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I. Case 1 – What is arbitration?

CASE STUDY 1

Part A: [Excerpt from a distribution agreement between a Spanish company and a German company]

Art 15: "The parties agree [1] that any dispute arising out (apparaît) of this agreement shall be resolved [3] by three arbitrators. Each party shall appoint (choisir) an arbitrator [2] and both arbitrators thus appointed shall select the chairman (president) of the arbitral tribunal. The seat of the arbitration shall be Geneva. The language of the arbitration shall be English".

The clauses showed here are not models. When it is model, it will be told. They are taken out of actual contracts and may sometimes be very bad. This one is ok but can be better. Here it is a clause taken out of a distribution agreement. We have three important elements:

- The parties agree: It's a consensual method of resolution. This is a contract in the contract. We can call it the arbitration clause, which is a contract, and we don't have arbitration if we don't have a contract agreement about arbitration, wrote by the parties.
- "Resolved": It's a binding decision. It's not a recommendation, not a suggestion. This isn't a binding decision like a contract but like a court judgment.
- Appointing an arbitrator: You cannot appoint a judge in the court, but you can appoint an arbitrator. The judge is there, he is pre appointed by someone else. On the other side, the arbitrator isn't there. There isn't a pre existent body. We have to constitute the arbitrator tribunal.

In summary, arbitration is a consensual method for resolving disputes between different private individuals chosen by the parties (they can delegate the choice to someone else) and empowered (authorize) to decide in lieu of the courts. Consequences: arbitrators need to respect the principle of due process, fair trial, principles and the award will be the equivalent of a judgment (force of a judgment and not of a recommendation or a simple report).

Part B: [Excerpts from a sale and purchase agreement (1) of shares of company A entered into between German company B and Spanish company C]

Art 14: Payment of the price

"The price of the shares (portion) shall be paid in the following manner: 60% upon the execution [i.e. signing] of this agreement and 40% one year thereafter. If the accounts of the current year show a turnover (revenue), which is lower than the amount guaranteed by the seller, the 40% balance will be reduced proportionally. In the event of disagreement over such reduction (3), the amount will be determined by the accountant D (2), whose determination will be binding on the parties (4)".

Here we have a clause with sounds not like an arbitration clause. We have incorporated in the agreement a consensual contractual mechanism. This is an expert determination (neutral third person). It won't happen if it doesn't appear in the agreement. The accountant D determines the amount of the reduction. In fact and on the other side, the arbitrator resolves the dispute. The accountant cannot and wouldn't resolve the dispute between the parties.
Then, the determination is binding by the parties. This isn't the same binding nature like a court judgment or an arbitral award that you can enforce by an enforcement procedure. It's

more than a contract and less than a judgment. The parties appoint another person, the accountant. If there don't agree, the parties go to the court.

In summary, expert determination is a contractual mechanism by which parties appoint a neutral third person to provide his other her opinion on matters of fact or law and commit to comply with such opinion. If they don't comply, the parties go to the court.

Part III: [Excerpt from a license and know-how agreement (1) between an Italian engineer and a British company]

Art 24**:** "In case of disagreement arising out of or in connection with this agreement, the Parties may resort to a mediator (2), who shall be selected jointly and shall establish the rules of procedure".

There is a mediation clause. Parties sometimes use the wrong words or words that don't match with the concept. In others words, the simple fact of saying the word "mediation" doesn't mean that there is a mediation clause. This clause doesn't speak about arbitration, binding or seat. The only element we have here is mediator and that the parties will jointly select the mediator. There is a contractual mechanism because the clause is part of the contract.

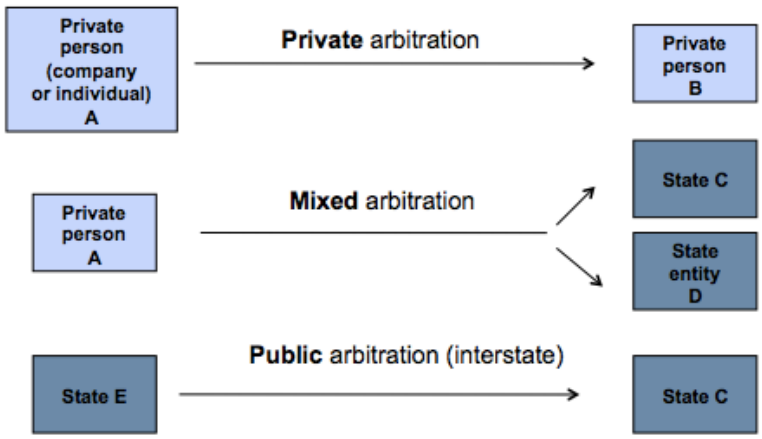
In summary, mediation is a contractual mechanism in which the parties choose a third person. The mediator assists them in order to reach a settlement (there isn't a resolution). An outcome can be if

- Mediation succeeds: we have a settlement and the settlement is a contract.
- Mediation fails: the dispute remains and the parties must refer to other dispute resolution mechanism (if there is an arbitration clause, we have an arbitration and if we don't, we go to the court).

In reality, mediation isn't like by a lot of people because they want to fight and don't show their weakness by the negotiation.

1. Distinctions as to the type of arbitration

a. Private – mixed – public



b. Commercial - sport – investment

Commercial arbitration is any claim based on private law (subject to arbitrability) Sport arbitration is mostly an athlete or a club against a sports governing body in respect of a sport-related dispute or a disciplinary sanctions (like doping, bad behaviour). Investment arbitration is a situation where we have a private party (the investor) who files arbitration against a State (the State where the investor made his investment) in relation to a dispute arising out of an investment (like building a plan in the country and produce in this country but this one want to expropriate the plan).

c. Domestic – International

It's irrelevant in the countries where the same legal regime applies to both and there is an important distinction for domestic and international arbitration.

Domestic arbitration is any arbitration that's not international is domestic.

International arbitration is defined by the parties, a subjective test (are they domiciled in different places or not) or by an objective test (it's this dispute an international dispute or a domestic dispute).

- Example of a subjective test (art. 176 PILA): The provisions of this chapter shall 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 had neither its domicile nor its habitual residence in Switzerland
- Example of an objective test (art. 1504 NFCCP): Arbitration is international when the interests of international commerce are at stake (en jeu).

The first test (subjective test) is the easiest to apply because either people are domiciled somewhere or they're not, it is easy to assess. The second one (objective test) is the more intelligent test because the first one can be a little silly in the sense that if we have an international federation who is based in SW and a pilot who lives in SW. If for example there is a dispute about a F1 race somewhere in the world, then this is an international dispute. If we choice the subjective test, it will be a domestic dispute. The problem of the objective test is that it's a quit vague because we need to find the international interests.

d. Institutional – ad hoc

As opposed to ad hoc arbitration, an arbitral institution is governed by arbitration rules and administered by an arbitral institution. There are numerous arbitral institutions. For example:

- Truly international (ICC, LCIA) or regional / domestic (SRIA, SCC).
- Generalist or specialized (CAS = TAS, WIPO).

In between, UNICTRAL (United nations commission for international trade law) arbitrations are governed by arbitration rules, but not administered. There aren't linked with an institution. Parties can choice the UNICTRAL's rules. There are introduced in many arbitration investments treaties. This is an ad hoc arbitration. Parties engaging in ad hoc arbitration are responsible for determining and agreeing on their own arbitration procedures rather than being supervised by the procedures of an arbitral institution. → *On oppose usuellement l'arbitrage institutionnel, dans lequel la procédure est prise en charge et administrée par une institution d'arbitrage, selon son règlement et en contrepartie d'une rémunération, à l'arbitrage ad hoc, dans lequel les parties administrent elles-mêmes la procédure.*

2. Sources of the law of arbitration

We have a lot of sources:

- International conventions, principally NYC or ICSID Convention (International Centre for Settlement of Investment Disputes).
- National arbitration laws, for instance chapter 12 PILA
- Arbitration rules like UNICTRAL (United Nations Commission on International Trade Law), Institutional rules (ICC Rules (International Chamber of Commerce), SRIA (Swiss Rules of International Arbitration), CAS Code (Court of Arbitration for Sport)).
- Case Law and scholarly opinions
- Soft law and practice.

3. Reasons for resorting (recourir à) to arbitration: advantages and disadvantages

A few points:

- Neutrality: People don't choose arbitration because it's good, but because they don't have another valuable choice: they don't want to go in front of the courts of the other country and there is no other possibility than to choose arbitration.
- Home advantage: It's different to play at home. On top of that, it's important in term of perceptibility.
- Specialization of arbitrators: Arbitrators have resources like time (the time of an arbitrator is bigger than a judge's), while judges don't.
- Speed of the procedure: Arbitration is not fast. But, if we compare the arbitration and the court, arbitration is sometimes faster than the court system, but not always.
- Finality of the award: A first instance court knows that the decision can go the court appellant (like the court cassation). Arbitration knows that the award is definitive. By contrast, in a court we need to do a lot of procedure to validate it.
- Flexibility: the parties can shape the procedure as they want and if they don't, that power belongs to the arbitrators.
- Confidentiality: not an important advantage, because it depends. For example, for investment and commercial arbitration, confidentiality is a strong component but there is also a general interest of transparency so you can't but the two under the same hat.
- Enforcement (imposition) of the award (decision)
- Cost: The cost of the arbitration isn't cheap and becomes quite expensive because of the neutrality aspect.
- Predictability.
- Publicity.

II. Case study 2 – *Lex arbitri* – Which law governs the arbitration?

1. Essentials

1.1 Connecting factors

- Possible connecting factors (in theory)
  - Seat of the arbitration
  - Parties' intent

- Article 176 (1) PILA (Swiss Private International Law Act = LDIPrivé): "The provisions of this chapter apply to any arbitration if the seat of the arbitral tribunal is in Switzerland and if, at the time when the arbitration agreement was entered into, at least one of the parties had neither its domicile nor its habitual residence in Switzerland".

- Par. 1025 (1) ZPO D (German Arbitration Act): "The rules of the present Book are to be applied where the venue of the arbitration proceedings in the sense as defined by section 1043 (1) is located in Germany".

1.2 Concept of seat of arbitration

- Seat: legal, not geographical notion: you can have the arbitration in any place, say the seat is in Geneva and the hearings are in Paris, it does not matter. Chapter 12 PILA will still govern the arbitration.
- Determined by the parties (directly or indirectly) or, failing that, by the arbitrators (Article 176 (3) PILA)

1.3 Legal consequences of the determination of the seat

i. Determination of the *lex arbitri*: that is the law of international arbitration of the seat, which will govern the arbitration proceeding. But this is not the entire legal system of the seat; it is only the law of international arbitration.
ii. Determination of the courts with jurisdiction in support of the arbitration (*juge d'appui*) and control of the award: it is the judge that gives it's assistance to the arbitration, to a point at least where a party fails to appoint it's arbitrator for example.
iii. Determination of the State in which the award is issued ("nationality" of the award) for enforcement purposes (Article I(3) NYC): that is an award rendered under the swiss act (you will enforce a Swiss award even if the hearings or deliberations took place elsewhere).

1.4 Examples of arbitration acts: leges arbitri to look to for determination of the seat

- Chapter 12 PILA – CH (1987)
- Article 1504 ff. NCPC – F (2011)
- Arbitration Act 1996 – GB (1996)
- Federal Arbitration Act – US (1925)
- Chapter 10 ZPO – D (1998)
- Law of the Russian Federation on International Commercial Arbitration (1993)
- Arbitration Law of the People's Republic of China (1995)

1.5 Typical content of an arbitration act

- Framework legislation: it gives just a frame to the arbitration; it does not go on much detail.
- It will essentially say something about:
  - Applicability of statute
  - Validity of arbitration agreement
  - Constitution of arbitral tribunal
  - Parties' procedural autonomy and tribunal's procedural powers, subject to fundamental principles of procedure
  - Law applicable to the merits
  - Award
  - Annulment/setting aside action
- Numerous default rules: many of the rules are optional and the parties can agree on something else. Only if they don't agree the default rules may come in act. How do you know if it is a default rule or not? Most often it is sufficient to read the rule.

1.6 Two distincts

i. The law of the arbitration – a procedural law – must be distinguished from the law governing the merits of the dispute – a substantive law. However, the law of the arbitration contains rules on the determination of the law applicable to the merits (Article 187 PILA).

ii. The law of the arbitration (*lex arbitri*) must be distinguished from the arbitration rules (like the ICC rules, etc they are all done by private organization and only offered to the parties to use, it is a contractual process). The rules are selected by the parties by virtue of the autonomy granted to them by the law: "the parties may, directly or by reference to arbitration rules, determine the arbitral procedure; they may also submit it to a procedural law of their choice (Article 182 (1) PILA).

- Methodology:
  - Determine the *lex arbitri* (Article 176 PILA provides for 2 conditions)
    - If the conditions are met, Chapter 12 PILA applies, incl. Article 182, which grants procedural autonomy to the parties, allowing them to submit to arbitration rules, subject to mandatory provisions of the law.

CASE STUDY 2

I. Facts

The following provision is embodied in a contract between a US company (Karaha Bodas) and an Indonesian State entity (Pertamina), in connection with the construction of a power plant in Indonesia. It was the subject matter of divergent judicial and arbitral decisions in several countries.

"8. Arbitration

8.1. *If any dispute or difference of any kind whatsoever (a "Dispute") shall arise among the Parties in connection with, or arising out of, this Contract, or the breach, termination or validity hereof, the Parties shall attempt, for a period of thirty (30) working days after the*

receipt by one Party of a notice from the other Party of the existence of a Dispute, to settle such Dispute in the first instance by mutual discussions among the Parties.

8.2 a) *If the Dispute cannot be settled within thirty (30) working days by mutual discussions as contemplated by Article 8.1 hereof, the Dispute shall finally be settled by an arbitral tribunal (the "Tribunal") under the UNCITRAL Arbitration Rules.*

Each Party will appoint an arbitrator within thirty (30) days after the date of a request to initiate arbitration, who will then jointly appoint a third arbitrator within thirty (30) days of the date of the appointment of the second arbitrator, to act as Chairman of the Tribunal. Arbitrators not appointed within the time limit set forth in the preceding sentence shall be appointed by the Secretary General of the International Center for Settlement of Investment Disputes. Both Parties undertake to implement the arbitration award. The site of the arbitration shall be Geneva, Switzerland. The language of the arbitration shall be English.

The Parties expressly agree to waive the applicability of Article 650.2 of the Indonesian Code of Civil Procedure [(unusual) provision according to which the arbitrator's mission ends six months after their nomination, even when the arbitration is not terminated] so that the appointment of arbitrators shall not terminate as of the sixth (6th) month after the date(s) of their appointments.

b) *The award rendered shall apportion the costs of the arbitration. In accordance with Section 631 of the Indonesian Code of Civil Procedure, the Parties agree that the Tribunal need not be bound by strict rules of law where they consider the application thereof to particular matters to be inconsistent with the spirit of this Contract and the underlying intent of the Parties, and as to such matters their conclusion shall reflect their judgment of the correct interpretation of all relevant terms hereof and the correct and just enforcement of this Contract in accordance with such terms.*

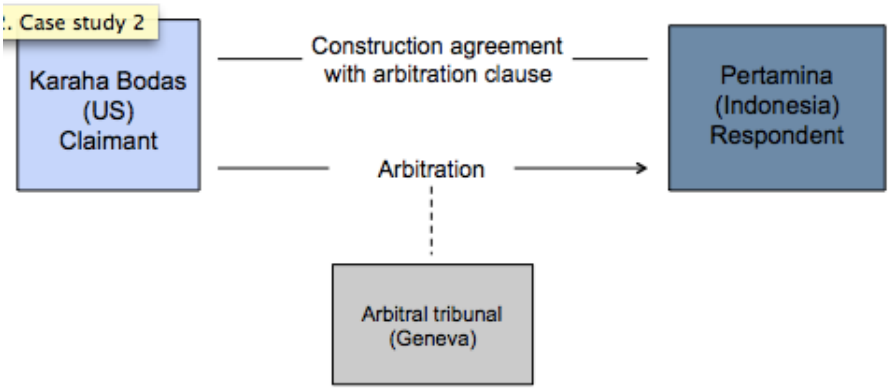
c) *The award rendered shall be in writing and shall set forth in reasonable detail the facts of the Dispute and the reasons for the Tribunal's decision.*

d) *The award rendered in any arbitration commenced hereunder shall be final and binding upon the Parties and judgment thereon may be entered in any court having jurisdiction for its enforcement. The Parties hereby renounce their right to appeal from the decision of the arbitral panel and agree that in accordance with Section 541 of the Indonesian Code of Civil Procedure neither Party shall appeal to any court from the decision of the arbitral panel and accordingly the Parties hereby waive the applicability of Article 15 and 108 of Law No. 1 of 1950 and any other provision of Indonesian law and regulations that would otherwise give the right to appeal the decisions of the arbitral panel. In addition, the Parties agree that neither Party shall have any right to commence or maintain any suit or legal proceeding concerning a dispute that has been determined in accordance with the arbitration procedure provided for herein and then only to enforce or facilitate the execution of the award rendered in such arbitration."*

N.B.: *The agreement contains a provision pursuant to which it is "governed by the laws and regulations of the Republic of Indonesia".*

II. Questions

1. *Assume that Karaha Bodas intends to initiate arbitration proceedings against Pertamina in Switzerland. Which arguments could it bring forward to substantiate the application of Chapter 12 PILA?*



It is a story about a contract for the design construction and operation of a power plant in Java. It was a contract between US company Karaha Bodas and the Indonesian state energy company Pertamina. KB in this school case starts arbitration at P. We assume that KB starts the arbitration in Switzerland. What arguments can it bring forward? It's the lex arbitri and Pertamina may argue against that Swiss seat (in reality P did not argue for that but for the proceedings for the award in different places like Hong Kong, US, etc).

Provision about negotiation: it is common in arbitration clauses that you have first a commitment to negotiate or to mediate and then only you go to arbitration if the negotiation/mediation does not lead into a settlement. When you have a preliminary step that is inserted before arbitration, 2 things are important: a.) you have to make clear if this step is mandatory or optional ("the parties may attempt" or "must attempt"; b.) it is clear at what point in time you can proceed to arbitration (typically "30 days after request for negotiation, if there is no result, any party can start an arbitration").

The clause 8.2.a) says: "The site of the arbitration shall be Geneva, Switzerland. The language of the arbitration shall be English. The Parties expressly agree to waive the applicability of Article 650.2 of the Indonesian Code of Civil Procedure". The last sentence is a very unusual and inconvenient provision. Besides 6 months is just too short for court so this is excluded here. The rest is of little interest.

What arguments can we give in favor of Geneva being the seat of the arbitration? They have actually chosen Geneva as the site of the arbitration in the clause 8.2. a.). Might that mean from the context that this is the legal seat? Generally when you refer to a seat, you write a seat. Also it could say that (if you rule out all these provisions) why would you rule them out if they don't apply in the first place. Another possibility, which was raised before: seat in Geneva and they have impliedly chosen the frame procedural law to govern the arbitration + they have woven a number of provisions that were not adapted to their proceedings.

