SWISS RULES OF INTERNATIONAL ARBITRATION AWARDS BEFORE THE SWISS FEDERAL SUPREME COURT

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Introduction

Although the case load of the Swiss Chambers has been steadily increasing, only few details are known about the awards rendered by arbitral tribunals sitting under the aegis of the Swiss Rules. The main reason for the scarcity of published arbitral case law is of course the confidentiality of arbitration proceedings. Another reason is the relative young age of the Swiss Rules, which came into force in 2004. The third reason is the unique system established by the Swiss legislator as to the remedies available against international arbitral awards. Contrary to all the other States which regularly host international arbitration proceedings, there is only one level of court before which challenges can be brought, the Swiss Federal Supreme Court. The chances of success are slim since in practice the Supreme Court confirms arbitral awards in more than 90% of cases.[1] Accordingly, parties dissatisfied with the outcome of an arbitration tend to think twice before initiating annulment proceedings, and there are few court decisions from which information about arbitral awards and arbitral proceedings can be derived.

A review of the Supreme Court decisions reported (or about to be reported) in the ASA Bulletin shows that, to date (July 2009), the Court has rendered nine decisions dealing with challenges of Swiss Rules awards.[2] Two further cases were withdrawn before a decision on the merits could be rendered by the Court. The nine cases consisted in requests to set aside awards on the grounds set out in Art. 190(2)(a), (b), (d), and (e), *i.e.* on all the grounds available in Switzer-

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1 F. DASSER, "International Arbitration and Setting Aside Proceedings in Switzerland: A Statistical Analysis", ASA Bull. 3/2007, at 444, 452. The statistics were compiled from from a record of all the decisions rendered by the Supreme Court since the enactment of the PIL Act on 1 January 1989 until December 2005 (221 cases, 172 heard on the merits): F. DASSER, *op. cit.* at 449, 450 and 465. The figure provided by F. DASSER in his update at the ASA Conference of 25 Sept. 2009, following a review of 289 decisions (including 229 on the merits) from 1989 to 2009, was 93.5% (up 0.5 point).

2 This is not counting of course the numerous decisions relating to arbitral awards rendered under the arbitration rules of Swiss Chambers of Commerce in force prior to the adoption of the Swiss Rules on 1 January 2004.

land, except *ultra/infra petita* (Art. 190(2)(c)), and one case was a request for *révision* (review). None of the applications was successful.[3]

The review of these cases – and of the underlying awards described in the Supreme Court decisions – is divided as follows:[4]

1. Challenges of arbitrators and defective composition of the arbitral tribunal (Art. 190(2)(a) PIL Act)
2. Jurisdiction – interpretation and scope of arbitration agreements (Art. 190(2)(b) PIL Act)
3. Due process and right to be heard (Art. 190(2)(d) PIL Act)
4. Public Policy (Art. 190(2)(e) PIL Act)
5. Expedited procedure (Art. 42 of the Swiss Rules)
6. Exclusion of remedies (Art. 192 PIL Act)
7. Révision (review) of arbitral awards
8. Withdrawal of requests to set aside and decisions on costs

1. Challenges of Arbitrators and defective composition of the Arbitral Tribunal (Art. 190(2)(a) PIL Act)

According to Professor Kellerhals, President of the Arbitration Committee of the Swiss Chambers, six challenges to arbitrators have been brought before the Special Committee, and none of them has been admitted.[5] In addition, **two** requests to set aside Swiss Rules awards have been filed before the Supreme Court on the basis of Art. 190(2)(a) PIL Act.

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[3] The cases reviewed are the following:
- 4A_500/2007 of 6 March 2008, ASA Bull. 1/2009, at 94; English translation: 2 Swiss Int'l Arb. L. Rep. 1 (2008), at 133
- 4A_42/2008 of 14 March 2008, ASA Bull. 4/2008, at 765
- 4P.146/2005 of 10 October 2005, ASA Bull. 2/2006, at 330
- 4A_294/2008 of 28 October 2008, ASA Bull. 1/2009, at 144; English translation to be published in 2 Swiss Int'l Arb. L. Rep. 2 (2008)
- 4A_452/2008 of 29 February 2008, ASA Bull. 2/2008, at 376
- 4A_376/2008 of 5 December 2008, ASA Bull. 4/2009, at 762.
- 4A_69/2009 of 8 April 2009, to be published in ASA Bull.
- 4P.88/2006 of 10 July 2006, ASA Bull. 2/2007, at 357
- 4A_2/2007 of 28 March 2007, ASA Bull. 3/2007, at 610; English translation: 1 Swiss Int'l Arb. L. Rep. 1 (2007), at 135
- 4A_426/2007 of 15 Nov. 2007, ASA Bull. 4/2009, at 780.
- 4A_306/2007 of 29 Nov. 2007, ASA Bull. 4/2009, at 781.

[4] As the underlying arbitral awards rendered under the Swiss Rules are not publicly available, the discussion of the awards is based exclusively on the findings of the Supreme Court.

[5] "Conference report – The Swiss Rules of International Arbitration – Five Years of Experience", ASA Bull. 3/2009, pp. 611–616.

In a first decision, **4P.146/2005 of 10 October 2005,**[6] the Supreme Court confirmed that when seeking the annulment of an award pursuant to Art. 190(2) (a) PIL Act, the only factual basis for challenging an arbitrator which may be invoked is the one which the challenging party **became aware of after the award was rendered.** Circumstances that are known and believed to be questionable must be immediately pointed out to the arbitrator. On the merits, the circumstances about which the plaintiff complained were held not to constitute a valid ground for a challenge. The mere possibility, based on the local fame of a law firm, that a colleague working in the same law firm as the arbitrator might have taken on a mandate somehow connected with the defendant was deemed to be insufficient. The Court confirmed that the doubts as to the independence of the arbitrator have to be based on **objective facts** that can lead a **reasonable independent observer** to become uncertain about the impartiality of the arbitrator.[7]

In the second case, **4A_294/2008 of 28 October 2008,**[8] the plaintiff had first asked the Chamber (Geneva) to issue a warning against a sole arbitrator pursuant to **Art. 12 of the Swiss Rules,** on the basis that the arbitrator had, wrongly in the plaintiff's view, allowed the other party to file a further submission. Art. 12 provides:

"If an arbitrator fails to perform his functions despite a written warning from the other arbitrators or from the Chambers, the Special Committee may revoke the appointment of that arbitrator."

The Chamber had rejected the request on the basis that it had no power to interfere in the management of the arbitral proceedings by the arbitrator. Subsequently, the same party challenged the award on the same ground before the Supreme Court. Unsurprisingly, the challenge was rejected.

