Arbitration in Switzerland

The Practitioner's Guide

Dr. Manuel Arroyo, Attorney-at-Law, LL.M.

Wolters Kluwer
Law & Business

Published by:
Kluwer Law International
PO Box 316
2400 AH Alphen aan den Rijn
The Netherlands
Website: www.kluwerlaw.com

Sold and distributed in North, Central and South America by:
Aspen Publishers, Inc.
7201 McKinney Circle
Frederick, MD 21704
United States of America
Email: customer.service@aspenpublishers.com

Sold and distributed in all other countries by:
Turpin Distribution Services Ltd.
Stratton Business Park
Pegasus Drive
Biggleswade
Bedfordshire SG18 8TQ
United Kingdom
Email: kluwerlaw@turpin-distribution.com

Printed on acid-free paper.

ISBN 978-90-411-3377-9

Printed and bound by CPI Group (UK) Ltd., Croydon, CR0 4YY

Chapter 2
The Swiss Private International Law Statute (Chapter 12)

Section III: Arbitration Agreement

Article 178

(1) The arbitration agreement must be concluded in writing, by telegram, telex, telefax or other means of communication which allow proof of the agreement by text.

(2) Furthermore, the arbitration agreement shall be valid if it conforms to the law chosen by the parties, to the law governing the dispute, in particular the principal contract, or to Swiss law.

(3) The validity of an arbitration agreement may not be contested on the ground that the principal contract is invalid or that the arbitration agreement concerns a dispute not yet existing.

I. Purpose of the Provision*

The purpose of Art. 178 PILS is to regulate the substantial and formal conditions an arbitration agreement must comply with in order, on one hand, to validly waive the parties' constitutional right[1] to see their dispute settled by a State court[2] and, on the other hand, to validly impose the jurisdiction of the arbitral tribunal.[3] **1**

Article 178 PILS undoubtedly lies at the crossroads of some fundamental notions in arbitration. Liberty and common intent of the parties are at the heart of the matter. Even if this provision is addressed to the arbitral tribunal and State courts,[4] Art. 178 PILS does reveal the parties' prerogative to prefer a private method of dispute resolution over State court jurisdiction. It evidences the parties' freedom to choose their own judge, to forge the procedure they see fit, to determine the law governing their dispute etc.[5] Indeed, the arbitration agreement, being the vehicle for this autonomy, is the cornerstone on which arbitration proceedings are built.[6] **2**

II. Terminology

Chapter 12 of the PILS, and in particular Art. 178 PILS, does not provide for a definition of the arbitration agreement.[7] Traditionally, the arbitration agreement is defined as being an agreement whereby two or more determined or determinable parties agree in a binding way to submit one or more existing or determined future disputes to an arbitral tribunal by excluding the original State court jurisdiction; this in accordance with a legal order which is determined directly or indirectly.[8] **3**

Unlike the old cantonal Concordat on domestic arbitration (see Art. 4 Concordat), the PILS does not differentiate between a submission agreement (for a dispute which has already arisen) and an arbitration clause (for a dispute which has not yet arisen). Rather, it is to be understood that the term "arbitration **4**

---

* I would like to thank Mr Olivier Riske, PhD candidate at the University of Neuchâtel (Switzerland), for his precious help in the drafting of this commentary.

1 Art. 30(1) FC; Art. 6(1) ECHR.

2 The principle that State courts have no jurisdiction to hear disputes covered by a valid arbitration agreement is recognized by major international conventions on arbitration such as Art. II(3) NYC, as well as by national legislation such as Art. 7 PILS, or Art. 8 UNCITRAL Model Law; Girsberger, *Pitfalls*, footnote 3 at p. 82.

3 Poudret/Besson, para. 367; Berti, *Beiträge*, p. 37.

4 See below, para. 8-10.

5 Gaillard, p. 18.

6 Abdulla, p. 15; Berti, *Beiträge*, p. 37.

7 BGE 130 III 66 para. 3.1; Berger/Kellerhals, para. 261.

8 BGE 130 III 66 para. 3.1; Müller, *Swiss Case Law*, p. 39; Girsberger/Voser, *2012*, para. 206; Wenger, para. 3 at Art. 178; Abdulla, p. 15; cf. Art. II(1) NYC, Art. 7(1) UNCITRAL Model Law and § 1029(1) of the German ZPO.

agreement" covers both situations, in conformity with the traditional conception.[9] Concerning domestic arbitration, the new ZPO – which replaced the Concordat as of 1 January, 2011 – uses forthwith the same terminology as the PILS (see Art. 357 ZPO).[10]

III. Nature of the Arbitration Agreement

5 Arbitration agreements contain aspects of both procedural and substantive law. Theories describing such agreements as belonging entirely to one or the other category are outdated.[11]

6 An arbitration agreement belongs to substantive law to the extent that it is the source of obligations to act and to refrain from acting which two equal private law subjects have promised to assume towards each other.[12] The parties mutually promise to cooperate in good faith in constituting the arbitral tribunal and to supply advances on costs in order for the arbitrators to be appointed and to exercise their function. At the same time, they promise each other to submit themselves to the award rendered by that arbitral tribunal. The parties also promise to abstain from hindering the dispute resolution proceedings, namely not to seize a State court for the same dispute.[13]

7 The arbitration agreement is procedural in nature insofar as it pertains to the relationship between the judiciary and the persons subjected thereto. Under this aspect, there are two further elements which add to the efficiency of arbitration.[14] First, State courts have to decline settling a dispute covered by a valid arbitration agreement if and to the extent that the respondent pleads lack of jurisdiction (see Art. 7 PILS).[15] Second, the award rendered by the arbitrator(s) need not – should the losing party fail to comply therewith – first be transformed into an enforceable title by an action on the contract, but is directly applicable in the same manner as a judgment of a State court is (Art. 193(2) PILS).[16]

IV. Addressees

8 Addressee of Art. 178 PILS is primarily the arbitral tribunal itself.[17] The latter must first decide upon its own jurisdiction, and thus examine whether there is a valid arbitration agreement. If that is the case, it has to decide on its own account whether the dispute in question is covered by said agreement (Art. 186(1) PILS; "*Kompetenz-Kompetenz*" in German).[18]

9 Further addressees are State courts under several aspects. First, Art. 178 PILS applies to any State court whose jurisdiction is contested by a party invoking an arbitration agreement submitting the dispute to an arbitral tribunal subjected to Chapter 12 PILS. Second, it applies to any State court before which a motion for setting aside an award on jurisdiction of an arbitral tribunal subjected to Chapter 12 PILS has been submitted (Art. 190(2)(b) PILS). Third, Art. 178 PILS is also addressed to the judge of seat of the arbitral tribunal who is being motioned for provisional or protective measures (Art. 183 PILS), assistance for the taking of evidence (Art. 184 PILS) or other judicial assistance (Art. 185 PILS). Fourth, addressee is any State court or private institution which has to summarily examine whether an arbitration agreement exists between the parties when appointing arbitrators (Art. 179(3) PILS).[19]

10 Finally, addressees of Art. 178 PILS are also foreign State courts which have to apply – according to Art. VII NYC – the potentially milder formal provisions of the PILS instead of those of the Conven-

---

9 Kaufmann-Kohler/Rigozzi, p. 90; Wenger/Müller, para. 2 at Art. 178.

10 Girsberger, para. 3 at Art. 357.

11 Lalive/Poudret/Reymond, p. 260; Berti, *Beiträge*, pp. 37-41; Berger/Kellerhals, p. 81; *contra*: Rüede/Hadenfeldt, p. 80.

12 See below, para. 82.

13 Wenger/Müller, para. 4 at Art. 178.

14 Wenger/Müller, para. 4 at Art. 178.

15 Wenger/Müller, para. 4 at Art. 178.

16 Wenger/Müller, para. 4 at Art. 178.

17 Tschanz, *Commentaire*, paras. 14-23 at Art. 178.

18 BGE 128 III 50 para. 2c/bb/aaa; BGE 121 III 38 para. 2b; Volken, para. 14 at Art. 178.

19 Volken, para. 15 at Art. 178; Wenger/Müller, para. 4 at Art. 178.

tion when making a decision on a plea of arbitration or on the recognition or enforcement of an award rendered under the PILS.[20] That being said, it is the formal and substantive provisions of the Convention (Arts. II and V(1)(a) NYC) – and not those of Art. 178 PILS – which do apply when it is contended before a Swiss court that an arbitral tribunal with seat abroad has jurisdiction. That is also the case when the object of the proceedings is the recognition or enforcement of awards rendered by foreign arbitral tribunals (i.e., with seat abroad).[21]

V. Structure and Regulatory Content

Article 178 PILS is structured as follows: Whereas para. 1 regulates the formal conditions for a valid arbitration agreement (Art. 178(1) PILS), para. 2 determines the law applicable to the substantive validity of an arbitration agreement, in particular in regard to its conclusion, its scope of application and its termination (Art. 178(2) PILS).[22] Para. 3 simply confirms the autonomy of the arbitration agreement towards the main contract (Art. 178(3) PILS).[23] **11**

Article 178 PILS does neither determine the features and the necessary content of an arbitration agreement,[24] nor does it cover arbitrability or personal capacity of the parties.[25] **12**

VI. Formal Prerequisites (Article 178(1) PILS)

A. Characteristics of the Provision

1. Nature

In international disputes with arbitral tribunals having their seat in Switzerland, the form of arbitration agreements is exclusively defined by Art. 178(1) PILS.[26] As regards form, parties may not – unlike under French law[27] – subject their agreement to any other law than Swiss law.[28] In this respect, Swiss law establishes a substantive rule of private international law which sets a minimal standard to be complied with.[29] Consequently, the formal validity of an arbitration agreement is always to be examined according to Swiss substantive law.[30] **13**