2. *Which contrary arguments could Pertamina raise?*

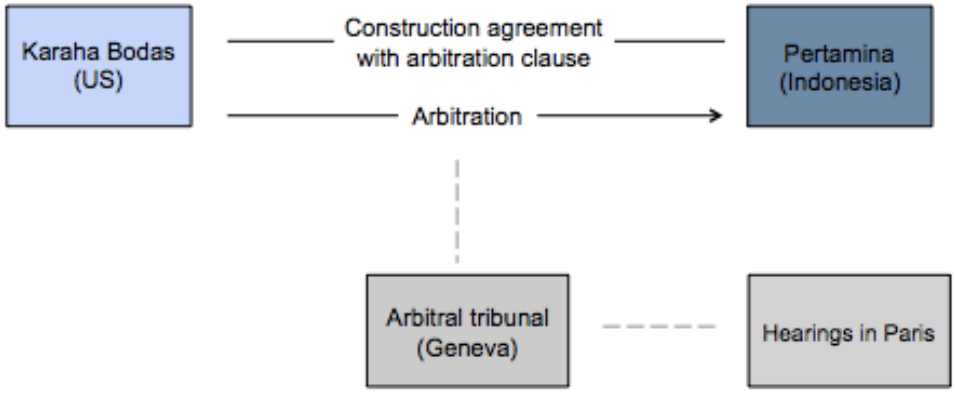
What about "site"? You use "place of arbitration", "seat", etc for legal purposes but "site" is for construction, competition, etc. Is it not the drafter that had some confusion in their mind? Who knows? Besides, the law of the arbitration must be distinguished from the arbitration

rules: the rules are selected by the parties by virtue of the autonomy granted to them by the law.

3. *In light of these arguments and your analysis, would you consider that Chapter 12 PILA is the applicable lex arbitri?*

It depends where the seat is located. The answer is yes, if the seat is considered as Geneva.

4. *Would your answer be different if the hearings in the arbitration initiated on the basis of this clause were held in Paris?*

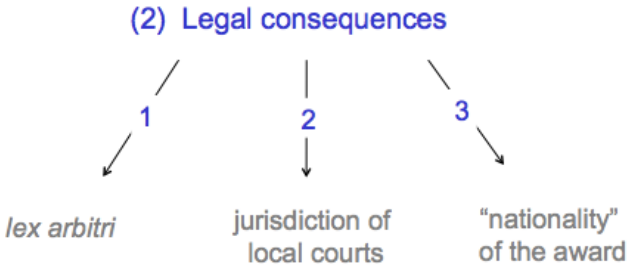


5. *Where would an award issued by an arbitral tribunal constituted on the basis of this provision be deemed to have been rendered? Which courts would have jurisdiction to rule on an annulment action against such award? How should the clause have been drafted?*

It depends where the seat is located. How should the clause have been drafted? It should say "any dispute arising out or in connection of this contract shall be submitted to arbitration under Chapter 12 PILA rules, the seat shall be Geneva, the tribunal shall be composed of 3 arbitrators appointed in accordance of such rules and the language of the arbitration shall be English.

RECAP: The choice of the seat must consider (1) practical aspects and (2) legal consequences.

- Practical aspects: local infrastructures; accessibility (transportation, visas, geographical situation); expertise and experience of local counsel and arbitrators; security; political environment.



- Lex arbitri:

- Arbitration friendly legislation:
  - Parties' procedural autonomy
  - Limited annulment action
  - No interference of local courts during the arbitration

- Jurisdiction of local courts
  - Jurisdiction in aid of arbitration (*juge d'appui*): constitution of the arbitral tribunal, challenge of arbitrators, and assistance to the proceedings.
  - Jurisdiction in control of arbitration: annulment
  - Local courts with experience in international arbitration and non-interventionist practice

- "Nationality" of the award
  - Seat in a Member State of the New York Convention

III. Case study 3 – Arbitration Agreement

Essential elements:

1.1 A special type of contract

- Basis of the tribunal's jurisdiction

- 2 types: arbitration clause and submission agreement (*compromis arbitral*). Essential difference between the two: for the submission agreement, the dispute has already arisen, while the arbitration clause deals with the submission of arbitration to a future dispute. When a dispute has already arisen, the parties have the possibility, if they have no arbitration agreement yet, to enter into a submission agreement, by which they say "we have X dispute and submit it to arbitration instead of going to court". The "*compromis"* is rarely used because there is already a dispute between the parties and you rarely have very reasonable parties who put aside their dispute on the merits and agree on the procedural resolution: in fact, they usually argue about everything.

- Offer and acceptance: they must match, so you have consent. Sometimes it is not clear so you have to interpret it and even use national interpretation rules.

- Essential elements:
  - Intent to arbitrate
  - Determined or determinable disputes
  - Connection to a legal system

- Separability: "contract in the contract", so it is a separate contract from the main contract in which it is embedded. If you analyze an arbitration agreement, you look at it as a contract in which it is embedded!
  "The validity of an arbitration agreement cannot be contested on the ground that the main contract may not be valid" (Article 178(3) PILA).

1.2 Subject to form conditions

1.2.1 Two legal bases

Article 178(1) PILA: "As regards its form, an arbitration agreement is valid if made in writing, by telegram, telex, telecopier or any other means of communication which permits it to be evidenced by a text." Also includes e-mail today, which you can print or store on your hard disk.

Article II(2) NYC: "The term "agreement in writing" shall include an arbitral clause in a contract or an arbitration agreement, signed by the parties or contained in an exchange of letters or telegrams". E-mails also included in the interpretation of this article.

- Which legal basis in which situation?
  - 178(1) PILA will be applied:
    - Where the arbitrator determines the validity of the arbitration clause (competence-competence)
    - Where the Federal Tribunal rules on an action for annulment of the award for lack of jurisdiction
  - II(2) CNY will be applied:
    - Where a court rules on the enforcement of a foreign award
    - Where a court rules on an *exceptio arbitri* if the seat of the arbitration is abroad

1.2.2 What is a written arbitration agreement?

- Signatures not required
- Parties' written manifestation of intent
  - Article II(2): signed agreement or "exchange" of two documents
  - Article 178(1): no exchange required
    - For NYC and PILA: arbitration clause and document incorporated by reference
      - Specific reference: valid
      - Global reference: validity depends upon the circumstances

- A party which addresses the merits without reservation waives any objections based on a formal and substantive defect (Article 186(2) PILA).
- The same applies is a claimant starts an arbitration on the basis of a defective arbitration agreement.

1.3 And to substantive conditions

1.3.1 Arbitrability

- Objective arbitrability: i.e. the ability of a dispute to be resolved through arbitration is governed by Article 177(1).
- Subjective arbitrability: i.e. a person's capacity to enter into an arbitration agreement, is governed by its personal law, subject to apparent authority and especially to Article 177(2).

Article 177

"1. Any dispute involving an economic interest may be the subject-matter of an arbitration.

2. If a party to the arbitration agreement is a state or an enterprise or organization controlled by it, it cannot rely on its own law in order to contest its capacity to be a party to an arbitration or the arbitrability of a dispute covered by the arbitration agreement."

1.3.2 Other substantive requirements (Article 178(2))

- Consent
- Interpretation
- Scope of the arbitration agreement as to parties bound and disputes covered
- Termination assignment
- 3 alternative laws (validation principle *in favorem validitatis* = in favor of the arbitration agreement): if you can take the least demanding of these 3 laws and if under this least demanding law the arbitration agreement is valid, then it will be valid for purposes of PILA. It is not the law chosen to govern the merits or the arbitration, but the arbitration agreement as a contract.

"As regards its substance, an arbitration agreement is valid if it conforms either to the law chosen by the parties, or to the law governing the subject matter of the dispute, in particular the law governing the main contract, or if it conforms to Swiss law."

CASE STUDY 3

I. Facts

In September 2014, Mr. Mickey Tramp, a US national domiciled in London, is hired as CEO by Busch, a German company active in connected household appliances. The employment agreement contains the following clause:

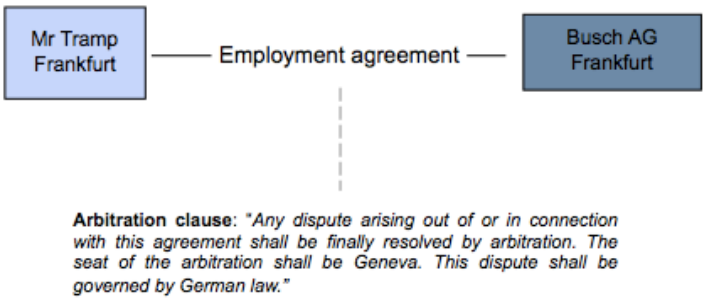
"Any dispute arising out of or in connection with this agreement shall be finally resolved by arbitration. The seat of the arbitration shall be Geneva. This dispute shall be governed by German law."

The employment agreement was negotiated and agreed upon by email; it has never been signed by the parties. Mr. Tramp then moves to Germany and settles down in Frankfurt. In July 2015, while dining at a fancy restaurant in Berlin, Mr Tramp is recorded on video saying that "my biggest challenge is to make devices that are easy to use because most of our customers are women and this will not change. Men have more interesting things to do". The video is made available online, becomes viral and triggers a very negative campaign against Busch.

Mr Tramp is dismissed with immediate effect, but opposes his dismissal. He considers that the video was good for Busch as it attracted a lot of media attention during several weeks and Busch became known to a wide public that had never heard of it. As a result, Mr. Tramp wishes to initiate arbitration proceedings against his employer. Busch argues that the arbitration agreement has been terminated in accordance with German law. He adds that, under German law, employment disputes are not arbitrable.

II. Questions

1. *Is the arbitration agreement valid?*



We must start by looking what law governs this arbitration. For that we will look at the seat and whether it's international or not. The seat is in Switzerland and at least one of the parties (here both) are not domicilied in Switzerland. Application of Chapter 12 of the PILA : Article 176(1) PILA: "The provisions of this chapter apply to any arbitration if the seat of the arbitral tribunal is in Switzerland and if, at the time when the arbitration agreement was entered into, at least one of the parties had neither its domicile nor its habitual residence in Switzerland". So Chapter 12 PILA applies in this particular case.

We must remember the principle of separability: Article 178(3) PILA: "The arbitration agreement cannot be contested on the grounds that the main contract is not valid or that the arbitration agreement concerns a dispute which had not as yet arisen". We do not look at the employment agreement, it may be valid or not but this is none of our concern. We look only at the arbitration agreement:

The agreement must have formal validity : Article 178(1) PILA: "The arbitration agreement must be made in writing, by telegram, telex, telecopier or any other means of communication which permits it to be evidenced by a text." How do we apply here? We can have an arbitration agreement conclued by e-mail. Here it was agreed upon so we assume that there was one e-mail with the proposal and another e-mail with a positive answer. We don't need a signature under 178(1) PILA so formal validity can here be confirmed.

The agreement must also have substantive validity: Article 178(2) PILA: "Furthermore, an arbitration agreement is valid if it conforms either to the law chosen by the parties, or to the law governing the subject-matter of the dispute, in particular the main contract, or to Swiss law". They chose German law in the agreement: one can say that it is a choice for the arbitration agreement so that would be under 178(2) the first alternative. But it is better to say that when we choose the seat in Switzerland it will trigger the application of Chapter 12 PILA, so that means that the seat will decide what arbitration law you're under and probably the best way of making sure you have no inconsistency is to interpret this interpretation clause is to refer to German law as the law governing the merits.

Arbitrability : Article 177(1) PILA: "Any dispute of financial interest may be the subject of an arbitration". It is an economic interest here, so the arbitrability is positive. Is there a consent ? Yes there was, it was agreed upon (there was an offer and an acceptance).

In conclusion, we have an arbitration with a seat in Switzerland, arbitrability is given, so is formal and material (substantive) validity. The arbitration agreement is valid.

2. *What issues are likely to arise if an arbitral tribunal constituted on the basis of this arbitration clause issues an award in favor of Mr. Tramp?*

Let's assume he seeks compensation. He gets an award in his favor and will not be able to enforce it in Germany. Why not ?

- Enforcement: Formal validity
  - Article V(1)(a): "Recognition and enforcement of the award may be refused, (…) if that party furnishes (…) proof that:
    (a) The parties to the agreement referred to in article II were, under the law applicable to them, under some incapacity, or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made (…)"

  - Article II(2): "The term "agreement in writing" shall include an arbitral clause in a contract or an arbitration agreement, signed by the parties or contained in an exchange of letters or telegrams".

- Enforcement: Arbitrability
  - Article V(2) NYC: "Recognition and enforcement of an arbitral award may also be refused if the competent authority in the country where recognition and enforcement is sought finds that:
    (a) The subject matter of the difference is not capable of settlement by arbitration under the law of that country (…)".
  - Individual employment disputes are not arbitrable in Germany.

IV. Case study 4 – Examination of the Jurisdiction of the Arbitral Tribunal

A. The form of the arbitration agreement

Form of arbitration agreement (178(2) PILA): "In writing"

- Any text that can be reproduced
- Requirement of the written form applies to
  - Identity of parties
  - Intent to arbitrate: there is no need for a written form of the intent of ALL the parties, it is enough to have one writing and then you can by other means substantiate the fact that everybody has consented to the clause.
  - Determination of dispute(s)
- Existence of consent of all parties is issue of substantial validity, not form (if unclear, calls for subjective or objective interpretation of contract). Hence, no need for writings emanating from all parties (disputed). Do you need a consent expressed in writing by all the parties? No. The arbitration clause could be an agreement although it is incorporated in a unilateral document. But if there is a challenge to the consent, you will have to prove that all the parties wanted arbitration. But this is a substantive requirement; it is not subject to form.

B. Essentials

i. Reminder

a. Before the arbitrator: respondent raises lack of jurisdiction
b. Before the Federal Supreme Court: losing party files action for annulment of award on ground of lack of arbitral jurisdiction
c. Before a Swiss court seized with an action on the merits (of the dispute): the defendant raises lack of jurisdiction of court on basis of arbitration agreement (*exceptio arbitri* = saying there is a valid arbitration agreement)
d. Before a Swiss court seized with a request for enforcement of a foreign award: if the party opposes enforcement on ground of arbitrator's lack of jurisdiction, then the enforcing court will have to rule on the jurisdiction of the tribunal.

ii. Competence-competence

This notion is not specific to arbitration but applies equally to courts. Every Court and Tribunal has so called competence-competence. Competence-competence is the power of a court or tribunal to rule on its own jurisdiction. That power has 2 effects:

- Positive effect: it empowers the arbitrator to rule on his/her jurisdiction: "the arbitral tribunal shall decide on its own jurisdiction" (Article 186(1)) PILA (situation (a) above, but you can find this in other similar laws, the only law that has an exception is the Chinese law). Situation 1: the question arises if the court reviews all the requirements with full power of review.

- Negative effect (is very controversial): it is the consequence that a court, which is seized with an action on the merits, is prevented from ruling on the arbitrators' jurisdiction if there is an *exceptio arbitri* raised / in the presence of an arbitration agreement (situation (c) above). In situation c), the question arises whether the court can go into the validity of an arbitration clause and review all the requirements (full power of review): then there would be no negative effect. Or it can do a *prima facie* review (it means that it looks at the document and say that it's an arbitration clause but not examine if it relates to the parties, if it's valid, etc: the prima facie review is only the appearance and the court will deny its jurisdiction on the base of this appearance and tell the parties to go and ask if the arbitration clause is valid).
    - Exists in France: "When a dispute subject to an arbitration agreement is brought before a court, such court shall decline jurisdiction, except if an arbitral tribunal has not yet been seized of the dispute and if the arbitration agreement is manifestly void or manifestly not applicable." (Article 1448 NCPC)
    - Currently exists partially in Switzerland (division made by case law): a Swiss court seized with an action on the merits rules on the jurisdiction of an arbitral tribunal with the seat:
        - Outside Switzerland, with full power (Article II (3) NYC), no negative effect: the arbitral tribunal rules on its own jurisdiction. That would be a decision subject to an annulment before a foreign court on which Swiss courts have no control on.
        - In Switzerland, on the basis of a *prima facie* review (Article 7 PILA) – negative effect. Then the tribunal will rule in Switzerland over its own jurisdiction. That would be subject to a decision on annulment by the Swiss Supreme Court.

One must distinguish the limited review from the *prima facie* review of the arbitrators' jurisdiction by the arbitral institution, which does not affect the arbitral tribunal's competence-competence (e.g. Articles 6(3) and (4) ICC Rules).

iii. Defense of lack of jurisdiction

If a party wishes to raise that there is no valid arbitration clause, it must do something before the arbitrators, before any defense on the merits. It cannot start discussing the merits of the case and THEN say "you don't have jurisdiction". The same applies when you are in court, especially when there is an arbitration agreement and a party wants to raise it for the lack of jurisdiction of the court.

- It "must be raised prior to any defense on the merits" (Article 186(2) PILA)
- The same applies to the *exceptio arbitri* before the court (Article 7(a) PILA)
- Failing that, respondent/defendant enters an appearance on the merits (*Einlassung*).

iv. Award of jurisdiction

- "The arbitral tribunal shall, in general, decide on its own jurisdiction by a preliminary decision" (Article 186(3)). It will decide that generally by a separate decision, which is a preliminary award if it has jurisdiction. Can the jurisdictional decision be final? Yes, if the tribunal decides that is has not jurisdiction, it is a final decision.
- There can be exceptions and exceptional circumstances when the tribunal can join the jurisdiction to the merits. Why? For example: because of the costs that are higher if you have 1 phase for the jurisdiction and 1 phase for the merits. Same for speed or when the facts are the same, or when the witnesses are the same, or when the same defense applies both for the jurisdiction and for the merits.
- Immediate annulment action (Article 190 (3)): if the tribunal decides to render a separate decision, it's final and you want to challenge it, you have to do it immediately. It is the same if the tribunal accepts its jurisdiction and you want to challenge its jurisdiction: you can't wait the merits to advance and challenge it afterwards. You must challenge it immediately (30 days in Switzerland, longer in other countries or arbitral rules, 60 or 90 days for instance).

C. Parallel proceedings

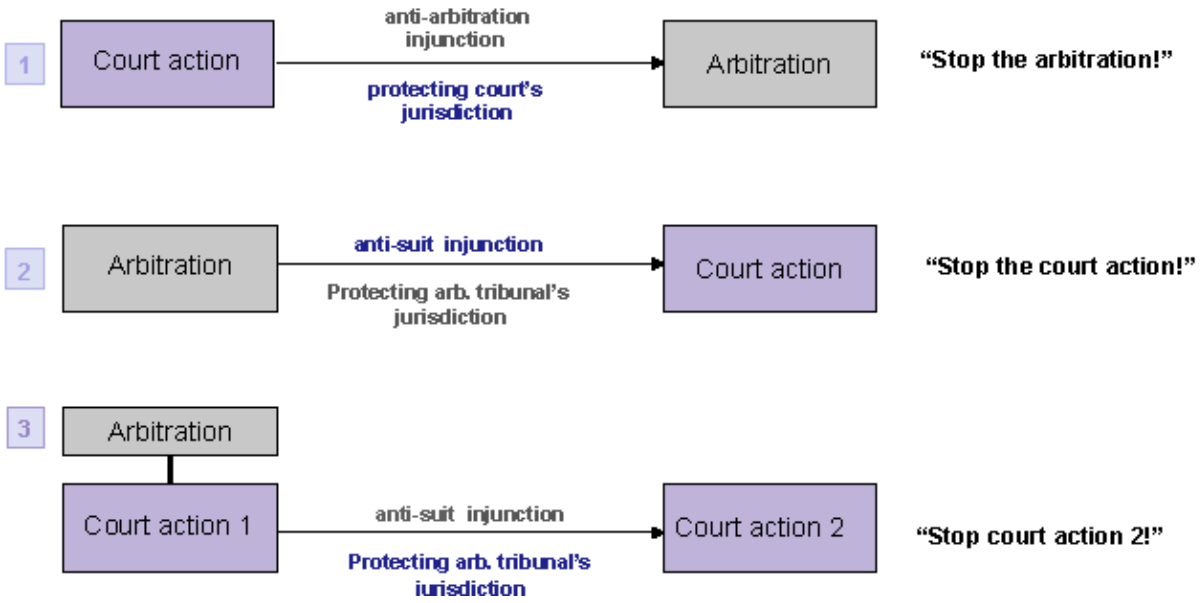
i. *Lis pendens* defense?