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6 4P.146/2005 of 10 October 2005, ASA Bull. 2/2006, at 330. The decision does not specify that the arbitration was governed by the Swiss Rules. However, as the arbitration was introduced after 1 January 2004 before the Chamber of Commerce of Ticino, it presumably was. The case is also discussed below in Section 4 (Public policy).

7 ATF 129 III 445.

8 4A_294/2008 of 28 October 2008, ASA Bull. 1/2009, at 144. This case is also discussed below in Section 2 (Jurisdiction), Section 3 (Due process) and Section 5 (Expedited Procedure).

2. Jurisdiction – Interpretation and scope of Arbitration Agreements (Art. 190(2)(b) PIL Act)

Three Swiss Rules arbitral awards have been considered by the Supreme Court in the context of setting aside requests based on the scope *ratione personae* or *ratione materiae* of the arbitration agreement.

In an award of 28 September 2007, considered by the Supreme Court in **4A_452/2008 of 29 February 2008,**[9] an arbitral tribunal had to determine the respective **scope of application of conflicting dispute resolution clauses in related contracts** and partially denied its jurisdiction to hear a dispute arising out of a group of contracts.

In 2000 and 2004, a German and a Russian corporation entered in two exclusive sales agreements for the supply of ferrotitan. Disputes were agreed to be subject to Swiss law with the jurisdiction of the courts of Zurich. Between 2002 and 2005, the parties entered into five supply agreements, all of which were subject to Russian law and provided that disputes would be heard through arbitration in Russia before the *"Internationale Handels-Schiedskommission bei der Kammer für Handel und Industrie der Russischen Föderation"*. In 2006, the parties agreed on an amendment to the exclusive sales agreement and replaced their forum selection clause by the standard arbitration clause of the Swiss Chambers. In 2007, the German party commenced arbitration under the Swiss Rules claiming USD 12 million under the exclusivity agreement and USD 300,000 under one of the supply agreements. It also sought declaratory relief that the Russian party had no claim under the exclusive sales and the supply agreements. The Russian party objected to the arbitral tribunal's jurisdiction.

In its award, the arbitral tribunal partially granted the payment claim under the exclusive sales agreements but rejected all prayers for relief submitted under the supply agreements for want of jurisdiction. The German party challenged the award but the Supreme Court rejected the application.

The Court first recalled that in case of jurisdictional challenges pursuant to Art. 190(2)(b) PIL Act, it was free to analyse the arbitration agreement afresh. In this case, the arbitral tribunal had found no evidence of the parties' real intention. Consequently, it had applied an objective test, based on the terms of the contract.

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[9] 4A_452/2008 of 29 February 2008, ASA Bull. 2/2008, at 376; Tribunal: D. Wehrli, P.A. Karrer, D. Girsberger. This case is also discussed below in Section 3 (Due process).

The latter had not revealed any intention of the parties to replace the arbitration agreements in the supply contracts by the one that was newly inserted in the amended exclusive sales agreements. Of relevance was the fact that the parties could easily have done so, that the supply contracts predated the amended exclusive sales agreements, and that their arbitration clauses were specific. The danger of contradictory decisions in the two fora was real, but already existed prior to the amendment, and, as a result, was deemed to have been accepted by the parties. The arbitrators had also rejected the German party's argument that the clause in the amended agreement had to be construed widely so as to encompass disputes under related agreements: the relevant German terms *"aus oder im Zusammenhang mit diesem Vertrag",* which translate as "under or in relation to this contract", could cover disputes under other agreements, but not in the event that such other agreements themselves contained a specific dispute resolution mechanism.

Before the Supreme Court, the plaintiff also argued that the arbitrators had violated the principle of good faith, and more specifically that of trust *("Vertrauensprinzip").* It again relied on the wide terms of the arbitration agreement and on the fact that all the agreements were connected *("konnex")* and asserted that, in the circumstances, it was entirely unreasonable for the arbitral tribunal to assume that the parties had not wanted a uniform mechanism.

The Supreme Court acknowledged that it would have made sense to provide for the same dispute resolution mechanism in all the contracts, but held that since the parties had provided for something else, different mechanisms had to be applied. The Court also noted that the two sets of contracts were governed by distinct substantive laws and that this point could not be altered even if the Swiss Rules arbitration agreement were to apply to all the contracts. This is a less convincing argument since it is not uncommon for international arbitral tribunals to apply different laws to different issues before them. Ultimately, however, the point that was decisive for the Court was that when they entered into the amendment, the parties had remained completely silent as to the possible application of the new arbitration clause to the existing supply agreements.

In a second award of 31 October 2007, an arbitral tribunal sitting under the auspices of the Geneva Chamber had addressed the **material scope of an arbitration agreement.** The case was decided by the Supreme Court in **4A_500/2007 of 6 March 2008.**[10]

[10] 4A_500/2007 of 6 March 2008, ASA Bull. 1/2009, at 94; English translation at 2 Swiss Int'l Arb. L. Rep. 1 (2008), at 133. This case is also discussed below in Section 6 (Exclusion of Remedies).

As noted above the dispute involved several parties. A French party (Y) and an Italian party (X) were shareholders of an Italian holding company (B) the main asset of which was a 63% stake in another Italian company. In 2002, Y and X entered into a put and call agreement, whereby Y intended to take over X's shares in B. Y exercised the call in 2005 and obtained and paid X's shares. However, X also requested that Y should buy a number of warrants issued by B in 2002. Each warrant entitled the owner to obtain a new share of B issued between 2005 and 2007. X had subscribed to several million warrants for a price in excess of EUR 20 million. X affirmed that it had reached an oral agreement with Y, confirmed by an exchange of letter attaching draft contracts in 2002 and 2003, whereby the put and call rights were extended to the warrants. X commenced proceedings before the Milan courts seeking the payment of the amount it had paid for the warrants. In turn, Y initiated arbitration under the put and call agreement, seeking declaratory relief that it had not undertaken to purchase the warrants. Y also requested that X be ordered to pay EUR 25 million in damages for violation of the agreement to arbitrate. X contested the jurisdiction of the arbitral tribunal, arguing that the arbitration agreement as contained in the original put and call agreement for the shares was not applicable to the subsequent put and call agreement relating to the warrants. Alternatively, X sought payment for the warrants as well as an indemnity payment from Y for abusive proceedings.

In its award, the arbitral tribunal admitted its jurisdiction with regard to both the shares and the warrants. It also found that Y did not owe X anything for the warrants. The monetary claims of both parties were rejected. X challenged the award, unsuccessfully.

