantive law requirements. Article 178(1) PILS provides that an arbitration agreement is valid if made in writing, or by telegram, fax or any other means of communication which permits it to be evidenced in a document. The substantive requirements are set forth in article 178(2) PILS, providing that an arbitration agreement is valid if it conforms to either (i) the law chosen by the parties; (ii) the law governing the subject-matter of the dispute, particularly the law governing the main contract; or (iii) Swiss law.

7.7. *Is an autonomous action admitted in order to verify the validity of the arbitration agreement?*

The question whether an action for a positive or negative declaration regarding the validity of the arbitration agreement before the state court is permissible is disputed by legal writers and has already been addressed *supra* at paragraph 4.2.1.

7.8. *Is arbitration on issues non-exhausting the object of jurisdictional proceedings admitted? E. g.* where arbitrators are demanded to quantify the damages resulting from a certain event, without prejudice to the issue relating to the right for compensation of these damages.

A person which is independent from the parties may be asked to decide only certain elements of a legal relationship, *e. g*. the amount of damages. This procedure is not governed by the arbitration law, and the decision rendered by the expert is not an award in the technical sense, since there is no definitive adjudication of a claim as a whole. Arbitration necessarily involves the binding adjudication of an entire dispute that results in an award with specific characteristics, in particular *res judicata* effect and enforceability. The characteristics of arbitral awards are thus essentially comparable to those of decisions of state courts.

By contrast, so-called expert determination ("valuations"; "Schiedsgutachten") relate to the binding determination of a legally material fact by one or more expert(s). The expert's duty is to usually reach a binding determination. Expert determination must be assessed from a purely contract law point of view. Furthermore, expert determination should not be confused, with the role of an expert appointed in the framework of arbitral proceedings.

8. *Are there different types of voluntary arbitration?*

The parties are free to provide that the arbitral proceedings shall be governed by the arbitration rules of an institution such as the International Chamber of Commerce or one of the different cantonal Swiss Chamber of Commerce arbitration rules (such as the Zurich or Geneva Rules). Moreover, the parties may provide that the proceedings be conducted on an *ad hoc* basis, *i. e*. without the involvement of an arbitral institution. The function of arbitral institutions is mainly to oversee the proceedings and to intervene in certain cases, *e. g*., if the parties fail to agree on the number or the identity of the arbitrators, or if an arbitrator is challenged for lack of independence. If the parties provide for *ad hoc* arbitration in Switzerland, they implicitly express their confidence in the Swiss legal system, in particular in the support and assistance given by the Swiss domestic courts at the seat of the arbitral tribunal, should this be required in specific instances (*e. g*., in connection with the appointment of arbitrators or a challenge for lack of independence).

8.1. *Is it possible to distinguish among the different types of arbitration in relation to the nature of the proceedings and/or to the relations between*

arbitration proceedings and state jurisdictional proceedings and/or to the effects acknowledged to the award and/or to its appeal regulation?

No, insofar there is no difference among the different types of arbitration.

8.2. *Is there a contrast between jurisdictional arbitration and contractual arbitration?*

There is only jurisdictional arbitration, no contractual arbitration in the sense of the Italian "*arbitrato irrituale*" or "*lodo irrituale*".

8.3., 8.4.

n/a.

8.5. *Is equity arbitration admitted* (ex aequo et bono)?

Yes, article 187(2) PILS provides that the parties may authorize the arbitral tribunal to decide *ex aequo et bono, i. e*. in equity.

9.1. *Does voluntary arbitration also include settlement or assessment agreements whenever their content are determined by a third party?*

The parties may either conclude an assessment agreement, *i. e*. provide for the appointment of an expert who's duty is to arrive at a binding determination on a question of fact or law. This mechanism is not to be characterized as arbitration (see *supra* paragraph 7.8.). Alternatively, the parties may agree to submit their dispute to an independent person who's task is to bring about an amicable settlement between the parties. This mechanism is referred to as mediation or conciliation, and is neither governed by the arbitration law. Eventually, within the framework of an arbitration, the parties may confer to the arbitral tribunal the power to make an award on agreed terms (also called award by consent). The effects of such an award are not distinguishable from an award rendered in the absence of a consent by the parties.