Lis pendens is qualified in the Lugano Convention and Brussels I Regulation. There are also similar rules under other civil procedures. Lis pendens is when you have an exactly same dispute pending somewhere else (same parties, same facts…). There is no general regulation of these situations in arbitration, unlike in the Lugano Convention. In court litigation, lis pendens triggers to suspension or dismissal of the action, which is brought, second: it is a strictly chronological test. Example: when you have two different courts that have jurisdiction for the same exact same case (example: in contract law). Whoever comes second will have his/her action dismissed or suspended. But there is no lis pendens defense in arbitration: "He (the arbitrator) shall decide on his jurisdiction without regard to an action having the same subject matter already pending between the same parties before a court or another arbitral tribunal, unless serious reasons require that the arbitrations be stayed" (Article 186(1bis)).

The lis pendens triggers either the suspension or the dismissal of the action brought second: the second dispute will be suspended or dismissed and it is a strictly chronological test. In court litigation it is a rule that works because 2 courts may have jurisdiction over the same dispute (example: an action in contract, a court can have jurisdiction at the place of the residence of the defendant AND another court under Brussels/Lugano at the place of performance of the contract).

a. Notion

- Constellations



What is an anti-suit injunction? It is a procedural technique known in many common law jurisdictions: the goal is to avoid fraudulent proceedings in front of a foreign court that has no jurisdiction. An anti-suit injunction is a decision by a court that enjoins a party from commencing or continuing proceedings before another court or arbitral tribunal. Generally it prohibits actions to the parties but sometimes, more rarely, directly to the arbitrators. There are different possible constellations. You have the court that gives an anti-arbitration injunction to protect its own jurisdiction.

ii. Legal obstacles to anti-arbitration / anti-suit injunctions

- In the European judicial area: CJEU Allianz v. West Tankers bars injunction in constellation 3 between Member Courts (could change with Brussels I Recast)
- CJEU Gazprom does not bar injunction in constellation 2, the courts were in Lithuania and the arbitration was in Sweden. The Lithuanian court asked the European court asked if they had to enforce the injunction of the arbitrators (there was an injunction by an arbitrator not to proceed) and the European court said "European law does not prohibit arbitrators to give injunctions".
- Generally, competence-competence of the court/tribunal sought to be enjoined
- Article II NYC 2; if a court is seized, when there is a valid arbitration agreement, the court should defer to the arbitration.
- "Il est interdit d'interdire", you should not prohibit another court to review its own jurisdiction; the court should be able to review it.

CASE STUDY 4

I. FACTS:

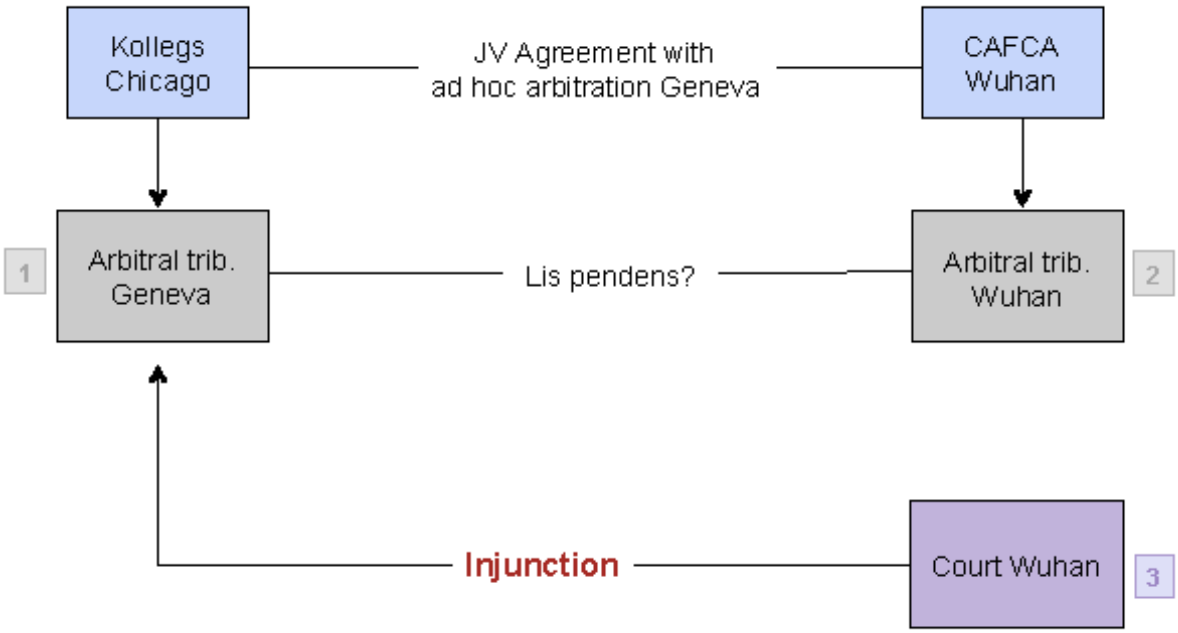
Kollegs, a food company having its headquarters in Chicago, enters into a joint venture agreement with CAFCA Group, a state entity of Wuhan Province in China. The agreement provides for ad hoc arbitration in Geneva.

When a dispute arises, Kollegs initiates arbitration. CAFCA challenges the jurisdiction of the arbitral tribunal on the ground that the arbitration clause is null and void because it was not authorized by the Province's Superior Council. At best, CAFCA would be willing to arbitrate before the Arbitration Commission of Wuhan. It shows its willingness by starting arbitration proceedings before such institution and by requesting the arbitral tribunal to stay the arbitration in Geneva on the ground of lis pendens. It also asks the court of Wuhan to enjoin the arbitrators from proceeding with the Geneva arbitration. The Wuhan court grants such injunction.

II. QUESTIONS

1. What will the arbitral tribunal decide in respect of:

- *the defense of lack of jurisdiction?*
- *the lis pendens defense?*
- *the anti-arbitration injunction issued by the court of Wuhan?*



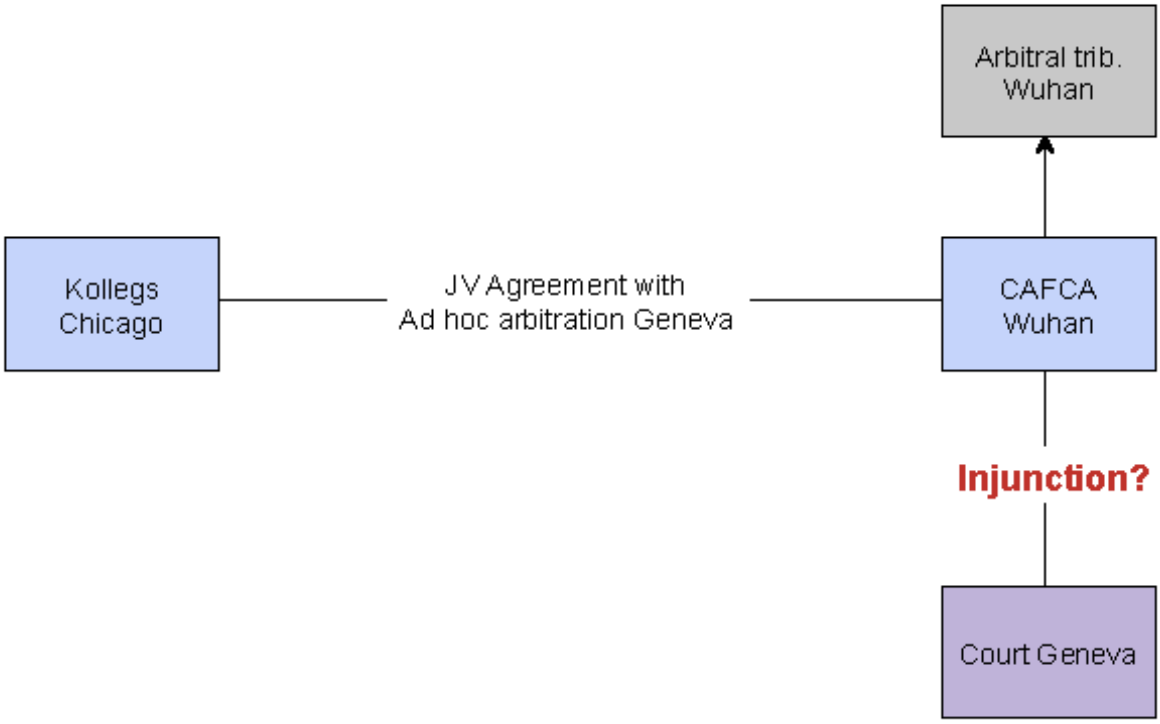
Concerning the defense of lack of jurisdiction, there is one because of the allegement of the arbitration agreement, which was not agreed. Is the arbitration clause valid or not ? First of all we need to assess which law governs the arbitration: art. 176 PILA tells us that both parties have decided that it was Switzerland, because the seat is in Switzerland and at least one of the parties is not domiciled in Switzerland (both of them aren't), so we meet both of the conditions and this arbitration is indeed governed by PILA. Then, is there anything in addition to PILA (institutional rules)? No. Then, what kind of issue is this? Consent is not clear and we

have an issue of jurisdiction. The court has competence-competence so it will review if its own jurisdiction. The issue is an issue of capacity of one of the parties to enter into the arbitration agreement: it is called subjective arbitrability (it is a question of parties and not the object, so not objective arbitrability). There is a specific rule codified in 177(2) PILA that says that a state cannot rely on its own laws to change an arbitration agreement in which it has entered. The result is that the arbitrator will say that the arbitral tribunal has jurisdiction and that it will proceed.

Concerning the lis pendens, there is one pending in Geneva and another one in China. The chinese party asks to suspend the Geneva arbitration. The tribunal can issue a decision without being stopped by another arbitration; art. 176 1bis PILA : unless serious reasons don't stop them. Example of serious reasons where the Geneva tribunal would have to suspend its arbitration? You have another pending arbitration in Switzerland and the first one has already produced an arbitral award-affirming jurisdiction, and that has been challenged before the Swiss Supreme Court, so it will directly impact by own jurisdiction. Arbitral tribunals must proceed in the best possible time and circumstances so you have to have a very serious ground to suspend arbitration. Do we have serious reasons here? No.

Finally about the anti-arbitration injunction issued by the Chinese court was issued at the arbitrators (and not the parties). The tribunal needs to decide whether it will respect this injunction or not. It means for this tribunal that the anti-arbitration injunction will not meet the requirements for enforcement of foreign judgments.

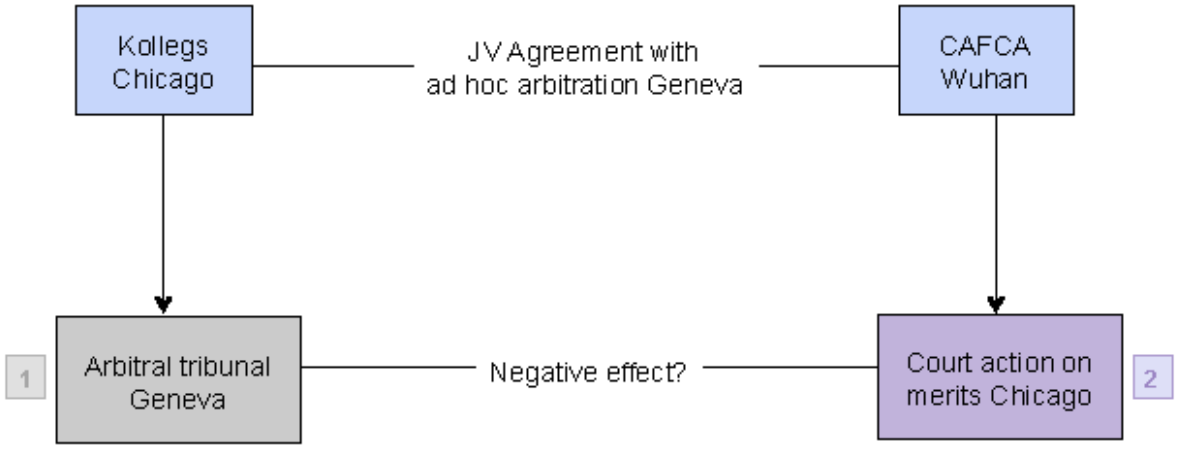
2. Kollegs resents its opponent's moves. It requests the courts in Chicago to order CAFCA to terminate the Wuhan arbitration, which the court refuses to do. Kollegs then turns to the Geneva courts and requests them to enjoin CAFCA from proceeding further in China. What will the Geneva court decide?



We have Kellogs that seeks to do the same. It turns to the Geneva courts to request them to enjoin CAFCA from proceeding further in China. This is our scenario 3 (we have an arbitration in Geneva and we go to the courts in Geneva, with another arbitration abroad (not another action)). We have already addressed this question by answering the 1st question: the court has competence-competence and there is no reason to intervening. It is not an exceptio arbitri though, because it is not a question about the merits. It is another type of procedure.

3. During the arbitration, CAFCA files an action on the merits in Chicago and Kollegs raises an exceptio arbitri. What will the Chicago court decide?

Tell the parties to go for arbitration : 2(3)NYC saying that if the court is seized on the merits of a dispute (…).



CAFCA into courts of the arbitration files an action on the merits in Chicago (domicile of the defendant) and Kollegs raises an exceptio arbitri. What will the Chicago courts do ? Tell the parties to go for arbitration because of art. 2.3 NYC saying that if a court seized with an ction of the dispute and that there is a valid arbitration clause it will have to further the parties to arbitation : the Chicaco court will simply deny its jurisdiction and the Geneva arbitration will simply proceed.

V. Case study 5 – Arbitral Tribunal

1. Constitution of the arbitral tribunal (art. 179 PILA)

" 1. The arbitrators shall be appointed, removed or replaced in accordance with the agreement of the parties.

2. In the absence of such an agreement, the matter may be referred to the court where the arbitral tribunal has its seat; the court shall apply by analogy the provisions of the CCP concerning the appointment, removal or replacement of arbitrators".

- First option: Constitution according to the parties' agreement (art. 179 (1))
  - Number of arbitrators and designation method agreed, directly or by reference to arbitration rules
  - Designation by the parties, the arbitral institution, or another appointing authority

- Second option: Constitution in the absence of agreement or when the agreed method does not work (articles 179(2) and (3) PILA and 360 ff CCP)
    - 3 arbitrators: each party appoints one, who appoint chair
    - If no appointment, request to court of seat
    - Which must appoint "unless a summary examination shows that no arbitration agreement exists between the parties" (article 179(3); prima facie review)
    - Appeal from the court's (non-) appointment decision? The mechanism under PILA is that the party shall request the court of the seat (in GE Tribunal de 1ère instance) to appoint the arbitrator in lieu of the party, which refuses to do it. This is the same kind of prima facie review as we have seen before. But what happens with the decision of the court appointing the arbitrator? Concretely the judge will choose the individual, which will seat in the arbitral tribunal. A distinction must be made where the court refuses to appoint an arbitrator (this decision can be then appealed) and when the court appoints an arbitrator (and this decision cannot be appealed).

- Constitution in multi-party arbitration
    - According to the parties' agreement, incl. by reference to arbitration rules
    - Failing that, according to CCP (Code of Civil Procedure); if no appointment, request to court of seat, which can appoint all arbitrators
    - (!) Equal treatment

2. Arbitrators

a. Arbitrator's contract

- Sui generis contract, similar to an agency agreement
- Binds the arbitrator to both parties
- Contains contractual obligations (mainly duty to disclose circumstances likely to cast doubt on independence; confidentiality; efficiency)
- And one precontractual obligation (disclosure)
- Entitlement to compensation

b. Independence and impartiality

- The arbitrator [chair and co-arbitrator] must be independent and impartial. This is not the case where "circumstances exist that give rise to justifiable doubts as to his or her independence" (Article 180(1)(c))
- Objective test
- Appearance, not actual bias
- Independence vis-à-vis of the parties
    - No economic or personal ties of a certain intensity, incl. professional and family ties
    - According to case law, essentially four situations:
        - Subordination of an arbitrator to a party
        - Arbitrator's interest in the outcome of the dispute or other important economic ties
        - Arbitrator's continued professional relationship with one party
        - Arbitrator's family or personal ties with one party

- Independence vis-à-vis the principal actors of the arbitration (counsel, experts, important witnesses)
- Independence vis-à-vis the subject matter of the dispute
- IBA Guidelines on Conflicts of Interest, basically they contain 4 different lists of situations, and the one on the non-wavable red list is a situation where is always a conflict of interest, same for red list. For orange list : depends on the specifics of the case. Green list : no such problems. The Guidelines apply to disclosure of situations by arbitrators and might be applied in challenge proceedings before the court or the Federal Supreme Court.

c. Challenge of arbitrator

1. Grounds (Article 180 PILA):

"An arbitrator may be challenged:

a.) if he or she does not meet the requirements agreed by the parties;
b.) if the arbitration rules agreed by the parties provide a ground for challenge; or
if circumstances exist that give rise to justifiable doubts as to his or her independence."
i. No challenge for a known ground (para. 2)
ii. Duty to investigate

2. Procedure (Articles 180(2) and (3) PILA)

- Immediate notice: "The ground for challenge must be notified to the arbitral tribunal and to the other party without delay." (para. 2.i.f)
- If arbitrator does not resign: "In the event of a dispute and (1) to the extent that the parties have not agreed upon the procedure for the challenge, (2) the court having jurisdiction at the seat of the arbitral tribunal shall make the final decision." (para. 3). As always in institutional arbitration the procedure is provided in rules (in ICC rules it would be similar to PILA, the difference is that the decision on challenge, if the arbitrator refuses to resign, will be taken by the ICC Court).
  - (1) Procedure agreed by the parties directly or by reference to arbitration rules
  - (2) If no agreement, court of the seat "shall make the final decision"
- Appeal from institutional or judicial decision? The decision shall be final, so this decision whether positive or negative cannot be appealed, whether the Court or the Federal Supreme Court took it. If ICC refuses the challenge and the arbitrator remains in place, the ground for challenge, which was brought to the court, might be relied on for setting aside the proceedings.

d. Replacement and revocation

According to the parties' agreement or, failing that, according to the CCP (Article 179 PILA).

CASE STUDY 5

I. Vorazen Inc., a US telecommunication company, and Toscalia s.p.a., another telecommunication company having its headquarters in Italy, have entered into a research and development agreement ("R&D Agreement") in 2012, which encompasses the following arbitration clause: "Any dispute arising out of the present agreement shall be settled by a sole arbitrator sitting in Geneva. The arbitrator shall be jointly appointed by the parties". According to Vorazen, the parties modified the arbitration clause in 2013 and agreed to submit disputes to arbitration in Paris according to the WIPO Expedited Arbitration Rules. Toscalia concedes that such a modification was contemplated, but considers that the discussions did not lead to an agreed amendment. In 2014, a dispute arises. The attempts to solve the dispute amicably fail and Toscalia intends to initiate an arbitration on the basis of the clause provided in the R&D Agreement. Vorazen objects that this clause is obsolete and refuses to cooperate in the appointment of the sole arbitrator. ***Will the arbitration proceed? How?***

First stage as always: we examine what is the applicable *lex arbitri*. In this case we assume that the arbitral tribunal seized is in Switzerland, so we apply chapter 12 PILA, more precisely art 176 par. 1 and the seat of the arbitral tribunal is in Geneva. Both parties are domiciled abroad so the applicable lex arbitri is chapter 12 PILA. Art. 179 par. 1 PILA refers to the agreement of the parties. We have no agreement in the arbitration clause itself, the parties in this clause did not refer to any arbitration institution, so this is an *ad hoc* arbitration, so that we have to fall back on the provisions of the PILA. And from there, according to the principle of competence-competence, the arbitral tribunal has jurisdiction to rule under its own jurisdiction. Here the claimant brings an arbitration clause. What the appointing judge will do is the following: art. 179 par. 1 PILA refers to the provision of the Swiss CCP (Civil Code of Procedure). As we have seen, the judge will have to designate the arbitrator if he finds on the basis of a prima facie assessment that there is an arbitration clause, and here it is pretty obvious that there is one. As it is a prima facie judgment he will not go further into the arguments of Vorazen, since V has no proof to bring forward, the modification having intervened by oral. Once the arbitral tribunal constituted, it will rule on its jurisdiction and it will address the arguments raised by Vorazen and it will establish whether the clause has been modified indeed. If that ad hoc arbitral tribunal finds that the clause had been modified indeed and declines jurisdiction, the claimant will have to initiate proceedings before a new arbitral tribunal under WIPO Expedited Arbitration Rules.