An arbitration agreement fulfills the formal conditions of Art. 178(1) PILS if it is made in writing or by any other undertaking allowing the mutual agreement to submit to arbitration to be evidenced by a text on a data medium such as a telegram, a telex, and a telefax (Art. 178(1) PILS).[31] Para. 1 does not require the parties' signatures. Therefore, an arbitration agreement concluded by e-mail for instance would be formally valid.[32] This is confirmed by the reform of Swiss domestic arbitration which aligns itself to the solution of Art. 178(1) PILS (see Art. 358 ZPO).[33] Indeed, the message of the Swiss Federal Council explicitly specifies that arbitration agreements may also be concluded by modern means of telecommunication, e.g., e-mail.[34] **14**

---

20 Wenger/Müller, para. 5 at Art. 178.
21 BGE 121 III 38 para. 2a; Lalive/Poudret/Reymond, pp. 285/316-317; Volken, para. 15 at Art. 178; Poudret/Besson, para. 185.
22 BGE 130 III 66 para. 3.1; BGer. 4P.253/2003 para. 5.1.
23 Dutoit, para. 10 at Art. 178.
24 BGE 130 III 66 para. 3.1.
25 Volken, para. 2 at Art. 178; Wenger/Müller, para. 1 at Art. 178.
26 Kaufmann-Kohler/Rigozzi, p. 112.
27 Boisséson, pp. 477-478.
28 Abdulla, p. 16; Volken, para. 19 at Art. 178.
29 Vischer/Huber/Oser, p. 650; Berger/Kellerhals, paras. 394-395; Abdulla, p. 16.
30 Volken, para. 19 at Art. 178; Lalive/Poudret/Reymond, p. 317.
31 BGE 130 III 66 para. 3.1.
32 Kaufmann-Kohler/Rigozzi, p. 114; Poudret/Besson, para. 193; Berger/Kellerhals, para. 395.
33 Girsberger, para. 7 at Art. 358; cf. Art. 7(4) UNCITRAL Model Law.
34 BBl 2006 I, p. 7002.

2. Function

15 The formal requirements of Art. 178(1) PILS for a valid arbitration agreement aim at protection and clarification.[35] With the latter element a certain practical security is to be achieved when reviewing arbitration agreements.[36] Arbitral tribunals have to be able to examine the intent of the parties to an arbitration agreement with a higher degree of security without having to go through lengthy evidentiary proceedings.[37] With the protection element, the goals of the formal prerequisites coincide with those set out in the NYC (Art. II(2) NYC) to the extent that the formal obstacle is intended to ensure that the parties really want to waive their right to State court proceedings.[38]

16 In spite of the reference in Art. 178(1) PILS to the evidentiary function of form, observance thereof is – as is illustrated by the French version of the statute ("*valable si*") – a condition of validity of arbitration agreements.[39] In this regard, Art. 178(1) PILS is related to Art. 7(2) UNCITRAL Model Law as well as to the German (§ 1031(1) ZPO) and Italian (Art. 807 CPC) Codes of Civil Procedure.[40] Indeed, when writing is a prerequisite of validity of arbitration agreements, a mere tacit acceptance, without refutation, of a text proposed by one of the parties or an oral acceptance of such text is insufficient.[41] On the other hand, the formal prerequisites under the NYC and as well as under Dutch and French law are considered to be evidentiary requirements only.[42] In other words, in the latter case, arbitration agreements may be established by tacit or oral acceptance.[43]

3. Scope of Application

17 An arbitration agreement is a contract. For its conclusion a mutual expression of intent by the parties on all the essential terms (i.e., the so-called *essentialia negotii*) is required under Swiss law (Arts. 1-2 CO). Since the arbitration agreement is submitted to such formal requirements as to allow evidence by text, the mutual expression of intent has to occur explicitly.[44] The mandatory requirements of form pursuant to Art. 178(1) PILS extend at any rate to the *essentialia negotii* of the arbitration agreement.[45]

18 The PILS does not define what the *essentialia negotii* are.[46] It may however be inferred from the aims of arbitration agreements that the intent of the parties to such agreements must show a willingness to submit one or more existing or determined future disputes to an arbitral tribunal by excluding State court jurisdiction.[47] Consequently, the objective *essentilia negotii* are the agreement to settle the dispute through arbitration and the designation of the legal relationship to be submitted thereto.[48] As recommendable as it may be, neither the seat of arbitration nor the designation of the number of arbitrators or their appointment are objective *essentilia negotii.*[49]

19 The question about what clear test should be elaborated for determining which additional central elements of an arbitration agreement require observance of the formal conditions is still debated among

---

35 Tschanz, *Commentaire*, paras. 25-25 at Art. 178; Vischer/Huber/Oser, p. 650; Wenger, para. 7 at Art. 178.

36 Volken, para. 21 at Art. 178.

37 Gabriel/Wicki, *ASA Bull.2009,* p. 238; BGE 119 II 391 para. 3, where the Swiss Federal Supreme Court is referring to Art. 5(1) PILS which essentially applies the same wording concerning choice of forum agreements.

38 Lindacher, p. 168; Van Den Berg, p. 173.

39 Wenger, para. 7 at Art. 178; Lalive/Poudret/Reymond, p. 318; Vischer/Huber/Oser, p. 651; Girsberger/Voser, *2012*, para. 263; *contra*: Rüede/Hadenfeldt, p. 66.

40 Wenger/Müller, para. 7 at Art. 178; Volken, para. 20 at Art. 178; Schwab/Walter, pp. 37-38.

41 Girsberger/Voser, *2012*, para. 220.

42 Poudret/Besson, paras. 183, 192 and 202; Wenger/Müller, para. 7 at Art. 178.

43 Poudret/Besson, para. 183; Girsberger/Voser, *2012*, para. 220.

44 Berger/Kellerhals, para. 270.

45 Tschanz, *Commentaire*, para. 34 at Art. 178; Wenger/Müller, para. 9 at Art. 178.

46 BGE 130 III 66 para. 3.1.

47 BGE 129 III 675 para. 2.3.

48 Rüede/Hadenfeldt, p. 69; Berger/Kellerhals, para. 272; Dutoit, para. 2 at Art. 178; *contra*: Kaufmann-Kohler/Rigozzi, pp. 91-94.

49 Lalive/Poudret/Reymond, p. 315.

Swiss legal scholars.[50] The solution must be drawn from the protective function of the provision. All understandings lying within the "natural framework" ("*cadre naturel*" in French)[51] of arbitration agreements must comply with the formal prerequisites, as opposed to minor points – considered from an objective standpoint or in the subjective assessment of the parties – of a merely supplemental nature.[52]

20 If in their agreement parties choose to go beyond the *essentilia negotii* mentioned above,[53] only understandings as to the seat of the arbitral tribunal, the number of arbitrators and their appointment would fall – from a objective point of view – into the natural framework of arbitration and require compliance with the formal prerequisites set out in para. 1 of Art. 178 PILS.[54] As regards all other understandings, one has to take into account the concrete circumstances of the case at hand, and therefore, the subjective assessment of the parties. What might be a mere supplemental point – such as the language of the procedure – for an international corporation with a multilingual legal department, might for an individual businessperson have the weight of an indispensable condition (i.e., a *conditio sine qua non*) for the conclusion of the agreement.[55]

B. Text-Form

1. Type

21 The Swiss legislator introduced for the first time in Art. 178(1) PILS – as is the case also in Art. 5(1) PILS for jurisdiction agreements – a new type of formal requirement, foreign to the traditional categories known under Swiss law.[56] As a matter of fact, the Swiss legislator opted for a simplified written form, abandoning the requirement of signature as an element of the written form, such as was still the case in the former Concordat on domestic arbitration (Art. 6 Concordat).[57] By contrast, the new ZPO (Art. 358 ZPO) aligns itself to the solution of para. 1 of Art. 178 PILS:[58] In order for the formal requirement to be complied with, a visually perceptible, physically reproducible and not necessarily signed text of agreement is sufficient.[59] Obviously, the legislator was inspired by Art. 7(2) UNCITRAL Model Law and Art. II(2) NYC.[60] To differentiate this type of form from the simple written form, the term "text-form" shall be used henceforth in reference to the widely used German expression "*Textform*".[61]

2. Subjective Scope

22 While the PILS is very close to the NYC as regards formal requirements, there is an important difference: Art. 178(1) PILS does not require an exchange of documents, in the sense that acceptance must explicitly refer to an offer, or to any such previous product of negotiations.[62] It is sufficient that consent to the arbitration agreement results from the entirety of all the parties' expressions of intent evidenced by

---

50 Schmidlin, paras. 99-102 at Art. 11; Wenger/Müller, para. 9 at Art. 178; Vischer/Huber/Oser, p. 651.

51 BGE 90 II 34 para. 2.

52 Wenger/Müller, para. 9 at Art. 178; *contra*: Vischer/Huber/Oser, pp. 651-652.

53 See above, para. 18.

54 Wenger/Müller, para. 9 at Art. 178; *contra*: Berger/Kellerhals, paras. 405-407.

55 Wenger/Müller, para. 9 at Art. 178.

56 Traditional categories of form under Swiss law range from absence of any formal requirement through simple and qualified written form up to notarized deeds.

57 Poudret/Besson, para. 193; Lalive/Poudret/Reyond, p. 318.

58 Girsberger, para. 2 at Art. 358.

59 See above, para. 14; BGE 121 III 38 para. 2c; BGer. 4P.124/2001 para. 2c; Gabriel/Wicki, p. 239; Poudret/Besson, para. 193; Volken, para. 18 at Art. 178; Wenger/Müller, para. 11 at Art. 178.

60 BGE 121 III 38 para. 2c; Berger/Kellerhals, para. 393; with extensive references to legislative materials, see also Arbitral Award of 13 October 1992, *ASA Bull.1994*, pp. 38-45.