The summary of the award in the Supreme Court decision is unfortunately rather limited although the case apparently raised a number of issues of interest, in particular whether an oral agreement had been reached, and if so, what dispute resolution mechanism was agreed to apply to this group of contracts. In addition, both parties claimed an indemnification for the costs they incurred in the proceedings commenced by the other party in the allegedly wrong forum. It is indeed accepted that a party who brings **court proceedings in disregard of a valid arbitration agreement** may be liable for damages for breach of the arbitration agreement.[11] This may also be the case for the **costs of ancillary court**

[11] S. DUTSON, "Breach of an Arbitration or Exclusive Jurisdiction Clause: The Legal Remedies if it Continues", Arb. Int'l 1/2000, vol. 16; WESSEL/COHEN "In Tune With Mantovani: The Novel Case of Damages for Breach of an Arbitration Agreement", Int.A.L.R. 2/2001, at 65; O. SANDROCK, "Malicious parallel suits in foreign jurisdictions (comments on England, court of appeal, Union Discount Company v Robert Zoller)", (2001) EWCA Civ 1555, Notes by SANDROCK, DELVOLVÉ and ZETTERMARCK in JARVIN/MAGNUSSON (eds.), *International Arbitration Court Decisions,* 2006.

proceedings that are not pursued in violation of the arbitration agreement, as decided by a Swiss Rules tribunal in relation to the costs of attachment proceedings in the Netherlands. This award was upheld (although not specifically on this point) by the Supreme Court in **4A_294/2008 of 28 October 2008.**[12]

The third case, addressed by the Supreme Court in **4A_376/2008 if 5 December 2008,**[13] raised two interesting jurisdictional issues: the interpretation of a pathological clause referring to an inexistent institution (with proceedings administered by the ICC but the defendant arguing that a Swiss Rules tribunal should hear the case), and the personal scope of application of the arbitration clause.

In 2006, an Italian individual (A) entered into a sales contract with C Ltd (UK), in its capacity as trustee of D and owner of all the shares of B Ltd (UAE) and B (Canada). Through the sales contract, A acquired the shares in B Ltd. On the same day, A and B Ltd executed an employment contract whereby A was appointed as director of B Ltd. The employment contract contained the following arbitration agreement:

"In case of any disputes deriving from the Contract, the parties agree that it should be competence of the Arbitration Court of the International Chamber of Commerce of Zürich in Lugano. The language of arbitration will be Italian. The law applied will be Swiss law."

In 2007, B Ltd commenced arbitration before the ICC against A based on the employment contract. According to B Ltd, A had unlawfully used assets of B Ltd for its own purposes. A objected to the jurisdiction of the ICC, and in the alternative, asserted a counterclaim against D, B and C Ltd. According to A, the arbitral tribunal had jurisdiction over these parties, even if they had not signed the employment contract, since they had – on the same day – signed the sales agreement which was inextricably linked to the employment contract. However, the ICC found *prima facie* that there was no arbitration agreement binding D, B and C Ltd and decided that the arbitration should not proceed with regard to these parties (pursuant to Art. 6.2 of the ICC Rules).

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[12] 4A_294/2008 of 28 October 2008, para. 5, ASA Bull. 1/2009, at 144, 152. This case is also discussed above in Section 1 (Arbitral Tribunal) and below in Section 3 (Due process) and Section 5 (Expedited Procedure).

[13] 4A_376/2008 of 5 December 2008, in ASA Bull. 4/2009, at 762; English translation to be published in 2 Swiss Int'l Arb. L. Rep. 2 (2008).

In an interim award, the sole arbitrator appointed by the ICC eventually confirmed his jurisdiction under the ICC Rules to hear the dispute between A and B Ltd, but no jurisdiction over D, B, and C Ltd. A filed a request to set aside the award before the Supreme Court, arguing that the arbitration clause did not refer to the ICC, but to the Zurich Chamber of Commerce, as the institution that was supposed to administer disputes under the employment contract. Furthermore, A asserted that the arbitrator had wrongly denied his jurisdiction with regard to D, B, and C Ltd.

Regarding **the first issue,** the Supreme Court found that **the clause was pathological** as there was no "Arbitration Court of the International Chamber of Commerce of Zürich in Lugano". However, in line with its previous case law, it added that the **wrong designation of the arbitral institution, or the choice of a body that does not exist,** did not necessarily render the arbitration clause void. Rather, the arbitral tribunal and the Supreme Court are required to try to find a solution which gives the clause a meaning and keeps it alive *("Utilitätsgedanke").*[14] Here, the parties had clearly expressed their wish to submit disputes to an arbitral tribunal, as opposed to the State courts, and to refer to the rules of an arbitration institution, rather than proceed with *ad hoc* proceedings. The only point of contention was whether the institution was the ICC or the Zurich Chamber of Commerce.

The arbitrator had analyzed this question exhaustively and acknowledged that the clause was ambiguous. Relying on existing case law, he had ruled that to the extent that the clause could be construed as referring to more than one institution, the institution first seized by the claimant had jurisdiction. He had further found evidence that the parties had in any event meant to vest jurisdiction in an ICC tribunal, not in a Zurich Chamber of Commerce panel. Indeed, a first draft of the arbitration clause had mentioned the ICC in Paris: *"Per le eventuali controversie relative al contratto d'impiego, le parti concordano la competenza del Tribunale arbitrale della Camera di Commercio Internazionale di Parigi. Localmente competente è la sezione distaccata di Bolzano e la lingua del processo è l'italiano."* To this proposal, A had replied that he would prefer a seat in Switzerland: "a Court outside Italy would be preferable, for instance Lugano where the Court language is Italian, Swiss law will apply". It was apparently on this basis that Bolzano was replaced by Zurich, and Lugano added as place of arbitration.

[14] ATF 130 III 66.