II. In an ad hoc international arbitration with seat in Geneva, the respondent (a Paraguayan state entity) puts forward the following objections against the chair of the arbitral tribunal:

1. The arbitration clause required arbitrators with expertise in the electricity market. At the hearing, the chair made comments that displayed his total lack of expertise in this field. ***What can the respondent do? What are its chances of success? Would the chances be different if the comments had been made by the co-arbitrator appointed by the claimant?***

The seat of the arbitration is in Geneva, both parties are domiciled abroad, so the lex arbitri is Chapter 12 PILA. This is an issue of challenge of arbitrators, so this would be art. 180 PILA, more specifically letter a, which refers to a case when an arbitrator does not meet the requirements of the parties (the requirements considered must be essential to the parties, and here as it relates to the ability to resolve the dispute, it is very hard to oppose the fact that it is essential to the parties, so that would be probably a ground for a challenge). Another issue to consider is that a party cannot raise grounds that it should have known if it had met its duty to investigate. So clearly the party here could not challenge successfully.

If the comments had been made by the co-arbitrator appointed by the claimant, it would not make any difference, because the same requirements apply to both appointed arbitrators and to the chair of the arbitral tribunal.

2. In the arbitration, the respondent requests the adaptation of a long-term contract because of changed circumstances that allegedly disrupted the economy of the contract. Five years earlier, the chair of the arbitral tribunal had published a scholarly article, which was very restrictive about the possible adaptation of contracts due to changed circumstances. ***What can the respondent do? What are its chances of success? Would the chances be different if the article had been authored by the co-arbitrator designated by the claimant?***

We must look at the IBA Guidelines of Conflict of Interest and number 4.1 in the green list, we find the previously expressed opinions by arbitrators. Usually this would not be a distinction made, if the arbitrator has addressed his opinion at this very issue and the same facts arise and gave birth to several arbitrators or if he published an opinion as an expert. In this case, the court will decide that he lacks impartiality.

3. The defendant learns during the arbitration that the chair of the arbitral tribunal acts as counsel of a subsidiary of the claimant in another arbitration. ***What can the respondent do? What are its chances of success? Would the chances be different if the facts involved the co-arbitrator designated by the claimant?***

Number 2.41 IBA Guidelines: 180 par. 2 PILA applies if it had been possible for the party to know in this case that the chair of the arbitral tribunal acted as a counsel of a subsidiary of the claimant in another arbitration. He would clearly lack independence and the challenge would succeed. If the information was not publicly available, the challenge will succeed. The sole fact that an arbitrator does not disclose something he should disclose is not a ground for challenge.

4. During a pre-hearing conference, the chair of the arbitral tribunal refuses to go on a site visit in Paraguay "far too dangerous a country". On the same occasion, the co-arbitrator appointed by the claimant mentioned that she would not be surprised if the respondent had indeed acted in the unlawful way complained of, as this was "typical of developing countries". ***What can the respondent do? What are its chances of success?***

Those both cases are here to show that it is a matter of circumstances of the case. Here it seems pretty clear that the claimant is biased against developing countries and lacks the necessary independence. As for the chair it might give rise to debate. If he doesn't want to go there because he read something in the newspaper, that led him to believe that he would get killed there, it wouldn't be an issue. But if it is a general negative view towards this country, we should conclude that he's biased. There is no definite answer based on the facts we have under our disposal.

VI. Case study 6a – Procedure before the Arbitral Tribunal

1. Applicable law: *lex arbitri*

- *Lex arbitri*: Article 176 PILA
- Legal basis: primarily Article 182 PILA
  - Also Article 183 (provisional measures)
  - Also Article 184 (taking of evidence); essentially says that the tribunal takes the evidence itself (it is often deducted from that, that you cannot just delegate that to one member of the tribunal, it is the whole full tribunal that performs this + the tribunal determines the admissibility of evidence).
  - Also Article 185 (court assistance); If you are stuck you can ask a judge for help (for example you have a deadline for issuing an award and you need to extend the deadline). Not really used in reality.
- And Article 6 ECHR (European Convention for Human Rights)? It is a provision that guarantees fair trial. The traditional approach in arbitration was to say that once you enter an arbitration agreement, you leave the scope of 6 ECHR and you don't benefit it anymore. Today one looks at things in a more nuanced way and it is generally accepted that 6 ECHR applies too and governs the actions of Courts. Note: protections of 6 ECHR are incorporated in arbitration law. Exception: publicity of the hearings is the rule under 6 ECHR but not under arbitration law.

2. Parties' procedural autonomy and the arbitrators' powers

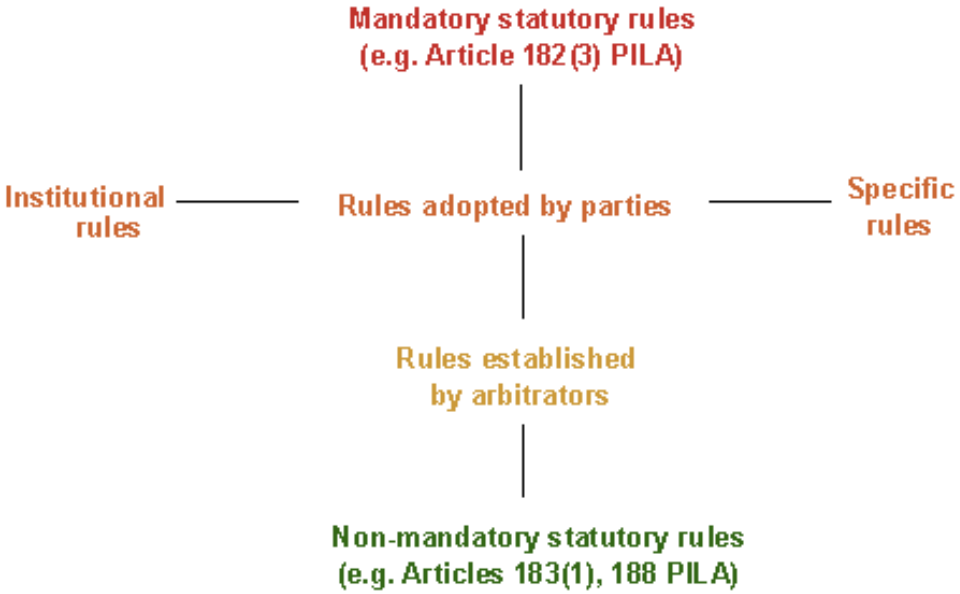
- <u>Parties' autonomy</u>

  "The parties may, directly (1) or by reference to arbitration rules (2), determine the arbitral procedure; they may also submit it to a procedural law of their choice (3)." (Article 182(1) PILA). → The most frequent situation is when the parties submit to arbitration rules. Concerning the procedural law of their choice, cf. case about the Indonesian procedural law. Prof thinks it should be deleted, it is very rarely used and when it's used it is very inconvenient and not practical, because the rules are usually national civil procedural rules and not adapted to arbitration.

- Alternatively, <u>arbitrators' powers</u>

  "If the parties have not determined the procedure, the tribunal shall determine it to the extent necessary, either directly or by reference to a law or to arbitration rules." (Article 182(2) PILA). In other words, if the parties don't exercise their autonomy, the power falls on the tribunal; the tribunal would generally issue an order number 1, number 2, some procedural rules, etc.

3. Hierarchy of the rules governing the proceedings



If have a number of possible rules which may govern the procedure before a tribunal. Mandatory rules of lex arbitri: you can't derogate from these rules. Then you have the rules adopted by the parties and then there are the rules adopted by the parties. In an ideal world, there is harmony between all these rules but in the real world there can be conflict. The mandatory rules prevail, that's obvious. But then, there are two questions:

- First question: what is the relationship between the rules adopted by the parties (institutional or specific) and the rules established by arbitrators? It is clear from 182 that the rules of the parties prevail on the rules established by the arbitrators/by a tribunal. If an arbitrator disagrees with a rule of the parties, the only thing the arbitrator can do about it is convince them to change, but if they don't want to, he can only resign (and can only resign for an important cause).
- Second question: what is the relationship between the institutional rules and the specific rules set by the parties? Can the parties deviate from the institutional rules by setting specific rules? Sometimes the institutional rules expressly say so, but sometimes it doesn't. The ICC Court is the only institution that says that it will accept the changes to the rules if it doesn't affect essential elements.

4. Fundamental principles of procedure

"Irrespective of the procedure chosen (by the parties or the arbitrators), the arbitral tribunal shall ensure equal treatment of the parties (1) and their right to be heard (2) in adversarial proceedings (3)." (Article 182(3)). Sometimes the right to be heard (better translated by due process or opportunity to be heard) conflated with adversarial proceedings but it is easier to set them apart and consider that you have three different principles.

a. Content

- The principle of equal treatment:

- Applies all along the arbitration: important especially for the constitution of the tribunal. That means an equal contribution to the constitution of the tribunal by all the parties. It can be an issue in multi-party arbitrations.
- Requires similar treatment of similar situations: it does not require exactly the same treatment. One party must not be disfavoured by the way proceedings are conducted (for example one party's native language is the same as the arbitration's, receives all the documents and can immediately start working, while the other party needs time to translate everything. So you must give a little more time to this other party).
- Does not preclude differences provided they are justified by the circumstances.

- The right or opportunity to be heard affords each party the right to:
  - Present all facts and legal arguments;
  - Adduce evidence; like documents, etc.
  - Attend the hearings;
  - Be assisted/represented by a person of his/her choice. It can be a lawyer but not necessarily under Swiss law.

- The right to be heard:
  - Entails a minimum duty for the arbitral tribunal to address the relevant issues; this is not every argument but issues that may impact on the outcome. If there is such an issue, then the Tribunal has a duty to briefly state its position on this issue in the award.
  - Has a limited scope in respect of the application of the substantive law: *iura novit curia*, save for surprise. The tribunal can decide what law, what legal theory, etc it will follow but if the parties have not raised an argument which the Tribunal thinks is important, they will ask them. The tribunal will never say that a contract is not valid if the parties did not addressed it, it will first ask the parties to comment its validity. The parties must not be surprised by a legal argument which was not in the debate or because they were not meant to expect it to be used. The tribunal cannot surprise a party, make a determination against a party on the basis of a ground against which it had no opportunity to defend itself.

- The right to submit evidence is not unlimited:
  - The evidence must be necessary and relevant;
  - And adduced in accordance with the applicable procedural requirements.

- The adversarial principle affords the right to:
  - Comment on the opponent's factual and legal arguments;
  - Comment and rebut on the evidence submitted by the opponent.

b. Sanctions for breach

- The sanction is conditional on an immediate objection: "(…) the defendant cannot rely on the breach of his right to be heard, for he has not invoked it straight away. A party who considers that it is a victim of such a violation (of fundamental principles of procedure) or of another procedural defect must raise it forthwith ("sur-le-champ", literally "on the spot") in the arbitration. A failure to do so will preclude it from raising the complaint in an annulment action. The behaviour consisting in invoking a

procedural breach only in the context of the setting aside action against an award – because this eventually proves unfavourable – although such breach could have been brought up during the procedure constitutes a breach of the principle of good faith." (Supreme Court decision of 25.7.97, Kc. E. SA, Bull. ASA 2000 96)

- If raised immediately, the breach is sanctioned by:
  - The annulment of the award:
    - "(The award) can be annulled (…):
      d. where the principle of equal treatment of the parties or their right to be heard in adversarial proceedings has not been observed" (Article 190 (2) PILA
  - The refusal to enforce the award
    - "1. Recognition and enforcement of the award may be refused (…) only if that party (the one which opposes the recognition) furnishes (…) proof that:
      b. (…) he was otherwise unable (…) to present his case;
      d. (…) the arbitral procedure was not in accordance with the agreement of the parties, or, failing such agreement, was not in accordance with the law of the country where the arbitration took place;" (Article V(1) CNY).

5. Court assistance to the proceedings

- Taking of evidence (Article 184(2) – Court of the seat)
- Provisional/interim measures/relief (Article 183(2) – "Competent" court)
- In general (Article 185 – Court of the seat)

Rare in practice.

CASE STUDY 6a

I. Facts

1. A dispute related to dredging works in the Suez Canal is submitted to an ad hoc arbitration, with seat in Geneva, between an Egyptian company (Orascam SAE), as claimant, and a British company (Belfort Betty plc), as respondent.

After the first procedural hearing, the arbitral tribunal issues Procedural Order N° 1 (PO 1), which inter alia provides the following:

i. The claimant shall file a Statement of Claim before 30 June and the respondent shall file a Statement of Defense before 31 August. These submissions shall put forward all of the parties' fact allegations and legal arguments. They shall append all the documents on which the parties intend to rely, as well as witness statements and expert reports, if any.

ii. A hearing will take place from October 1 to October 3, at which the arbitral tribunal will hear the witnesses and experts identified in the Statement of Claim and Statement of Defense.

iii. The Tribunal will give directions on the continuation of the proceedings at the end of the hearing.

2. With its Statement of Defense, Belfort Betty submits a financial expert report aiming at proving that the losses for which Orascam seeks recovery are non- existent. The claimant,

which did not file any expert report with its Statement of Claim, requests leave [permission] to submit a rebuttal expert report before the hearing. It also asks that the financial experts of both parties be heard at the hearing.

3. Following this request, the arbitral tribunal issues Procedural Order N° 2 (PO 2), by which it denies the claimant's request for the filing of an expert report as well as the examination of the financial experts on the ground that the financial issues in this case are "uncomplicated".

4. The hearing takes place as scheduled. As Orascam's counsel cross-examines one of Belfort Betty's experts on the canal's geological condition, the tribunal states that this topic seems irrelevant and that the line of questions is thus inadmissible. Counsel objects, but the tribunal confirms its ruling.

5. At the end of the hearing, the arbitral tribunal issues Procedural Order N° 3 (PO 3), which, among others, provides the following:

a) *On 31 October, both parties shall submit post-hearing briefs (PHBs), which shall summarize their position on the dispute; the PHBs shall not append any new documents;*
b) *A hearing for oral argument will be held on November 15.*

6. On 15 October, a partner of the claimant's counsel requests a two week extension of the time limit for the PHB explaining that counsel for the claimant is hospitalized following a car accident. The respondent does not oppose the request, on the condition that it benefits from the same extension.

7. By way of Procedural Order N° 4 (PO 4), the tribunal grants the extension sought by the claimant, but denies it to the respondent.

8. With its PHB, the respondent files reports of geological tests of the canal made during the dredging works. The claimant objects arguing that all documents had to be submitted with the submissions prior to the hearing.

9. The tribunal then issues Procedural Order N° 5 (PO 5), by which it strikes from the record the test results filed with the respondent's PHB.

10. The award is notified to the parties five months later. It grants some of Orascam's claims and dismisses others. It is inter alia based on the geological condition of the canal and dismisses one of the claims on the basis of Belfort Betty's financial expert report.

II. Questions

Both parties are dissatisfied with the outcome of the arbitration and try to have the award set aside. Which grounds for annulment may each invoke before the Federal Supreme Court? What will the opponent's defense be? How will the Supreme Court rule?

In summary:

- Ad hoc arbitration Geneva between Orascam (Egypt) and Belfort Betty (UK).
- PO 1 provides:
    - SoC and SoD, together with "all documents"

  - Witness and expert hearing
  - With SoD, respondent submits a financial expert report; claimant seeks leave to submit its own expert report and to examine the financial experts.
- PO 2: AT denies claimant's financial report and examination of financial experts.
- Hearing: AT declares claimant's questions inadmissible in spite of objection.
- PO 3:
  - Simultaneous PHBs on 31 October (without documents)
  - Hearing for the final oral argument on 15 November
- Claimant requests an extension of the time limit for PHB (accident); granted to claimant, not to respondent (PO 4)
- Respondent files documentary evidence with PHB
- PO 5: AT strikes respondent's documents from the record
- Award grants some claims and dismisses others; *i.a.* based on geological conditions and respondent's financial report
- Annulment action initiated by both parties on the following grounds:
  1. Questions held inadmissible at hearing (claimant)
  2. Denial of claimant's request for financial expert report and of examination of financial experts (PO 2)
  3. Refusal of extension of time limit for PHB (PO 4) (respondent)
  4. Exclusion of documents filed with PHB (PO 5) (respondent)

→ GROUND 1:

i. ***Lex arbitri?*** PILA because both parties are domiciled outside and (…). **Arbitration rules?** It is an ad hoc arbitration so no arbitration rules and the only legal basis we have is the PILA.

ii. **Characterization of the issue?** We have an issue of fundamental principles of procedure. **Legal basis (applicable rule)?** The legal basis for that is 182(3) PILA and the corollary in terms of ground of annulment is 190(2)(d), which provides to the annulment of the award for breach of the right to be heard (Article 182(3)).

iii. **Analysis: application of the rule to the facts:** we are dealing with the situation that happened at the hearing (the tribunal stopped the counsel from asking questions (held inadmissible) and the counsel said it was a breach in his right). The right to be heard compromises the right to submit evidence. Witness testimony is evidence and putting questions to witness is submitting evidence. By not allowing questions, AT breached the right to submit evidence, hence the right to be heard. Immediate objection: the objection point is important; we can reply that there was an objection because the counsel said, "you have to allow me to ask these questions". There is a right to rebut the evidence of your opponent: the evidence of the opponent is the witness statement. The right to produce evidence is not unlimited; it must be (i) necessary and relevant (ii), adduced in accordance with the applicable procedural requirements, incl. timelines. It was the case here: limitations complied: as to necessity, no indication that geological issues are already established. As to relevance, likely to influence outcome (see award). Evidence adduced according to rules, incl. on time (during the cross-examination of witnesses).

iv. **Conclusion:** It will lead to the annulment of the award.

→ GROUND 2:
The ground is the denial of financial expert report and expert examination. Article 190(2)(d) provides annulment ground for breach of adversarial principle and right to be heard, including the right to submit evidence. The adversarial principle comprises right to rebut opponent's evidence. Expert report and cross-examination are means of evidence. What about immediate objection? What about respect of procedural requirements? (i) Expert report had to be submitted with SoC (PO1) and hence belated; (ii) expert examination request probably admissible – necessary and relevant evidence? The conclusion depends on analysis of these questions.

→ GROUND 3:
The ground is the (non-)extension of deadline. Article 190(2)(d) provides annulment ground for breach of equal treatment (Article 182(3)). Requires similar treatment of similar situations. Immediate objection? Here, different treatment justified by different situations. So in conclusion: there will be no annulment.

→ GROUND 4:
The ground is the exclusion of documentary evidence. For lex arbitri see ground 1. Documents here are evidence. Immediate objection? Right to submit evidence subject to limitations (see ground 1); here limitations related to procedural requirements, including time, not complied with. So in conclusion, there is no annulment.

VII. Case study 6b – Proceedings before the Arbitral Tribunal (second part)

1.1 Standard Course

- Request for arbitration – Answer
- Constitution of tribunal – Advance on costs
- Preliminary procedural hearing (first hearing), where you discuss how the proceedings will be organized. It is generally discussed about:
    - Terms of reference/appointment/constitutive order (sometimes are dropped)
    - Procedural rules
    - Timetable (calendar)
- Possibly, jurisdictional phase (that is if you have a jurisdiction of defence, you often would have a first phase and a first award on jurisdiction, but it is not a must).
- Memorials, with documentary evidence, witness statements, expert reports
- Often, between the first and the second rounds of memorials, document production phase
- Hearing on the merits
    - [Oral opening arguments]
    - Witness and expert examinations
    - [Oral closing arguments]
- [Post-hearing briefs and/or hearing for final oral arguments]
- Deliberation
- Award

1.2 Provisional / interim measures / relief

1.2.1 Definition

All conservatory measures which are ordered on a provisional basis to *safeguard the parties' rights* or *regulate their relationship* during the proceedings on the merits and which are ancillary to such proceedings. They are provisional !