61 BGE 119 II 391 para. 3; Poudret/Reymond, p. 157; Wenger/Müller, para. 11 at Art. 178.

62 Poudret/Besson, para. 193; Berger/Kellerhals, para. 404; Lalive/Poudret/Reymond, p. 316.

text-form.[63] However, all parties to an arbitration agreement must meet the text-form requirement.[64] A mere tacit acceptance, without refutation, of the other party's suggestion to settle their dispute through arbitration is insufficient.[65] This means that the assenting party has to expressly consent in text-form also, albeit this may be achieved indirectly and without comment, e.g., by sending back a defective mobile phone along with the guarantee slip containing an arbitration clause or by presenting tickets containing an arbitration clause when entering a sports stadium.[66] In BGE 121 III 38 on the NYC, the Swiss Federal Supreme Court held that this may also be done by filling in a bill of loading by the loader and handing this unsigned document to the transporter. Interestingly enough, it interpreted in this regard Art. II(2) NYC in light of Art. 178(1) PILS and made no distinction between these two provisions.[67]

23 The requirement of observance of text-form by all parties is also part of the protective function of the formal prerequisites. One cannot determine in advance which of the two or more parties to an arbitration agreement necessitates more protection than the other. As a matter of fact, the party who first suggests the wording of the agreement is not necessarily the one party needing more protection than the one subsequently assenting to arbitration. Therefore, it cannot be that mere coincidences in the sequence of the various documented offers and acceptances should establish which party will ultimately benefit from the protective function of the formal requirements of Art. 178(1) PILS.[68]

3. Terms

24 Where parties use "modern" communication techniques – such as telefax, telegram and telex as mentioned by Art. 178(1) PILS – it is unanimously admitted that the signature of the party expressing the intent to conclude an arbitration agreement and the communication of the signature to the addressee is not required for compliance with the formal prerequisites of text-form.[69]

25 The question may arise as to whether para. 1 of Art. 178 PILS requires the simple written form – including signature in the sense of Art. 13 CO – when parties simply agree in writing by means of traditional communication instead of using modern techniques, or whether a written but unsigned text is sufficient pursuant to an autonomous interpretation of the PILS. According to newer case law,[70] para. 1 requires no signature when parties simply hand over written documents, such as contractual documents or "contract notes" drawn up by brokers.[71] Most legal commentators do concur: No matter what technique is used – traditional or modern – the text-form of Art. 178(1) PILS does not require the parties' signatures.[72]

26 At any rate, the chosen means of communication must generate a written text that may be kept and reproduced.[73] In conformity with the rules applicable to the simple written form, it is not required that the sender keeps a copy in text-form. Given the actual standards of technology, the requirements of visual perceptibility and physical reproducibility are not only complied with by employing the three means of communication mentioned in Art. 178(1) PILS,[74] but also by physically sending texts on electronic data carriers and by electronic data transfer, provided that the expressions of intent contained therein can be

---

63 Wenger/Müller, para. 16 at Art. 178; Volken, para. 31 at Art. 178; St-Gallen Cantonal Court, decision of 16 January 2007, para. 2 (cf. Müller, *Swiss Case Law*, p. 40).

64 Volken, para. 31 at Art. 178; Poudret/Besson, para. 193.

65 Girsberger/Voser, *2012*, para. 270; Poudret/Besson, para. 193; see also BGE 119 II 391 para. 3a (concerning a forum selection agreement pursuant to Art. 5 PILS).

66 Girsberger/Voser, *2012*, para. 270; Wenger/Müller, para. 16 at Art. 178; *contra*: Vischer/Huber/Oser, p. 653.

67 Poudret/Besson, para. 193.

68 Wenger/Müller, para. 16 at Art. 178.

69 Vischer/Huber/Oser, p. 652; Wenger/Müller, para. 13 at Art. 178; Lalive/Poudret/Reymond, p. 318; on using modern communication techniques when contracting in general, see BGE 112 II 326 para. 3.

70 BGer. 4P.124/2001, para. 2c; see also Müller, *Swiss Case Law*, p. 41 (including references to decisions of cantonal Courts).

71 Lalive/Poudret/Reymond, p. 318.

72 Lalive/Poudret/Reymond, p. 318; Vischer/Huber/Oser, pp. 655-656; Abdulla, pp. 16-17.

73 Abdulla, p. 17; Vischer/Huber/Oser, p. 652.

74 See above, para. 24.

stored or printed out at once.[75] Therefore, in addition to the means of communication listed in para. 1, any document that may be used as evidence – such as order confirmations, notes, minutes, general terms and conditions, by-laws or e-mails – may constitute a formally valid arbitration agreement.[76]

C. Arbitration Agreements by Reference

27 In practice, arbitration agreements are often contained neither in the contractual documents nor in the declarations of the parties in themselves, but in a distinct and separate text which the parties incorporate by reference into their agreement. That is the case namely of references to general terms and conditions, to former agreements between the same parties or to standard contractual terms used by professional organizations such as SIA (i.e. the Swiss Society of Engineers and Architects), FIDIC (i.e., the International Federation of Consulting Engineers), GAFTA (i.e., the Grain and Free Trade Association).[77] The problem of so-called *arbitration agreements by reference* generates two sets of questions. First, do these types of arbitration agreements comply with the formal requirements of the law? Second, is a mere reference to another document sufficient as to the issue of consent? The latter question pertains to the substantive validity of arbitration agreements and will thus be discussed in connection with para. 2.[78] As to the former question concerning formal validity, the reference to an arbitration clause contained in another document does not need to be explicit. In other words, the existence of an arbitration clause in the document incorporated by reference does not need to be expressly mentioned in the wording of the clause setting forth the reference.[79] The formal requirements of Art. 178(1) PILS are complied with when both the reference and its object meet the text-form prerequisite, provided the parties' consent also covers the object of the reference according to the law applicable pursuant to para. 2 of Art. 178 PILS.[80]

D. Power of Attorney

28 Because of the close connection with the formal validity of arbitration agreements which has to be examined according to Swiss substantive law,[81] the form of the power of attorney to conclude an arbitration agreement is also subjected to Swiss law.[82] Recent Swiss legal writings hold that where formal requirements to conclude a legal relationship have a protective function – as is the case in para. 1 of Art. 178 PILS[83] – those same formal prerequisites must be complied with when granting a power of attorney for entering into such a relationship.[84] In other words, the formal prerequisites set out in para. 1 of Art. 178 PILS must be complied with when issuing a power of attorney to conclude an arbitration agreement.[85]

E. Formal Deficiencies

29 An arbitration agreement which fails to comply with the formal requirements of Art. 178(1) PILS is invalid.[86] Consequently, a party being sued by the other based on such an agreement is barred from pleading lack of jurisdiction before a State court. Also, an arbitral tribunal constituted in spite of the invalidity of an arbitration agreement has to decline jurisdiction on the respondent's motion.[87] A deci-

---

75 Wenger/Müller, para. 13 at Art. 178.
76 Abdulla, p. 17; Lalive/Poudret/Reymond, p. 318; Poudret/Besson, para. 193.
77 Lalive/Poudret/Reymond, pp. 319-320; Abdulla, p. 17; Wenger/Müller, para. 18 at Art. 178.
78 See below, paras. 61-66; Tschanz, *Commentaire*, paras. 42-43 at Art. 178; Lalive/Poudret/Reymond, p. 320.
79 Girsberger/Voser, *2012*, para. 274; Abdulla, p. 17.
80 See below, para. 33; Wenger/Müller, para. 18 at Art. 178; Abdulla, p. 17.
81 See above, para. 13.
82 Wenger/Müller, para. 10 at Art. 178.
83 See above, para. 15.
84 Watter/Schneller, para. 14 at Art. 33; Kut/Schnyder, para. 6 at Art. 33; Chappuis, para. 9 at Art. 33.
85 Poudret/Besson, para. 274; Wenger/Müller, para. 10 at Art. 178; *contra*: Volken, paras. 41-47 at Art. 178.
86 See above, para. 16.
87 Wenger/Müller, para. 21 at Art. 178; Vischer/Huber/Oser, p. 661.

sion by an arbitral tribunal wrongfully accepting jurisdiction will be set aside on appeal pursuant to Art. 190(2)(b) PILS.[88]

30 However, a possibly formally invalid arbitration agreement is more than no arbitration agreement at all. Indeed, it may serve as a basis for setting up an arbitral tribunal where a State court or a private appointing authority does not exclude *prima facie* formal validity and therefore assists in the appointment of arbitrators in place of the party refusing to collaborate.[89]

31 It should be noted that formal deficiencies in the original arbitration agreement may always be cured by a subsequent arbitration agreement in proper text-form, even after proceedings have started. Thus, any former deficiencies of the original arbitration agreement may for example be remedied by signing the arbitral tribunal's constitution order or, in proceedings under the ICC Rules, by signing the terms of reference without making any reservation (Art. 23 of the 2012 ICC Arbitration Rules).[90]

32 Finally, in two precise situations the formal requirements of Art. 178(1) PILS do not have to be fulfilled at all. First, if a party pleads on the merits without objecting to the arbitral tribunal's jurisdiction and if the other party answers without alleging lack of jurisdiction, the formal requirements of para. 1 need not be complied with (see Art. 186(2) PILS and Art. 359(2) ZPO).[91] § 1031(6) of the German ZPO for instance explicitly provides that submitting to the proceedings on the merits remedies formal deficiencies.[92] Second, in certain circumstances, it has been admitted that pleading that an arbitration agreement does not comply with formal requirements may constitute an abuse of rights.[93] In other words, under certain circumstances a specific conduct may, pursuant to the principle of good faith, replace fulfillment of formal prerequisites.[94]

VII. Substantive Validity (Article 178(2) PILS)

A. *Characteristics of the Provision*

1. *Principle of* Favor Validitatis

33 With regard to substantive validity, para. 2 of Art. 178 PILS constitutes an *in favorem validitatis* conflict of laws provision[95] and provides for three alternative connecting factors: an arbitration agreement is valid if complies either *i*) with the law chosen by the parties (specifically to govern the arbitration agreement, which is a rare occurrence) or *ii*) with the law governing the subject-matter of the dispute – in particular the law governing the main contract – or *iii*) with Swiss law (Art. 178(2) PILS).[96] The conflict of law provision of para. 2 upholds the *favor validitatis* principle insofar as it allows an arbitral tribunal to consider an arbitration agreement which would be invalid – e.g., both under the law chosen by the parties and under the law governing the main contract – nonetheless as valid, provided it complies with the relevant requirements of Swiss law. In accordance with the *favor validitatis* principle, para. 2 of Art. 178 PILS sets forth that it is the potentially mildest law deciding upon the validity of an arbitration agreement.[97] Even though the provision does not contain any hierarchy,[98] arbitral tribunals should nevertheless follow the set down order of para. 2. In other words, if parties subject both their arbitration agreement and their