A argued that the mention of Zurich in any event demonstrated that the parties had the Zurich Chamber of Commerce in mind, not the ICC. The Supreme Court accepted that in previous cases it had construed similar clauses as indicating a reference to the Zurich Chamber ("Swiss Arbitration Court, Zurich", "International Trade Arbitration Organization in Zurich" or "International Trade arbitration in Zurich").[15] However, the Court pointed out that this was prior to 2004, *i.e*. before the Chambers of Commerce of Zurich, Geneva, Bern, Lugano, Basel and Vaud had adopted uniform rules of international arbitration, the Swiss Rules, and had appointed an Arbitration Committee to supervise all arbitral proceedings administrated by the Chambers under the Swiss Rules. In this case, since the employment agreement had been entered into two years later, the Court considered that the parties, and in particular A who had proposed the amendment of the clause, were aware of the existence of the Swiss Rules. The Court concluded that if the parties had really intended to substitute the ICC as the administrating body by the Swiss Chambers, (a) they would have probably replaced "Court of arbitration" by "Arbitration Committee", (b) they would not have used the adjective "international", and, above all, (c) they would have avoided any reference to the Zurich Chamber of Commerce since any Swiss Rules arbitration in Lugano would in any event have been subject to the Swiss Rules and to the supervision of the Arbitration Committee.[16]

Whilst the end result reached by the Court is justified, in particular in light of the genesis of the clause in the negotiations between the parties, the Supreme Court's arguments regarding the wording the parties would have chosen had they really meant to refer to the Swiss Rules are more questionable. There are legions of arbitration agreements entered into after 2004 that do not explicitly mention the Swiss Rules, or arbitration by the Swiss Chambers, let alone contain any reference to the Arbitration Committee.

Ultimately, A's request to set the award aside was successful in its **second branch:** the Supreme Court admitted that the arbitrator should have extended the arbitration to the third parties D, B and C Ltd. The Court recalled that under Swiss law it is perfectly possible to **extend an arbitration agreement to non-signatories in certain circumstances,** including on the basis of the conduct of such parties. The Court found that the two contracts were **inseparably linked,** as was evidenced by their content and signatories.

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15 ATF 129 III 675, paras. 2.3–2.4.

16 *"(E) soprattutto avrebbero evitato il riferimento alla Camera di commercio di Zurigo, quale autorità responsabile dell'amministrazione e della sorveglianza dell'arbitrato da svolgersi a Lugano; l'arbitrato avente sede a Lugano sarebbe stato infatti in ogni caso disciplinato dal Regolamento Svizzero e sottoposto alla vigilanza del Comitato d'arbitrato."*

Hence the employment contract was signed by:

"– A. _____, 'hereafter referred to as Managing Director'
– B. _____Ltd, represented by the unique partner
– D. _____ (...) represented by C. _____ Ltd through its Managing Directors Mrs F. _____ and Mr G. _____."

And the Sales Contract was signed by:
"– A. _____, 'hereafter referred to as Buyer'
– B. _____ 'hereafter referred to as Director and Creditor (of B. _____ Ltd)'
– C. _____ Ltd 'as Trustees of D. _____, represented by its Directors, Mrs F. _____ an Mr G. _____, hereafter referred to as Seller'."

A also persuaded the Court that the two contracts formed a whole, with the ultimate objective to transfer to A the full control of B Ltd. The goal of the employment contract was simply to enable A as managing director of B Ltd to have access to the assets of B Ltd, run the business and reimburse the outstanding debts of B Ltd regarding the other shareholders. Given their overlap, the undertakings in the two agreements could not be set apart. Violations of the employment contract necessarily had repercussions on the sales agreement and vice versa. Considering the heavy involvement of D, B and C Ltd in the preparation of the employment contract and the role they played in relation to its performance, the Court concluded that these parties had, by their conduct, subscribed to the arbitration agreement in the employment contract. The Court added that the arbitration agreement in the sales agreement was practically identical to the one in the employment contract. Accordingly, the Court modified the operative part of the award and admitted the request to extend the arbitration proceedings to D, B and C Ltd.

It should be noted that under the ICC Rules, the sole arbitrator barely had any other possibility than to reject his jurisdiction *vis-à-vis* the third parties, since the ICC had previously decided that there was no *prima facie* arbitration agreement regarding such parties. The arbitrator had pointed out in the proceedings that A could start a new arbitration under the sales agreement, which may have allowed for a joinder of proceedings with the consent of the parties. On this point, **Art. 4.2 of the Swiss Rules** would have certainly granted more latitude to the tribunal as it provides that:

"(…) where a party to arbitration proceedings under these Rules intends to cause a third party to participate in the arbitration, the arbitral tribunal shall

decide on such request, after consulting with all parties, taking into account all circumstances it deems relevant and applicable."

3. Due process and right to be heard (Art. 190(2)(d) PIL Act)

Breach of due process or violation of a party's right to be heard is often invoked as a ground for annulment by the party who has been defeated in an arbitration. This ground for setting aside a Swiss Rules award has been invoked in **five cases** heard by the Supreme Court in relation essentially to the taking of evidence, the weight attached to the party's arguments and generally the organisation of the arbitral proceedings.

In its decision **4P.88/2006 of 10 July 2006,**[17] the Supreme Court heard a claim by an investor in a Bulgarian-Swiss investment dispute that its right to be heard had been violated where the arbitral tribunal had **failed to hear certain arguments and accept certain evidence.**

Pursuant to a contract with the Bulgarian Privatisation Agency, S had acquired a 60% shareholding in a Bulgarian company B. The main assets of B were rights to a popular Bulgarian ski resort. The contract comprised an Information Memorandum with background information on B and further provided for a USD 2.5 million investment program to be carried out by the buyer over a three year period for the modernization of the hotels and certain equipment. The contract contained a specific penalty provision for default. In December 2004, the Privatisation Agency initiated arbitration under the Swiss Rules against S, claiming that S had failed to carry out the agreed investment and was liable for the contractual penalty of USD 700,000. The investor's defence was that it had invested much more than the amount contemplated under the contract; that the investment program had to be amended as a result of, on the one hand, regulatory proceedings and third party claims and, on the other, the higher than anticipated investments required to turn the ski resort into a profitable venture. The Agency was successful and S challenged the award before the Supreme Court.

The sole arbitrator had ruled that the investor had not complied with the agreed investment program and ordered that it pay the penalty. All the investor's defences had been rejected, including that of a pre-contractual fault *("culpa in*

[17] 4P.88/2006 of 10 July 2006, ASA Bull. 2/2007, at 357; Sole Arbitrator: Louis Degos, Paris. This case is also discussed below in Section 4 (Public Policy).

contrahendo") on the part of the Agency for having allegedly failed to disclose all the relevant information. The arbitrator had found that the Information Memorandum did refer to a number of problems and that it would have been for S, as a responsible investor and drafter of the investment program, to carry out a proper due diligence.[18]

Before the Supreme Court, the investor argued that the arbitrator had failed to hear its arguments and to take evidence regarding the Agency's purported breach of pre-contractual duties as evidenced in the Information Memorandum prepared by the Agency; in particular, the arbitrator had not asked for the production of the Information Memorandum. The Supreme Court rejected the argument. It held that the arbitrator had examined the Information Memorandum but had concluded that, in any event, even if the latter was inaccurate (which indeed he had not examined), the investor had a duty to conduct a due diligence. The Supreme Court added that it was incomprehensible that the investor itself had not produced a full copy of the Investment Memorandum in the arbitration whilst arguing that it was incomplete; having failed to produce potentially relevant evidence, the investor was clearly ill-placed to criticize the arbitrator for an allegedly incomplete taking of evidence.