- Three characteristics:
  - Measures ordered following a simplified procedure on the basis of a summary review; you don't have to prove, only show likelihood.
  - Having some relative authority but no *res judicata*; an arbitral award or any court judgement has res judicata, which means it cannot be changed.
  - Which may be revoked or amended in the course of the proceedings

No restrictions as to the *type of measures*.

1.2.2 Jurisdiction

- Of arbitral tribunal
  "Unless the parties have agreed otherwise, the arbitral tribunal may, at the request of a party, grant interim relief and conservatory measures." (Article 183(1))

- Of arbitral tribunal with court assistance
  "If the party so ordered does not comply therewith voluntarily, the arbitral tribunal may, request the assistance of the competent court. Such court shall apply its own law." (Article 183(2)).

- Of court (pursuant to rules on judicial jurisdiction)
  - Before and after constitution of the arbitral tribunal?
  - Concurrent or subsidiary?

1.2.3 Applicable Law (law governing provisional measures before arbitrator)

- *Lex arbitri* or *lex causae*, or both?

- In any case, rules provide by the parties, e.g.:
  "[…] the President of the ad hoc Division […] shall consider whether the relief is necessary to protect the applicant from irreparable harm [1], the likelihood of success on the merits of the claim [2], and whether the interests of the applicant outweigh those of the opponent [3] or of the other members of the Olympic Community." (Article 14(2) of the CAS Arbitration Rules for the Olympic Games)

Requirements in arbitral practice:

(1) Risk of irreparable or serious harm (harm difficult to compensate by way of damages). Example: reputational harm is difficult to repair in money
(2) Likelihood of success on the merits / claim not manifestly without merit (i.e. not certain to fail)
(3) Balance of interest/harm/convenience
(4) Urgency? Controversial. Relief cannot await the final award. You do not need to prove urgency but show its likelihood. Also it is sufficient to show that the decision cannot wait the final award.

Article **17A** UNCITRAL Model-law on International Commercial Arbitration

- (1) The party requesting an interim measure under article 17(2)(a), (b) and (c) shall satisfy the arbitral tribunal that:
  a.) *Harm not adequately reparable by an award of damages* (1) is likely to result if the measure is not ordered, and such harm *substantially outweighs* (3) the harm that is likely to result to the party against whom the measure is directed if the measure is granted; and
  b.) *There is a reasonable possibility that the requesting party will succeed on the merits of the claim* (2). The determination on this possibility shall not affect the discretion of the arbitral tribunal in making any subsequent determination.

1.2.4 Proceedings (procedure following request for provisional remedies)

- Both parties must in principle be heard.
- Possibly, security to cover possible damaged caused by measure (Article 183(3) PILA), you can also find this in other rules.
- *Ex parte* measures (i.e. without the party against whom the measure is requested being heard)?

1.2.5 Enforcement of provisional measures

- Often, voluntary performance (do not want to irritate the arbitrators, because in the end they are the ones which decide → psychological factor)
- Arbitrator has no coercive power
- Arbitral order =/= award within the meaning of NYC, because it is temporary
- Resort to courts
  - In Switzerland: Article 183(2) ("competent court")
  - Abroad: depends on foreign law (e.g. par. 1041(2) and (3) ZPOD)

Article **17H** UNICTRAL ML (= Model Law)
1) An interim measure issued by an arbitral tribunal shall be recognized as binding and, unless otherwise provided by the arbitral tribunal, enforced upon application to the competent court, irrespective of the country in which it was issued, subject to the provisions of article 17 I.

Article **17I** UNICTRAL ML
Principal grounds for refusing enforcement of interim measures:

- Same as for awards, lack of jurisdiction, violation of fundamental procedural principles, irregular composition of the arbitral tribunal, *ultra petita* decision, lack of Arbitrability and violation of public policy;

- Moreover, non-provision of security ordered by arbitral tribunal; measure terminated or suspended by arbitral tribunal or by the court of the State in which the arbitration takes place, where so empowered or pursuant to the law under which the measure was granted.

CASE STUDY 6b

1. A Texan construction company by the name of Lone Star Ltd enters into an agreement in connection with the design, procurement and construction of a coalfired power plant in

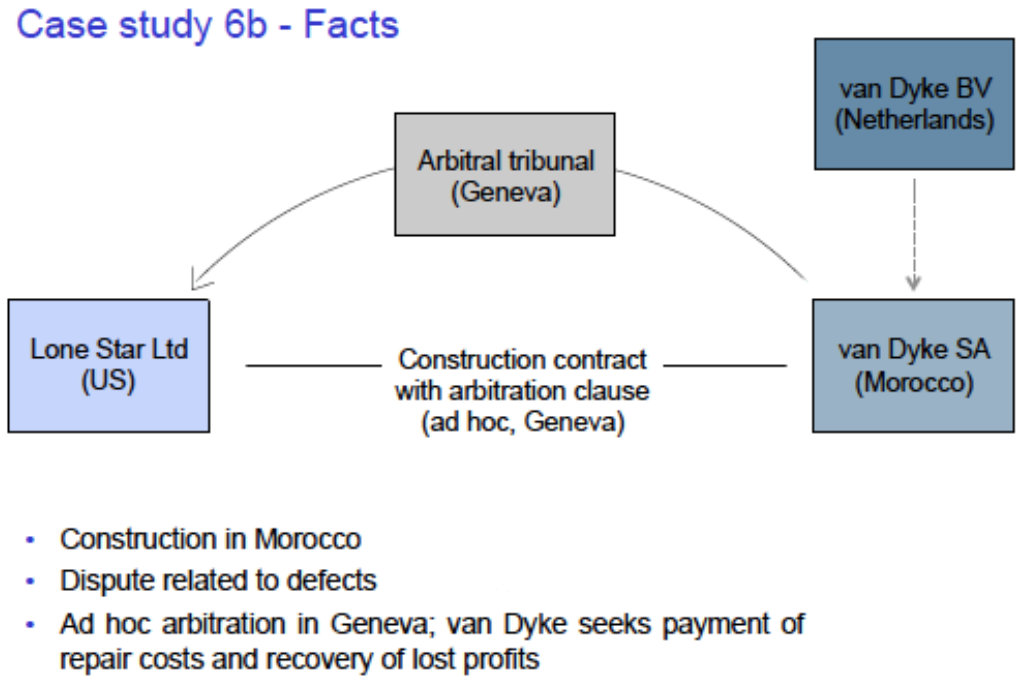
Morocco with van Dyke SA, a Moroccan company which is wholly owned by the Dutch company of the same name. The agreement encompasses the following arbitration clause: "Any dispute in connection with or arising out of the present agreement shall be settled by arbitration. The seat of the arbitration shall be Geneva".

2. The coal is shipped to the plant by boat. A 300m long jetty must allow the ships to berth in front of the plant. While the construction is completed and the plant is in its testing phase, an unusually violent storm causes severe damage to the jetty, which must be entirely rebuilt. Van Dyke considers that the jetty design was defective, which would explain that it did not withstand the storm. By contrast, Lone Star argues that the jetty was flawless and that the damage was caused exclusively by the storm.

3. Van Dyke initiates arbitration against Lone Star and seeks the payment of the jetty reconstruction costs and the recovery of profits lost due to the delay in the start of the plant's operation.

4. Assume you are Lone Star's counsel. Your client tells you that van Dyke is about to start rebuilding the jetty. These works are likely to prevent the assessment by technical experts of the cause of the damage (=détermination by technical experts of the cause of damages), which may serve as evidence in the arbitration.

What would you recommend to Lone Star?



LS is the respondent and is concerned about being able to prove that there was no defect in the manufacture of the jetty. Can we ask a request from the tribunal for an order that the reconstruction be stopped? Anything else? An inspection. Who would retain the expert? The idea is to have an expert who will take whatever evidence is needed and during this time there would be no reconstruction; the expert can be the parties' expert (LS's) or it would be safer that the expert would be appointed by the tribunal (would therefore be neutral and it would be difficult to challenge his report about the defect of the jetty).
Do we meet the requirements in arbitral practice of:

- Risk of irreparable or serious harm (harm difficult to compensate by way of damages)? Yes. There would be significant harm done if it is deprived of any means of proof.
- Likelihood of success on the merits / claim not manifestly without merit? Yes
- Balance of interests/harm/convenience? Yes.
- Urgency? Relief cannot await the final award? Yes.

What procedure would the arbitral tribunal follow here? Would it hear both parties? Yes, no reason for ex parte. Security to cover possible damage? Yes. Enforcement / would the measure be enforced? The question is: can we also go to a Court? Yes, court on the construction site, not a court in Switzerland. We would have to check what the Moroccan law says.

We can also go directly to the Moroccan court, not only for enforcement measures and send the police to stop the reconstructions. Indeed, the problem is they urgency of the situation.

The recommendation one can give to LS is to go to Moroccan court, if its law is clear. If it isn't, one can go to arbitrators. If there is no compliance, the most efficient way is to go to the Moroccan court.

Note: If the court has legislation that enacts the model law, then it will take what we have seen in terms of requirements for provisional orders. Otherwise it will probably consider that it is not an award and will have no legal bases for tribunal orders, so it will not enforce and that is not even a question of review but of the nature of the decision.

5. Assume that the arbitration is governed by the SRIA (Swiss Rules of International Arbitration) and that you are the arbitral tribunal:

a. During the first hearing, the parties express widely divergent views on the document production. What would you decide?

This is a question specific to the proceedings. VD says that it wants very broad document production (adopt the US style discovery) and LS wants very restrictive production. The parties can agree on the document rules under 182 PILA, which gives them the procedural autonomy to refer to the Swiss rules. What do the Swiss rules say about this? Art. 24(3): "at any time during the proceedings, the tribunal may require the party to produce documents". So the fact that the tribunal can order this is recorded, and in addition to this it is a right that the tribunal has in general to conduct the proceedings. Under 24(2), "the tribunal shall determine the admissibility of the evidence". This doesn't help us much though: the tribunal can indeed order the production of documents. It means that the conditions are essentially fixed by the tribunal. It would usually look at the IBA rules of taking of evidence and these rules have specific description of the requirements and the scope of document production; that would be an easy way to resolve the issue between the rules. It is a middle-way between the parties: none of them would be happy but they would be equally unhappy.

b. During the same hearing, the parties also disagree on the use of written witness statements. What would you decide?

Cf. the discussion about witness statement in the book, there is the answer.
Note: You will find an illustration of possible considerations related to document production

and witness statements on pp. 348 ff. of the French edition, on pp. 27 ff. of Chapter 6 in the English excerpts, and on pp. 319 ff. of the third edition in English.

VIII. Case study 7 – Law Applicable to the Merits

1. Subject matter

- Law governing the contract and the dispute arising out of it
- Not the law of the arbitration or *lex arbitri*
- Not the law governing the arbitration agreement
- The rules on the determination of the applicable law are found in the *lex arbitri*

What issues are covered by the lex arbitri/law of arbitration? Basically, it governs all the procedural aspects of arbitration. The law governing the arbitration agreement covers only the said agreement. Art. 178 PILA mentions 3 laws that confirm the validity of an arbitration agreement. You always have to start with the lex arbitri who says which rules the tribunal has to apply.

2. Award according to rules of law (187(1) PILA)

"The arbitral tribunal shall decide the dispute according to the rules of law chosen by the parties or, in the absence of such a choice, according to the rules of law with which the case has the closest connection."

- Party autonomy and proximity: same principles of conflict of laws as in court
- However, practical differences with sociological and legal causes

a. Autonomy and choice of law

- Which law?
  - National law (including treaties, etc) as the domestic judge of that state would interpret/use it. Note: art. 28 UNCITRAL rules says exactly the same thing. The parties can also adopt a common trunk approach, for example that the contract is governed by the general principles common to France and England.
  - When parties choose a certain law, does it have to be a connection between this law and the case? There is no such requirement for parties when they choose a law that it has a connection between the case/the disputes. But this right is not unlimited; it is subject to some mandatory rules.
  - Non-national rules / *lex mercatoria ("rules of law")* : General principles of international commerce: "spontaneous rules of law" (droit spontané) created by the actors of international commerce; incomplete legal system; sources and examples : Cf art. 187 PILA: says that the limits are general principles of commercial contracts (UNIDROIT et PECL/ Principles of European Contract Law are private codifications of these spontaneous rules, which parties may also choose).
- Validity requirements: contract (you always need an offer and acceptance), separate from the main contract, no form requirements. For example it is admissible for a choice of law to be made tacitly.

- Limits to the choice of law

- Matters not covered by the choice of law
- Transnational public policy: we are talking about true TPP rules (droit public vraiment international), it is a very narrow set of principles that would have some sort of transnational recognition in a wide number of states (prohibition of slavery, of corruption, etc). Public policy can come to play in several aspects. Here we are talking about TPP as a limitation to parties' rights to choose some laws. It operates in a negative way, the arbitral tribunal will have to disregard a choice of law made by the parties in the contract if the outcome of the case reached through the application of that law will be incompatible with transnational public policy.
- Overriding mandatory rules (Article 19 PILA by analogy): it is generally accepted that, under certain circumstances, arbitrators have the power to apply foreign mandatory rules.
- Role of trade usages

Article 19 PILA

1. When interests that are legitimate and clearly preponderant [3] according to the Swiss conception of law so require, a mandatory provision of another law than the one referred to by this Act [1] may be taken into consideration, provided that the situation dealt with has a close connection with such other law [2]. «

It is now accepted that an AT in Switzerland would apply article 19 by analogy. It contains the first part of the PILA and is meant by domestic courts, but not as such by an AT. The numbers make it easy to read in this order: three requirements, which, if they're present, allow the AT to resort to these mandatory provisions. The first one say that is has to be a mandatory provision of another law. Secondly, there has to be a close connection between the law to be applied and the situation at hand. The 3rd condition needs adaptation: the outcome of the application of these overriding mandatory rules must not be incompatible with transnational standards. NB: it is said that when those conditions are met, by analogy of article 19 the AT may take into consideration (=/= must).

b. Applicable law in the absence of party choice (objective method)
"[…] rules of law with which the case has the closest connection" (187(1))

- Tribunal not bound by conflict of laws rules applicable in court at the seat.
- Closest connection test.
- Tribunals have broad freedom in determining the applicable law.
- In practice, tribunals use different methods to implement closest connection test :
  - Center of gravity of contract resulting from factual links
  - Conflict rule of legal systems close to contract (where they converge) or of system closest to contract
  - Conflict rule with transnational recognition, e.g. characteristic performance (performance which is non monetary)

- Can the arbitrator apply non-national rules of law? You can imagine such situations, for example if the contract is equally connected to several states and none of their law prevails.

- Limitations: overriding mandatory rules and transnational public policy

c. Relevance of institutional rules

- "The arbitral tribunal shall decide the case in accordance with the rules of law agreed upon by the parties or, in the absence of a choice of law, by applying the rules of law with which the dispute has the closest connection." (Article 33 SRIA)

- "1 The parties shall be free to agree upon the rules of law to be applied by the arbitral tribunal to the merits of the dispute. In the absence of any such agreement, the arbitral tribunal shall apply the rules of law which it determines to be appropriate.
  2 The arbitral tribunal shall take account of the provisions of the contract, if any, between the parties and of any relevant trade usages." (Article 21 ICC Rules)

3. Award *ex aequo et bono (Article 187(2))*

"The parties may authorize the arbitral tribunal to decide ex aequo et bono"

- Parties' authorization necessary (they have to consent to that). Not formal requirement is needed, you can have tacit agreement, and this will suffice for the purpose of Swiss PILA.
- The arbitrator ruling *ex aequo et bono* is not bound by rules of law (save for transnational public policy).

4. Any control of the application of the law governing the merits?

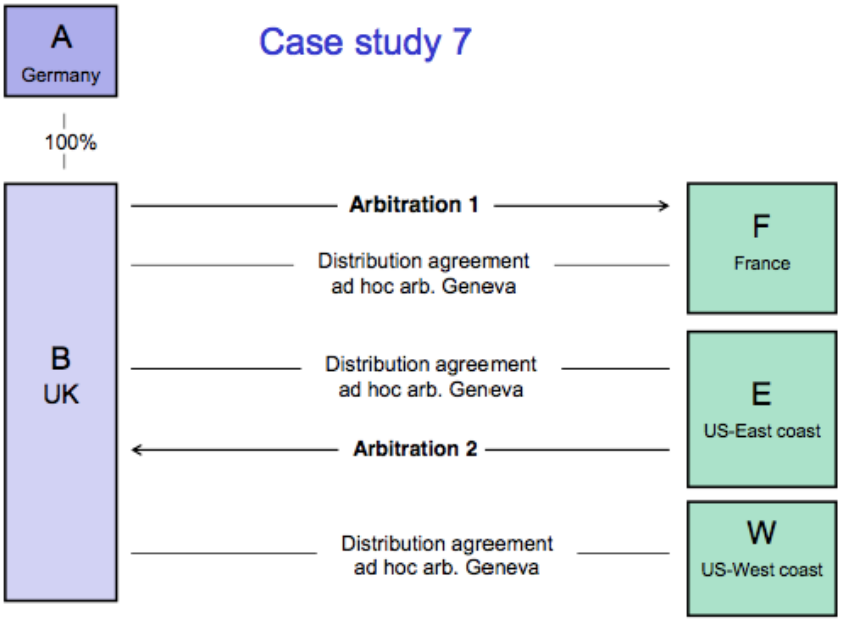
No, except in a very limited manner in the context of international public policy:

- Award may be annulled "where the award is incompatible with public policy" (Article 190(2)(e))
- Award may be refused enforcement on the ground that "[t]he recognition or enforcement of the award would be contrary to the public policy of that country." (Article V(2)(b) NYC)

CASE STUDY 7

I. *The British company B, which manufactures the famous luxury cars R, recently acquired the German group A. One of the first decisions of the new management was to set up an exclusive distribution network in order to safeguard the brand's prestige. B thus concluded a distribution agreement with an exclusive importer in each Member State of the European Union, Switzerland and Canada. In respect of the US market, it entered into an agreement with an importer in New York (E) for the East Coast and with another importer in San Francisco (W) for the West Coast. The agreements determine the sale price of each car model based on the purchasing power of each country's customer base, prohibit sales outside of the distributor's territory, and prevent distributors from granting discounts above 5%. All agreements provide for ad hoc arbitration in Geneva for disputes arising between the manufacturer and the distributor. B learns that F, the exclusive distributor in France, offers discounts far in excess of the 5% contractual limit. B thus terminates F's distribution agreement with immediate effect, chooses a new importer, and initiates an arbitration against F. The arbitral tribunal is constituted and the arbitration begins. B seeks compensation for the harm inflicted to its brand's reputation as a result of F's behavior. The latter opposes this claim by arguing that (i) it was forced to grant substantial discounts because of B's delays in*

the delivery of the cars and (ii) the provision limiting discounts to 5% is in any event null and void being contrary to European competition law. F for its part requests damages for unlawful termination.



1. ***What law governs the distribution agreement?***

Would chapter 12 PILA apply here? Yes, pursuant art. 176 PILA, because the seat is in Geneva and both parties are seated abroad. We find what is the provision that deals with the law governing the merits: it is art. 187 which first gives the party autonomy, we have no express choice of law, so we skip to the second part, which is the AT would determine the law, according to the closest connection test. How would the AT go further? If you apply the conflict rule which is the residence of the debtor of the characteristic performance, that would lead us to apply art. 4 of the Rome I Regulation; that would then lead us to the application of the French law, because this is where the debtor/distributer is based. But there is also sense to apply English law, because of the many contracts. The contracts are though separate agreements and the AT is constituted under one agreement, so it will only have jurisdiction on that agreement and will probably not take into consideration any other agreement/contract.