---

88 BGE 117 II 94 para. 5a; Wenger/Müller, para. 21 at Art. 178; Vischer/Huber/Oser, p. 662.
89 Wenger/Müller, para. 22 at Art. 178.
90 Wenger/Müller, para. 23 at Art. 178.
91 Girsberger/Voser, *2012*, para. 275; Berger/Kellerhals, para. 410.
92 Schwab/Walter, pp. 39-40; Wenger/Müller, para. 23 at Art. 178.
93 BGE 121 III 38 para. 3; BGer. 4P.154/1999 para. 2e/cc (cited in Berger/Kellerhals, footnote 189 at para. 409).
94 BGE 121 III 38 para. 3; Schlosser, pp. 272-273; Girsberger/Voser, *2012*, para. 275; Berger/Kellerhals, paras. 408-410.
95 By contrast, Art. 178(1) PILS is a substantive rule of private international law (see above, para. 13).
96 Poudret, *ASA Special Series no. 8*, pp. 30-31; Abdulla, p. 17; Berger/Kellerhals, para. 368; Lalive/Poudret/Reymond, pp. 321-323.
97 BBl 1983 I, p. 448; BGE 119 II 380 para. 4a; Berger/Kellerhals, para. 371; Girsberger/Voser, *2012*, para. 283.
98 BGE 129 III 727 para. 5.3.2.

main contract to foreign law, Swiss law is only to be considered if the arbitration agreement is deemed invalid according to the other two laws.[99]

All aspects of the question of substantive validity must be answered by applying one sole law. A partial application of the three possible laws to individual aspects is not admitted.[100] Under "law" in the sense of this provision and contrary to Art. 187 PILS in which the French text speaks more explicitly of "*règles de droit*",[101] a national legal system is intended. It is only within the structure of such a system that references made by the parties to arbitration rules, trade usages or general principles of law can be of any effect. It is submitted that in light of the arbitration-friendliness of the PILS, there is no practical necessity to check whether an arbitration agreement which is invalid under all three of the laws available for choice would be valid under non-national rules of law such as *lex mercatoria*. Besides, such legal orders do not provide for sufficient rules for the here relevant questions which would meet the requirement of predictability.[102] **34**

2. Scope of Application

The scope of application of the law designated pursuant to Art. 178(2) PILS comprises the rules on the conclusion of contracts (e.g., offer, acceptance, consent in cases of arbitration agreements by reference, deficiencies of intent), issues related to their performance (e.g., delay, impossibility, *exceptio non adimpleti contractus*), and their objective and subjective scopes including succession, as well as expiry of arbitration agreements.[103] **35**

Other elements relevant for determining the validity of an arbitration agreement fall outside of the scope of application of the law determined pursuant to para. 2 of Art. 178 PILS. The PILS itself does have substantive rules regulating objective arbitrability and subjective capacity to be a party in arbitration proceedings of countries and State-controlled enterprises and organizations (Art. 177 PILS). Furthermore, the law designated pursuant to para. 2 is neither applicable to other aspects of relevance to validity, such as capacity of parties other than States or State-controlled enterprises and organizations, nor is it applicable to questions such as capacity in general, authority of officers, agency and apparent authority. The law applicable to these questions has to be determined according to the test of closest connection (Art. 187 PILS).[104] **36**

B. Applicable Law

1. Law Chosen by the Parties

Pursuant to the first possible alternative set out by Art. 178(2) PILS, an arbitration agreement is valid if it complies with the law chosen by the parties. This provision illustrates that it is not necessarily and exclusively the law of the seat of arbitration which applies to an arbitration agreement. Indeed, Swiss law offers the law of the seat of the arbitration proceedings only as one out of several alternatives (see Art. 176(1) PILS). Art. V(1)(a) NYC has served as a model for this alternative connecting factor and provides that the law of the seat is only of subsidiary application in the event that the parties have not made a choice of law.[105] **37**

By contrast to para. 2 of Art. 178 PILS, however, the NYC does not provide for the alternative pursuant to which an arbitration agreement is valid if it conforms to the law governing the subject-matter of the dispute. Problems might arise where an arbitration agreement is valid only under the law applicable to **38**

---

99 Berger/Kellerhals, para. 371; Volken, paras. 52-54 at Art. 178; Girsberger/Voser, *2012*, para. 283.

100 Berger/Kellerhals, para. 372; Volken, para. 53 at Art. 178; Girsberger/Voser, *2012*, para. 288; *contra*: Tschanz, *Commentaire*, para. 73 at Art. 178.

101 Karrer, para. 17 at Art. 187.

102 Walter/Bosch/Brönnimann, pp. 81-82; Wenger/Müller, para. 26 at Art. 178; *contra*: Lalive/Poudret/Reymond, p. 322; Berger/Kellerhals, para. 378; Volken, para. 55 at Art. 178; Poudret, *ASA Special Series no. 8*, p. 30.

103 Dutoit, para. 8 at Art. 178; Lalive/Poudret/Reymond, pp. 321-322; Abdulla, p. 18; Volken, paras. 56-60 at Art. 178.

104 Wenger/Müller, para. 25 at Art. 178; Lalive/Poudret/Reymond, pp. 324-325.

105 BBl 1983 I, p. 448; Berger/Kellerhals, paras. 374-377; Lalive/Poudret/Reymond, p. 323.

the merits of the dispute, but not under the two other laws. In that eventuality, a Swiss award might be unenforceable abroad if it is claimed that the award is invalid under the law chosen by the parties to be applicable to the arbitration agreement. Likewise, an award might be unenforceable where the parties have not made a choice of law and Swiss law applies as the law of the State in which the award was rendered. Legal commentators solve the problem by interpreting the words "the law of the country in which the award was rendered" (Art. V(1)(a) NYC) as to embrace the conflict of law provisions of that country. For Switzerland that includes precisely Art. 178(2) PILS with all its possible alternatives.[106]

39 In practice, it is rather seldom that parties make use of the possibility of an explicit choice of the law to be applied to the arbitration agreement which differs from the law applicable to the subject-matter of the dispute. It is a matter of interpretation of the parties' (tacit) understanding which determines if and to what extent a choice of the law applicable to the merits also extends to the arbitration agreement. Where such extension is admitted, the arbitration agreement is subjected to the law governing the subject-matter of the dispute pursuant to the second alternative of Art. 178(2) PILS. The first alternative only comes into play if a different law than the one governing the merits of the dispute is chosen.[107]

40 Parties often make neither an explicit nor a tacit choice of the law governing their arbitration agreement. In that case, substantive validity is to be determined under one of the two other laws mentioned in para. 2 of Art. 178 PILS. It is admitted that parties do tacitly opt for Swiss law when making Switzerland the seat of the arbitral tribunal or when electing that rules of an arbitration institution anchored in Switzerland are applicable.[108]

41 Finally, a choice of law by reference is possible. This may be done by an explicit or a tacit reference to the law governing the main contract or by a specific or a global reference to general business conditions, to former agreements between the same parties etc.[109]

2. Law Applicable to the Merits

42 Pursuant to the second alternative set out in Art. 178(2) PILS, an arbitration agreement is valid if it conforms to the law governing the merits of the dispute, in particular the law governing the main contract (*lex causae*). The law governing the merits of the dispute – or the law governing the main contract respectively – is primarily chosen by the parties. In absence of such choice, the law governing the subject-matter of the dispute is the law having the closest connection with the dispute (Art. 187(1) PILS).[110]

43 If parties have chosen to endow an arbitral tribunal with the power to decide *ex aequo et bono* (Art. 187(2) PILS), such empowerment only relates to the merits of the dispute and does not extend to the arbitration agreement.[111]

3. Swiss Law

44 Pursuant to the third and last alternative set out in Art. 178(2) PILS, an arbitration agreement is valid if it conforms to Swiss law. This alternative comes into play if neither the law chosen by the parties to govern the arbitration agreement nor the law applicable to the merits of the dispute refers to Swiss law.[112]

45 Furthermore, where Swiss law is the most favorable law regarding substantive validity of the arbitration agreement, it operates in direct application of para. 2 of Art. 178 PILS as the law of the seat of the arbitral tribunal (*lex fori*), regardless of whether the parties themselves, an arbitral institution, or the arbitral

---

106 Girsberger/Voser, *2012*, para. 1179; Berger/Kellerhals, para. 385; Wenger/Müller, para. 24 at Art. 178; Tschanz, *Commentaire*, para. 76 at Art. 178.

107 BGE 129 III 675 para. 2.3; Berger/Kellerhals, para. 375; Girsberger/Voser, *2012*, para. 289.

108 Wenger/Müller, para. 27 at Art. 178; Berger/Kellerhals, para. 376; Vischer/Huber/Oser, p. 656.

109 Berger/Kellerhals, para. 377; Volken, para. 55 at Art. 178.

110 Girsberger/Voser, *2012*, para. 292; Berger/Kellerhals, para. 378; Wenger/Müller, para. 28 at Art. 178.

111 Wenger/Müller, para. 28 at Art. 178; Tschanz, *Commentaire*, para. 83 at Art. 178; *contra*: Kaufmann-Kohler/Rigozzi, p. 125; Berger/Kellerhals, para. 380.