In a later decision, **4A_2/2007 of 28 March 2007,**[19] the Supreme Court addressed objections against an award based on factual findings established by the arbitral tribunal through an **inference against the party which had refused to produce certain documents.**

In the context of a dispute between a principal and its agent, the agent (from Iran) requested the production of documents from the principal (from Germany) and all its affiliates showing all sales in the territory allocated to the agent pursuant to the agency agreement. Under the agreement, such sales were the triggering event for the payment of the agent's fees.

The sole arbitrator had found that the principal was obliged, pursuant to the agreement, to give access to its sales figures and ordered the production in the following terms:

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18 4P.88/2006, para. 3.2 ; ASA Bull. 2/2007, at 362.

19 4A_2/2007 of 28 March 2007, ASA Bull. 3/2007, at 610; English translation: 1 Swiss Int'l Arb. L. Rep. 1 (2007), at 135.

"Respondent is ordered to submit to the Arbitrator and Claimant, by 29 July 2005, a comprehensive list, duly signed by Respondent, showing all sales or economically equivalent transactions (such as leasing agreements) made by Respondent and/or any of its affiliates, including Y. S.p.A. and/or any company owned or controlled by the Y.-Group, into the territories of Saudi Arabia, the United Arab Emirates, Oman, Qatar, Bahrain and Kuwait from 1 January 2002 until 13 December 2004, and into the territory of Iran from 1 January 2002 until 6 April 2006, with respect to (i) products produced by Respondent, or (ii) to the extent produced by a different manufacturer, products identical or similar in their function and design to products formerly manufactured by Respondent."[20]

The arbitrator had further directed the principal to grant access to the list to an independent auditor who would verify its completeness and accuracy.

Interestingly, the tribunal's order took the form of an award which is unusual for requests for interim measures on procedural matters. They are by and large issued as procedural orders, even if arbitral tribunals have the right to render interim awards under the Swiss Rules (Art. 26.2). In this case, however, the request appears to have been founded (also) on substantive law, *i.e.* on the agency agreement itself so that the order was for the performance of a contractual duty. In addition, the partial award dealt with other issues, and contained an order for the payment of a penalty.

The principal had not complied with the tribunal's order for production. It had not provided a complete list or confirmed that it would grant access to the list to an auditor. The tribunal had considered that this was a violation of the procedural duty to cooperate in evidence gathering *("Verletzung der Mitwirkung bei der Beweiserhebung")* and drawn an adverse inference on the number of sales completed within the territory. The decision was based on Art. 9.4 of the **IBA Rules on the Taking of Evidence in International Commercial Arbitration,** which provides that the failure to produce documents upon an order of the arbitral tribunal can lead to an adverse inference that such documents would be adverse to the interest of the recalcitrant party.

The principal challenged the tribunal's inference before the Supreme Court, claiming that pursuant to the agency agreement, it had no duty to open its books. The Court held that the principal did have a contractual obligation to disclose the information requested and that the adverse inference drawn by the tribunal was not a violation of the plaintiff's right to be heard. More generally, the Court

[20] ASA Bull. 3/2007, at 612.

ruled that a violation of the IBA Rules, or of the evidentiary rules of the local (Zurich) Procedural Code, did not constitute grounds for challenging an arbitral award since the list in Article 190 of the PIL Act was exhaustive.

It should be noted however that where a right to access documents is founded directly on the contract and/or a legal provision *(e.g.* Art. 418k Swiss CO), there should be no need to examine whether the usual prerequisites for interim measures are met (irreparable harm, prima facie case, balance of inconvenience, and, if appropriate, urgency). It is merely a question of applying the contract or the applicable law directly. The IBA Rules might simply be relied upon, by analogy, in order to design a production mechanism where the contract or the law do not contain specific provisions to this effect.

In the same decision, 4A_2/2007 of 28 March 2007,[21] the Supreme Court dealt with a **party's right to the appointment of an expert.** The arbitral tribunal had in this case rejected the plaintiff's request to appoint a technical expert (formulated in the post-hearing brief). The plaintiff, in its request to set aside the award, relied on a previous decision of the Supreme Court, in which the Court had held that the arbitral tribunal ought to appoint an expert if it lacked the technical knowledge required to make the award.[22]

The Supreme Court rejected the argument. It recalled that its previous ruling only applied where the arbitral tribunal, based on the entire evidence submitted by the parties, was not in a position to decide on a technical issue. In the present case, the tribunal had drawn on the witness testimony to decide the technical issue, including that of the plaintiff's own technical experts who had admitted at the hearing that his written witness statement was incomplete. The Supreme Court mentioned, in an *obiter dictum,* that, in any event, here the plaintiff had also failed to show that its request for an expert opinion had been made in a timely fashion.

Art. 32.3 of the Swiss Rules provides that the tribunal "shall state the reasons upon which the award is based, unless the parties have agreed that no reasons are to be given." In **4A_452/2007 of 29 February 2008,**[23] the Supreme Court confirmed that arbitral tribunals are **not obliged to give reasons.**[24] The

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21 4A_2/2007 of 28 March 2007, ASA Bull. 3/2007, at 610.

22 Supreme Court Decision of 11 May 1992, ASA Bull. 2/1992, at 381, 397.

23 4A_452/2007 of 29 February 2008, ASA Bull. 2/2008, at 376. This case is also discussed above in Section 2 (Jurisdiction).

24 See 134 III 186 para. 6.1; 133 III 235 para. 5.2.

Court, however, admitted that arbitrators have a minimal duty to hear and examine the relevant arguments, although it does not mean that they have to examine every single argument explicitly. They can do so implicitly and have no duty to elaborate on irrelevant points or arguments; a failure to do so does not constitute a breach of a party's right to be heard. In the case at hand, the Court noted that the arbitral tribunal had listed all the arguments at the outset of the award and held that its failure to explicitly elaborate on some of them was not a violation of due process.

The same ruling was made in **4A_294/2008 of 28 October 2008,**[25] which concerned an award rendered in expedited proceedings under Art. 42 of the Swiss Rules, paragraph (e) of which specifically provides that "the arbitral tribunal shall state the reasons upon which the award is based in *summary form,* unless the parties have agreed that no reasons are to be given."

