Answers To The Questionnaire Prepared By The Swiss Reporters.

Prof. Dr. Iur. Daniel Girsberger And Prof. Dr. Iur. Markus Müller-Chen*

PRELIMINARY REMARKS TO QUESTIONS 1-4

In view of the fact that certain questions of the questionnaire overlap (e.g. questions 3 and 4), and others are dependent on further questions (e.g. questions 11 and 12), the more general problems and issues related to questions 1 to 4 are addressed in these preliminary remarks.

Question 1 raises the issue of the definition of the term *«Uniform Law»* (question 1, last sentence). However, we are asked to describe this term from a national rather than an international perspective. We understand that the relationship between national and international law with regard to the term *«Uniform Law»* must be particularly addressed in question 3, where it is asked whether and to which extent *«Uniform Law»* is applied in a national jurisdiction in the context of contracts or torts by a court or arbitral tribunal having its seat in that jurisdiction.

Question 4, which points in the same direction, asks to which extent national courts or arbitral tribunals, having their seat in that country, accept *«Uniform Law»* as part of the applicable foreign law, or apply it for that purpose. Therefore, questions 3 and 4 have a common core, and will thus be addressed in these preliminary remarks (II).

In view of the aim of the Congress which relates exclusively to international law and commercial arbitration, we shall not address purely domestic situations (i.e. in which no relevant international element is involved), nor will we address particular contracts such as consumer contracts which are never or only very rarely subject to arbitration proceedings.

**General** issues summarized

We understand the two basic issues to be answered as follows:

Which possible elements of a *«Uniform Law»* concept may be applied by a national court within Switzerland, if any?

Is there a difference when, instead of a national court, an arbitral tribunal, with a seat in Switzerland decides?

* The reporters thank their scientific research assistants lic.rer.publ. HSG et M.A. HSG Law Rahel Egger and lic. iur. HSG Joachim Huber, RA for their valuable support in preparing this report.

Analysis

Applicability of «Uniform Law» by Swiss State Courts

Whenever, a national court must decide which law applies to a specific contract, it will first look at the choice of the parties (Art. 116 (1) of the Swiss Code on Private International Law, «CPIL»). Only where no such choice of law exists, a court will apply the law with which the contract has its closest connection (Art. 117 (1) CPIL).[1]

Choice of Law by the Parties

A choice of law in the strict sense (so called *«kollisionsrechtliche Verweisung»*) leads to the application of both non-mandatory rules (so called *«dispositive Bestimmungen»,* i.e. rules from which the parties may deviate by common consent), and mandatory rules of the chosen jurisdiction.[2]

Unlike Art. 117 CPIL (see Nr. 12 hereunder) Art. 116 (1) CPIL does not specify whether the parties may only choose a national law (state law) or whether they are also authorized to choose private rules of law (*«anationales Recht», «droit anational»*, i.e. rules of law that are not enacted by a state; hereafter referred to as «non-state rules») to govern their contract.[3] The Swiss Federal Court has very recently rendered a judgment in that context (Decisions of the Federal Court, Official Reporter [«DFC»] 132 III 285, the so called «FIFA-decision»), where it has explicitly limited a choice of law by the parties to state law. In particular, the court has stated the following (free translation):

According to the practice of the Swiss Federal Court, rules of private organizations cannot have the quality of legal rules, even where they are detailed such as for example the norms of the Swiss Engineers and Architects Association […], or the rules of conduct of the International Ski Association […]. Thus, rules created by private organizations are subordinated to state laws and can only be taken into consideration to the extent that applicable state law leaves room for an

---

1 See, e.g., MARC AMSTUTZ / NEDIM PETER VOGT / MARKUS WANG in: Honsell/Schnyder/Vogt/Berti (Eds.), Internationales Privatrecht, Basler Kommentar, 2nd ed., Basel 2007 [cited as *AUTHOR(S), BSK-IPRG*], Art. 116 N 1.

2 See DFC 132 III 285, cons. 1.1 (abstract of the said decision published under <http://www.unilex.info>, Country: Switzerland, Date: December 20, 2005); AMSTUTZ/VOGT/WANG, BSK-IPRG, Art. 116 N 11.

3 DFC 132 III 285, cons. 1.2.

«autonomous» rule (i.e. rules agreed upon by the parties) […]. Consequently, such rules do not form «law» as defined in Art. 116 (1) CPIL […].[4]

Where the parties have chosen non-state rules, therefore, such a choice cannot be qualified, according to Swiss precedent, as a choice of law in its strict sense (*«kollisionsrechtliche Verweisung»*), but only as a contractual incorporation of these rules which would bind the parties, only to the extent that they are not contrary to the mandatory provisions of the applicable domestic law (so called *«materiellrechtliche Verweisung»*).[5] Consequently, the choice of non-state rules is only possible to the extent that the applicable state law leaves room for an autonomous regime and, in any event, the mandatory norms of the applicable state law take precedence. [6]

However, the findings of the Swiss Federal Court have been criticized by various commentators such as Markus Müller-Chen, especially because the court did not distinguish various types of «non-state rules».[7] In particular, it is submitted that the UNIDROIT Principles of International Commercial Contracts should be accepted as «law» as defined in Art. 116 (1) CPIL, because the current wording of Art. 116 (1) CPIL does not absolutely exclude the choice of an international regime such as the UNIDROIT-Principles or the Principles of European Contract Law (PECL).[8] Further authors interpreted the FIFA decision in the sense that a party's choice of the *«lex mercatoria»* should be excluded, but not necessarily regarding the UNIDROIT Principles.[9] According to Schwander, *«[d]e lege lata [...]»,* the FIFA decision appears correct. [10] He proposes to change Art. 116 (1) CPIL in the nearest future to reflect the trend to also accept a choice of legal rules such as the UNIDROIT Principles or the PECL.[11]

Certain authors go even further by submitting that in general, legal regimes that have been established by internationally recognized organizations should qualify as the possible object of a

---

4 DFC 132 III 285, cons. 1.3.

5 DFC 132 III 285, cons. 1.1.

6 DFC 132 III 285, cons. 1.3 and 1.4.

7 MÜLLER-CHEN, Reglement der FIFA nicht Gegegenstand kollisionsrechtlicher Rechtswahl, SpuRt 4/2007 [cited as *MÜLLER-CHEN, SpuRt 4/2007*], 159 et seqq.

8 MÜLLER-CHEN, SpuRt 4/2007, p. 161.

9 AMSTUTZ/VOGT/WANG, BSK-IPRG, Art. 116 N 21.

10 IVO SCHWANDER, SZIER 2006, p. 346-350 [cited *as SCHWANDER*], p. 347.

11 SCHWANDER, p. 349.

party's choice of law, to the extent that they contain a coherent and detailed set of rules which is based on a sufficiently substantive content to address individual cases. [12]

Absence of a Specific Choice by the Parties

Art. 117 CPIL, which governs the issue of conflict of laws, less a specific choice of law by the parties, is explicit in that it does not allow any other approach than the application of a state law. Thus, whenever a choice of law by the parties is missing, the state courts must apply «the law of the state» with which the contract has the closest connection.