112 Girsberger/Voser, *2012*, para. 293; Berger/Kellerhals, paras. 381-382.

tribunal determined its seat as being in Switzerland.[113] Consequently and in accordance with the *favor validitatis* principle, if the arbitration agreement is valid under Swiss law, it can be upheld notwithstanding its possible invalidity under the law explicitly chosen by the parties.[114]

The reference to Swiss law mainly embraces the provisions of the CO on the conclusion and validity of contracts.[115] It is to be reminded that where parties explicitly choose "Swiss law" to govern the main contract without making any further specification, Swiss law is understood as to encompass the CISG. On the other hand, it is also to be emphasized in this context that the CISG is not concerned with the validity of the contract or of any of its provisions or of any usage (Art. 4(a) CISG). **46**

C. Basic Core of Arbitration Agreements

The PILS is silent as regards the necessary minimal content of arbitration agreements.[116] Where substantive validity of an arbitration agreement is determined by Swiss substantive law, a mutual expression of intent by the parties with regard to all the essential terms of such an agreement (*essentialia negotii*) is required within the meaning of Arts. 1-2 of the CO.[117] **47**

The necessary minimal content of an arbitration agreement includes: **48**

(i) an agreement by the parties to submit their dispute to arbitration;[118]

(ii) a specification of the object of the dispute or the legal relationship which shall be the subject-matter of the dispute.[119]

In addition to that, even though they are not absolutely essential within the meaning of Arts. 1-2 of the CO, the basic core of an arbitration agreement encompasses: **49**

(iii) an agreement as to the seat of the arbitral tribunal;[120]

(iv) an agreement as to the number of arbitrators and the manner of their appointment.[121]

1. Submission to Arbitration

When examining the substantive validity of an arbitration agreement, the starting point is to determine whether the parties have expressed their consent to submit their existing or future dispute(s) to arbitration. Thereby, the center point of their common intent has to acknowledge the fact that private persons – i.e., persons not exercising State jurisdiction – are to render a "judgment" which is intended to have the same effect as a State court decision. Using terms such as "arbitrator", "arbitral tribunal/panel", "award" or similar wordings – in English or their equivalents in another language – to indicate arbitral proceedings is considered sufficient to express this aspect of the content of the arbitration agreement. It is neither required to explicitly exclude State court jurisdiction nor is it necessary to subject oneself explicitly to the award as being final, binding and enforceable. A skeleton clause such as "Dispute. Arbitration in Neuchâtel" or "Arbitration: in London if necessary" in a contractual document complies with the minimal requirement as to content in this regard.[122] **50**

---

113 Wenger/Müller, para. 29 at Art. 178; Lalive/Poudret/Reymond, p. 323.

114 Wenger/Müller, para. 29 at Art. 178; Berger/Kellerhals, para. 382.

115 BBl 1983 I, p. 448; Berger/Kellerhals, para. 383; Walter/Bosch/Brönnimann, p. 82; Girsberger/Voser, *2012*, para. 294.

116 BGE 130 III 66 para. 3.1.

117 See above, para. 17; Girsberger/Voser, *2012*, para. 296; Wenger/Müller, para. 30 at Art. 178.

118 See below, para. 50.

119 See below, paras. 51-52; Rüede/Hadenfeldt, p. 69; Dutoit, para. 2 at Art. 178; Berger/Kellerhals, para. 272; Girsberger/Voser, *2012*, para. 297.

120 See below, para. 53.

121 See below, paras. 54-55; Wenger/Müller, para. 31 at Art. 178.

122 Italian *Corte di Cassazione*, decision ecision of 21. November 1983, Case No. 6925 (cf. *YCA 1985*, pp. 478-480, 479); Wenger/Müller, para. 32 at Art. 178; Rüede/Hadenfeldt, pp. 69-70; Tschanz, *Commentaire*, para. 115 at Art. 178.

2. Designation of the Legal Relationship

51 Furthermore, an arbitration agreement has to designate either the existing dispute or – if the arbitration agreement refers to disputes that might arise in the future between the parties – the legal relationship out of which disputes might possibly arise. If it is intended that several legal relationships be submitted to arbitration at the same time, these have to be individually identified in order to fulfill the requirement of specification. Global references such as "all legal disputes which might arise from the current or future business relationship between the parties" without any further indication are insufficient.[123] The prerequisite of specificity is generally considered as being met if the arbitration agreement is part of or annexed to a contractual document and if it results from that text that it refers to disputes arising from the contract in question.[124] Unless otherwise agreed upon, an arbitration agreement also extends to disputes arising out of addenda supplementing, modifying or expanding the original contract.[125] However, in a lasting business relationship with separate follow up contracts between the same parties, an arbitration agreement covers generally only the contract in which the arbitration clause is included.[126]

52 By contrast, possible claims which might have to be determined by the arbitral tribunal do not require detailed specification in the arbitration agreement. As long as the latter does not contain any restrictions as to the subject-matter falling within its scope, it must be understood as conferring all-embracing jurisdiction to the arbitral tribunal.[127] All-encompassing arbitration clauses referring e.g., "to all disputes arising from or in connection with the contract" are meant to include disputes as to the conclusion and binding effect of the contract, claims resulting from its termination, as well as torts or unjust enrichment claims in connection with that contract.[128]

3. Designation of the Seat

53 For the sake of the arbitration agreement's effectiveness, it is advisable that the parties to an arbitration agreement either determine the seat of the arbitral tribunal – and that with a precise indication as to location – or through reference to an arbitral institution which will determine the seat if necessary (Art. 176(3) PILS).[129] If the seat is neither determined nor determinable prior to the establishment of the arbitral tribunal and if the parties have failed to designate an authority which will assist in the constitution process, the arbitration agreement is generally deemed to be ineffective.[130] However, an arbitration agreement indicating the seat as being in Switzerland – without indication as to a precise location – might be possibly sufficient to vest a Swiss court with jurisdiction to appoint arbitrators.[131]

4. Number and Appointment of the Arbitrators

54 Parties only have to provide for the number of arbitrators and the manner of their appointment if and to the extent that they wish to diverge from the rules resulting from the application of the amended Art. 179(2) PILS. The latter states that in absence of an agreement as regards arbitrators, the judge of the seat may be motioned and will apply by analogy the relevant provisions of the ZPO (Arts. 360-371 ZPO). According to these rules, in the absence of choice as to the number of arbitrators, arbitral proceedings have three members (Art. 360(1) ZPO).[132] If not otherwise agreed upon, each party appoints an equal

---

123 Girsberger/Voser, *2012*, para. 315; Wenger/Müller, para. 34 at Art. 178.

124 Girsberger/Voser, *2012*, para. 315; Rüede/Hadenfeldt, p. 69; Walter/Bosch/Brönnimann, pp. 71-72.

125 Rüede/Hadenfeldt, p. 75; Jolidon, p. 134.

126 Rüede/Hadenfeldt, p. 75; Jolidon, pp. 132-133.

127 BGE 129 III 675 para. 2.3; BGE 116 Ia 56 para. 3b; BGer. 4C.40/2003 para. 5.2; Girsberger/Voser, *2012*, para. 316; Walter/Bosch/Brönnimann, p. 73.

128 Wenger/Müller, para. 35 at Art. 178; Kaufmann-Kohler/Rigozzi, p. 92; Rüede/Hadenfeldt, pp. 74-78.

129 Wenger, para. 34 at Art. 178; Kaufmann-Kohler/Rigozzi, p. 94.

130 Schramm/Furrer/Girsberger, para. 16 at Art. 176-178; Poudret/Besson, para. 160; Wenger/Müller, para. 36 at Art. 178.

131 Wenger/Müller, para. 36 at Art. 178; Poudret/Besson, para. 139; as to German law, see Schwab/Walter, p. 132.

132 Girsberger, para. 7 at Art. 360.

number of arbitrators and these together unanimously appoint another arbitrator as presiding member of the panel (Art. 361(2) ZPO).[133]

If parties wish to depart from these supplemental rules – e.g., by appointing one sole arbitrator instead of a three member panel, by making the number of arbitrators dependant on the complexity of the dispute (see Art. 12(2) of the 2012 ICC Arbitration Rules and Art. 6(2) of the 2012 Swiss Rules of International Arbitration), or by naming an arbitral institution to make the appointments on their behalf – then these understandings are generally considered to be objectively or subjectively more than just secondary points and, as such, belong to the part of the agreement which requires compliance with the formal prerequisites of para. 1 of Art. 178 PILS.[134] **55**

D. Supplementary Agreements

Beyond the basic core of arbitration agreements, the parties to such an agreement may provide for numerous further facets, in particular they may wish to detail the terms of procedure. As a rule, these will – from the subjective standpoint of the parties – be mere supplementary secondary points. Consequently, agreement thereupon does not require fulfillment of any particular form.[135] **56**

How many detailed further understandings the parties might want to include into their arbitration agreement will generally depend on whether they decide on an institutional arbitral tribunal or an *ad hoc* arbitral tribunal to settle their dispute. If they agree on rules of a permanent arbitral institution, it is advisable and will be usually sufficient to implement the standard clause recommended by that particular institution, complemented as necessary by an agreement as to the language of the proceedings and an agreement as to the seat of the arbitral tribunal.[136] **57**

E. Interpretation

The meaning of an arbitration agreement does sometimes require interpretation. Under Swiss law, the chief rule regarding interpretation of contracts is that the true and common intent of the parties is decisive beyond the wording they actually use (Art. 18 CO). In other words, the wording the parties used in their agreement is just a starting point and all other relevant circumstances surrounding the contract have also to be taken into account. If the parties' intents differ, or if their true and common intent cannot be established, their declarations must be construed pursuant to the principle of good faith.[137] As a consequence, arbitrators will interpret the parties' declarations as they would and should be understood by a reasonable person in the situation of the addressee, in view of all the circumstances at the time of conclusion of the contract.[138] **58**

It should be noted that in light of the *favor validitatis* principle expressed in para. 2 of Art. 178 PILS, a restrictive interpretation as to whether an arbitration agreement has been concluded is not appropriate.[139] A restrictive interpretation might be fitting within the context of Swiss domestic arbitration, the reason being that a waiver of jurisdiction of the national courts should not be admitted lightly because of the restrictions as far as challenges are concerned and the generally higher costs of arbitration.[140] In the context of international arbitration however, restrictive interpretation is not justified, given that this method of dispute resolution certainly offers no less guarantees of neutrality and efficiency than proceedings **59**

---

133 Girsberger, paras. 23-32 at Art. 361.

134 See above, para. 20; Wenger/Müller, para. 37 at Art. 178.

135 See above, para. 20; Lalive/Poudret/Reymond, pp. 350-351; Rüede/Hadenfeldt, p. 200.

136 Wenger/Müller, para. 39 at Art. 178.

137 BGE 130 III 66 para. 3.2; BGE 129 III 675 para. 2.3.

138 Girsberger/Voser, *2012*, para. 302; Kaufmann-Kohler/Rigozzi, pp. 133-134; Tschanz, *Commentaire*, para. 119 at Art. 178; see also Müller, *Swiss Case Law*, pp. 52-54, with numerous references to both Supreme Court and cantonal case law.