9.2. *Does voluntary arbitration also include the joint mandate to settle and the joint mandate to stipulate an assessment agreement?*

It is usually acknowledged that within certain limits, arbitrators have the power to seek to conciliate the parties in the course of the arbitral proceedings. *E. g*., article 21 of the Geneva Rules provides that "[t]he arbitral tribunal may at any time seek to conciliate the parties". By the same token, article 16 of the Uncitral draft model legislative provisions on international commercial conciliation entitled "arbitrator acting as conciliator" provides.

It is not incompatible with the function of an arbitrator if the arbitrator raises the question of a possible conciliation and, to the extent agreed to by the parties, participates in efforts to reach an agreed settlement.

If arbitrators intervene as conciliator during arbitral proceedings, they must ensure that their independence may not be put into question, especially if the efforts at conciliation fail.

Besides, a "joint mandate to settle" as such actually constitutes a conciliation or mediation agreement. Furthermore, a joint mandate to stipulate an assessment agreement is to be characterized as an agreement on expert determination ("Schiedsgutachten"). If the parties so provide, a conciliation or assessment agreement may be coupled with an arbitration procedure.

10. *How is a contractual expert report (or arbitral expert report) characterized? Which is its regulation?*

As noted above, in Switzerland, expert determination falls outside the scope of arbitration and is thus not governed by Chapter 12 PILS or the Concordat. It is governed by the Swiss Code of Obligations, in particular the provisions on mandate to the extent that they are not superseded by specific procedural provisions applied by analogy.

11. *Which is the relation between arbitration and conciliation?*

The relation between arbitration and conciliation consists in the following: arbitration is a way of resolving disputes which results in a binding and enforceable decision by the arbitral tribunal. Conciliation means a process, whether referred to by the expression conciliation, mediation or an expression of similar import, whereby parties request a third person, or a panel of persons, to assist them without the authority to impose a binding decision on the parties in their attempt to reach an amicable settlement of their dispute arising out of or relating to a contract or other legal relationship.

11.1. *Is an attempt to conciliate a necessary step in order to have access to arbitration proceedings?*

An attempt to conciliate the parties is not a necessary step in order to have access to arbitration proceedings, unless the parties have provided so in their arbitration agreement.

11.2. *Is an attempt to conciliate used as a necessary step of arbitration proceedings and as a condition in order to proceed with the latter?*

An attempt to conciliate is neither used as a necessary step of arbitration proceedings nor as a condition to proceed with the latter. However, it frequently occurs that arbitrators assist the parties in their efforts to arrive at an amicable settlement. Approximately 60% of all disputes submitted to arbitration are eventually settled.

12. *In your country, are there systems of "informal justice" aimed at favouring conciliation-mediation between the parties (Mini-Trial, Summary-Jury trial, Moderated-Settlement, etcetera)?*

In Switzerland alternative dispute resolution methods such as expert determination, mini-trial, conciliation, mediation, Med-Arb, an so forth are widely used in practice. In particular, the Zürich Chamber of Commerce has adopted its own Mini-Trial Rules on 5 October 1984 which have been frequently quoted. In addition, various trade associations and the like are offering independent expert determinations services in their branch of industry.

12.1. *Are there forms of alternative justice administered by private or public institutions?*

Various Swiss cantonal Chambers of Commerce have their own institutional arbitration rules, especially Zürich and Geneva. There are no public institutions which would administer arbitral proceedings or alternative dispute resolution mechansims.

12.2. *Is there a legislative discipline of these forms of alternative justice?*

Reference can be made to the cantonal procedural laws which regularly provide that a lawsuit may only be brought before a state court if the parties have previously made an attempt to conciliate before the competent state judge.

12.3. *Which is the relation between these forms of alternative justice and the state jurisdiction?*

If the cantonal procedural law provides for such an attempt to conciliate as a precondition for lodging a lawsuit with the competent state court, the latter will reject a claim filed if the said conciliation procedure has not previously taken place.

12.4. *Which is the relation between these forms of alternative justice and arbitration?*

Swiss arbitration law does not provide for such a necessary preliminary attempt to conciliate. However, as already noted, the parties are free to provide for a med-arb clause (or any form of so-called multi-tiered dispute resolution clauses). Under a med-arb clause, the parties agree to first of all conduct mediation proceedings before a mediator or a mediation panel. Arbitral proceedings may only be brought after the attempt to mediate has failed, *i. e*. on the basis of a statement by the mediator or mediation panel to this effect.