Conclusion

Although, from a Swiss point of view *«Uniform Law»* may also contain «non-state law» (*«anationales Recht», «droit anational»*),[13] the application of *«Uniform Law»* is excluded from Swiss state court proceedings by the CPIL insofar as it does *not* amount to state law. However, to the extent that *«Uniform Law»* contains rules that have been incorporated into national law (such as the CISG), these rules of *«Uniform Law»* may be applied to a contract (see questions 3 and 4 hereunder).

Application of *«Uniform Law»* by Arbitral Tribunals in Switzerland

Regarding arbitral tribunals having their seat in Switzerland, Art. 187 CPIL applies, according to which, a specific choice of law by the parties must be respected. Furthermore, the parties may authorize the tribunal to decide *«ex aequo et bono»* (Art. 187 (2) CPIL). In the absence of such choices by the parties, the arbitral tribunal shall decide the dispute «according to the rules of law with which the case has the closest connection» (free translation of Art. 187 (1) CPIL).

Specific Choice of the Parties

Unlike in proceedings in front of Swiss state courts, in arbitral proceedings, a specific choice of law, in its strict sense (*«kollisionsrechtliche Verweisung»,* cf. para. 0 above), is not limited to state law.[14] Parties are free to choose any kind of law including non-state law and all possible

---

[12] MÜLLER-CHEN, SpuRt 4/2007, p. 161, with further references; CHK-A. DOSS / ANTON K. SCHNYDER in: Amstutz et al. (Eds.), Handkommentar zum Schweizer Privatrecht, Schulthess 2007 [*cited as DOSS/SCHNYDER*], Art. 116 N 4, with further references.

[13] In this sense (in particular with regard to the *lex mercatoria*) see FELIX DASSER, Internationale Schiedsgerichtsbarkeit und lex mercatoria - Rechtsvergleichender Beitrag zur Diskussion über ein nicht-staatliches Handelsrecht, (Schweizerische Studien zum internationalen Recht, Vol. 59), Zürich 1989 [*cited as DASSER*], p. 63 et seqq., and similarly URSULA STEIN, Lex mercatoria – Realität und Theorie, Frankfurt (Main) 1995 [*cited as STEIN*], p. 3; less committed is PAUL-FRANK WIESE, Lex mercatoria – Materielles Recht und internationale Handelsschiedsgerichtsbarkeit, Studien zum vergleichenden und internationalen Recht, vol. 8, Frankfurt am Main 1990 [*cited as WIESE*], p. 5.

[14] PIERRE A. KARRER, in: BSK-IPRG, Art. 187 N 17.

rules of law enumerated in question 1. This allows the parties to stay outside the framework of most mandatory provisions of a state law.[15] Such a choice of law is only limited by the rules belonging to international public policy.[16]

Absence of a Specific Choice by the Parties

Art. 187 (1) CPIL is different from Art. 117 (applying to state courts) in that it does not explicitly refer to a «state law», but, according to the French wording *«règles de droit»,* only to «rules of law». This different wording is interpreted in a way that international arbitral tribunals in Switzerland are not limited to state law as the applicable law.[17] However, this interpretation of Art. 187 (1) CPIL does not allow more than a finding that no limitation to pure state law regimes was intended by the Swiss lawmakers.[18]

In addition, the question must be answered whether, and to what extent, the elements of the term *«Uniform Law»* as addressed in question 1, are to be considered as *«règles de droit»* in the sense of Art. 187 (1) CPIL.

This aspect has recently been extensively analyzed by Matthias Courvoisier in his doctoral thesis.[19] Courvoisier emphasizes the distinction between a decision *«ex aequo et bono»* and an «ordinary» arbitral award, and finds that an arbitrator who is not authorized to decide *«ex aequo et bono»*, may apply non-state rules merely to the extent that they are in conformity with the following criteria:[20]

The examined rules have to derive from a sufficiently coherent set of rules which must be sufficiently clear to apply them.[21]

They have to be adequate to be applied as «law»; i.e. they must have been already tested, in the sense that they have been applied and enforced as binding rules in the framework of a major social group.[22]

---

15 KARRER, BSK-IPRG, Art. 187 N 88.

16 KARRER, BSK-IPRG, Art. 187 N 88 and 204.

17 KARRER, BSK-IPRG, Art. 187 N 85.

18 MATTHIAS COURVOISIER, In der Sache anwendbares Recht vor internationalen Schiedsgerichten mit Sitz in der Schweiz – Art. 187 Abs. 1 IPRG, (Schweizer Studien zum internationalen Recht, vol. 125), Zürich 2005 [*cited as COURVOISIER*], p 191 et seq.; **similarly** KARRER, BSK-IPRG, Art. 187 N 85 (stating that the French language version prevails which clearly shows that the choice is not necessarily limited to state law regimes).

19 See footnote 18.

20 COURVOISIER, p. 197 et seq. and p. 212 et seq.

21 COURVOISIER, p. 212.

They have to take into account the principles of legal security and fairness in a sufficient manner.[23]

Among others, Courvoisier reaches the conclusion that in addition to state law[24] and international law,[25] the following types of «law» may qualify as *«règles de droit»* under Art. 187 (1) CPIL:

International conventions for the unification of international private law (such as the CISG),[26] as well as

instruments used by participants in international commerce and its organizations, as long as such instruments are acknowledged as binding, e.g.:[27]

model contracts and clauses;

trade usages;

trade customs.

However, the following rules *do not* fulfill all requirements developed by Courvoisier and therefore do not qualify as *«règles de droit»* under Art. 187 (1) CPIL:

the so called «lex mercatoria»,[28]

general principles of the law such as the ones listed by the Center for Transnational Law (CENTRAL, http://www.tldb.de),[29] as well as

rules of organizations that do not directly participants in international commerce (such as the UNIDROIT Principles or the PECL).[30]

The last of the above mentioned findings of Courvoisier is disputed in Swiss doctrine. In particular, certain authors state that the UNIDROIT Principles qualify as *«règles de droit»* in the

---

22 COURVOISIER, p. 209 and p. 213.

23 COURVOISIER, p. 213.

24 COURVOISIER, p. 224.

25 COURVOISIER, p. 289.

26 COURVOISIER, p. 291.

27 COURVOISIER, p. 301 et seq.

28 COURVOISIER, p. 285.

29 COURVOISIER, p. 297.

30 COURVOISIER, p. 313.

sense of Art. 187 (1) CPIL.[31] A decision by the Swiss Federal Court clarifying this question has not yet been rendered.