139 Wenger, para. 49 at Art. 178; Kaufmann-Kohler/Rigozzi, pp. 134-135; *contra*: Rüede/Hadenfeldt, p. 74; Walter/Bosch/Brönnimann, p. 73; Girsberger/Voser, *2012*, para. 303.

140 BGE 116 Ia 56 para. 3b; BGE 129 III 675 para. 2.3.

before national courts. After careful consideration of all advantages and disadvantages of both methods, it is submitted that it is neither a restrictive interpretation nor an interpretation favoring arbitration but a neutral interpretation according to general principles which ought to prevail when examining the conclusion of arbitration agreements.[141] However, once the existence of an arbitration agreement has been admitted, the objective scope of the arbitration agreement is to be interpreted broadly.[142]

60 The principle of *favor validitatis* also applies when interpreting so-called "pathological" arbitration agreements, i.e., agreements which are incomplete, deficient or contradictory.[143] For instance, clauses mentioning the International Chamber of Commerce and indicating a Swiss town, even though the institution has its seat in Paris, can often be interpreted as meaning that the parties submitted to the Arbitration Rules of the ICC in Paris and, according to Art. 18 of the 2012 ICC Arbitration Rules, wished for the seat of the arbitral tribunal to be in Switzerland.[144] On the other hand, if a pathological clause concerns one of the *essentialia negotii* of arbitration agreements,[145] in particular the agreement to submit the dispute to arbitration, and if the defectiveness cannot be cured by means of interpretation or gap-filling according to one of the three laws mentioned in para. 2 of Art. 178 PILS, the arbitration agreement is deemed invalid.[146]

F. Arbitration Agreements by Reference

61 It may also be necessary to resort to contractual interpretation where arbitration agreements are incorporated by reference. "Arbitration agreements by reference" means that the arbitration clauses are contained in separate and pre-existing documents, such as general terms and conditions, standard form contracts, regulations, sales conditions of a supplier etc.[147] The central issue in this context is to determine under what conditions such a reference complies with the requirement of consent, so that the text referred to will be part of the contract. To the extent that this question is to be resolved under Swiss substantive law (pursuant to Art. 178(2) PILS), the principle of good faith, which was developed in this context in connection with Art. 1 CO, namely with regard to general terms and conditions, will govern the solution.[148]

62 In accordance with the principle of good faith, consent to arbitration will be admitted as a rule, whenever the reference specifically refers to the arbitration clause and the document referred to is either physically joined to the contract, or is in some other way unmistakably defined and known to the other party, e.g., through previous commercial dealings between the same parties. In such cases, the contract explicitly manifests the intent of the parties to submit to arbitration, and the fact that the details are contained in a separate document is not decisive.[149]

63 The solution is less evident where there is a global reference to a text containing an arbitration agreement, i.e., when the reference only mentions the document referred to and not the arbitration clause contained therein. Whether this is sufficient from the point of view of consent must also be decided by application of the principle of good faith and thus, by taking into account all circumstances of the case

---

141 Poudret/Besson, para. 304; Wenger/Müller, para. 52 at Art. 178.

142 This corresponds to the principle of *effective interpretation*; Poudret/Besson, para. 304.

143 BGE 130 III 66 para. 3.1.

144 BGE 129 III 675 para. 2.3; ICC Arbitration Award No. 5983, *ASA Bull. 1993*, p. 511; *Oberlandesgericht Dresden*, decision of 5 December 1994, Case No. 2U 1010/94, *ASA Bull. 1995*, p. 252; Wenger/Müller, para. 56 at Art. 178; Poudret/Besson, para. 159.

145 See above, para. 48.

146 BGE 130 III 66 para. 3.1; Wenger/Müller, para. 53 at Art. 178; Müller, *Swiss Case Law*, p. 52.

147 See above, para. 27; Poudret/Besson, para. 213.

148 Forstmoser, pp. 99-142; Kramer, paras. 173-222 at Art. 1; Gisrberger/Voser, *2012*, para. 305; Wenger/Müller, para. 58 at Art. 178.

149 Girsberger/Voser, *2012*, para. 306; Poudret/Besson, para. 214; Kaufmann-Kohler/Rigozzi, p. 127.

at hand. Indeed, personal qualifications of the parties, their ongoing business relationship, and relevant trade usages can play an important role in this regard.[150]

Based on the aforementioned principle,[151] a global reference to a text containing an arbitration clause is, as a rule, deemed insufficient if the party suggesting the arbitration agreement knows or should have known that the other party was not ready to submit to arbitration at all, or was ready to submit to arbitration but only under different conditions.[152] By contrast, a party acquiescing to a global reference without making any reservation, and who knows about the arbitration clause referred to, is deemed to consent to arbitration under that clause.[153] However, the remaining difficulty of the matter lies within the ability to prove the subjective knowledge of the addressee. **64**

In this context, Swiss case law and legal commentators have elaborated the so-called *rule of the unusual* ("*Ungewöhnlichkeitsregel*" in German; "*règle de l'insolite*" in French), pursuant to which a party cannot be expected to have agreed to a clause contained in a text to which the main contract or another document refers if the content of such a clause is unusual, i.e., if the content departs from what a reasonable party in the same circumstances could expect.[154] **65**

However, in dealings between experienced business people and within the framework of trade usages, an arbitration clause in a text to which one globally refers to should not be considered unusual.[155] On the other hand, an arbitration agreement has to be more carefully reviewed to determine whether the parties consented to arbitration when the party who globally agreed to the arbitration agreement is not an experienced business person.[156] In this regard, it should be mentioned that even inexperienced persons who engage in international trade might be assumed to be aware of the fact that the resolution of their dispute by means of arbitration is usual or, at least, widespread in that field of activity.[157] **66**

G. Extension of the Arbitration Clause to Non-Signatories

One of the main fields of application of what is called the "extension of the arbitration clause to non-signatories" concerns the context of groups of companies.[158] As a matter of fact, a party often deals with several entities of the same group, even though a formalized contractual relationship containing an arbitration agreement is concluded only with one entity of the group of companies. The danger lies within the fact that a party might succeed in convincing an arbitral tribunal to extend the scope of the arbitration clause to a party who has not entered into such clause on its own demise. Indeed, an arbitral tribunal may closely consider the structure and organization within a group of companies. The fact that the different companies of the group – such as various subsidiaries or sister companies – may form a so-called *economical unit* can be a significant element and, as such, may contribute to justify that not only a particular subsidiary must be considered bound by the arbitration agreement, but also its sister or its parent company.[159] **67**

---

150 BGE 110 II 54 para. 3 (*Tradax* case regarding Art. II NYC); Girsberger/Voser, *2012*, para. 307; Poudret/Besson, para. 214; Kaufmann-Kohler/Rigozzi, p. 27; Müller, *Swiss Case Law*, p. 50.

151 See above, paras. 61-63.

152 Girsberger/Voser, *2012*, para. 307; Poudret/Besson, para. 214; Wenger/Müller, para. 60 at Art. 178.

153 BGer. 4P.230/2000 para. 2a; Dutoit, para. 6 at Art. 178; Wenger/Müller, para. 60 at Art. 178; Müller, *Swiss Case Law*, p. 50.

154 BGE 108 II 416 para. 1b; BGE 109 II 213 para. 2; Zurich Commercial Court, decision of 30 August 1993 (cf. *ASA Bull. 1993*, p. 536); Zurich Commercial Court, decision of 25 August 1992 (cf. *ZR 1992/93*, p. 80); Girsberger/Voser, *2012*, para. 307; Müller, *Swiss Case Law*, p. 51.

155 BGE 110 II 54 para. 3c/cc (*Tradax* case); BGE 101 Ia 521 para. 3; Zurich Commerical Court, decision of 30 August 1993 (cf. *ASA Bull. 1993*, pp. 535-536); Huber/Schürmann, *ASA Special Series no. 8*, pp. 81-83; Berger/Kellerhals, paras. 441-442.