13. *Is arbitration award validity described by utilising expressions such as* "*decision validity*", "*judgment validity*" *or similar ones?*

Article 44 of the Concordat provides that upon a motion by a party, the competent state court certifies that the arbitral award is enforceable in the same way as a judgment if the award has formally *res judicata* effect (*i. e*., if the award is final and binding). Similarly, according to article 193(2) PILS, "[o]n request of a party, the court shall certify the enforceability of the award". The first draft of a Federal Code of Civil Procedure now suggests to adopt a provision stating that arbitral awards have the same effect between the parties as a final and binding court judgment. This principle has already been acknowledged by the Swiss Federal Court in its case law.

14. *In your jurisdiction, are there rules containing the following expressions:* "*decision validity*", "*judgment validity*" *or similar expressions used to describe the validity of contractual deeds (e. g. transaction or assessment agreements)? Which are these rules?*

Awards for a sum of money are enforced in accordance with the provisions of the Swiss Federal Debt Enforcement Act (DEA). Awards other than for a sum of money (*e. g*., orders to do a specified act) are enforced in accordance with the provisions of the cantonal civil procedural law.

According to article 80 DEA, the creditor may request the lifting of an opposition filed by the debtor against enforcement measures if the claim results from an enforceable judgment. Paragraph 2 of this provision specifies that settlement agreements entered into before a state court and acknowledgements of debts explicitly made in court proceedings are equivalent to judgments. Provisions like article 80(2) DEA may also be found in

cantonal civil procedural laws, such as article 397(3) of the Code of Civil Procedure of the Canton of Berne.

On the other hand, the decision resulting from an expert determination (assessment agreement) is not equivalent to a judgment. It will rather be the basis for an action filed with the competent state court or an arbitral tribunal.

15. *Independently of the expressions utilised, do the effects of awards and those of judgments issued by the State judge actually coincide?*

As mentioned above, arbitral awards have in principle the same effects between the parties as a final and binding court judgment.

15.1. *Which are the objective and subjective limits of the arbitration award validity?*

The objective *res judicata* effect of awards encompasses claims and counterclaims which have actually been disposed of in the arbitral tribunal's award. For example, if the arbitral tribunal has only decided part of a claim, the *res judicata* effect will equally be limited. Moreover, according to Swiss concepts of *res judicata*, only the decision itself (the dispositive portion of the award, if necessary by taking into account the award's considerations) will have *res judicata* effect, and not also any decisions regarding facts or preliminary legal questions. By the same token, the *res judicata* effect does not extend to defenses raised by the defendant except in case of set-off.

The subjective scope of the res judicata effect extends not only to the parties to the proceedings but also —as for state court judgments— to third parties which have succeeded to the rights and obligations of the original parties, either by means of universal succession or singular succession, *e. g*. as a result of an assignment of the relevant claim.

15.2. *The consequent effects of the award, both for the parties and third parties, are the same as those of a judgment issued by a judge?*

Yes, see *supra* paragraph 15.1.

15.3.1. *Does an award which is not appealed within the required time limit has the same effects as a final judgment?*

An award made in Switzerland is final and binding from its notification (article 190[1] PILS). It is therefore in principle immediately enforceable in Switzerland. The action for annulment which may be brought before the

Federal Court (articles 190-191 PILS) does not have suspensive effect unless it is so ordered by the Swiss Federal Court. In other words, a motion to set aside does not in itself have the effect of removing the finality of the award. The effects of *res judicata* are only deferred if the Federal Court orders that the motion shall have suspensive effect. Thus the institution of setting aside proceedings does in principle not hinder the immediate enforceability of the award.

15.3.2. *In the affirmative, even though it is rendered in the absence of an arbitration agreement, or in respect of a controversy which cannot be submitted to arbitration? Even though its measures are contrary to public order?*

A motion to set aside the award made under Chapter 12 PILS can be brought, among others, on the grounds that the arbitral tribunal lacked jurisdiction (*i. e*., that the arbitration agreement was invalid or ineffective, or that the dispute was not arbitrable), or that the award violates the public policy (article 190[2] PILS). If a motion to set aside is dismissed, or if the time limit for filing such a motion (30 days from the communication of the award) has elapsed, an award is generally enforceable in Switzerland irrespective of any defects it may have. There is one exception to this principle: An award may be null and void and therefore be incapable of having any legal effect. Some legal commentators submit that where the subject matter is not arbitrable the resulting decision is null and void. They propose that this should also apply —despite the wording of article 190(2)(e) PILS (which provides that an application must be made), but in line with German law (§ 1059[2] ZPO)— in the event of serious violations of the public interest.