Conclusion

Parties in arbitral proceedings in Switzerland may choose all types of *«Uniform Law»* as the applicable law.[32] If such a choice of law is missing, the arbitral tribunal must apply the law with which the dispute has the closest connection (Art. 187 (1) CPIL). Contrary to a Swiss state court, an arbitral tribunal with its seat in Switzerland is not limited to apply state law. In addition to state law and international law, an arbitral tribunal may also apply *«Uniform Law»*. Such *«Uniform Law»* includes at least international conventions for the unification of international private law (e.g. the CISG) as well as trade usages and customs of participants in international business and its organizations (e.g. associations within a business sector) in international commerce.[33] Whether or not the UNIDROIT Principles can be applied (or other sets of legal rules which are neither established as international conventions nor created by organizations participating in international commerce), is disputed.[34]

ANSWERS TO THE INDIVIDUAL QUESTIONS

Answer to Question 1

From your national law perspective, would it be proper to include, within the notion of "Uniform Law", usages of the trade or "customs", general principles of law, general principles of contract law or of the law of obligations, transnational law, *lex mercatoria*, and general rules of procedure? Uniform Law below shall mean Uniform Law according to the meaning assigned to this expression in your reply to this question 1.

The answer to this question 1 can be found in the Preliminary Remarks (Sec. 0 to III above).

Answer to Question 2

To what extent has your country incorporated Uniform Law as national law through treaty ratification, other enactments or court decisions?

---

[31] ANTON HEINI, in: GIRSBERGER/HEINI et al. (Eds.), Zürcher Kommentar zum IPRG, 2nd ed., Zurich 2004 [*cited as HEINI, ZK-IPRG*], Art. 187 N 16a; MÜLLER-CHEN, SpuRt 4/2007, p. 161.

[32] See para. 0.

[33] See para. 0-0.

[34] See para 0.

Direct Incorporation of *«Uniform Law»* Trough Treaty Ratification

In Sec.III.B.2 above, international conventions for the unification of international private law have been qualified as *«Uniform Law»*. Such treaties are directly applicable in Switzerland as soon as they are ratified and have entered into force. Therefore, we can speak of a direct incorporation of *«Uniform Law»*.

Switzerland ratified among others the following treaties for the unification of both conflicts of law and private law rules (whether procedural or substantive):

Conflicts of laws, e.g. Convention on the Law Applicable to Trusts and on their Recognition (1985); entered into force in Switzerland on 1 July 2007.

Procedural law (regarding jurisdiction): Convention on jurisdiction and the enforcement of judgments in civil and commercial matters («Lugano Convention», 1988); entered into force in Switzerland on 1 January 1992.

Substantive law:

United Nations Convention on Contracts for the International Sale of Goods («CISG», 1980); entered into force in Switzerland on 1 March 1991.

Convention providing a Uniform Law for Bills of Exchange and Promissory Notes (1930); entered into force in Switzerland on 1 July 1937.

It must be noted that the above mentioned Lugano Convention of 1988 has been ratified by most member states of the European Union («EU») and three of the four member states of the European Free Trade Association («EFTA»), including Switzerland.[35] The Lugano Convention was designed as a parallel convention to the «Brussels Convention»[36] in order to enable the free movement of judgments among the member states of both organizations, since the Brussels Convention was only open for EU member states.[37] On 1 March 2002, the Brussels Convention

[35] States participating to the Lugano Convention are the EU member states Austria, Belgium, Denmark, Finland, France, Germany, Gibraltar (British overseas territory), Greece, Ireland, Italy, Luxembourg, Poland, Portugal, Sweden, Spain, The Netherlands and the United Kingdom as well as the EFTA member states Iceland, Norway and Switzerland.

[36] Brussels Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters of 27 September 1986.

[37] ULRICH MAGNUS, Introduction, in: Magnus/Mankowski (Eds.), Brussels I Regulation, 2007 [*cited as MAGNUS*], N 21 on p. 15.

was replaced by the so called «Brussels I Regulation»[38]. The Lugano Convention is likely to be replaced soon, in 2010, with a revised Lugano Convention ("Lugano Convention II").

Since the Lugano Convention was designed as a parallel convention to the Brussels Convention, one had to make sure that it would also be interpreted in parallel with the Brussels Convention. Therefore, «Protocol 2» to the Lugano Convention states as follows:

«The courts of each Contracting State shall, when applying and interpreting the provisions of the Convention, give due account to the principles laid down by any relevant decision delivered by courts of the other Contracting States concerning provisions of this Convention.»[39]

As a consequence, Swiss courts do not only have to take into account the relevant decisions delivered by the courts of the other contracting states, but also and particularly, the decisions of the Court of Justice of the European Communities («ICJ»), which is also the court of last resort with regard to the «Brussels I Regulation».

Indirect Incorporation of «Uniform Law»

Swiss courts use the comparative law method not only in cases where they are obliged to so (see para. 0 above). Rather, it is a well established method in the interpretation of private law in general.[40] The same is true for the legislation process. Therefore, *«Uniform Law»* does not have to be directly incorporated in Switzerland to have an impact on the Swiss law system. It may also be indirectly incorporated by enacting new legislation based on or influenced by *«Uniform Law»* or by applying comparative law methods in case law.

The unification process of private law within the European Union has especially had a substantial influence on Swiss legislation. Although Switzerland is not a member of the European Union and therefore is not obliged to implement any directives of the European Union, Switzerland has deliberately adopted substantial parts of EU law (so called *«autonomer*

---

[38] Council Regulation (EC) No. 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters; Official Journal No L 012, 16/01/2001, p. 1-23.

[39] Art. 1 Protocol N° 2 on the uniform interpretation of the [Lugano] Convention; the English text can be found under the URL < http://curia.europa.eu/common/recdoc/convention/en/c-textes/_lug-textes.htm>.

[40] HANS PETER WALTER, Das rechtsvergleichende Element – Zur Auslegung vereinheitlichten, harmonisierten und rezipierten Rechts, in: Zeitschrift für Schweizerisches Recht (ZSR) 2007 I, p. 259-277 [*cited as WALTER, ZSR 2007 I*], p. 262.

*Nachvollzug»*), especially in the fields of contract law, company law, intellectual property rights, competition law, tax law and immigration law.[41]

Furthermore, in cases where the Swiss legislator has deliberately adopted unified European private law, the Swiss Federal Court has not hesitated to refer to the Court of Justice of the European Communities in its decisions. As a result, the Swiss Federal Court has applied the same method as the one stated in Protocol 2 of the Lugano Convention (see para. 0 above), although there is no international obligation to do so. The Swiss Federal Court has argued that if Switzerland adapts rules made by the EU to unify private law, such law should be interpreted in conformity with EU law, although it has not been unified in a treaty.[42]

In some cases however, the Swiss legislator did not follow the EU directives completely when implementing them but found that certain aspects should be treated differently in Switzerland. In such cases, the Swiss Federal Court would not try to interpret such provisions in conformity with the EU law.[43]

Answer to Question 3

To what extent should your national law be considered as including Uniform Law when designated as proper law of the contract? The law governing the tort? When your country is designated as place (seat) of the arbitration?