156 Girsberger/Voser, *2012*, para. 308.

157 Wenger/Müller, para. 61 at Art. 178; Girsberger/Voser, *2012*, para. 308; Müller, *Swiss Case Law*, p. 49.

158 Blessing, *ASA Special Series no. 8*, p. 151.

159 Blessing, *ASA Special Series no. 8*, p. 161; Jarvin, *ASA Special Series no. 8*, p. 199.

68 The issue is often apprehended under the legal question as to whether the particular group-entity has concluded the arbitration agreement with authority as an agent for another company within the same group.[160] If one company, when entering into the arbitration agreement, has had an express or at least a tacit power of authority to act for the affiliated company, then there is no difficulty: the affiliated company will be bound, and entitled, by that arbitration agreement.[161] But even if there is a lack of authority on the part of the company entering into the contract, the result may be the same under the theory of apparent authority. However, Swiss case law and most legal commentators agree that an arbitration agreement entered into by one entity can only be extended to another entity within the same group in specific and exceptional circumstances. Such is to be admitted for instance where a party fashions an appearance so as to create another party's justified reliance, whose good faith is worthy of legal protection.[162]

69 In the context of groups of companies, privity of contract must remain the rule. The mere existence of a group of companies is not sufficient to compel the parties within that group to arbitration when they have not subscribed to the arbitration agreement themselves. It is the interpretation of the specific circumstances which will determine whether it is justified to extend an arbitration agreement to a non-signatory company within the same group and thus, to recognize an exception to the principle of privity of contract.[163]

70 Under Swiss law, the other field of application of the extension of the arbitration clause to non-signatories worth mentioning concerns third party involvement in the performance of the contract. In BGE 129 III 727, the Swiss Federal Supreme Court rendered a landmark decision in this respect. Indeed, it ruled that the extension of an arbitration agreement to a non-signatory party is admissible if the non-signatory party participated in the performance of the contract, thus evidencing its willingness to be bound by the arbitration agreement included in that contract. The Swiss Federal Supreme Court considered that Swiss law permits an extension based on the "real intent of the parties" ("*la volonté réelle des parties*" in French), and the principle of good faith.[164] The situation is altogether different if the third party's obligation to perform does not arise out of the main contract between the original signatory parties, but out of a separate and distinct legal document. In such a case, the extension of an arbitration agreement to the non-signatory party is generally not admitted, except of course in cases where the latter explicitly agrees to such an extension.[165]

H. Unilateral Consent to Arbitration

71 Arbitration agreements are generally understood to be agreements between two or more parties. Some legal scholars held – albeit mainly in the context of domestic arbitration under the former Concordat – that jurisdiction of arbitral tribunals may be vested through unilateral declarations such as a will, an act of constitution of a foundation, prize contests etc.[166] According to newer scholarly opinions however, unilateral declarations to submit to arbitration constitute merely an offer for the conclusion of an arbitration agreement which still needs to be accepted by the addressee.[167]

72 A distinction is made in these opinions according to whether the legal relationship to be submitted to arbitration already exists or has yet to be created by a unilateral act. If the relationship already exists, the subsequent unilateral declaration can only establish a right to an arbitral decision of the addressee.

---

160 Zuberbühler, *ASA Bull. 2008*, pp. 20-22.

161 Sandrock, *ASA Special Series no. 8*, p. 170.

162 Decision of the Swiss Federal Supreme Court of 29 January 1996 para. 7, *ASA Bull. 1996*, pp. 506-507; BGE 120 II 197 para. 2a; Müller, *Swiss Case Law*, p. 66; Girsberger/Voser, *2012*, para. 312; Sandrock, *ASA Special Series no. 8*, pp. 170-172.

163 Blessing, *ASA Special Series no. 8*, p. 16; Jarvin, *ASA Special Series no. 8*, pp. 198-199; Poudret/Besson, paras. 259-260; Kaufmann-Kohler/Rigozzi, p. 154.

164 BGE 129 III 727 para. 5.

165 Girsberger/Voser, *2012*, para. 310.

166 Jolidon, pp. 116-117; Habscheid, pp. 524-525; Rüede, *ASA Special Series no. 8*, pp. 142-150; Rüede/Hadenfeldt, p. 45; *contra*: Knellwolf, p. 56; Lalive/Poudret/Reymond, p. 46.

167 Girsberger, para. 35 at Art. 357; Berger/Kellerhals, paras. 451-457.

A corresponding obligation is only called into existence if and when the favored party assents to the planned arbitration clause. If substantive rights are yet to be created by a unilateral declaration, these rights may be linked to the intended arbitration clause by the person creating them in such a way that the beneficiary cannot exercise them without also consenting to arbitration.[168]

I. Arbitration Clauses in Corporate By-Laws

73 Arbitration clauses are often part of partnership agreements and found in by-laws of legal entities which provide for dispute resolution in corporate matters between the partners, the company itself and its organs. As far as partnerships are concerned, such clauses require consent in text-form pursuant to Art. 178(1) PILS of all partners involved. Subsequent adherence to the partnership also requires consent to the arbitration clause. In practice, this is often achieved by consent through global or specific reference[169] to the partnership agreement.[170]

74 The binding effect of by-laws of corporate bodies – corporations, limited liability companies, cooperatives etc. – does not result, once the relevant act of embodiment has been accomplished, from agreement but from corporate law functioning as *lex specialis*.[171] In this regard, the law applicable to the corporate body is not the law determined pursuant to para. 2 of Art. 178 PILS and in accordance with the *favor validitatis* principle, but the law determined pursuant to the principles contained in Art. 154 PILS.[172] According to the standards of the law thus designated, members who did not consent to a subsequent introduction or modification of a provision in the corporate by-laws may be nonetheless bound by it. If Swiss corporate law is the applicable law, this is precisely the case – with the sole reservation of abuse of rights – for statutory arbitration clauses which are subsequently introduced or changed.[173]

75 When a new member joins a corporate body – e.g., by buying shares or by a document evidencing his intent to join – this can often be construed as a valid consent to its by-laws and any therein included arbitration clause. In particular, if the new membership resulted from a divestment, the whole transaction may be treated – in conformity with principles of assignment and debt assumption[174] – as a transfer of the entire legal position of the transferor to the buyer with all the rights and obligations pursuant to the by-laws then in force.[175]

J. Succession and Bankruptcy

76 By succession, a third party takes the place of one of the original parties to a legal relationship. The latter may be the object of an arbitration agreement. Whether and to what extent that third party may be bound by the arbitration agreement is decided by the most favorable law – taken as a whole with regard to both validity and transfer of the arbitration agreement – amongst all possible applicable laws pursuant to Art. 178(2) PILS.[176] By contrast, the question as to whether the disputed claims were assigned and whether the claimant has therefore entitlement is governed by the applicable law as determined pursuant to Art. 187(1) PILS.[177]

---

168 Wenger/Müller, paras. 63-66 at Art. 178; Berger/Kellerhals, para. 455; Zurich High Court (*Obergericht*), decision of 16 February 1987 (cf. *ASA Bull. 1990*, pp. 248-250).

169 See above, paras. 61-66.

170 Wenger/Müller, para. 68 at Art. 178.

171 Riemer, para. 12 at Art. 66.

172 Wenger/Müller, para. 69 at Art. 178.

173 Berti, *ASA Special Series no. 8*, p. 122; Vischer/Huber/Oser, pp. 603 and 660; Wenger/Müller, para. 69 at Art. 178.

174 See below, para. 79.

175 Wenger/Müller, para. 71 at Art. 178; Berti, *ASA Special Series no. 8*, pp. 120-121; Rüede/Hadenfeldt, p. 44; BGE 33 II 205 para. 5; *St. Gallen* Cantonal Court, decision of 16 January 2007, para. 2a (cf. Müller, *Swiss Case Law*, p. 67); *Graubünden* Cantonal Court, decision of 9 March 1992 (cf. *ASA Bull. 1994*, p. 63).

176 BGE 128 III 50 para. 3a; BGE 117 II 94 para. 5b; Wenger/Müller, para. 73 at Art. 178; Poudret/Besson, para. 283; Lalive/Poudret/Reymond, p. 325.

177 Decision of the Swiss Federal Supreme Court of 13 October 1992 para. 6, *ASA Bull. 1993*, pp. 70-73.

77 Under Swiss law, it is the parties' intent which will establish whether the arbitration agreement is transferred to the third party along with the right to which it refers.[178] If the parties have expressly excluded the transfer of the right to which the arbitration agreement refers in their contract, than this exclusion also encompasses the arbitration agreement contained in the contract.[179] An arbitral tribunal which is motioned based on such an arbitration agreement has to decline its jurisdiction.[180] If, exceptionally, the parties opted for dispute resolution by arbitration because of their personal relationship or personal characteristics – e.g., membership in an association – their intent is to be interpreted as meaning that the arbitration agreement is to elapse in the event of a transfer of the legal relationship to a third party to whom those personal characteristics do not apply.[181] As a rule however, it is the original parties' intent that the right resulting from the legal relationship containing the arbitration clause be inseparable from such clause.[182] In other words, there is a contractual prohibition to assign the legal relationship in the event that the assignee declines the arbitration agreement.[183] If the parties agreed that an assignment is only possible provided there is a prior written consent (Art. 164(1) CO), that is to say that it was the original parties' intent not to be confronted to another party without their approval, then this is true also for arbitration proceedings.[184]

78 The transfer of an arbitration agreement – both as a right and an obligation – operates in all cases of universal succession, except in specific cases with a personal aspect, or if there was an agreement to the contrary, or other circumstances which suggest that the arbitration clause was intended to be effective between the original parties only.[185] Therefore, consent of the successor to an arbitration agreement – in cases of inheritance or merger of companies in particular – is not required. As a consequence, the question of form is not at issue in the case in point.[186]

79 As far as individual succession is concerned – such as assignments and subrogation by operation of the law, contractual assignment and assumption of debt – the same rules apply.[187] The transfer of an arbitration clause is a question of Swiss substantive law.[188] Under Swiss Federal Private Law arbitration agreements are considered to be part of the privileged and ancillary rights which are transferred by operation of the law to the new assignee, or the new debtor respectively (Art. 170(1) CO). No specific declaration of intent is required with regard to the arbitration agreement (Art. 166 CO). Therefore, the question of form is not at issue either in the case in point, even if the succession is based on contract.[189]

---

178 BGE 103 II 75 paras. 2-3.

179 BGE 128 III 50 para. 3b; Kaufmann-Kohler/Rigozzi, p. 142.

180 BGE 128 III 50 para. 3b; BGE 117 II 94 para. 5c/bb; BGE 116 Ia 56 para. 3b.

181 Wenger/Müller, para. 75 at Art. 178; Kaufmann-Kohler/Rigozzi, p. 142; Werner, *J.Int.Arb. 1991*, pp. 15-16.

182 Schlosser, p. 326; Kaufmann-Kohler/Rigozzi, p. 141.

183 Wenger/Müller, para. 75 at Art. 178.

184 BGE 128 III 50 para. 3b; BGE 117 II 94 para. 5c/aa; BGE 116 Ia 56 para. 3b; Werner, *J.Int.Arb. 1991*, pp. 15-16; Wenger/Müller, para. 75 at Art. 178.

185 See above, para. 77; Werner, *J.Int.Arb. 1991*, pp. 15-16; Poudret/Besson, para. 290; Tschanz, *Commentaire*, para. 176 at Art. 178.