16. *Which are the effects on arbitration proceedings of the constitutional legitimacy issue regarding a rule that arbitrators have to apply?*

According to article 191 of the Swiss Federal Constitution, not only international treaties but also Swiss federal laws are binding upon the state courts and administrative authorities, *i.e*. their constitutional legality cannot be reviewed. The same principle applies of course for arbitral tribunals.

17. *Is a second instance arbitration admitted?*

A second tier arbitration procedure is possible and depends on the parties' arbitration agreement, *i. e*. the relevant arbitration rules (especially in the field of commodities trading).

18. *How can an arbitration award be appealed?*

Under Chapter 12 PILS, setting aside proceedings can be brought against an award on the following limited grounds (article 190[2] PILS):

- if the sole arbitrator has been improperly appointed or the arbitral tribunal improperly constituted (lit. a);
- if the arbitral tribunal has wrongly accepted or denied jurisdiction (lit. b);
- if the arbitral tribunal has ruled beyond the claims submitted to it, or failed to decide one of the claims (lit. c);
- if the principle of equal treatment of the parties or their right to be heard in an adversarial procedure has not been observed (lit. d); or
- if the award is incompatible with public policy (lit. e).

The above grounds for setting aside an award correspond to a large degree with those upon which enforcement of awards may be denied under article V NYC. The grounds for denying enforcement of the NYC are even wider in scope than those of article 190(2) PILS. Thus under Chapter 12 PILS, the statement of facts and the legal considerations on the merits of the case which are contained in an award may only be reviewed by the Swiss Federal Court in setting aside proceedings on the ground of public policy (article 190[2][e] PILS). The Swiss Federal Court has adopted a very narrow definition of public policy. In particular, the ground for "arbitrariness" ("Willkür") available under the regime of the Concordat (article 36 lit. f) is not sufficient to overturn an award made under Chapter 12 PILS. Under the Concordat, an award is arbitrary if it is based on findings which are manifestly contrary to the facts appearing on the file, or in that it constitutes a clear violation of law or equity. By contrast, under the standard of public policy of article 190(2)(e) PILS, an award can in general not be annulled as a result of false findings of facts or in case that the award's result entails a legally unsustainable solution; even clear violations of the applicable law are in principle not sufficient in order to constitute a violation of the public policy.

Moreover, if none of the parties has its domicile, a habitual residence or a place of business in Switzerland, the parties may agree to exclude all setting aside proceedings, or limit such proceedings to one or several of the grounds listed in article 190(2) (see article 192 PILS). If the parties have excluded all setting aside proceedings and the award is to be enforced

in Switzerland, then article V NYC will apply, however only to the extent that they do not go further than the grounds upon which an award is to be set aside under article 190(2) PILS.

The losing party has to file a motion to set aside with the Federal Court within 30 days from the communication of the final award. Proceedings to have a preliminary decision (interim award) set aside can only be initiated if (i) the arbitrator has been improperly appointed or the arbitral tribunal improperly constituted (article 190[2][a]), or (ii) the arbitral tribunal has wrongly accepted or denied jurisdiction (article 190[2]b); see article 190(3) PILS. The losing party must immediately file a motion to set aside against an interim award. As a result, a party that does not appeal against an interim award on jurisdiction within the time limit of 30 days is prevented from pleading incompetence later on (*i. e.*, in connection with the final award).

Article 191 PILS provides that proceedings to have an award set aside may only be brought before the Federal Court. However, the parties may agree that the Cantonal Superior Court at the seat of the arbitral tribunal shall decide instead of the Federal Supreme Court.

Furthermore, an application for retrial (revision of an award) may be brought against the award even after the time limit for filing a motion to set aside has elapsed or after such a motion has been dismissed. Even though the PILS does not mention retrial in the arbitration context, the Federal Court has held that there is a gap in the statute which must be filled by analogous application of articles 137 and 140-143 of the Statute on the Organisation of the Federal Judiciary. A motion for retrial must be made with the Federal Court on the grounds that the result of penal proceedings has shown that the award was influenced by criminal acts or that new relevant facts or evidence are discovered which the applicant was unable to plead or adduce in the earlier proceedings.