The extent to which Swiss law includes *«Uniform Law»* has been explained in the answer to question 2 above (see para. 0 et seqq.). When Switzerland is designated as place of arbitration, it depends on the parties' choice of law or, if such a choice is missing, on the arbitral tribunal's findings regarding the applicable law, the extent to which *«Uniform Law»* governs the dispute; see hereto Sec. III.B above, 0 et seqq..

Answer to Question 4

To what extent will legal notions in your country applicable in the process of deciding a dispute by courts or arbitrators (including public policy and international mandatory rules or *lois de police* (national or foreign)) accept Uniform Law incorporated in the foreign law (substantive or

---

[41] ANDREAS FURRER / DANIEL GIRSBERGER / KURT SIEHR, Internationales Privatrecht, Allgemeine Lehren, Basel 2008 [*cited as FURRER/GIRSBERGER/SIEHR*], N 177 on p. 60 et seq. with examples of Swiss legislation based on EU directives.

[42] See DFC 129 III 335 cons. 6; WALTER, ZSR 2007 I, p. 269 et seq. with further references.

[43] WALTER, ZSR 2007 I, p. 270.

procedural) applicable, as the case may be, to the contract giving rise to the dispute/at the foreign arbitral place or seat?

State Courts in Switzerland

As explained in Sec. III.A above (para. 0 et seqq.), even in cases of a choice of law by the parties, Swiss state courts will only apply state law. Therefore, *«Uniform Law»* can only be applied, if it is duly incorporated within applicable state law.

Art. 13 CPIL states that the reference to a foreign law includes all provisions applicable to the facts of the case under that law. Thus, if a Swiss court has to apply foreign law, it must apply this law in the same way as a court in that country would do.[44] As soon as the applicable foreign law has, by whatever means, incorporated *«Uniform Law»,* Swiss courts will apply this *«Uniform Law»* according to Art. 13 CPIL.

However, according to Art. 17 CPIL, the application of provisions of foreign law,regardless of whether such provisions qualify as *«Uniform Law»* or not, is limited by Swiss public policy (*«ordre public»*).

Arbitral Tribunals with seat in Switzerland

With regard to arbitral proceedings in Switzerland, see Sec. III.B above (para. 0 et seqq.).

Answer to Question 5

To what extent are arbitral awards officially published or informally disseminated in business and legal circles in your country? To what extent are arbitral awards informally disseminated in business and legal circles?

Swiss arbitral awards are not officially published. Only if an arbitral award is challenged before the Federal Supreme Court can it be officially published within the court's decision. The arbitral award itself, however, is not officially published.

Arbitration procedures are usually confidential. An arbitral award shall usually not be published without the consent of the parties. In the appeal procedure, confidentiality might conflict with public interests. However, the interest in confidential treatment has to be seriously considered.[45]

---

44 MONICA MÄCHLER-ERNE / SUSANNE WOLF-METTIER, in: BSK IPRG, Art. 13 N 7.

45 DFC 4P.74/2006 cons. 8.

In practice, many awards are accessible in business and legal circles because the parties themselves or the arbitrators publish them with the consent of the parties.

An important unofficial source of arbitral awards is the Bulletin of the Swiss Arbitration Association, the ASA bulletin (*Association Suisse de l'Arbitrage*). The Bulletin is published quarterly and contains up-to-the-minute information on arbitration matters, including arbitral awards.[46]

Is your country a stare decisis country? If so, to which extent stare decisis applies to arbitral determinations/awards?

No, Switzerland is not a *stare decisis* country. Swiss courts are not formally bound to precedents. They are only bound to existing rules. However, Art. 1 (2) CC gives guidance to courts on how to proceed if there is no written legal rule to apply. In the absence of a rule the court decides in accordance with customary law and, in the absence of customary law, it is up to the court to set a rule that is adequate to decide on a plurality of unforseen cases. Art. 1 (2) CC uses the following concise wording:

«[…] in the absence of customary law, it [the court] decides in accordance with the rule which it would make as legislator.»

By developing such a rule, the court must follow established doctrine and case law (Art. 1 (3) CC). Although Swiss courts are not formally bound to precedent, they have to follow continuous practice, namely the one of the highest courts. With regard to legal certainty, modifications of the court's practice should only be made if there are serious and objective reasons to do so.

Furthermore, it is generally acknowledged that international arbitration has a specific character (principle of specificity of international arbitration). The specificity of international arbitration requires that the arbitration tribunal is not bound to former decisions by the courts or by other arbitration tribunals. There is no precedent and the arbitration tribunal is only responsible to the concerned parties.

To what extent is issue preclusion or collateral estoppel (if accepted in your legal system) applicable in arbitration (from court of law to arbitral tribunal and vice versa / between arbitral tribunals)?

---

[46] See <http://www.arbitration-ch.org/publications/bulletins.php> (visited 24th April 2008).

Issue preclusion and collateral estoppel are unknown. However, the federal principle of *res iudicata* has some similarities. In the following paragraphs, the concept of *res iudicata* in Switzerland and its applicability between courts and arbitral tribunals and vice versa as well as between arbitral tribunals, are discussed.

The concept of res iudicata applied by Swiss courts and arbitral tribunals

According to Swiss law, *res iudicata* covers conclusive (positive) and preclusive (negative) effects of arbitral awards and judgements. Regarding conclusive effects, *res iudicata* may be invoked by a claimant in further proceedings to develop his case. As to preclusive effects, *res iudicata* works as a defensive instrument to stop relitigation of a subject matter, which has been decided on in a previous arbitral award or judgement.

In Switzerland, as a rule, *res iudicata* effects of international arbitral awards and *res iudicata* effects of judgements of state courts are treated equally.

Four cumulative conditions for *res iudicata* can be identified: First, the prior award/judgment must be final, binding and capable of recognition; second, identity of the subject matter; third, identity of the cause of action and fourth, identity of the parties.[47]

*Res iudicata applies not only to claims but also to counterclaims.*

*Res iudicata* only covers the part of the claim that was entered into in legal proceedingss.[48] It does not apply to claims that have not been raised so far.[49] In addition, a second claim with the same cause of action can be asserted if new and serious facts can be introduced.

*Res iudicata* only applies to the litigants, whereas it is irrelevant if the litigants' roles have changed. However, arbitral awards and judgments which shape rights and liabilities with general effects (*erga omnes*) have also *res iudicata* effects towards third parties.[50] In such exceptional cases, a third party may invoke *res iudicata* in a subsequent proceeding for its benefit against a party to prior proceedings.

In principle, courts and arbitral tribunals in Switzerland endorse a restrictive notion of *res iudicata* under which the implications of *res iudicata* are to be read from the dispositive part of a

---

47 See also VOGEL/SPÜHLER, N 67 et seqq.; Art. 57 (2) e of the Draft of the Federal Council of Switzerland on the Federal Law on Civil Procedures of 28th June 2006.