In that case, when challenging the award before the Supreme Court, the plaintiff made three further allegations of breach of due process. First, the plaintiff (respondent in the arbitration) took issue with the fact that the sole arbitrator had had a **telephone conversation with counsel** for the opposing party where the procedural rules issued by the arbitrator provided that all contacts with the tribunal should be in writing. The Court dismissed the argument and found that the sole purpose of the call was for the claimant to ask for an opportunity to comment on the allegedly new arguments raised in the respondent's statement of defence; the arbitrator had then asked counsel to apply for leave in writing. Subsequently, the arbitrator had admitted the application but also given the respondent an opportunity to file comments in reply to the additional brief of the claimant.

Secondly, the plaintiff alleged that the **arbitrator had proceeded with the arbitral proceedings without waiting for the expiry of the time limit** he had set for the plaintiff's comments on the claimant's new brief. The objection was also rejected as the plaintiff had sent a fax with detailed remarks within two days of having received the brief, and had not indicated any intention to submit further comments. In these circumstances the arbitrator had no reason to believe that the plaintiff would file any additional submission.

Finally, the plaintiff objected to a purportedly **unequal treatment** of the parties on two accounts. The arbitrator had first **rejected all of the plaintiff's affidavits** but had admitted one of the claimant's. The Supreme Court found no

[25] 4A_294/2008 of 28 October 2008, ASA Bull. 1/2009, at 144. This case is also discussed above in Section 1 (Arbitral Tribunal) and Section 2 (Jurisdiction) and below in Section 5 (Expedited Procedure).

unequal treatment since the affidavit admitted was in fact a document that had been prepared prior to the commencement of the arbitration. The arbitrator had then allegedly set **unequal time limits** for the filing of the parties' submissions: the claimant had had six weeks to submit its comments on the allegedly new arguments contained in the plaintiff's statement of defence, whilst the plaintiff had only been granted two weeks to respond to the claimant's additional submission. Again, the Court rejected this argument since both parties were granted two weeks from the (relevant) date on which the arbitrator had admitted the claimant's request for leave to file comments. The Court also noted that the respondent had at no point asked the arbitrator to extend the purportedly unequal time limit.

The last Swiss Rules award challenged on the basis of Art. 190(2)(d) PIL Act was addressed in **4A_69/2009 of 8 April 2009.**[26] In that case, the plaintiff argued that the arbitral tribunal had violated its right to be heard by **disregarding evidence** that the plaintiff had introduced in the arbitration in conformity with the procedural rules. However, since the plaintiff had **not raised this issue earlier in the arbitral proceeding,** the Supreme Court paid short shrift to this argument. It is indeed well established that a party who considers that its procedural rights have been violated must voice its complaint without delay.[27] It is against the principle of good faith to rely on a procedural violation only in annulment proceedings if the same issue could have been raised during the arbitral proceedings so as to afford the arbitral tribunal a possibility to remedy the issue.

4. Public policy (Art. 190(2)(e) PIL Act)

Violation of public policy is often raised as a ground of last resort to set aside arbitral awards. To date it had never succeeded in relation to any challenge of arbitral awards.[28] It has been invoked in **three** cases against a Swiss Rules award since the Swiss Rules came into force.

In the award reviewed by the Supreme Court in **4P.146/2005 of 10 October 2005,**[29] despite the fact that the claimant had always referred to itself as "B. Ltd, Lugano branch", the arbitrator had decided that the real party to the arbitral pro-

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[26] 4A_69/2009 of 8 April 2009, to be published in ASA Bull. This case is also discussed below Section 4 (Public Policy).

[27] ATF 127 III 576.

[28] F. DASSER, *Op. cit.* at 456. This was confirmed by F. DASSER in his presentation at the ASA Conference on 25 September 2009.

[29] 4P.146/2005 of 10 October 2005, ASA Bull. 2/2006, at 330. This case is also discussed above in Section 1 (Arbitral Tribunal).

ceedings was B. Ltd, represented by its Lugano branch. In its request to set aside the arbitral award, the plaintiff, respondent in the arbitral proceedings, submitted that the entity that had initiated the arbitration was the branch office, and that it was a violation of procedural public policy to admit the **standing of a branch office.** In the plaintiff's view, only the company itself, not a mere branch office which lacks legal independence, had standing to be a party to the arbitration. The plaintiff had not raised the argument during the arbitral proceedings.

The Supreme Court first confirmed that the inexistence, respectively the lack of standing, of a corporation, may be raised at any stage in the proceedings, including in the court proceedings seeking the annulment of the award.[30] It distinguished this type of argument from other procedural defences, such as a purported partiality or procedural violations of the arbitral tribunal which ought to be raised immediately. On the merits, however, the Court confirmed its previous case law according to which a branch can be considered to be acting for the "main company" by virtue of a special proxy. The request to set aside the award was therefore rejected.

In **4P.88/2006 of 10 July 2006,** also referred to above,[31] the investor in a Bulgarian-Swiss investment dispute challenged the arbitral award alleging, *inter* alia, a violation of public policy. The investor first argued that the arbitrator, by blaming the investor for having failed to carry out a due diligence, had at the outset ruled out the possibility that the investor had been misled by the Agency's incomplete Information Memorandum. Under Swiss law pre-contractual liability *(culpa in contrahendo)* is **part of the more general concept of good faith,** which has **public policy status.** The Supreme Court admitted that as such *culpa in contrahendo* was a public policy rule, but held that in the present case, it had not been violated since the arbitrator had merely decided the case against the investor based on legal considerations other than good faith.

The investor also complained that the arbitrator had, in breach of public policy, failed to reduce what was an excessive penalty by awarding the contractual penalty amount in full to the Privatisation Agency. The Supreme Court left open the question of whether the **obligation to reduce an excessive penalty** is part of public policy. It indeed found that in this case the arbitrator had examined whether a reduction was appropriate and decided against it since the pen-

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30 4P.146/2005, para. 5.2.1; ASA Bull. 2/2006, at 335. See also ATF 128 III 191, para. 8, also published ASA Bull. 2/2002, at 358, 370–371.

31 4P.88/2006 of 10 July 2006, ASA Bull. 2/2007, at 357. This case is also discussed above in Section 3 (Due Process). For another recent post-privatisation dispute see 4P.114/2006, ASA Bull. 1/2007, at 123 *(Czech Republic v. Saluka)*.

alty had been freely negotiated. Hence, the arbitrator had come to the conclusion, accepted by the Court, that no reduction was in any event warranted. The Supreme Court also refused to examine whether the decision in this respect was in conformity with Bulgarian law, as the **disregard of substantive law** is not a ground for challenging an arbitral award under Art. 190 PIL Act.