186 Wenger/Müller, para. 76 at Art. 178; Kaufmann-Kohler/Rigozzi, pp. 142-143; similarly with regard to German law: Schwab/Walter, p. 62.

187 BGE 128 III 50 para. 2b/bb; e.g., contractual assignment: BGE 103 II 75 paras. 2-3; decision of the Swiss Federal Supreme Court of 13 October 1992 para. 6, *ASA Bull. 1993*, pp. 70-73; BGer. 4P.124/2001 para. 2d; e.g., subrogation: Geneva Cantonal *Cour de Justice*, decision of 16 October 1987 (cf. *ASA Bull.1987*, p. 272); Italian *Corte di Cassazione*, decision of 11 August 1979, Case No. 4746 (cf. *YCA1981*, p. 232), Arbitral Award of 18 September 1985 (cf. *YCA 1987*, p. 160); e.g., assumption of debt: BGE 134 III 565 para. 3.2; BGer. 4P.126/2001 para. 2e/bb; under German law, an arbitration agreement is transferred along with the assigned right without the acquiring party having to assent to the agreement in the form of § 1031 (formerly § 1027 (1)) ZPO: cf. decision of the German Bundesgerichtshof of 2 March 1978, Case No. III ZR 99/76 (*NJW 1978*, p. 1586); Schwab/Walter, p. 62; regarding Swedish law, see Jarvin, pp. 183-184; as to French law, see Poudret/Besson, para. 284.

188 Spirig, p. 249; Kaufmann-Kohler/Rigozzi, p. 141.

189 BGE 103 II 75 paras. 2-3; decision of the Swiss Federal Supreme Court of 13 October 1992 para. 6a, *ASA Bull.1993*, pp. 70-71; BGer. 4P.289/1995 para. 2a (cf. also Müller, *Swiss Case Law*, p. 63); Wenger/Müller, para. 77 at Art. 178; Spirig, pp. 246, 249.

The question as to whether bankruptcy of a party to an arbitration agreement is a case of transfer by operation of the law and whether the bankruptcy trustee who is taking the place of the bankrupt party is bound by an arbitration agreement which that party had previously concluded is not established pursuant to one of the laws designated by Art. 178(2) PILS but under the law applicable to the bankruptcy proceedings.[190] If Swiss Bankruptcy Law applies, there is no transfer of the rights and obligations of the debtor to the bankruptcy authorities.[191] An arbitration agreement concluded by the bankrupt party remains binding notwithstanding bankruptcy proceedings. As a matter of fact, an arbitration agreement binds the estate in bankruptcy regardless of whether it acts as claimant or respondent in a procedure and irrespective of whether arbitration proceedings have already started at the time of the opening of bankruptcy or not.[192] On the other hand, it is the law applicable to the arbitration proceedings which will establish whether procedures introduced before the opening of bankruptcy are to be stayed in view of the bankruptcy proceedings.[193] **80**

K. Enforcement of Arbitration Agreements

The following sanctions come primarily into mind when enforcement of arbitration agreements is at issue. First, if one party violates an arbitration agreement by seizing a State court, the respondent may raise the plea that an arbitration agreement has been concluded pursuant to Art. 7 PILS and Art. II(3) NYC ("arbitration defense"). The State court will have to decline jurisdiction upon a *prima facie* examination of the arbitration agreement.[194] Second, if a party does not assist in the constitution of the arbitral tribunal in breach of the rules agreed upon for the appointment of arbitrators, or in absence of such agreement, the arbitral tribunal is constituted with the help of the judge of the seat. The State judge will have to comply with the request to appoint an arbitrator if a *prima facie* examination shows the existence of an arbitration agreement (Art. 179 PILS). Third, if a party hinders the conduct of arbitral proceedings in any other manner, the State judge at the seat of the arbitral tribunal can be requested to assist (Art. 185 PILS).[195] Above and beyond that, arbitral tribunals have the prerogative to employ the threat of default sanctions against a passive party. Indeed, arbitral tribunals may conduct arbitration proceedings in the absence of such party and render an enforceable award (Art. 28 of the 2012 Swiss Rules of International Arbitration; Art. 30 UNCITRAL Arbitration Rules and Art. 56 WIPO Arbitration Rules).[196] **81**

However, arbitration agreements are not only procedural in nature.[197] The substantive aspect of arbitration agreements expresses itself through their being a source of contractual obligations. Breaching them may entail claims for compensation.[198] Swiss case law acknowledges that the parties to an arbitration agreement have to refrain in good faith from everything which would unnecessarily delay the normal course of the proceedings.[199] Positively formulated that also means that the parties to an arbitration agreement have to do all what is in their power to achieve what is required for the constitution of the arbitral tribunal and for the unimpeded conduct of the arbitral proceedings up until the moment an award is rendered by that arbitral tribunal. In practice, damage resulting from dilatory procedural conduct is often taken into account within the context of the order on costs. If no compensation is possible through that means, then an independent claim for damages brought before the same arbitral tribunal ought to be admissible.[200] Therefore, a party invoking a State court despite an existing arbitration agreement can **82**

---

190 Wenger, para. 68 at Art. 178; Schlosser, pp. 328-329; *contra*: Kaufmann-Kohler/Rigozzi, p. 143.

191 Wenger/Müller, para. 78 at Art. 178.

192 Jolidon, p. 141; Poudret/Besson, para. 290; Lalive/Poudret/Reymond, p. 47; Cantonal Court of *Valais/Wallis*, decision of 9 July 1986 (cf. *ASA Bull.1987*, pp. 204-205).

193 Wenger/Müller, para. 78 at Art. 178; Schlosser, p. 329.

194 BGE 122 III 139 para. 2b.

195 For comparative law aspects, see Schlosser, pp. 296-299.

196 Wenger/Müller, para. 80 at Art. 178.

197 See above, paras. 5-7.

198 Habscheid, p. 511; Poudret/Besson, para. 376; Schlosser, pp. 34-39; *contra*: Knellwolf, pp. 57-58; Rüede/Hadenfeldt, p. 80; Jolidon, p. 109.

199 BGE 111 Ia 259 para. 2b; BGE 109 Ia 81 para. 2a; BGE 108 Ia 197 para. 3.

200 Wenger/Müller, para. 79 at Art. 178.

be ordered in subsequent arbitral proceedings to pay for the other party's legal costs to the extent that the State court did not award these in full, regardless of the fact that the other party successfully raised a plea of lack of jurisdiction.[201]

VIII. Principle of Autonomy (Article 178(3) PILS)

83 Article 178(3) PILS sets forth two substantive private international law rules. First, it confirms the principle of autonomy of the arbitration agreement in relation to the main contract. The validity of the former may not be challenged one the sole ground that the latter is invalid. Indeed, the validity of the main contract and that of the arbitration agreement must be examined separately. An arbitration agreement may thus be governed by a law different from that governing the main contract. Second, it confirms that an arbitration agreement may also be validly concluded with regard to future disputes. In other words, no further confirming agreement between the parties is required once a dispute has arisen.[202]

84 Both rules must be put in relation with the *favor validitatis* principle of para. 2 of Art. 178 PILS, which provides for the possibility that the validity of an arbitration agreement be determined according to foreign law, that being either the law chosen by the parties in this respect or the law applicable to the merits of the dispute. While this might prove helpful in affirming the validity of an arbitration agreement in relation to other aspects, that law might not contain one or both of the two aforementioned rules,[203] so that the arbitration agreement might be at risk of being considered invalid. Para. 3 of Art. 178 PILS prevents that risk by confirming both rules favoring validity of arbitration agreements.[204]

85 The principle of autonomy (also called doctrine of "severability" or "separability") has been recognized under Swiss law for decades and applies to most legal systems for some time.[205] It can now be considered as a true transnational rule of international commercial arbitration and is embodied in the UNCITRAL Model Law (Art. 16(1) UNCITRAL Model Law) as well as in institutional rules (Art. 6(9) of the 2012 ICC Arbitration Rules; Art. 23(1) UNCITRAL Arbitral Rules; Art. 21(2) of the 2012 Swiss Rules of International Arbitration).[206]

86 The legal justification of this principle is that an arbitration agreement is regarded as having procedural implications, and is autonomous and independent from the main contract. Reasons of practicability as well as the hypothetical will of the parties are further justifications supporting the principle of autonomy. The doctrine of severability allows for the constitution of an arbitral tribunal and the conduct of arbitral proceedings notwithstanding allegations that the main contract is null and void. The arbitral tribunal may examine the validity of the arbitration agreement and thus its own competence.[207] If competent, it may then decide upon the grounds of the nullity invoked against the main contract (see Art. 6(9) of the 2012 ICC Arbitration Rules; Art. 23(1) UNCITRAL Arbitral Rules; Art. 21(2) of the 2012 Swiss Rules of International Arbitration).[208] Indeed, as a rule, parties endeavor with an arbitration agreement to submit to arbitration all disputes in connection with their contractual relationship, including the issue as to whether such relationship was validly concluded at all.[209]

---

201 ICC Award No. 5946/1990 (cf. *YCA 1991*, p. 112).

202 Lalive/Poudret/Reymond, p. 326; Dutoit, para. 10 at Art. 178; Volken, paras. 61-64 at Art. 178; Girsberger/Voser, *2012*, para. 400; Tschanz, *Commentaire*, paras. 183-184 at Art. 178.

203 See above, para. 83.

204 Wenger/Müller, para. 89 at Art. 178; Lalive/Poudret/Reymond, p. 326; Volken, para. 65 at Art. 178.

205 BGE 119 II 380 para. 4a; BGE 116 Ia 56 para. 3b; BGE 88 I 100 para. 2; Schlosser, pp. 291-294; Jolidon, pp. 137-139.

206 Girsberger/Voser, *2012*, para. 401.

207 See above, para. 8.

208 BGE 121 III 495 para. 5; BGE 116 Ia 56 para. 3b; Girsberger/Voser, *2012*, para. 403; Volken, para. 63 at Art. 178.

209 BGE 116 Ia 56 para. 3b; Wenger/Müller, para. 91 at Art. 178.