48 BERNHARD BERGER / FRANZ KELLERHALS, Internationale und interne Schiedsgerichtsbarkeit in der Schweiz, Berne 2006, N 1509; GEORG LEUCH / OMAR MARBACH / FRANZ KELLERHALS / MARTIN STERCHI, Die Zivilprozessordnung für den Kanton Bern, 5. ed., Berne 2000, Art. 192 N 12c bb.

49 DFC 128 III 191 cons. 4a.

50 BERGER/KELLERHALS, N 1507.

judgement or an award and not from the underlying considerations. However, in practice, the reasoning has to be considered in order to interpret the dispositive part of a judgment or an arbitral award.[51]

Applicability between courts and arbitral tribunals and vice versa as well as between arbitral tribunals

Legal effects of *res iudicata* have to be fully respected if an arbitral tribunal domiciled in Switzerland is invoked in litigation, concerning the same subject matter, the same cause of action and the same parties, which was already decided by a *Swiss* court.[52] If the judgement is rendered by a *foreign* court the binding effect of *res iudicata* depends on its recognition in Switzerland. In such a case it can be controversial if the foreign court has, in spite of appropriate defences, disregarded a valid arbitration agreement that asks for appointment of an arbitral tribunal in Switzerland. According to the practice of the Swiss Federal Court, the arbitral tribunal has to deal with this preliminary question within Arts. 25/26 CPIL and take into consideration Art. II (3) NYC (New York Convention of 10th June 1958 on the Recognition and Enforcement of Foreign Arbitral Awards, SR 0.277.12).[53]

In opposing circumstances, *res iudicata* has binding effects as well. If a Swiss court is given a complaint that has been decided by an arbitral tribunal domiciled in Switzerland, the court has to refuse relitigation in a case between the same parties, concerning the same subject matter and the same cause of action. Only if arbitrability was challenged, the court does not have to consider *res iudicata*,[54] because *res iudicata* of a foreign arbitral award (arbitral tribunal is located in another state) depends on the recognition of the award according to the NYC. Recognition is particularly denied if there is a lack of arbitrability (Art. V (2) a NYC).[55]

There is a binding effect of *res iudicata* between different arbitral tribunals located in Switzerland. Concerning the binding effect of *res iudicata* in the case of starting proceedings at an arbitral tribunal in Switzerland given a prior foreign arbitral award, please see the

---

51 DFC 128 III 191 cons. 4a; 121 III 474 cons. 4a; VOGEL/SPÜHLER, N 71 et seqq.

52 DFC 127 III 279 cons. 2c.bb; BERGER/KELLERHALS, N 1512.

53 DFC 124 III 83 cons. 5b; dissenting opinion: MANUEL LIATOWITSCH, Schweizer Schiedsgerichte und Parallelverfahren vor Staatsgerichten im In- und Ausland, Diss. Basle 2002, p. 76-83 who asks with good reasons for an analogue application of article 7 in connection with article 176 et seqq. CPIL. In the context of Arts. 27/28 of the Convention of 16th September 1988 on Jurisdiction and the Enforcement of Judgements in Civil and Commercial Matters (Lugano Convention, SR 0.275.11) a re-examination of arbitrability should be open in such a case (LIATOWITSCH, p. 85-94).

54 LIATOWITSCH, p. 70, 74.

55 BERGER/KELLERHALS, N 1511.

considerations for the case of legal action at a Swiss court given prior judgment of a foreign court (see para. 0).

*Answer to Question 6*

To what extent are national laws and state courts in your country "arbitration friendly"?

There is an interest in promoting Switzerland as a good place for international arbitration. The following arguments shall illustrate how far Swiss laws and state courts are arbitration friendly:

In general, it can be acknowledged that the *Swiss legal system* provides confidence with clear, balanced and liberal laws. Parties might therefore choose the Swiss law as applicable law.

*With Arts. 176 to 194 CPIL Switzerland has a modern Arbitration Act:*

The scope of the claims that can be submitted to arbitration is very broad. According to Art. 177 (1) CPIL, all pecuniary claims may be submitted to arbitration. According to the wide interpretation of the notion of «pecuniary claim» by the Federal Supreme Court it is crucial that the claim is motivated by financial interests.[56]

Parties have a lot of room to maneuver in how they wish to design the arbitration procedure. The parties may directly, or by reference to rules of arbitration, regulate the arbitral procedure. They may also subject the procedure to a procedural law of their choice (Art. 182 (1) CPIL). If the parties have not regulated the procedure, it shall be fixed, as necessary, by the arbitral tribunal either directly, or by reference to a law or rules of arbitration (Art. 182 (2) CPIL). Irrespective of the procedure chosen, the arbitral tribunal shall accord equal treatment to the parties and their right to be heard in an adversarial proceeding (Art. 182 (3) CPIL). Apart from these two fundamental principles, local courts only break into the autonomy if they are asked to do so by the arbitral tribunal or a party.

The arbitral tribunal rules on its own jurisdiction (Art. 186 (1) CPIL). It shall rule on its jurisdiction irrespective of any legal action already pending before a state court or another arbitral tribunal relation, unless noteworthy grounds require a suspension of the proceedings (Art. 186 ($1^{bis}$) CPIL).

Local courts only intervene if necessary:

[56] DFC 118 II 353 cons. 3a/b; 1P.113/2000 cons. 1b; BERGER/KELLERHALS, N 196.

In the absence of an agreement, the judge at the seat of the arbitral tribunal shall appoint, remove or replace arbitrators in accordance with the provisions of cantonal law or by analogy (Art. 179 CPIL).

Support by local courts might be necessary in the procedure of taking evidence or of taking provisional or protective measures:

The arbitral tribunal shall take evidence. If the assistance of the judicial or administrative authorities of the state is needed to take evidence, the arbitral tribunal or, with the consent of the arbitral tribunal, a party may request the assistance of the judge at the seat of the arbitral tribunal who shall apply his own law.

Concerning provisional and protective measures the arbitral tribunal may request the assistance of the judge with jurisdiction who shall apply his own law (Art. 183 (2) CPIL).

If further assistance of the judicial or administrative authorities is required (Art. 185 CPIL).

Does your answer change depending on whether a state party or a state interest are directly involved in or affected by the resolution of the dispute or the contract may be labeled as "a public" or as an "administrative" contract under your legal system?

No, disputes with or without a state party or state interest are treated equally from the perspective of arbitration friendliness.

Of course there can only be a valid arbitral award with a state party if the rights at stake can be decided on by an arbitral tribunal. An arbitral tribunal with its domicile in Switzerland decides on arbitrability by using Art. 177 (1) CPIL which states that all pecuniary claims can be submitted to arbitration (see para. 0).

Arbitrators are the judges of their own jurisdiction. However, this so-called "competence-competence" may be overruled by a judgment in response to a jurisdiction complaint. When assessing the arbitrability the arbitral tribunal has to follow the compulsory rules of the applicable *lex arbitri*. The jurisdiction complaint cannot be renounced effectively (Art. 192 (1) CPIL). Even a party who is neither domiciled nor habitually resides in Switzerland can renounce it.