In a more recent Supreme Court decision, **4A_69/2009 of 8 April 2009** also referred to above,[32] the plaintiff argued that the consultancy contract containing the arbitration agreement was illegal as it provided for the **payment of bribes.** The plaintiff acknowledged that it had not adduced evidence of such bribery in a timely fashion in the arbitration,[33] but submitted that the Supreme Court should review the award for compliance with public policy on its own motion. The plaintiff relied on Art. 99 of the new Federal Supreme Court Act, which provides:

> *"1. No new fact or evidence may be submitted unless it results from the decision of the previous authority.*
> *2. Any new argument is inadmissible."*

The Court ruled against the plaintiff. It recalled that, when reviewing an award in the annulment proceedings, it had to **rely on the facts established by the arbitral tribunal.** New evidence is allowed only within the limits of Art. 99. The Court acknowledged legal commentary to the effect that it should review the possible illegality of contracts on its own motion, but found that the doctrinal authorities related only to administrative matters; for private law contracts, such as the one in this case, there was no room for discarding Art. 99 and allowing a party to raise new arguments which had not been made in a timely fashion in the arbitration. In addition, here, since the facts determined in the arbitral award did not show any elements that would suggest bribery, the challenge based on purported violation of public policy was not founded.

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[32] 4A_69/2009 of 8 April 2009, to be published in ASA Bull, discussed above in Section 3 (Due Process).

[33] In fact, the plaintiff had applied for a review of an earlier partial award on the basis of alledgely new evidence demonstrating bribery. The Supreme Court had dismissed the application as the evidence was not new: 4A_42/2008 of 14 March 2008, ASA Bull. 4/2008, at 765, discussed below in Section 7 (Revision).

5. Expedited procedure (Art. 42 of the Swiss Rules)

The availability of expedited proceedings undoubtedly provides a competitive advantage to the Swiss Rules over other major arbitration rules.[34] The default provisions in Art. 42 ensure speed and cost-efficiency, but the Rules also make a clear allowance for the parties' right to be heard and for some flexibility.

First, they provide for one round of pleadings "in principle", which means that further briefs may be submitted in appropriate circumstances, and there are no time limits set in advance by the rules for the submission of briefs. Secondly, a single hearing – for the examination of witnesses and for oral argument – has to take place, unless both parties agree that the Tribunal should decide on the basis of the documentary evidence alone. Thirdly, the rules apply automatically to all cases where the amount in dispute is below CHF 1 million. This is much higher than under the few other rules with a similar provision.[35] Again however, this is so "unless the Chambers decide otherwise, taking into account all relevant circumstances", which circumstances will include the complexity of the case (factual, legal, procedural) and the nature of the relief *(e.g.* declaratory relief). For disputes involving a higher amount, the parties are free to opt in, and expedite their arbitral proceedings. Fourthly, the case must be heard by a sole arbitrator unless the parties initially agreed and continue to insist on a three member tribunal. Finally, there is a six month time limit to render the award which may be extended in exceptional circumstances only (Art. 42(1)(d)). An extension may in particular be required where excessive speed would conflict with the parties' right to be heard, typically if a party submits a lengthy expert opinion, or a substantial amount of documentary evidence, which call for more time for the other party to respond.[36]

There appears to be two Supreme Court decisions dealing with Swiss Rules awards rendered under the expedited procedure of Art. 42, **4P.88/2006 of**

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[34] Similar mechanisms are available under the rules of the Stockholm Chamber of Commerce, the AAA, the Central Chamber of Commerce of Finland, the CIETAC and the Japan Commercial Arbitration Association (JCAA). Cases decided under the Expedited Procedure represented 24% of the Swiss Chambers' cases in 2008 and 32% of the cases since the adoption of the rules in 2004.

[35] Approximately US$ 75,000 for the AAA and CIETAC, and US$ 200,000 for the JCAA.

[36] For a discussion on Art. 42 see E. GEISINGER, "The Expedited Procedure under the Swiss Rules of International Arbitration", in ASA Special Series No. 22, at 67; M. SCHERER, "Acceleration of Arbitration Proceedings – The Swiss Way: The Expedited Arbitration Procedure under the Swiss Rules of International Arbitration", in SchiedsVZ 5/2005, at 229.

10 July 2006 and **4A_294/2008 of 28 October 2008.**[37] As noted above, in the latter case,[38] the plaintiff raised a number of alleged due process violations, including the lack of reasons in the award, unequal time limits, and the striking of all affidavits produced by the parties. The Supreme Court rejected all these grounds.

Interestingly, however, when disallowing the argument that the award had not been sufficiently motivated, the Supreme Court saw no need to refer specifically to the parties' agreement to arbitrate under the Swiss Rules, entailing their agreement to an accelerated procedure pursuant to Art. 42 and to an award stating reasons "in summary form" only. The Court simply referred to its standing case law[39] and to the clear circumstances of the case. In other words, the Supreme Court applied its standard (and very strict) approach when hearing challenges of arbitral awards, and confirmed that awards rendered pursuant to the expedited procedure are as safe as awards rendered in regular proceedings.

6. Exclusion of Remedies (Art. 192 PIL Act)

Parties that are not domiciled in Switzerland can waive any remedy against arbitral awards available under Swiss law by a specific exclusion agreement (Art. 192 PIL Act). In a decision of 2005,[40] the Supreme Court ruled that the waiver even applies if a party asserts that the arbitral tribunal lacks personal jurisdiction over one of the parties to the arbitration. The decision was criticized by legal writers,[41] as it is indeed problematic to prevent a party who argues that it is not bound by an arbitration clause from challenging the award as a result of an exclusion agreement contained in the very same arbitration clause. This issue was addressed in part by the Supreme Court in the context of

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37 Only the latter raises issues of interest with respect to Art. 42; 4P.88/2006 of 10 July 2006 is discussed above in Section 3 (Due Process) and Section 4 (Public Policy).

38 4A_294/2008 of 28 October 2008, ASA Bull. 1/2009, at 144. Sole Arbitrator: Bernd Ehle, Geneva. An English translation will be published in 2 Swiss Int'l Arb. L. Rep. 2 (2008). The case is also discussed above in Section 1 (Arbitral Tribunal), Section 2 (Jurisdiction) and Section 3 (Due Process).

39 *E.g.* ATF 134 III 186 para. 6.1; ATF 133 III 235 para. 5.2.