Can we find a common conflict rule? Since here the parties are European, it would look for guidance at the Rome I Regulation. Another possibility? What is the center of gravity? The factual links here which are the companies and France, so again it leads us to French law.

2. ***Would your answer be different if the arbitration was an ICC arbitration?***

It would be an indirect choice, which cuts the way to obligations to apply the closest connection test. We would only have to determine the applicable law, but there would be no significant difference here, we would probably again arrive to the same result (French law).

3. ***Must the arbitral tribunal take European competition law into consideration?****

If we assume that French law is the law that governs the dispute (or even british law), of course European competition law would be considered as part of mandatory law. So of course the AT would have to apply it.

4. What if the agreement contained a choice of Swiss law?

Can we say that since mandatory European competition law is not part of Swiss law and therefore it would not be applicable? Actually the parties have expressed their choice which is Swiss law, so as a basis we would say that Swiss law applies pursuant art. 187(1), this is undisputed. The choice of law is not completely unlimited though. It finds its limits firstly in transnational public policy and its difficult to say that competition law is part of a very limited transnational public policy. The Federal Supreme Court has actually said that this is not the case. That would not be possible to bring this ground. But it should be considered that European competition law principles are part of mandatory provisions (they protect fundamental interests of a state). What would be the criteria that the AT would apply? Art. 19 by analogy: what would be the requirements?

i. Check whether the competition rules of the European state claim to be applied (intended scope of the regulation), here it wants to be applied when it concerns a European market, so here this requirement is accomplished.
ii. Close connection with the situation at hand? Yes, all these countries are European.
iii. Would the result we reach with these rules be compatible with transnational standards? The result would not be incompatible because it is a rule that can be accepted from a transnational perspective.

The AT is not strictly mandated to apply the rules under art. 19 by analogy, but it may do so.

What wishes more to be applied here? Swiss law (with no connection whatsoever with the dispute, apart from being the law chosen by the parties) or European competition rules? Of course it would be European law. So the AT would look more heavily at the mandatory rules of these rules.

5. Or if the parties had authorized the arbitral tribunal to rule ex aequo et bono?

The parties need to agree. It would be a good (and risky) way for parties wishing to circumvent (avoid) the application of mandatory rules.

6. What should the tribunal do if in the course of the arbitration the parties request it to resolve the dispute by application of Swiss law to the exclusion of any rule of competition law?

Is it allowed to agree to a choice of law during the proceedings? Before the award is rendered, yes of course. Effect of this kind of strange choice of law clause? It would be a negative choice of law clause (exclusion of any rule of competition law).

**Article 101Treaty on the Functioning of the European Union (TFEU) (ex art. 81 TCE) reads as follows:*

"1. The following shall be prohibited as incompatible with the internal market all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the internal market, and in particular those which:

(a) directly or indirectly fix purchase or selling prices or any other trading conditions; (b) limit or control production, markets, technical development, or investment; (c) share markets or sources of supply; (d) apply dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;

(e) make the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.

2. Any agreements or decisions prohibited pursuant to this article shall be automatically void. 3. The provisions of paragraph 1 may, however, be declared inapplicable in the case of:

any agreement or category of agreements between undertakings, any decision or category of decisions by associations of undertakings, any concerted practice or category of concerted practices, which contributes to improving the production or distribution of goods or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit, and which does not:

(a) impose on the undertakings concerned restrictions which are not indispensable to the attainment of these objectives;

(b) afford such undertakings the possibility of eliminating competition in respect of a substantial part of the products in question".

Article 4(a) Commission Regulation (EU) No 330/2010 of 20 April 2010 on the application of Article 101(3) TFEU to categories of vertical agreements and concerted practices reads as follows:

"The exemption provided for in Article 2 shall not apply to vertical agreements which, directly or indirectly, in isolation or in combination with other factors under the control of the parties, have as their object: (a) the restriction of the buyer's ability to determine its sale price, without prejudice to the possibility of the supplier to impose a maximum sale price or recommend a sale price, provided that they do not amount to a fixed or minimum sale price as a result pressure from, or incentives offered by, any of the parties".

IX. Case study 8a – Annulment of the Award

1. Key element: finality of award

Limited means to challenge the award: key difference between arbitration and court litigation. Unlike for courts, an award is not subject to appeal (pas possible de recourir contre une décision d'un tribunal arbitral contrairement aux décisions de tribunaux ordinaire). Under the PILA the only means to attack the award is expressely the annulment of the award. The Supreme Court has admitted also some very limited circumstances for a revision. The main means remains the annulment of the award. Besides when we talk about annulment, the grounds are extremely limited. Restricted grounds (art. 190(2) PILA, similar to those one can see in art. 5 NYC): they deal with procedural effects, concern the way in which the decision was reached but these grounds are not concerned with the content of the award/the decision of the arbitral tribunal. Indeed, if we attack an award, it is for annulment. Note: annulment does not allow to review the merits (pas de révision au fond)!

2. Annulment

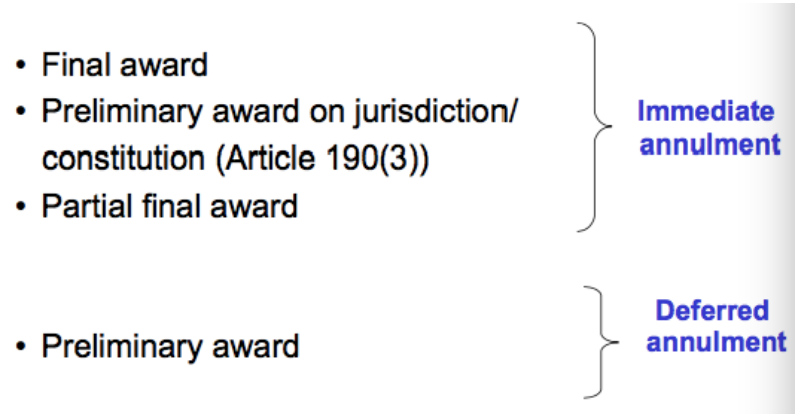
a. Which awards?

- Three categories of awards:

1.) Final: brings the arbitration to an end for substantive or procedural reasons, it resolves the entire dispute and puts an end to the entire arbitration and to the claims.
2.) Partial final: ends a part of the dispute, it finally decides a part of the dispute only. It's an award that finally resolves a portion of the dispute, especially when there are many different claims. Art. 188: it is possible for the tribunal to give a partial award in Switzerland.
3.) Preliminary: rules on preliminary substantive or procedural issue; to be distinguished from procedural order. It does not put an end to the arbitration. It's a step to reach what will be later the final award.

NB: Award on jurisdiction or constitution may be final or preliminary

- When to seek annulment of which awards?



Necessity for one to seek immediate annulment: if it doesn't do it, it will lose its rights.

Deferred annulment: if you have preliminary award, this in Switzerland also must be challenged immediately after it is rendered. You cannot wait until the final award.

- Article 190

1. The award is final from the time when it is communicated.

2. Proceedings for setting aside the award may only be initiated:
   a. where the sole arbitrator has been improperly appointed or where the arbitral tribunal has been improperly constituted;
   b. where the arbitral tribunal has wrongly accepted or denied jurisdiction; (…)

3. As regards preliminary decisions, setting aside proceedings can only be initiated on the grounds of the above paragraphs 2(a) and 2(b); the time-limit runs from the communication of the decision.

b. Which court?

- Article 191:

1. Setting aside proceedings may only be brought before the Federal Supreme Court. The procedure is governed by Article 77 of the Law of 17 June 2005 on the Federal Supreme Court.

- Article 77 Supreme Court Act:

1. An application for review in civil matters is admissible against decisions by arbitral tribunals: a. in international arbitration, pursuant ot the requirements provided in Articles 190 to 192 of the Private International Law Act of 18 December 1987; (…)

2. (Some provisions related to the review in civil matters are not applicable in arbitration)

3. The Supreme Court shall review only the grounds that the applicant has raised and substantiated.

→ No stay of the enforcement of the award.

c. Which grounds?

- Article 190:

2. Proceedings for setting aside the award may only be initiated:

a. where the sole arbitrator has been improperly appointed or where the arbitral tribunal has been improperly constituted;

b. where the arbitral tribunal has wrongly accepted or denied jurisdiction;

→ Any issue related to the validity (formal, substantive, arbitrability) and scope of the arbitration agreement.

c. where the arbitral tribunal has ruled beyond the claims submitted to it, or failed to decide one of the claims;

→ To be distinguished from ground based on jurisdiction.

d. where the principle of equal treatment of the parties or their right to be heard in an adversary procedure has not been observed;

→ Only related to the breach of principles provided in Article 182(3), not the breach of the other procedural rules.

e. where the award is incompatible with public policy

→ procedural and substantive public policy
→ source? Distinguish AT's and court's public policy
→ incompatibility of outcome

d. Waiver (dispense/renonciation) of annulment

- Article 192

1. Where none of the parties has its domicile, it habitual residence, or a place of business in Switzerland (1), they may, by an express statement (2) in the arbitration agreement or in a subsequent agreement in writing, exclude all setting aside proceedings, or they may limit such proceedings to one or several of the grounds listed in Article 190, paragraph 2.

CASE STUDY 8a

The French-Spanish construction consortium FS enters into a consultancy agreement ("CA") with N, a business man living in New York. The CA provides that, in the event that the Latin American State S awards the contract for the construction of a highway system to FS, N will receive a commission equivalent to 7% of the construction price. The CA contains the following arbitration clause:

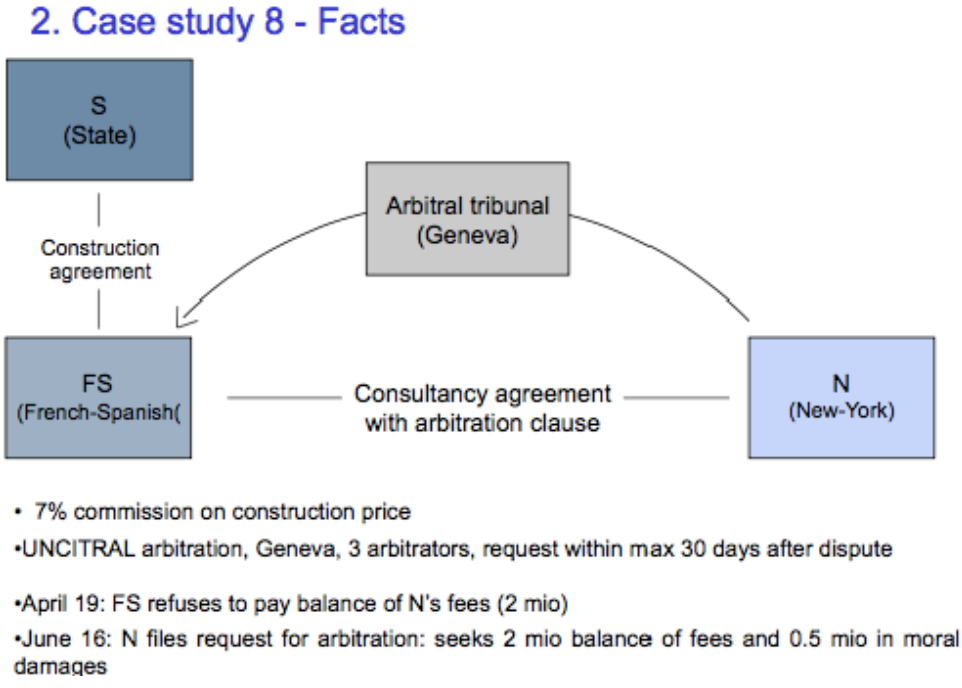
Any dispute arising out of this agreement shall be finally settled by three arbitrators sitting in Geneva according to the UNCITRAL Arbitration Rules. The request for arbitration shall be filed no later than thirty days after the dispute has arisen.

FS is indeed awarded the construction contract. While it has paid part of B's commission, it writes on April 19, 2014 that it will not pay the balance. On June 16, 2014, N initiates an arbitration against FS and seeks the payment of USD 2'000'000 representing the balance of the agreed commission, as well as USD 500'000 in moral damages.

During the arbitration, two witnesses testify that part of N's commission was intended to be spent on presents for senior government officials of S. Two documents produced in the arbitration appear to substantiate these testimonies. However, none of the parties has raised the nullity of the CA.

Towards the end of the arbitration, the arbitral tribunal deliberates but fails to reach a consensus or a majority. The chair thus decides that his opinion will prevail and he drafts an award with summary reasons. The award orders FS to pay to N USD 2'500'000 in damages for non-performance of the CA and dismisses the claim for moral damages.

In the fact section of the award, the tribunal states that it is established that bribes have been paid to senior government officials of S. In the legal analysis, the tribunal underlines that while bribery is objectionable, it is normal practice in tenders for construction processes. It adds that, since neither party invoked the nullity of the CA, the latter must be deemed valid.



1. Annulment of the award (Class 9)

FS intends to seek the annulment of the award in the Federal Supreme Court.

a. On which grounds for annulment can it rely? What are its chances of success?

During proceedings, witnesses and documents refer to « gifts ». Deliberations: chair decides.

Award: a) grant 2.5 mio in damages; 0 in moral damages. b) notices payment of bribes (corruption basically), but admits agreement's validity.

Lex arbitri: both parties have no connection to Switzerland (art. 176 PILA) and the seat is Geneva, so the conditions of chapter 12 PILA apply here.

Waiver under art. 182 would be provided in the case? Is there room for a party to argue that the claimant has waived its right to go to the Supreme Court? Are the conditions of 182 met or not (we are not talking about the loss of a right to object here)? A language like this would not constitute an express statement. The first condition is met, the parties can have such a principle agreed (they could have done it, but they didn't in this case). Any possibility to argue about constitution? No. Tribunal improperly constituted? No elements here.

The dispute was not brought within the time limit provided in the arbitration clause. It could be framed as a jurisdictional issue, or not be. The party that wants to have the award annulled will argue on this ground: the jurisdictional defense must be raised, but can't under 192(b), only under 186 PILA. If it has not been done, the right to object has been lost.

Argue that the award has gone *infra petita*? You can argue that the amount awarded exceeds the amount requested. Would that succeed here? It should. The total is 2.5 mio in damages. You have to apply the iura novit curia and see whether the parties could have reasonably foreseen the application of this rule.

Right to be heard? Perhaps the party will try to argue that it has not correctly considered the evidence that has been presented. We may agree or not with the conclusion of the AT that the bribes were paid, but this as such cannot be a violation of a right to be heard.

Violation of public policy? The non-respect of the 30 days time limit isn't so fundamental to be considered as such a violation. The only ground that may succeed is that the outcome of the decision is shocking. The award gives effect to corruption practices, and the prohibition of corruption is a fundamental principle of all legal systems of the world. Therefore, this decision enforces corruption and is a violation of public policy, pursuant art. 190 par. 2(e) PILA.

Would there be any ground on the issue of the deliberation? There was no majority and the chair took its decision alone. Is that correct to do it under the circumstances? (…)

X. Case study 8b – Enforcement of the Award

1. Concept

- Recognition – enforcement: the CNY is called the Convention on recognition AND enforcement so they are closely linked but different. Recognition is taking into account of an arbitral award in existing proceedings. Enforcement is a special

proceeding in which court will decide on putting into execution an award rendered previously if needed with recourse to public force.

- National award – foreign award: national award is simply an award that was rendered by a tribunal having its seat in a country. A foreign award is an award rendered by a tribunal having its seat in another country. We will focus on foreign awards, because national awards have the same value as local decisions.

2. Applicable law to the enforcement of a foreign award

- In Switzerland: article 194 PILA says that the recognition of foreign awards is governed by the CNY. The Swiss law incorporates the CNY for all foreign awards.
- NYC: main instrument in terms of recognition and enforcement of foreign awards (but also of arbitration agreements!).
    - Scope of application
      Article I
      "1. This Convention shall apply to the recognition and enforcement of arbitral awards (material scope) made in territory of a State other than the State where the recognition and enforcement of such awards are sought (territorial scope) (…)"

    - Reservations (Article I(3) CNY)
        - Reciprocity reservation: when a ratifying state adheres to the CNY but only to respect to the countries that do the same. Very many states have made this reservation, so one must always check if there is one.
        - Commerciality reservation: where a state specifies that it will only apply the CNY to awards rendered in commercial matters. It is not defined (more like enumerated) in the CNY but in a footnote to the UNCITRAL Model Law, which uses the same term.

    - More favorable law clause (national law of the enforcement State or treaty applicable in such State) (Article VII)

3. Grounds for non-enforcement

Article V(1): Grounds to be raised by the parties

- (a)-(d): jurisdiction, constitution, *ultra petita* (= beyond that which is sought, used in relation to a judgment of a court which exceeds even that which was asked for, such as a damage award which is in excess of what a plaintiff requested / that is the arbitrators rule on something that was not submitted to them), procedural rules.
- (e): award not binding, set aside, suspended.

Article V(2): Grounds raised *ex officio*

- (a): Non-arbitrability under the law of the enforcement State (it is not the State of the seat and that of course shows that you can have a disconnect between the rules for instance on arbitrability of the seat and the arbitrability of the enforcement of a country. Assume you have an intellectual property right issue resolved by the tribunal at the seat in Switzerland, where the Tribunal can very well declare that the IP is null

and void. If you take this decision to Italy, the validity of the trademark is not an arbitrable right. Italy would apply the art. 5(II)(a) CNY and say that it is not enforceable because of the concept of non-arbitrability, which does not allow to arbitrate IP rights! But the use of IP rights, which is contractual, would be arbitrable on the contrary.).

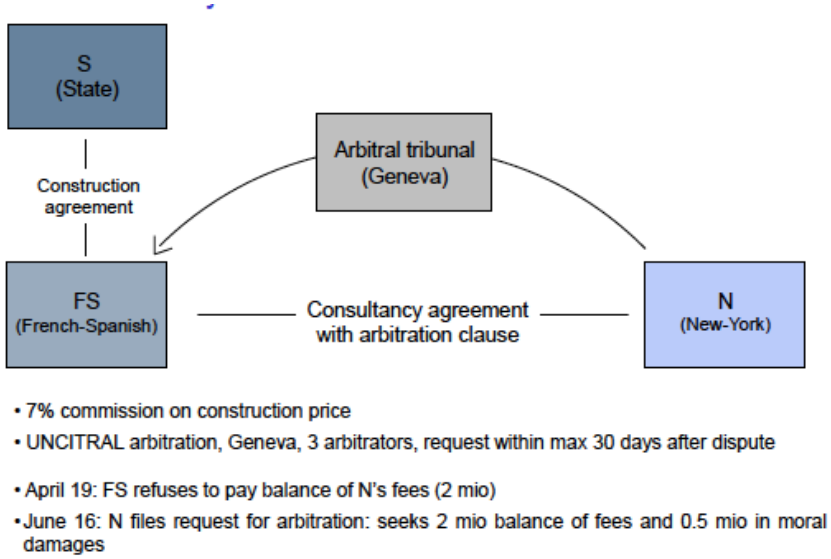
- (b): Incompatibility with international public policy of the enforcement State: it is a national concept applied to international matters, it is not domestic.

4. Proceedings (Articles III and IV)

- Documents to be produced
- Furthermore, domestic rules of procedure applicable
- "National treatment" (no more onerous conditions/higher fees as for domestic awards)

CASE STUDY 8b

***2. Enforcement of the award (Class 10)**: Assume that the Swiss Supreme Court has dismissed the annulment action and that N now seeks to enforce the award in Spain: Can FS oppose the enforcement? On which basis? For which grounds? What are its chances of success?*



- During the proceedings, witnesses and documents refer to "presents".
- Deliberations: chair decides.
- Award:
  - Grants 2,5 mio in damages; 0 in moral damages
  - Notes that bribes paid, but accepts validity of contract.