Art. 177 (2) CPIL explicitly requires equal treatment with state parties (i.e. a state or an enterprise or organization dominated or controlled by a state). It states that if one party to an

arbitration agreement is a state, or an enterprise dominated by or an organization controlled by a state authority, it may not invoke its own law to contest the arbitrability of a dispute, or its capacity to be subject to arbitration.

*Whether the arbitration is "international or domestic"?*

International and domestic arbitration are governed by different rules. They are treated separately because of their different nature. The claim of the specificity of international arbitration recommends a separate ruling. The autonomy of the parties and the tribunal is smaller in domestic arbitration. The Arbitration Act (Arts. 176-194 CPIL) deals only with international arbitration. Domestic arbitration is governed by the intercantonal concordat on arbitration (*«Konkordat über die Schiedsgerichtsbarkeit»*) of 27th March 1969. The concordat will be replaced by the Federal Code of Civil Procedure, which is likely to come into effect in 2010.

*Whether its seat/place is within/outside your country?*

The Arbitration Act (Arts. 176-194 CPIL) only applies if the seat of the arbitral tribunal is in Switzerland and if at least one of the parties was neither domiciled nor habitually resident in Switzerland at the time the arbitration agreement was concluded (Art. 176 (1) CPIL).

*Answer to Question 7*

To what extent are arbitral awards subject to control on the merits (including from the outlook of private international law or choice-of-law methodologies, rules or principles applicable or accepted in your country) or in respect of procedural notions or matters (e.g., due process) when rendered in your country or (if rendered abroad) when brought for enforcement/recognition in your country?

The award is rendered in Switzerland

The award is final when communicated. According to Art. 190 (2) CPIL it can be *challenged only*:

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

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

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

If equal treatment of the parties, or their right to be heard in an adversarial proceeding, was not respected;

*If the award is incompatible with the public policy.*

The award can be challenged based on Art. 190 (2) b CPIL; if the claim is not of pecuniary nature (Art. 177 (1) CPIL); if the arbitration agreement is invalid (Art. 178 CPIL), or if the scope of the arbitration agreement agreed on by the parties was not respected.[57] The objection to a lack of jurisdiction must be raised prior to any defense on the merits (Art. 186 (2) CPIL).

According to the new Art. 186 ($1^{bis}$) CPIL, the award cannot be challenged anymore on the grounds of a pending legal action. The jurisdiction of the arbitration tribunal exists, irrespective of any legal action already pending before a state court, or another arbitral tribunal relating to the same object between the same parties, unless important grounds require a suspension of the proceedings.

An award might be challenged if the tribunal ruled quantitatively or qualitatively (*ultra or extra petita)* beyond matters of the claim.[58] So-called catch all clauses are delicate because they are considered to be in breach of the ban of *ultra petita* rulings.[59] However, the Federal Supreme Court dismissed such a complaint in the «*Methania*» case.[60]

The core principles of the equal treatment of the parties and their right to be heard in an adversarial proceeding are considered as formal in nature by the Federal Supreme Court.[61] Therefore, if equal treatment of the parties or their right to be heard in an adversarial proceeding was not respected, the decision has to be overruled without demanding causality between the breach of these core principles and the implications on the material result.

A party who was a victim of unequal treatment, or whose right to be heard was infringed, has to claim it immediately during the arbitration. Otherwise these claims cannot be brought forward on appeal.

The award can also be challenged if it is incompatible with public policy. Incompatibility with public policy can be substantial or procedural.[62] Examples of substantial public policy are the

---

57 DFC 4P.298/2005 cons. 2.2.
58 E.g. DFC 4P.54/2006 cons. 2.1; 4P.260/2000 cons. 5c; 120 II 172 cons. 3a; 116 II 639 cons. 3.
59 BERGER/KELLERHALS, N 1097.
60 DFC 4P.114/2001.
61 DFC 127 III 576 cons. 2d; 121 III 331 cons. 3c; 4P.48/2005 cons. 3.4.2.2; in disagreement: BERGER/KELLERHALS, N 1592.
62 E.g. DFC 128 III 191 cons. 4a.

principles of *pacta sunt servanda*, good faith, prohibition of abuse of legal right (inclusively *venire contra factum proprium*) and the protection of persons who have no sufficient ability to act and judge.[63] Examples of the procedural public policy are the principle of fair and due procedure[64], independency and impartiality of referees[65], and the prohibition of an inwardly conflicting award[66].

Art. 190 (2) e CPIL, according to the Federal Supreme Court, supports an international public policy[67]. The interpretation of the Federal Supreme Court of public policy reflects the specific nature of international arbitration. However, it concluded in DFC 120 II 155 cons. 6a with the remark that Swiss and international public policy are unlikely to differ in practice and therefore asked for a pragmatic approach. In literature, the subject is controversial with the majority opinion in favor of an international public policy. However, a minority opinion supports an exclusive Swiss public policy.[68] A practically relevant consequence of the decision in favor of a Swiss or international public policy can be found in punitive damages, for example. They might be in breach of the Swiss public policy whereas they may not be in breach of international public policy.

The notion of public policy is different from the ban of arbitrariness.[69] In order to judge if an award is compatible with the public policy or not, one has to look solely at the result of the decision. The reasoning is not relevant. Therefore the judgment always depends on the individual case.[70]

An *interlocutory award* may only be challenged on the grounds stated in Art. 190 (2) a/b CPIL. The time limit for lodging an appeal begins when the interlocutory award is communicated (Art. 190 (3) CPIL).

An appeal can be taken *only to the Federal Supreme Court*. The procedure shall be subject to Art. 77 of the Law on the Federal Supreme Court of 17th June 2005 (LFSC; *Bundesgesetz über das Bundesgericht,* BGG, SR 173.110; Art. 191 CPIL). An appeal against the award has to be handed in within 30 days of the communication of the award (Art. 100 (1) LFSC). The appeal

63 DFC 120 II 155 cons. 6a; see also CHK-SCHRAMM/FURRER/GIRSBERGER, IPRG 190-192, N 14; BERGER/KELLERHALS, N 1597 et seqq.
64 DFC 4P.143/2001 cons. 3a/aa.
65 DFC 126 III 249 cons. 3c.
66 DFC 4P.99/2000 cons. 3b/aa.
67 DFC 120 II 155 cons. 6.
68 E.g. LALIVE/POUDRET/REYMOND, CPIL 190 N 5e.
69 DFC 132 III 389 cons. 2.2.2.
70 DFC 4P.48/2005 cons. 3.4.2.1; 120 II 155 cons. 6a; 116 II 634 cons. 4.

has to be formulated precisely and substantially (*«Rügeprinzip»*; Art. 77 (3) LFSC). The appeal has only suspensive effects if there is a ruling accordingly (Arts. 77 (2); 103 (1/3) LFSC).