40 ATF 131 III 173, in ASA Bull. 3/2005, at 496.

41 See, among others: Note by F. PERRET, ASA Bull. 3/2005, pp. 520–524; S. BESSON, "Etendue du contrôle par le juge d'une exception d'arbitrage; renonciation aux recours contre la sentence arbitrale: deux questions choisies de droit suisse de l'arbitrage international, Rev. Arb. 2005, pp. 1080–1082; D. BAIZEAU, "Waiving the Right to Challenge an Arbitral Award Rendered in Switzerland: Caveats and Drafting Considerations for Foreign Parties", Int. A.L.R. 8/2005, pp. 69–77; J.F. POUDRET/S. BESSON, *Comparative law of International Arbitration,* 2nd ed., N 839 at 782 *in fine;* P M PATOCCHI/C JERMINI, *Basler Kommentar* IPRG, Honsell/Vogt/Schnyder/Berti (eds.), Basel 2007, note 19 at Art. 192; B. BERGER/F. KELLERHALS, *Internationale und interne Schiedsgerichtsbarkeit in der Schweiz,* Bern 2006, note 1688.

a request to set aside a Swiss Rules award, in the decision **4A_500/2007 of 6 March 2008.**[42]

A French party (Y) and several Italian parties were in dispute over the application of a put and call option agreement. The company in respect of which the option applied had issued certain warrants. Y refused to purchase the warrants taking the view that the option only applied to shares. The arbitral tribunal found that the option agreement did not encompass the warrants. The Italian party sought to set aside the award before the Supreme Court. While accepting that the parties had entered into an exclusion agreement,[43] the Italian party submitted that the waiver could not possibly apply **in cases where the arbitral tribunal's jurisdiction was being challenged.**

The Supreme Court found that, in this case, the wording of the exclusion agreement was unambiguous and clearly also covered challenges based on the purported lack of jurisdiction of the arbitral tribunal. The Court held that with regard to the material scope of application of the arbitration agreement (competence *ratione materiae*), as in this instance, such exclusion was unproblematic; on the other hand, where the arbitral tribunal has allegedly wrongly decided on its personal jurisdiction (competence *ratione personae*) an advance exclusion of remedies might raise concerns. However, since here the plaintiff had not argued that the arbitral tribunal lacked personal jurisdiction, but only substantive jurisdiction, the Supreme Court was not required to either confirm or alter its 2005 decision, taking into account the criticisms voiced by legal commentators.

7. Révision (Review) of Arbitral Awards

Applications for *révision* (review) are admissible for judicial decisions and arbitral awards. Whilst the statutory law (including Chapter 12 of the PIL Act) does not specifically foresee this remedy for arbitral awards, the Supreme Court has long confirmed its availability.[44] However, applications for review are rarely made and rarely succeed. The two grounds are essentially:

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42 4A_500/2007 of 6 March 2008, ASA Bull. 1/2009, at 94. For an English translation: 2 Swiss Int'l Arb. L. Rep. 1 (2008), at 133. See also Note by C. JERMINI & M. ARROYO, "Pitfalls of Waiver Agreements under Art. 192 in Multi-Contract Settings: Some Remarks on Decision 134 II 260", ASA Bull. 1/2009, pp. 103–113. This case is also discussed above in Section 2 (Jurisdiction).

43 The relevant portion of the arbitration agreement stated: *"Le Parti rinunciano fin d'ora ad ogni ricorso ordinario e straordinario contro la decisione che sarà resa."*

44 ATF118 II 199.

1. when criminal proceedings establish that the judgment or the award was influenced to the detriment of the applicant by a felony or crime (which may include perjury); and
2. when the plaintiff discovers important facts or decisive evidence, which it could not bring forward in the previous proceedings, to the exclusion of facts and evidence which took place after the decision.[45]

In its decision **4A_42/2008 of 14 March 2008,**[46] the Supreme Court had to deal with a request for review of an arbitral award rendered by a sole arbitrator in a principal-agent dispute administered by the Zurich Chamber.

The principal had refused to pay the agent on the ground that the latter had paid bribes to third parties. In an interim award, the arbitrator had rejected this defence (although the decision of the Court does not describe the arbitrator's reasoning). The award could have been challenged within 30 days pursuant to Art. 190 PIL Act, but it was not and the arbitration continued. One year after the award was rendered, the principal filed a request for review before the Supreme Court. It relied on the discovery of new evidence, namely the discovery, in its archives, of documents that allegedly evidenced that the consultancy agreement contemplated the payment of bribes.

The Supreme Court confirmed that the extraordinary remedy of review is also available under the new Federal Supreme Court Act. It however rejected the request outright since the documents on which the principal relied had been available in its own archives, and could therefore not be considered as new or newly discovered.

8. Withdrawal of requests to set aside and decisions on costs

Two applications to set aside awards rendered under the Swiss Rules were **withdrawn** and therefore did not give rise to a decision on the merits but to **decisions on costs** against the plaintiff pursuant to Art. 8(3) of the Ordinance on Indemnification for Legal Costs of 31 March 2006 (the "Ordinance").

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45 Art.137 of the Swiss Judicial Organisation Act and Art. 123 of the new Federal Supreme Court Act which came into force on 1 January 2007.

46 4A_42/2008 of 14 March 2008, ASA Bull. 4/2008, at 765.

In case **4A_426/2007 of 15 November 2007,**[47] when the plaintiff withdrew its application, the defendant requested that it be awarded its legal costs since at the time of the withdrawal (13 November) it had already drafted its answer due on 19 November. The Supreme Court awarded CHF 10,000.[48]

In the other case, **4A_306/2007 of 29 November 2007,** the plaintiff asked for a stay of the setting aside proceedings pending the determination by the arbitral tribunal of a request for correction and interpretation of a partial award (presumably based on **Art. 35 and 36 of the Swiss Rules)**. The Supreme Court stayed the proceedings, but subsequently, the plaintiff asked the Court to strike the matter from the register as it had become without object *("als gegenstandslos abzuschreiben")*. The arbitral tribunal had indeed in the meantime clarified that the question which was at the heart of the plaintiff's request to set the award aside had not been dealt with in the partial award. The defendant claimed compensation for its legal costs arguing that the plaintiff should have withdrawn its application, rather than asked for it to be struck from the register. It claimed all costs, at a minimum CHF 17,000.

The Supreme Court ruled that a withdrawal required a formal request by the plaintiff and that no such request had been made. The plaintiff had to bear the defendant's costs as its application had caused costs (*"Verursacherprinzip",* Art. 66(3) and 68(4) of the new Federal Supreme Court Act). The Court found that the timesheets submitted by the defendant counsel amounted to CHF 4,000 for the submissions in the Supreme Court proceedings, and ultimately awarded costs of CHF 6,000, taking into account all the circumstances of the case.

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47 ASA Bull. 4/2009, at 780.

48 ASA Bull. 4/2009, at 781.