Article V(2)(b) CNY: violation of international public policy of state where enforcement is sought. "Recognition and enforcement of an arbitral award may also be refused if the competent authority in the country where recognition and enforcement is sought finds that: (…) (b) The recognition or enforcement of the award would be contrary to the public policy of that country".

"That country" in this particular case is Spain and we can't ask Spain to enforce a decision, which is against transnational public policy! If the award orders performance of agreement the purpose of which is corruption, then it is contrary to international public policy. The consequence is that there is no enforcement. We could stop here, but it is interesting to think about other problems, which could rise in this case concerning the enforcement:

The tribunal chair decided without forming a majority and obviously there was no majority reached. The question is, was it entitled to do that? Art. 33(I) UNCITRAL Arbitration rules: the arbitration is conducted under the UNCITRAL Arbitration rules when there is more than one arbitrator, the majority of arbitrators shall make the decision. So it does not give a casting vote to the president. Note: in the PILA on the contrary, if there is no majority, the president can decide. Does that give us a non-enforcement ground? It should be invoked, yes. Indeed, article V(1)(d) CNY talks about the violation of procedural rules : "The composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties (…)". That does not come into play because you have an agreement of the parties. If we had the law of the seat, the president would have a casting vote. But the problem is that we have this agreement, which points to 33(I) UNCITRAL Arbitration rules. Most often, because the article says, "it may", the court has some discretion and can use a condition of a substantial injustice caused to one of the parties: then the violation of procedural rules will lead to non-enforcement.

What else? Lack of jurisdiction (30 days) (Art. V(I)(a) NYC): "The parties to the agreement referred to in article II were, under the law applicable to them, under some incapacity, or the said agreement is not valid under the law to which the parties have subjected it or, *failing any indication thereon, under the law of the country where the award was made;* (…)" We can use this and say that it was governed by Swiss law (178 and 186(2) PILA), which brings us to the following option:

- If not raised during arbitration, then there was an acceptance (Article 186(2) PILA)
- If raised, interpretation of parties' intent: (1) mere time-related modality or (2) consent to arbitrate limited in time?

The first option is the most obvious in the particular case (interpretation of parties' intent: mere time-related modality). Enforcement or not, depending on how you resolve this, but Prof. GKK rather thinks that there is indeed an enforcement.

Anything else? Article V(1)(c): *ultra petita*. In other words, did the tribunal award something that was not requested? "The award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration (…)". → Total amount granted does not exceed last claim, it just changes the legal characterization of the total amount granted. So there should be enforcement.

Finally, we can look at article V(1)(b) concerning due process: "The party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case; or". We could argue because the arbitrator did not consider witness statements and documents, that alluded to presence which was indicating that there were bribes. But that seems wrong in the term of assessment: the tribunal did take this into account so much that it considered that the bribes were established and found that bribery was customary. Therefore, there is no violation of article V(1)(b) and so there is enforcement.

In conclusion, this award will not be enforced on the basis of article V(2)(b) for violation of international public policy of the state where enforcement in sought.

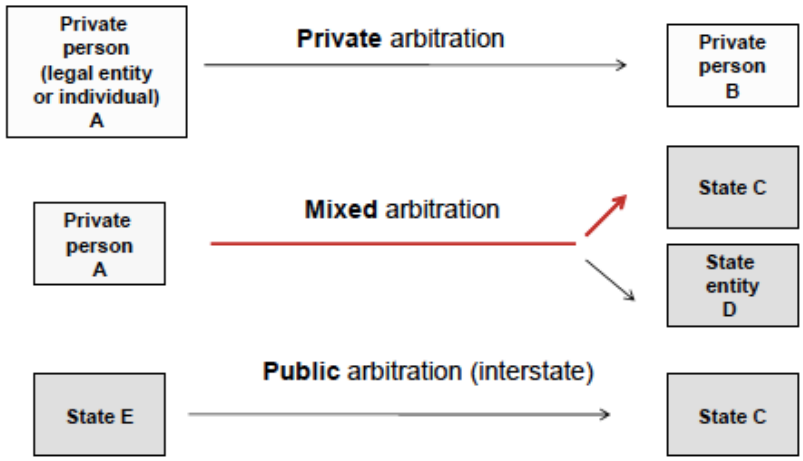
XI. Case study 9 – Investment Arbitration

1. Definition

It is an arbitration between a private person (legal entity or an individual!) and a state (the state will always be the respondent) concerning a dispute arising out of an investment. May be based on:

- An arbitration clause in an investment agreement/contract
- A dispute resolution provision in a investment treaty
- A dispute resolution provision in a national investment statute

Remember this schema: now we are in the mixed arbitration.



2. Types of arbitration

- Ad hoc, usually according to UNCITRAL Rules or
- Institutional
  - Principally ICSID
  - Also SCC, ICC

3. Differences with commercial arbitration

- International treaty as basis for jurisdiction
- ICSID arbitration based exclusively on treaty (no national *lex arbitri*)

4. History

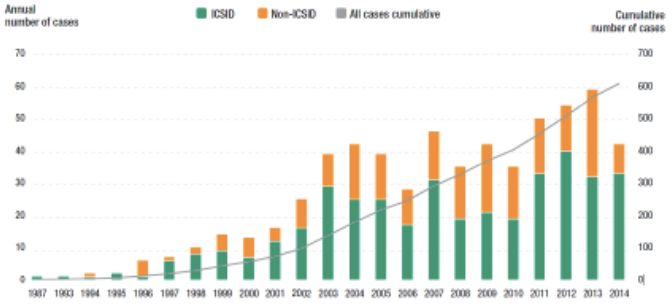
After WW II and the decolonization process, with the aim of attracting foreign capital to support developing economies and protect foreign investors

- ICSID Convention
- About 3000 bilateral investment treaties, several multilateral treaties

- Most of them with a dispute settlement cause

Almost non-existent in the eighties, investment arbitration based on treaties exploded during the last fifteen years

Figure III.7. Known ISDS cases, annual and cumulative, 1987–2014



Source: UNCTAD, ISDS database.
Note: Information about 2014 claims has been compiled on the basis of public sources, including specialized reporting services. This part does not cover cases that are based exclusively on investment contracts (State contracts) or national investment laws, or cases in which a party has signaled its intention to submit a claim to ISDS but has not commenced the arbitration. Annual and cumulative case numbers are continuously adjusted as a result of verification and may not exactly match case numbers reported in previous years.

5. Legal framework

- Investment treaty: grants investors a substantive guarantee and offers dispute resolution mechanism (ICSID and others) in case of breach of this protection; about 3000 BITs and several multilateral treaties (NAFTA; ECT, CAFTA)
- Investment contract: between states and foreign investors (e.g. concession agreement) may provide for ICSID arbitration or other.
- ICSID Convention: 159 Contracting States; created arbitration institution and sets out the arbitration procedure for disputes between a Contracting State and nationals of another Contracting State related to investment.

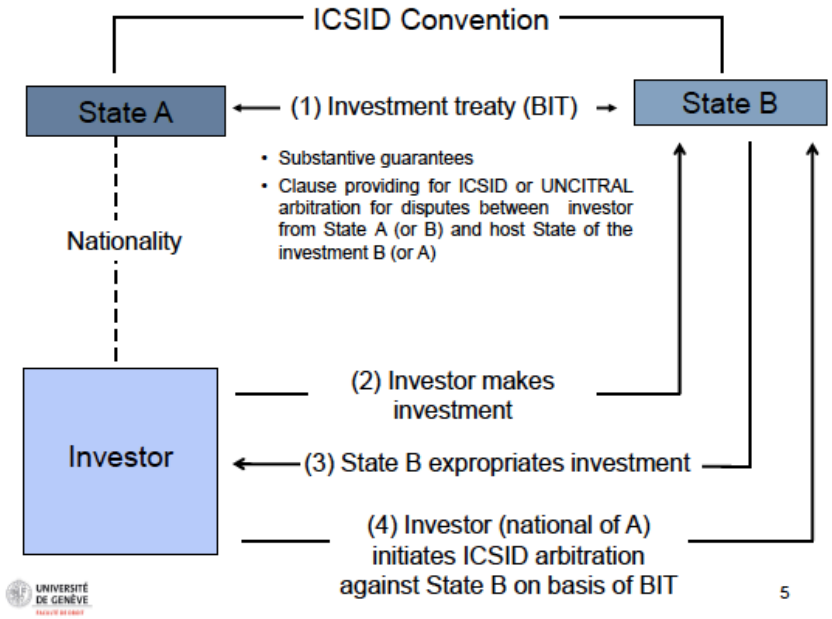
6. Essentials – ICSID Arbitration (standing for: International Centre for Settlement of Investment Disputes)

a. Foundation: based on public international law

- No national *lex arbitri* (seat irrelevant).
- No jurisdiction in aid or control of local courts of the seat.
- ICSID awards are equivalent to local judgments in court in every ICSID Convention contracting States; no need to enforce according to NYC.
- Procedure governed by ICSID Convention and Rules.
- Similar to commercial arbitration: but no *juge d'appui (*no court at the seat that can help*)*; no provisional measures by courts (no recourse to courts at all); transparency (limited confidentiality, *amicus curiae = impartial adviser of the court, non-parties*).

b. Jurisdiction

- Based on dispute settlement clause in investment treaty. When ICSID arbitration chosen, jurisdictional requirements of ICSID Convention apply.
- Consequently, requirements of two texts (ICSID Convention and investment treaty) must be met.



- Article 25 ICSID Convention: 4 requirements: "The jurisdiction of the Centre shall extend to (1) any legal dispute arising directly out of an (3) investment, between (2) a Contracting State (…) and a national of another Contracting State, which the parties to the dispute (4) consent in writing to submit to the Centre (…)" (1).

i. *Requirement 1: Legal dispute*
  - Not a mere conflict of interests
  - Expressed conflict/disagreement concerning rights and obligations

ii. *Requirement 2: Nationality*
  - Contracting state host of investment and national of other Member state
  - National = natural (2a) or juridical person (2b)
    - With nationality other than of host state, or
    - With nationality of host state if parties agreed to treat the juridical person and a foreign one because of foreign control

iii. *Requirement 3: Investment (3 elements)*
  - Allocation of resources, i.e. contribution of investor in money/assets (know-how, labor, etc) of a certain economic value
  - Expectation of profit comprising a risk (of loss).
  - Duration

iv. *Requirement 4: Consent to arbitrate*
  - State's offer to arbitrate made at the time of the conclusion of the treaty encompassing the dispute settlement clause. It is made erga omnes / in favor of everyone who meets the requirements of the treaty.
  - Investor's acceptance given by filing the request for arbitration (or in earlier writing). When the investor files his request, he accepts the offer either expressly or tacitly. The investor could also give his consent earlier, even before dispute arises, rarely done though.

- Jurisdictional requirements of investment treaty
  - Generally, treaties contain definition of:
    - Disputes which can be the subject matter of an arbitration (e.g. "*any legal dispute arising directly out of an investment*")
    - Investor, who is the one entitled to resort to arbitration
    - Investment

- In addition, investment treaties often provide for further requirements, for instance cooling-off period (for example when you can start an arbitration only in 6 months). You can also put pre-conditions.

c. Law applicable to the merits

- Very often, investment treaty contains choice of law clause in favor of i.a. treaty, other public international law rules (for instance rules on protection of the environment or human rights), and sometimes national law of the host state of the investment (even if it does not say this, there are some notions that have to be interpreted/understood as host state).

- See also Article 42 ICSID Convention (drafted for arbitrations based on arbitration clauses contained in investment contracts), about applicable law. This article is a bit difficult to apply to treaty arbitration because it is framed for contract arbitration ("law chosen by the parties or the law of the host state", which means the law with the closest connection with the case, which would be the law of the host state, this is the proximity principle we know from international contract law).

d. Annulment of the award

- ICSID ad hoc committee.

- Grounds (Article 52(1) ICSID Convention, similar to what we know from national arbitration laws, drafted somewhat differently):
  a.) The Tribunal was not properly constituted;
  b.) *The Tribunal has manifestly exceeded its powers;* you find that in some national arbitration laws. Note: you find nothing here about jurisdiction, yet this is the most obvious ground for annulment! This is why that is included in this letter.
  c.) There was corruption on part of a member of the Tribunal;
  d.) There has been a serious departure from a fundamental rule of procedure; due process breaches, similar to what we know.
  e.) *The award has failed to state the reasons on which it is based.* That can mean two things: either contradictory grounds OR an argument has not been addressed and could have been decisive for the outcome.

CASE STUDY 9

Swissoil, a company located in Geneva and active in oil exploration, extraction and trading, operates several oil wells in the Caspian Sea by virtue of a concession granted by the Republic of Azerbaijan in 2012. The concession contract provides for arbitration in Baku under the ICC Rules. The other concessionaires of oil wells in the region are private operators under Azerbaijani control and the National Oil Company of Azerbaijan (NOCAZ).

Before concluding the concession contract, the management of Swissoil had a meeting with the Minister of Energy of Azerbaijan. The latter stated that he was pleased to welcome a foreign operator and assured his guests of his and the President's unconditional support. Shortly afterwards, he reiterated his support in a formal letter.

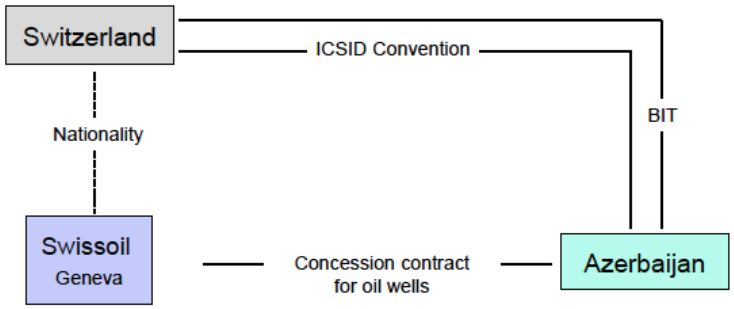
In January 2015, considering that the capacity of its pipelines was not sufficient to ship the

oil extracted on a daily basis, NOCAZ requisitioned the pipelines of private operators for its own use for the duration of one month.

Around the same time, the Government, acting upon a proposal of the Ministry of Energy, submitted a draft bill to Parliament imposing an extraction tax on foreign companies benefiting from oil concessions. This bill was approved in March and came into force on 1 April 2015.

1. Swissoil considers that it was harmed by these measures and would like to receive an answer to the following questions:

1.1 Would an ICSID tribunal have jurisdiction over the dispute?



Switzerland and Azerbaijan are contracting states of ICSID and have entered into a bilateral treaty (BIT). Swissoil has entered into a concession contract for oil wells with the State of Azerbaijan. Who are the other oil explorers? The State national oil company called NOCAZ and nationals of Azerbaijan. Swissoil is the only foreign explorer: it has built a pipeline in some places to get the oil and in January 2015 NOCAZ finds that its own capacity of pipeline is insufficient and therefore it requisitions the pipeline of Swissoil for its own use for one month. Meanwhile, the government, acting on the proposal of the Minister of the energy, introduces an oil extraction tax for foreign companies in April 2015. The ICSID arbitral tribunal would have jurisdiction of it meets the sets of jurisdictional requirements of (i) BIT (bilateral investment treaty) and (ii) ICSID convention. What happens if it meets only the requirements of the BIT but not those of the ICSID convention? If you don't, generally because you don't meet the nationality requirement, you can then choose another option in the investment treaty and go to another arbitration mechanism (usually UNCITRAL). Do we meet the BIT and ICSID Convention requirements in this particular case?

a. BIT:

- Dispute resolution clause: art. 8 BIT. We know that we need to go and see how investments are defined: "between a contracting party (Azerbaijan) and an investor (we need to check the definition of investor in the BIT).
- Par. 2 says that we have to have a consultation. If we don't have on in 6 months, we go to national courts of the contracting party (that would be the courts in Azerbaijan). Assuming that the investor doesn't want that (which happens most often), we have two possibilities here:
  - UNCITRAL rules with an ad hoc arbitration
  - Exit
- Specific clause here that the parties declare their consent to submit the dispute to arbitration in accordance with par. 2.

- We need to meet the definition of investment of the art. 8 BIT. The art. 1 BIT defines the term investment. It is a purely drafted definition that we have practically in all investment treaties. Note: the asset is a product/consequence of the investment and in the result of your contribution you have an asset (example: you use your money to buy a plant and this is your investment, but you have a property title on this plant and that is your asset). Do we have an investment here? Yes, because Swissoil built the pipelines in order to get the oil, which is the investment (actual allocation of resources in a duration and in an idea of making profit, with a possibility of risks/losing the profit). The oil in itself would be the asset.
- Investor? Article 1(2) BIT let. a: does not apply because we don't have a natural person. What about let. b? Swissoil is a legal person constituted under the law of a Contracting Party (Switzerland), so we do have an investor as well.
- Consultation? Swissoil will have to start immediately with the consultation and to document that they asked for consultation on a certain date. If they get no answer (or an evasive answer), then they will have to go to arbitration. It is better to wait the 6 months, otherwise there is a risk because there are some awards that you can't use if you didn't wait 6 months.

The conditions of the BIT are met in this particular case.

b. ICSID Convention (art. 25):

- *Requirement 1: Legal dispute*: it is not a mere conflict of interests, we certainly have a legal dispute here, directly arising out of an investment, between a Contracting State (Azerbaijan) and a national of another contracting State (Swiss national company – Swissoil).
- *Requirement 2: Nationality*: Swissoil (national of other Member state, juridical person with nationality other than of host state). This condition is also given here.
- *Requirement 3: Investment (3 elements)*
  - Allocation of resources, i.e. contribution of investor in money/assets (know-how, labor, etc) of a certain economic value. It is the case here (pipelines).
  - Expectation of profit comprising a risk (of loss). It is also the case here.
  - Duration. It is also the case here.
- *Requirement 4: Consent to arbitrate*
  - State's offer to arbitrate made at the time of the conclusion of the treaty encompassing the dispute settlement clause. It is made erga omnes / in favor of everyone who meets the requirements of the treaty.
  - Investor's acceptance given by filing the request for arbitration (or in earlier writing). When the investor files his request, he accepts the offer either expressly or tacitly. The investor could also give his consent earlier, even before dispute arises, rarely done though.
  - Do we have consent? It is explicitly given here, indeed (art. 8(3) BIT).

All the conditions of the ICSID Convention are met. In conclusion, an ICSID tribunal would have jurisdiction over the dispute of this particular case.

1.2 Which treaty guarantees may Swissoil invoke before an ICSID tribunal?

Art. 4 BIT says that there must be fair and equitable treatment for all investors (art. 4(1) BIT). Plus, the treatment must not be less favorable than that which it accords to its own investors (national treatment, art. 4(2) BIT). Art. 6 BIT ? It says that "neither of the Contracting Parties shall take, either directly or indirectly measures of expropriation (…)", but we don't fall under

this legal basis because of the duration. So basically all we have are the discriminatory measures.

1.3 If an ICSID tribunal is constituted, accepts jurisdiction, and proceeds on the merits, can a NGO active in defending the environment and fighting what it considers excessive exploitation of oil reserves in the Caspian be admitted to attend the hearings and make written submissions?

It can make written submissions as *amicus curiae* provided the requirements under Article 37(2) and (3) of the ICSID Rules are met. In order to assist the tribunal, this is person must not be a party to the dispute / to the arbitration, which is the case here. It has to request the tribunal to authorize it via a written submission: it must show that it would assist the tribunal to give its opinion because it has a particular knowledge of the issues that the parties are not likely to have. This is most likely the case here. It must also explain what it will say. It must have a significant interest in the proceedings, and that will be shown easily as it is an active NGO in defending the environment (it will have to show some documents, in order to prove that it is not just a cover for some claims of one of the Parties). The tribunal must ensure that the submission will not delay the proceedings, etc (art. 37(3) ICSID Rules). Concerning the attendance of the hearing, only the Parties can attend the hearing and the NGO can't, unless you have the consent of both of the Parties. That is different if you have the UNCITRAL Transparency Rules that govern: then, hearings are open to everyone who wants to attend them.