A *waiver of appeal* can be concluded if neither party has a domicile, a place of habitual residency, or a place of business in Switzerland (Art. 192 (1) CPIL). The waiver can take the form of an express declaration in the arbitration agreement or in a subsequent written agreement. The appeal may also be excluded on one or several of the grounds set out in Art. 190 (2) CPIL. If the parties have excluded all appeals against the award, and enforcement of the awards is sought in Switzerland, the NYC is applicable by analogy (Art. 192 (2) CPIL).

The NYC applies to the recognition and enforcement of arbitral awards made outside the territory of Switzerland. According to Art. V NYC recognition and enforcement of the award may be refused, at the request of the party against whom it is invoked. Art. V (1) a-e NYC enumerate reasons of refusal of recognition and enforcement. It can be observed that the cases in which a Swiss award can be challenged (Art. 190 (2) CPIL) are largely the same as in Art. V (1) a-e NYC.[71] The analogous application of Art. V NYC in the case of a comprehensive waiver of appeal, therefore differs not much from the legal situation without waiver if recognition and enforcement is sought in Switzerland. A difference lies in the interpretation of public policy in Art. 190 (2) e and Art. V (2) b NYC. In Art. 190 (2) e CPIL an international public policy is meant, whereas Art. V (2) b NYC is concerned with the Swiss public policy. Furthermore, the CPIL is more liberal than the NYC in respect of the scope of arbitrability, as well as the applicable law concerning the validity of the arbitration agreement.[72]

*The award is rendered abroad for enforcement/recognition in Switzerland*

Switzerland is a member of the NYC and has made no reservation of reciprocity. Therefore, the convention is applicable to all foreign awards, as long as there is no other international treaty concerned. The reference in Art. 194 CPIL to the recognition and enforcement of foreign awards to the NYC only has declaratory character in relation to the commitments with the NYC. With Art. 194 CPIL, a party cannot call for domestic national or cantonal law.[73]

[71] BERGER/KELLERHALS, N 1543.
[72] BERGER/KELLERHALS, N 1689.
[73] BERGER/KELLERHALS, N 1929.

The legal situation in the case where the award is rendered abroad for recognition/ enforcement in Switzerland, is analogous to the case where the award is rendered in Switzerland and there is a comprehensive waiver of appeal. Therefore, it can be referred to the above-mentioned.

*Answer to Question 8*

Which is the notion of and role played by public policy in the recognition or enforcement of arbitral awards rendered abroad?

According to Art. V (2) b NYC, recognition and enforcement of the award may be refused if the Swiss authority finds that the recognition or enforcement of the award would be contrary to the *Swiss* public policy. The authority has to verify compatibility with the Swiss public policy *ex officio*. However, the initiative to verify the public policy has to come from the party against whom the award is invoked.

The reservation of Swiss public policy in the recognition and enforcement of foreign arbitral awards has to be interpreted in a strict sense, more strict than in Art. 17 CPIL (governing decisions of state authorities).[74] Other than Art. 190 (2) e CPIL, Art. V (2) b NYC deals with the Swiss public policy and not an international one (see answer to question 7).

Incompatibility with the public policy under Art. V (2) b NYC can only be approved if the enforcement of a foreign award hurts the Swiss understanding of justice in a manner that is *not tolerable* (*«l'exécution d'une décision étrangère heurte de manière intolérable les conceptions Suisse de la justice»*)[75]. Also, public policy under Art. V (2) b NYC can be substantial or procedural.[76] As far as the procedural public policy is concerned, Art. V (2) NYC is subsidiary to Art. V (2) NYC.[77] All kinds of infringements of the parties rights to be heard in an arbitration proceeding have to be dealt with under Art. V (1) b NYC. As such, they are not examined *ex officio*, but have to be brought forward in a well-founded claim.[78] An example of a grave infringement against the public policy under Art. V (2) b NYC, is a lack of parity in the composition of the arbitral tribunal.[79] A waiver of appeal or a missing accession to an appellate court in the country of the arbitral seat is not considered to constitute a breach of public policy.[80]

---

74 DFC 4P.173/2003 cons. 4.1.
75 DFC 4P.173/2003 cons. 4.1; 101 Ia 521 cons. 4a
76 DFC 93 I 265 cons. 4a; 101 Ia 154 cons. 3; 101 Ia 521 cons. 4a.
77 DFC of 8th February 1978, SJ 1980, 65 cons. 2b.
78 BERGER/KELLERHALS, N 1922.
79 DFC 84 I 46 cons. 5-6.
80 Decision of the appellate court of the city of Basle of 5th November 2003 cons. 3c, ASA Bull. 2006, 125-127.

Missing reasons in the decision are not conflicting with the Swiss public policy either.[81] However, enforcement can be refused for a claim out of game or bet duties (Art. 513 CO).[82] Moreover, decisions with punitive damages are conflicting with the Swiss public policy according to a major opinion.[83]

The mere recognition of an award can be obtained in Switzerland without a specific procedure, but incidentally. However, it is rare that a party demands only recognition. Recognition is sometimes asked in a preliminary question in accordance with Art. 29 (3) CPIL.[84]

*Of lack of arbitrability?*

According to Art. V (2) a NYC, recognition and enforcement of an award can be refused if the Swiss authority discovers that, according to the Swiss *lex fori,* the subject matter cannot be dealt with before an arbitrary tribunal. In connection with recognition and enforcement, arbitrability is only to be examined within the boundaries of Swiss public policy. In other words, Art. V (2) b NYC has no stand-alone relevancy.

The authority has only to verify if the result of the award is incompatible with Swiss public policy in respect ofarbitrability. The judgment of arbitrability under Art. V (2) b NYC is not the same as in Art. 177 (1) CPIL. Arbitrability under Art. 177 (1) CPIL is not connected to public policy and stands on its own. Therefore it might happen that even if arbitrability under Art. 177 (1) CPIL is not fulfilled, it might be under Art. V (2) b NYC. In practice, a lack of arbitrability under Art. V (2) b NYC does not seem to play a role. So far, no case has been brought before the Federal Supreme Court.[85]

International mandatory rules or *lois de police* (national or foreign)?

They do not play an important role in the recognition and enforcement of foreign awards.

To what extent do any of these reservations/notions serve the purpose of advancing primarily local or domestic notions regarding both substantive law and procedural law matters?

Switzerland is not pursuing local or domestic notions, neither for substantive nor procedural law matters.

---

81 DFC 101 Ia 521 cons. 4.
82 Obiter DFC 61 I 271 cons. 2.
83 See for citations in BERGER/KELLERHALS, N 1924.
84 BERGER/KELLERHALS, N 1935.
85 BERGER/KELLERHALS, N 1917.

*Answer to Question 9*

Bearing in mind your answers to questions 3-8 above, to what extent do arbitral awards or determinations influence, or may be considered as possibly influencing state court decisions or legislative change in your country? To what extent do courts of law in your country defer to determinations made by local or international arbitral institutions in charge of administering arbitrations? If no experience at hand, what would be the prospective answer to these questions? Please differentiate the areas of the law in which this influence exists or may potentially exist in the future.