19. *Are the above forms of "appeal" subject to a previous granting of executive validity to the award or subject to the approval of the award by the State judge?*

The time limit within which a motion to set aside must be filed starts to run regardless of the granting of executive validity of the award, viz. upon receipt of the award.

20. *Is there a specific regulation for arbitration, whose object is transnational private controversies?*

As explained above (paragraph 1.1.), Chapter 12 PILS is applicable to international arbitrations conducted in Switzerland, and the Concordat to domestic arbitration. According to article 176(1) PILS, the provisions of Chapter 12 apply to all arbitrations if the seat of the Arbitral Tribunal is in Switzerland and if, at the time of the conclusion of the arbitration agreement, at least one of the parties to the arbitral proceedings had neither its domicile nor its habitual residence in Switzerland. Thus whether or not the subject-matter of the dispute is of a transnational nature or not is irrelevant.

21. *How is the granting of executive validity of awards regulated?*

Pursuant to article 193(2) PILS, "[a]t the request of a party, that Court [*i. e*., the court of the seat of the Arbitral Tribunal, see article 193(1)] shall certify the enforceability of the award". However, the certificate of enforceability has only a declaratory effect and does not confer to the award its enforceability. Indeed, as already noted above, pursuant to article 190(1) PILS, the award is final and binding as from the time when it is communicated. As a result, there is no need for such a certificate. It is only a means of proof that shows that the award is res judicata in the formal sense (*i. e*. no [possible] setting aside procedure with suspensive effect).

22. *Is there a specific regulation aimed at granting executive validity to foreign awards?*

Article 194 PILS provides that foreign arbitral awards shall be recognised and enforced in Switzerland in accordance with the provisions of the NYC. There are no additional requirements.

23. *Which is the regulation taken into consideration in order to acknowledge and carry out foreign awards?*

There are no special procedural rules regarding the recognition or enforcement of foreign arbitral awards. Foreign arbitral awards are enforced in Switzerland in the same way as foreign judgments: Awards for a sum of money are enforced in accordance with the Debt Enforcement Act; awards other than for a sum of money are enforced pursuant to the cantonal civil procedural laws. The compatibility of the foreign award with the NYC is examined by the competent state court as a preliminary question.

24. *Which is the principle applied in order to distinguish between national awards and foreign awards?*

See *supra* paragraph 20.

25. *How can the same litigation between the same parties pending before a foreign judge affect internal arbitration proceedings?*

See *supra* paragraph 4.2.2.

26. *How can a pending foreign arbitration between the same parties, whose object is the same litigation, affect an internal arbitration proceedings?*

In the light of the Fomento decision of the Federal Court (see *supra* paragraph 4.2.2.), it may be expected that the requirements of article 9 PILS would also be applicable to a Swiss arbitral tribunal second seized when deciding upon possible jurisdictional conflicts with another arbitral tribunal constituted by the same parties. Yet the issue is still controversial. The following remarks should be made.

A jurisdictional conflict between two different arbitral tribunals will usually presuppose that the parties have concluded two different overlapping arbitration agreements contained in different contracts (*e. g*., in a "group of contracts" or in a main contract and a subsequent [implementing or settlement] agreement). It is of course possible that the objective scope of both arbitration agreements is sufficiently broad so as to cover in principle the same dispute. However, in such a situation, article 9 PILS will often not be applicable for at least two reasons:

First, the Swiss arbitral must examine the relationship between the two arbitration agreements under the Swiss *lex arbitri* (*i. e*. the law which is applicable to the arbitration agreement on which the Swiss arbitral tribunal may base its jurisdiction). In view of the case law of the Federal Court, the jurisdictional clause (arbitration agreement or forum selection clause) contained in the more recent agreement (*e. g*., a settlement agreement) presumably better reflects the current intention of the parties than the arbitration agreement included in the preceding (often: main) contract, at least to the extent that the parties have not indicated otherwise. Accordingly, any claims falling within the scope of the jurisdictional clause contained in the more recent agreement are in principle exclusively governed by the dispute resolution mechanism provided for in that agreement.

Second, the requirement of article 9 PILS according to which the subject-matter must be the same in both proceedings is met if the same relief is sought on the basis of the same facts. The relief sought is also identical if in the first proceeding the exact opposite of the second proceeding is sought. However, in the situation of parallel proceedings before two arbitral tribunals, it is very well possible that the alleged facts or cause of action are not exactly the same in the two proceedings. Consequently, the lis pendens rule would be inapplicable.