1.4 How could the prevailing party enforce the award?

Art. 54(1) ICSID Convention says that "Each Contracting State shall recognize an award rendered pursuant to this Convention as binding and enforce the pecuniary obligations imposed by that award within its territories as it if were a final judgment of a court in that State. A Contracting State with a federal constitution may enforce such an award in or through its federal courts and may provide that such courts shall treat the award as it if were a final judgment of the courts of a constituent state.

2. In the concession agreement, Swissoil has committed to develop seawater-purifying projects in order to reduce pollution in the Caspian Sea by installing pumping and filtration stations at the bottom of each of its rigs. The Azerbaijani government observes that no such installation has been set up. What action can it take in this respect?

This is a claim based on a contract. One must distinguish between a contract and a treaty claim: you can claim treaty claims if you are in treaty arbitration. But if you are in a contract obligation and that there is a violation, then you have to bring it up in a contract arbitration (exception: umbrella clauses, but there is no such here). Contract claims are resolved through dispute resolution mechanism provided in contract: Azerbaijan must go to ICC arbitration in Baku and raise this as a contract claim, and not a treaty claim.

XII. Examination example

Part I

The prestigious London based architect firm NORMAN & NORMAN ("N&N") is entrusted

with the design of a large cultural and congress center in Naypyidaw, the capital of Myanmar (Burma), which is aimed at improving the international attractivity of the country. N&N commit to provide the architectural design and to deliver the final blue print (plans) as the construction proceeds. The agreement concluded between the Region of Mandalay ("RM"), where the city of Naypyidaw is located, and N&N encompasses the following provision:

"Any dispute arising out of or in connection with the present agreement shall be settled by an arbitral tribunal under the Rules of Arbitration of the International Chamber of Commerce (ICC) in Paris. The arbitral tribunal shall be composed of three members and the seat of the arbitration shall be Geneva. This agreement shall be governed by Burmese law".

As the construction is under way, a British newspaper reveals that the employees working on the project for the RM have not been paid for weeks and are badly treated. These revelations cause a scandal in Great Britain and are devastating for the reputation of N&N, which knew nothing about these facts. As a result, N&N decides to terminate the agreement and, although it has not delivered all the blue prints yet, it requests payment of the totality of its fees (i.e. 9 billion kyats, about CHF 9 million). The RM refuses to pay anything and request delivery of the remaining blue prints. Faced with this refusal, N&N files a request for arbitration, in which it seeks payment of the contractual fees as well as compensation for its reputational damage.

	True	False	
1.	❑	❑	The lex arbitri is the Swiss PILA.
2.	❑	❑	We are in presence of an investment arbitration.
3.	❑	❑	If the arbitral tribunal considers that the claim for damages is a tort claim, it must decline jurisdiction over such claim.
4.	❑	❑	If the respondent wishes to challenge the arbitral tribunal's jurisdiction, it should refuse to appoint its arbitrator.
5.	❑	❑	The respondent challenges the jurisdiction of the arbitral tribunal. It invokes a Burmese statute pursuant to which regional authorities cannot conclude agreements involving a commitment in excess of one billion kyats (about one million CHF) with foreign companies without the Parliament's approval. In the present case, the Governor of the Province signed the contract with N&N without such authorization. **The arbitral tribunal must therefore decline jurisdiction**.

1. **True**:
   - **Scope of application of the PILA (art. 176 (1) PILA):** *The provisions of this chapter apply to any arbitration if the seat of the arbitral tribunal is in Switzerland and if, at the time when the arbitration agreement was entered into, at least one of the parties had neither its domicile nor its habitual residence in Switzerland*
   - Both parties have their domiciles abroad and the seat of the arbitration is in Geneva.
2. **False**:
   - **This is an issue about the jurisdiction of the center and the definition of the notion of "Investment" (art. 25 ICSID Convention):** *The jurisdiction of the Centre shall extend to any legal dispute arising directly out of an investment, between a Contracting State (or any constituent subdivision or agency of a Contracting State*

designated to the Centre by that State) and a national of another Contracting State, which the parties to the dispute consent in writing to submit to the Centre.

- Investment arbitration implied an investment, that is to say a certain duration of the relevant activities, regularity of profit and return, presence of a certain economic risk and an allocation of resources.
- There is no allocation of resources, no risk and no duration. Moreover, the respondent isn't not the State itself, but a State entity.

3. **False**:

- **Scope of the arbitral tribunal jurisdiction (art. 178 (2) PILA)**: *As regards its substance, an arbitration agreement is valid if it conforms either to the law chosen by the parties, or to the law governing the subject matter of the dispute, in particular the law governing the main contract, or if it conforms to Swiss law.*
- The jurisdiction is established by the arbitration agreement. The law governing this question is provided in 178 (2) PILA and it provides of three different laws. If any of this three laws governs the tort claim, the jurisdiction will be given.
- We don't know what the Burmese law say about the tort claim. In consequence, we come back to the Swiss law. Swiss law is very liberal and the Federal Supreme Court says that one mustn't be strict when we interpret the submission to arbitration. Once the intend to arbitrate is established, one should interpret the arbitration to give the largest scope. Swiss case law covers the disputes arising in tort law.

4. **False:**

- **This is an issue relate to the arbitral tribunal jurisdiction and more precisely relate to the challenge (article 186 (2) PILA):** *Any objection to its jurisdiction must be raised prior to any defense on the merits.*
- Article 186 (2) PILA provide that the the respondent loses his right to challenge the arbitral tribunal if it doesn't comply with this rule.
- This duty to raise the objection doesn't prevent the respondent to participate in the constitution of the arbitral tribunal. He can participate in the constitution of the arbitral tribunal and then challenge the award.

5. *Explain the reasons for your answer to question 5.* **False:**

- **First, we have to see if the PILA is applicable (176 PILA):** *The provisions of this chapter apply to any arbitration if the seat of the arbitral tribunal is in Switzerland and if, at the time when the arbitration agreement was entered into, at least one of the parties had neither its domicile nor its habitual residence in Switzerland.*
  - PILA is applicable
- Then we have to indicated if we are on an institutional arbitration or in an *ad hoc* arbitration.
  - The parties have chosen an institutional arbitration by submitting the arbitration to the ICC Rules.
- Finally, we have a problem about the subjective arbitrability (art. 177 (2) PILA): *If a party to the arbitration agreement is a state or an enterprise or organization controlled by it, it cannot rely on its own law in order to contest its capacity to be a party to an arbitration or the arbitrability of a dispute covered by the arbitration agreement.*
- The respondent objects that the government of the Province hasn't the power to enter into an arbitration. The respondent is a state entity. In consequence, he cannot rely on

its own law, the Burmese statute, to object the fact that the government hasn't the power.
- The arbitral tribunal must admit his jurisdiction.

	True	False	
6.	❑	❑	Assume that the arbitral tribunal issues a decision entitled « Procedural Order n° 2 », by which it upholds its jurisdiction over all of N&N's claims. **The respondent cannot file an action for annulment against this decision before the Federal Supreme Court.**

+ *Explain the reasons for your answer to question 6 :*

6. **False:**
- NB: Once we have said that the PILA is applicable in an extensive answer, we don't have to repeat this and that there is an *ad hoc* or institutional arbitration.
- **This is an issue about an annulment setting aside (art. 190 (3) PILA):** *As regards preliminary decisions, setting aside proceedings can only be initiated on the grounds of the above paragraphs 2(a) and 2(b); the time-limit runs from the communication of the decision*.
- First, we have to see what kind of award is. The characterisation of the arbitral tribunal itself wasn't correct. It confirms jurisdiction in the matter. In this case, the arbitral tribunal upholds (confirmer) his jurisdiction. It's an interim decision, so a preliminary award on jurisdiction.
- Then, we have to see if the award could have an impact or not on the proceedings. The decision attempt could have an impact on the continuation of the proceedings but it's not a procedural order as it was called, but an award on jurisdiction. He can have an impact on the continuation of the proceedings because he accepts the jurisdiction of the arbitral tribunal over all of N&N's claims and not only the claim brings by N&N's
- **Grounds for settings aside the award (Art. 190 (2) b PILA):** *Proceedings for setting aside the award may only be initiated where the arbitral tribunal has wrongly accepted or denied jurisdiction;*
- The arbitral tribunal has wrongly accepted his jurisdiction on all the claims and not only the one mention on the case.
- **Setting aside proceedings (art. 191 PILA):** *Setting aside proceedings may only be brought before the Federal Supreme Court. The procedure is governed by Article 77 of the Law of 17 June 2005 on the Federal Supreme Court.*
- This award can and must be challenged immediately before the Federal Supreme Court.

	True	False	
7.	❑	❑	If the respondent appoints the President of the Court of Appeal of Naypyidaw as arbitrator, N&N will be able to successfully challenge this arbitrator.
8.	❑	❑	The hearings must take place in Geneva.

7. **True**:
- NB: We can argue the opposite.
- **This is an issue related to the challenge of arbitrator (art. 180 (1) c PILA):** *An arbitrator may be challenged if circumstances exist that give rise to justifiable doubts as to his or her independence.*
- We refer to independence and impartially. Here, this is an issue on the independence. This is the independence vis-à-vis the objects of the dispute and the parties of the arbitration.
- We can refer to the **IBA Guidelines** to see if there is a situation of lack of independence. The question is complicated because there is a judge and this judge doesn't have a duty of independence and impartiality. Here we can argue that both, independence and impartiality aren't assured in the given situation. He chooses a judge which is the President of the Court of Appeal of Naypyidaw. **It's possible, but this is the place where the facts are and it can give rise to justifiable doubts of lack of impartiality and independence**

8. **False:**
- **This is an issue on the hearings in arbitration and about the procedure of arbitration (art. 182 (1) PILA**): *The parties may, directly or by reference to arbitration rules, determine the arbitral procedure; they may also submit it to a procedural law of their choice*.
- NB: The seat of arbitration must be distinguished of the place where the hearings take place. The seat is a legal notion and not the hearings.
- As we have seen, the parties refer to ICC Rules.
- Article 18 (2) ICC Rules provides that "*the arbitral tribunal may, after consultation with the parties, conduct the hearings and meetings at any location it considers appropriate, unless otherwise agreed by the parties*.
- The parties don't say anything in the arbitration agreement. In consequence, the arbitral tribunal is entitled to conduct the hearing where he considers appropriate. The hearings mustn't take place in Geneva but they can take place in Geneva. It's not an obligation, but a possibility offers to the arbitral tribunal.

	True	False	
9.	❑	❑	The arbitral tribunal wishes to examine the construction project manager, who was employed by the respondent. N&N fears that he may be intimidated and therefore requests that he be examined in the absence of the respondent's counsel and without giving the respondent access to the content of his testimony. **The arbitral tribunal should grant such a request.**
10.	❑	❑	N&N argues that the termination of the contract was justified by the fact that the workers on the construction site were subject to conditions close to slavery. The respondent establishes that there was no violation of the law governing the merits of the dispute. **The arbitral tribunal cannot take the argument put forward by N&N into consideration.**

9. **False:**

- **This is a question about the evidence and the right to be heard (art. 182 (3) PILA):** *Whatever procedure is chosen, the arbitral tribunal shall ensure equal treatment of the parties and their right to be heard in an adversary procedure.*
- There is no question that the arbitral tribunal would have the power to grant this kind of request. The arbitral tribunal shall ensure equal treatment of the parties and their right to be heard in an adversary procedure. It possibly to protect the witness, but this isn't possible to take an evidence without giving the possibility to the respondent to give its point of view on this statement according to the right to be heard.
- The arbitral tribunal cannot grant such a request.

10. **False:**
- **This is an issue about the fact that the tribunal must or not take into consideration the overriding mandatory rules (art. 19 (1) PILA):** *When interests that are legitimate and clearly preponderant according to the Swiss conception of law so require, a mandatory provision of another law than the one referred to by this Act may be taken into consideration, provided that the situation dealt with has a close connection with such other law.*
- The arbitral tribunal should take the argument because of the right to be heard. However, it's understandable that the question is whatever the arbitral tribunal should enter into account or not. It can take this argument into account.
- Article 187 (1) PILA provides that "*the arbitral tribunal shall decide the dispute according to the rules of law chosen by the parties or, in the absence of such a choice, according to the rules of law with which the case has the closest connection"*.
- It's admitted that the arbitral tribunal shall defer and apply the law chosen by the parties. However, the arbitral tribunal should always take into account the international public policy.
- There is no discussion that the prohibition of slavery is covered by the international public policy.
- The arbitral tribunal should take into consideration mandatory rules which aren't part of the *lex causae* when the rule wants to govern the situation at issue (1), there is a close connection between the rule and the situation of the dispute (2) and the result must be compatible with transnational standards (3).
- In the case, it has an impact because this can be a justification of the termination of the contract. The overriding mandatory rules in the British order about the slavery are intended to be applied. The rule about the slavery govern the situation at issue. It has a close connection with the dispute and are compatible with the international stands.
- In consequence, art. 19 (1) PILA provides that the third state mandatory rule can be taken into consideration. The arbitral tribunal must take the argument put forward into consideration.

	True	False	
11.	❑	❑	The claimant will be able to enforce the final award in Switzerland even before obtaining a certificate of enforceability pursuant to Article 193(2) PILA.

11. **True**:

- **This is an issue about the deposit and certificate of enforceability (art. 193 (2) PILA):** *At the request of a party, the Swiss Court shall certify the enforceability of the award.*
- According to article 193 (2) PILA, the award is final where it's communicated to the parties and not when the party obtains the certificate of enforceability.
- The claimant will be able to enforce the final award. The certificate is just a paper mentioning that the award is enforceable. It's a possibility but not mandatory.

Part II

Mr. YABE, a young and talented computer engineer, **has created an online auction website that met with a tremendous success**. He sells the shares of the company owning the website for USD 50 million to the American group BEABLE, which is trying to enter the Asian market. The sales price is determined based on the number of users registered on the website.

The share sales and purchase agreement ("SPA") contains a provision pursuant to which "*any dispute arising out of or in connection with this agreement* ***shall be referred to and finally resolved by arbitration***. ***The place of arbitration shall be Geneva****."* The SPA also contains a **choice of New York law.** Six months after the sale, **BEABLE** finds out that the website is far from being as profitable as represented because many of the registered "users" are totally inactive. The buyer even believes that many accounts are fake. **It thus initiates an arbitration and seeks the reimbursement of <u>one half of the sale price.</u>**

After the submission of the parties' written submissions, **BEABLE files a technical expert report** demonstrating that one third of the accounts have been created during the month preceding the sale, all from computers located in the same city, and that none of these accounts have ever been active.

Mr. YABE requests the arbitral tribunal to authorize him to <u>submit his own expert report</u> or to appoint a neutral expert in order to examine the merits of the claimant's report. **<u>The arbitral tribunal denies such request</u>**, arguing that the only subject matter of the dispute is the interpretation of the agreement and that **technical issues are not relevant**. It adds that the respondent had a sufficient opportunity to present his case in his two written briefs. **Mr. YABE reiterates his requests unsuccessfully.**

The arbitral tribunal deliberates and orders Mr. YABE to <u>reimburse the entire sales price</u> plus interest. **In the award, it notes that the law governing the merits does not allow for the full reimbursement of the price, but considers <u>that it is a fair solution on the basis of *ex aequo and bono* considerations.</u>** What is decisive in this respect, says the award, is that the seller created bogus accounts in order to artificially increase the value of his company, which is proven by BEABLE's expert report.

Mr. YABE wishes to initiate setting aside proceedings against this award. Which grounds may he possibly invoke and what would his chances of success be?

Applicability of the PILA (176 PILA)

According to art. 176 (1) PILA, *« the provisions of this chapter apply to any arbitration if the seat of the arbitral tribunal is in Switzerland and if, at the time when the arbitration*

agreement was entered into, at least one of the parties had neither its domicile nor its habitual residence in Switzerland ». In this case, both parties are domiciled abroad and the seat of the arbitration is in Geneva. In consequence, the PILA applies. The arbitration is an *ad hoc* arbitration because the parties haven't chosen any institutional rules in their arbitration agreement.

Characterisation of the award (190 (1) PILA)

According to art. 190 (1) PILA, "*the award is final from the time when it is communicated.*" In this case, the arbitral tribunal has settled the dispute on the merits. He rendered an award on the dispute of the merits and this award is a final one when it's communicated (the communication has been done).

Waiver or exclusion (192 (1) PILA)

Acccording to art. 192 (1) PILA, "*where none of the parties has its domicile, its habitual residence, or a place of business in Switzerland, they may, by an express statement in the arbitration agreement or in a subsequent agreement in writing, exclude all setting aside proceedings, or they may limit such proceedings to one or several of the grounds listed in Article 190, paragraph 2*"

In our case, there is no waiver or exclusion provided by an express statement or in a subsequent agreement.

- **Grounds for the annulment (190 (2) PILA)**

According to art. 190 (2) PILA, "*Proceedings for setting aside the award may only be initiated*"

Letter c: "*where the arbitral tribunal has ruled beyond the claims submitted to it, or failed to decide one of the claims*".
In this case, the arbitral tribunal has ruled *ex aequo and bono*. According to the art. 187 (2) PILA, the parties must give the authorization to the arbitral tribunal to rule *ex aequo and bono*. They haven't done it. The arbitral tribunal has ruled beyond his power. However, the notion of "*ultra petita"* is referred to the claims of the parties, which it isn't the same notion than the "*ex aequo and bono*". The last is a different question concerning the applicable law. We cannot raise this ground for this thing.

Letter e: "*where the award is incompatible with public policy*"

In this case, the award can be annulled if it's incompatibly with material or substantive public policy. Where the arbitral tribunal doesn't apply the law chosen by the parties, this is a breach of international public policy and this can be applicable in the same way to *ex aequo and bono*. This act is in violation of a procedural policy. It must be an outcome incompatible with fundamental values that any states should recognize which is not the case. This ground cannot have any chance of success.

Letter c: "*where the arbitral tribunal has ruled beyond the claims submitted to it, or failed to decide one of the claims*".

The arbitral tribunal has ruled *ultra petita* because the claimant asks for the reimbursement of the half of the sale price and the arbitral tribunal orders Mr Yabe to reimburse the entire sales prices. The arbitral tribunal cannot give more or something else than what was claimed by the claimant. Mr Yabe can raise this ground and the Supreme Court will probably annul the award.

Letter d: "*where the principle of equal treatment of the parties or their right to be heard in an adversary procedure has not been observed"*.

In our case, the arbitral tribunal has accepted the expert report of the claimant but not the expert report of Mr Yabe. However, both expert report has been filed after the submission of the parties' written submissions. Mr Yabe can raise the breach of the equal treatment which applies to submission of evidence and the time to submit them.
The arbitral tribunal must treat similar situation in a similar manner and different situation in a different manner. There are circumstances where the tribunal may be justified to grand a different treatment to a party in a different situation. Here, the arbitral tribunal treats both parties in a different manner but there is no justification to do it.
However, the right to produce the necessary evidence isn't an absolute right and only applies where three conditions are met

- Exercised in a timely manner
- Relevant and necessary fact.
- Be capable of establishing the existence of a given fact in the tribunal's assessment.

According to the information of the case, we can reach the conditions that the three requirements are met. There are reasons to believe that the right to be heard has been breach by the arbitral tribunal. Mr. Yabe can raise this ground only if he raises an objection immediately. He reiterates his requests which is an objection. In consequence, he can raise this ground which have a success.

Conclusion: Letter c, grounds against the *ultra petita* and letter d, grounds against the breach of equal treatment and the right to adduce evidence.