Arbitral Awards are not considered to have a direct influence on state court decisions, because they are not directly addressed by Art. 1 (3) of the Civil Code *("*established doctrine and case law" - *«bewährte Lehre und Überlieferung»*).

However, there are several forms of indirect influence:

Through appellate decisions (which are published) of the Federal Supreme Court when such issues are analyzed on the basis of judgments based on Art. 190 CPIL (now in connection with Art. 77 (1)BGG). For example, regarding the right to be heard or international public policy – see answers to questions 7 and 8 above);

Through legal commentary and further doctrine regarding the relevance of Uniform Law incorporated in Swiss law in general (in the sense of common principles applying to both state court and arbitration proceedings, see answers 1.-2. above)

Through participation of academics and practitioners in the creation of Uniform Law (such as INCOTERMS or the like).

So far, very few published decisions of the Swiss courts of law appear to have deferred to decisions rendered by arbitral tribunals. We would not be surprised if this changes in the future.

*Answer to Question 10*

Bearing in mind your answers to questions 1-9 above, to what extent do arbitral awards rendered in your country, enforced or enforceable in your country or concerning nationals of or residents in your country apply or may be deemed as based on Uniform Law? If no experience at hand, what would be your prospective answer to this question?

More and more, and in line with a general trend in international arbitral practice, Swiss arbitral tribunals have based their decisions on *«Uniform Law»* whenever it is deemed to have been chosen by the parties, and even more so in a gap-filling function when the chosen (or otherwise applicable) law does not or does not clearly address an issue which is international in nature.

For example, the authors have personal knowledge of arbitral awards – in which Swiss substantive law was the applicable law, where a particular provision of the UNIDROIT Principles was used to decide an issue which was international in nature, but not (or not clearly enough) addressed by Swiss statutory law or court practice.

However, as explained in Sec. III.B.2 above and in particular in para. 0, it is disputed in Swiss doctrine, whether an arbitral tribunal with its seat in Switzerland is allowed to apply legal rules such as the UNIDROIT Principles or the PECL when the parties have not chosen such rules nor have authorized the tribunal to decide *«ex aequo et bono»*.

*Answer to Question 11*

Bearing in mind your answers to questions 1-10 above, what has been the impact of arbitral awards and determinations in introducing, firming up or applying Uniform Law, including through legislative change or the action of the courts, in your country? Of foreign court decisions regarding arbitral awards or determinations referring to or based on Uniform Law? If no experience at hand, what would be the prospective answers to these questions?

To answer this question, one must distinguish between the influence on (1) state courts (2) arbitral tribunals and (3) legislation.

*State courts*

According to Art. 13 CPIL, State courts must apply foreign law as a whole, such as including those (uniform and non-uniform) rules held to be incorporated by competent courts of the state whose law is applied (see para. 34 above).

*Arbitral Tribunals*

While Art. 13 CPIL is not applicable to arbitral tribunals, similar considerations apply nevertheless. Art. 187 CPIL, however, gives the arbitrator(s) even more authority to apply *«Uniform Law»* when the international character of the dispute mandates its consideration (see Sec. III.B above, para. 0).

*Legislator*

On several occasions, *«Uniform Law»* has influenced the Swiss legislature to introduce new legislation which takes its rules into account. One key example is the autonomous implementation of unified EU private law (see para. 97 below).

*Answer to Question 12*

Bearing in mind your answers to questions 1-9 above, what has been the impact on the fashioning of your national legislation on arbitration – domestic or international – or on arbitral awards rendered in your country or concerning nationals of or residents in your country of: (a) the action and rules of international arbitral institutions (e.g. the International Court of Arbitration of the International Chamber of Commerce (ICC), the American Arbitration Association (AAA) and its International Centre for Dispute Resolution (ICDR), the London Court of International Arbitration (LCIA)); (b) the works of international organizations (e.g., UNCITRAL, UNIDROIT, the European Union, NAFTA, the Organization of American States); and (c) foreign court decisions or legislation reflecting the influence of the action or works of institutions or organizations like the ones mentioned in subparagraphs (a) or (b) above? If no experience at hand, what would be your prospective answers to these questions?

Influence of Action and Rules of International Arbitral Institutions:

*On Legislation*

*Only a little influence, if any.*

*On Arbitral Awards*

If institutional arbitration has been agreed-upon by the parties, the arbitral tribunal is bound to respect the rules of the chosen institution. Often, arbitral tribunals consider rules of other institutions to fill gaps (e.g. of the ICC rules when applicable institutional rules do not contain a rule, or contain similar rules). They will also consult with commentaries on such rules, which are written by experienced academics or arbitrators who are relying on models used by other arbitral institutions and the like.

Influence of the Works of International Organizations on Legislation

The Swiss legislator pays close attention to the works of international organizations when drafting a new statute. This is especially true for the works of UNCITRAL or UNIDROIT.

This applies even more to EU law. The following statutes, for example, were directly based on EU directives (regarding the theoretical background see para. 29.above):[86]

Art. 40a-g of the Swiss Code of Obligations («CO», entered into force on 1 July 1991) is based on the Council Directive 85/577/EEC of 20 December 1985 to protect the consumer in respect of contracts negotiated away from business premises.

Art. 333 CO (entered into force on 1 Mai 1994) is based on the Council Directive 77/187/EEC of 14 February 1977 on the approximation of the laws of the Member States relating to the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of businesses.

The Federal Act on Product Liability (entered into force on 1 January 1994) is based on Council Directive 85/374/EEC of 25 July 1985 on the approximation of the laws, regulations and administrative provisions of the Member States concerning liability for defective products.

The Federal Act on Package Travel (entered into force on 1 July 1994) is based on the Council Directive 90/314/EEC of 13 June 1990 on package travel, package holidays and package tours.

The Federal Act on Consumer Credits (entered into force on 1 January 2003) is based on the Council Directive 87/102/EEC of 22 December 1986 for the approximation of the laws, regulations and administrative provisions of the Member States concerning consumer credit, as well as its amendment in Council Directive 90/88/EEC.

Influence of Foreign Court Decisions or Legislation

In cases where Swiss courts have to apply foreign law, they will not only take the statute, but also the case law of the applicable foreign law into their considerations (Art. 13 CPIL, see para. 34 above). As long as this foreign law reflects the influence of the action or works of institutions or organizations mentioned in subparagraph (a) and (b) in the question at hand, this influence would be reflected in the decision of the Swiss court.

[86] See FURRER/GIRSBERGER/SIEHR, N 177 on p. 60 et seq.

As stated in para. 0 and 27 above, with regards to cases in which the Lugano Convention is applicable, Swiss courts have to pay due account to the principles laid down by any relevant decision delivered by the courts of the other contracting states, especially to the decisions delivered by the Court of Justice of the European Communities («ICJ»). Furthermore, the Swiss Federal Court also takes the decisions of the ICJ into account, when interpreting Swiss domestic law resolutely based on unified EU private law.[87]

[87] See para. 0 and 0.